BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

RESPONSE BRIEF OF RESPONDENT CITY OF CALHOUN

I. INTRODUCTION

As it does in its Petition, NGEMC's[1] Initial Brief ignores recent precedent and continues to advocate for the PSC to overturn the decision it issued less than a year and a half ago. The legal question raised by NGEMC in this action is the ***exact same question*** presented in Calhoun's 2019 Petition in Docket No. 42514: whether the Agreement entitles Calhoun to extend electric service lines outside of the Box when it has legally annexed the property and provided the requisite municipal services. The PSC ***already decided that question*** in the 2022 Ruling – albeit not in the way NGEMC apparently desired – and recognized that the Agreement entitles Calhoun to extend its service into newly annexed parcels within the ever-expanding Box. Now, following that unfavorable ruling that NGEMC failed to timely appeal or challenge, it has filed the instant Petition to essentially overturn the 2022 Ruling and the PSC's prior interpretation of the Annexation Provision in the Agreement. In the interest of finality and respect for its prior precedent, Calhoun

[1] Defined terms shall have the same meaning set forth in Calhoun's Initial Brief, unless otherwise defined herein.

respectfully requests that the PSC uphold the 2022 Ruling and reject NGEMC's current attempt to relitigate an issue that the PSC has fully and definitively resolved.

II. ARGUMENT

A. The PSC Has Already Resolved the Matter at Issue in Favor of Calhoun

As in its Petition, NGEMC's Initial Brief goes to great lengths to argue why the 2022 Ruling was incorrectly decided. However, none of these arguments successfully demonstrate why the PSC should depart from its prior precedent on an identical issue.

To avoid prolixity, Calhoun will not recount the entire history underlying the 2022 Ruling, all of which is set forth in its Initial Brief. In summary, Calhoun submitted this exact legal question (among others) to the PSC in its 2019 Petition. Following decades of uncertainty and disputes initiated by ***both*** parties, Calhoun sought declaratory relief and submitted four legal questions to the PSC regarding the interpretation of the Territorial Agreement, including the following: "Whether the 'Box' is static or dynamic – that is, whether Calhoun can extend electric service outside of the Box as long as it has annexed the territory and begun providing municipal services to it." *See* Calhoun's Reply in Support of its 2019 Petition, p.4; *see generally* 2019 Petition. Calhoun argued that the Annexation Provision acted as an exception to the geographic limitation in the preceding paragraph of the Agreement, and that the language of the Annexation Provision referencing Gordon County and the State of Georgia necessarily contemplates expansion beyond that limitation. *See* 2019 Petition, pp. 9-10; *see also* Calhoun's Reply in Support of its 2019 Petition, pp. 17-19. Calhoun also summarized NGEMC's position that the Box was an immovable outer boundary. *Id.* at p. 10 ("NGEMC has argued that under the Agreement the City willingly agreed to never expand its electric service lines beyond the Box."). Calhoun "respectfully request[ed] a resolution of these questions so that it may avoid further expense of time and money

addressing these issues." *See* 2019 Petition, p. 4. Therefore, that proceeding – like this one – presented a legal question regarding the interpretation of the Annexation Provision and was not dependent on any set of facts that would distinguish it from the instant dispute.

NGEMC filed a seventeen-page brief in opposition to the 2019 Petition, and in doing so, had the opportunity to fully respond to Calhoun's interpretation that it could supply electric service outside the Box pursuant to the Annexation Provision. Moreover, after the PSC's ruling, NGEMC also had the opportunity to request a full review by the PSC (or judicial review) after the Hearing Officer clearly confirmed Calhoun's interpretation of the Agreement. It did neither. Instead, NGEMC has filed its current Petition attempting a new angle on the same arguments – all of which were available to NGEMC in the 2019 proceeding – even though this action presents the same legal question as the 2019 Petition.

Having failed to successfully argue its position in Docket No. 42514, NGEMC is now seeking a second bite at the apple and has asserted numerous reasons why the Annexation Provision should not be read to support Calhoun's expansion outside of the Box. But critically, NGEMC's Petition and Initial Brief devote less than a page each to discussing the controlling 2022 Ruling itself, and even then, only to misrepresent the substance of the 2022 Ruling. As explained in Calhoun's Initial Brief, the 2022 Ruling was not, in fact, premised on dicta from prior proceedings or a misunderstanding of what constitutes the Box. *See* Calhoun's Initial Brief, pp. 12-17. Instead, the PSC denied Calhoun's request for declaratory relief as unnecessary ***because of*** the PSC's long-established precedent in favor of Calhoun's interpretation of the Annexation Provision and the ever-expanding Box. *See* 2022 Ruling, pp. 7-8.

Other than this misrepresentation of the PSC's ruling and the erroneous argument that the 2022 Ruling was incorrect (as premised on dicta and the PSC's alleged misunderstanding

regarding the Box), ***NGEMC has not shown*** any factual or legal reason why the 2022 Ruling is distinguishable from the present dispute, ***nor can it***. Like the 2019 Petition, this action presents a purely legal question for the PSC's determination (particularly given that the parties have stipulated to the underlying facts). By its Petition, NGEMC is simply seeking a declaration of the parties' respective rights under the Annexation Provision – the precise issue Calhoun brought to the PSC via its 2019 Petition and ultimately resolved by the 2022 Ruling.

In sum, Calhoun squarely presented the question of whether it can extend its lines to newly annexed municipal areas to the PSC in the 2019 Petition. The PSC considered the issue in depth, and ultimately issued the 2022 Ruling deciding the issue in Calhoun's favor. In the 2022 Ruling, the PSC unambiguously reinforced "that the Agreement permitted the expansion of the Box by [Calhoun's] annexation of and provision of municipal services to new areas." *See* 2022 Ruling, p. 8 (quoting multiple statements in prior PSC rulings establishing Calhoun's right to expand to areas following annexation and the provision of municipal services) (internal quotations omitted). In the forty pages of briefing that NGEMC has submitted in this action, it has failed to explain any factual or legal basis to distinguish this dispute from the 2022 Ruling. In the absence of any new or differing factual or legal issue, NGEMC is simply trying to relitigate the issue in hopes of getting a different answer. But as explained in Calhoun's Initial Brief, the avenue for that relief was a request for reconsideration or appeal – neither of which did NGEMC timely pursue. As such, and for the reasons described at length in Calhoun's Initial Brief, NGEMC's Petition can only be seen as a procedurally inappropriate attempt to collaterally attack a prior decision of the PSC and should be denied.

B. NGEMC's Attempt to Paint Calhoun as a Bad Faith Actor is Unfounded

Much of NGEMC's Initial Brief, as with its Petition, is devoted to painting Calhoun as a bad faith actor intent on avoiding its contractual obligations and ignoring prior rulings of the PSC where convenient, while NGEMC, the story goes, has dutifully abided by the terms of the Agreement and prior precedent. This strategy is a historic favorite of NGEMC's and has been employed in numerous other proceedings. *See, e.g.*, NGEMC's Brief Opposing the City of Calhoun's Petition for Declaratory Relief, p. 1-2 (Docket No. 42514). Of course, NGEMC's contentions are a gross misrepresentation of the long contractual relationship between the parties and the history of disputes before the PSC.

As the PSC is well-aware, the Agreement is nearly fifty years old, and in that time both NGEMC ***and*** Calhoun have sought the PSC's guidance in interpreting and enforcing its terms. During that time, technology has changed, the electric market has changed, and the population has changed. ***Both parties*** have responded to these changing circumstances and to prior PSC decisions, and both have attempted to ensure protection of their contractual rights and the advancements of their interests. The reality is that both parties have advanced successful and unsuccessful arguments before the PSC.

For example, NGEMC cites the *Advance Auto Parts* case in its Initial Brief.[2] In that case, NGEMC attempted to provide electric service to a new customer on a property within Calhoun's territory, as established by the Agreement, on the basis that NGEMC had served a previous, different customer in a much more limited capacity. *See City of Calhoun v. North Georgia EMC* (Docket No. 5090-U). In that dispute, NGEMC argued that if it was serving a property in

[2] NGEMC also unsuccessfully attempted to prevent Calhoun from serving its own water intake facility which was outside of the Box in contravention of the Territorial Act. *See North Georgia EMC v. City of Calhoun*, Docket No. 3718-U (1989).

Calhoun's territory, it had the right to continue serving the property in perpetuity regardless of a change in customer. *See id.*, Brief of City of Calhoun at pp. 7-11 (Docket No. 5090-U). The PSC denied this argument as contrary to the terms of the Agreement and ruled in favor of Calhoun. *See id.*, PSC's Initial Decision (Docket No. 5090-U). Since that time, and despite NGEMC's present attempt to paint itself as humbly abiding by the Agreement, NGEMC has continued to try to serve new customers in Calhoun's undisputed territory, in direct contravention of the PSC's order. Thus, while NGEMC would have the PSC believe that Calhoun is a bad faith actor that has ignored the PSC's prior precedent, the reality is that NGEMC has done just that, and is attempting to do so again by filing this action to undermine the PSC's 2022 Ruling.

Here, it is NGEMC – not Calhoun – that is attempting to shirk prior precedent and revisit an issue already decided at least twice by this body. NGEMC failed to timely challenge the 2022 Ruling, presumably because the ruling partially resolved other issues in NGEMC's favor. For that reason, NGEMC sat back while Calhoun devoted time and resources to acting on the 2022 Ruling by providing municipal services to the Michael's Building. Only after that did NGEMC file its Petition challenging the PSC's prior interpretation. NGEMC's strategy displays the very bad faith that it attempts to impute to Calhoun. NGEMC's arguments in this action were available to NGEMC in 2019. The fact that NGEMC now wishes for a different outcome, or that it had timely sought reconsideration or appeal, does not entitle it to now waste the PSC's time and resources by filing a second, duplicative action to retread the same old path. This strategy by NGEMC serves only to needlessly squander taxpayer dollars and introduce further uncertainty in the decades-long history of PSC decisions interpreting the Agreement.

Despite NGEMC's unfounded accusations that Calhoun is acting in contravention of the Agreement and prior PSC rulings, Calhoun has acted in strict compliance 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 newly incorporated municipal territory expanding the boundaries 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. Having satisfied all agreed upon 1975 requirements 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. In sum, Calhoun has done precisely what the 2022 Ruling (and the Agreement) entitle it to do.

C. Overturning the 2022 Ruling Would Require Calhoun to Seek Further Relief from the PSC

Finally, as a practical matter, overturning the 2022 Ruling would require Calhoun to seek further clarification from the PSC as to all questions presented in the 2019 Petition and resolved in the 2022 Ruling. As detailed above, the 2019 Petition sought clarification on several questions regarding the interpretation and enforceability of the Agreement, only one of which pertained to the Annexation Provision. Although Calhoun may not have necessarily agreed with the outcome of every question, it chose not to seek reconsideration on the grounds that the 2022 Ruling resulted in a balanced interpretation of the Agreement that provided Calhoun an acceptable path forward for future expansion. However, if NGEMC succeeds in undermining or overturning the PSC's 2022 Ruling, the resolution of those other issues will be left in question and will require Calhoun to seek further relief from the PSC, in which event Calhoun will be forced to pursue its prior legal arguments raised in Docket No. 42514, including without limitation, the enforceability of the Agreement. For these reasons, and in the interest of finality, the PSC should refuse NGEMC's attempt to undermine the PSC's 2022 Ruling and deny NGEMC's Petition.

III. CONCLUSION

NGEMC is attempting to relitigate an issue which the PSC recently decided. The PSC should deny NGEMC's Petition because it has already decided the issue and NGEMC waived its right to challenge the PSC's prior decision. Finding otherwise would reopen a resolved issue and result in the unnecessary expenditure of taxpayer dollars.

Respectfully submitted this 10th day of November 2023.

/s/ Peter K. Floyd

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONSE 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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