BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

RESPONSE BRIEF OF NORTH GEORGIA EMC

The City's initial brief goes to great lengths to avoid addressing the central question in this case: whether the terms of the parties' Territorial Agreement allowed the City to extend its electric lines east of I-75, beyond the Agreement's Outer Boundary, to serve a premises within North Georgia EMC's exclusive assigned territory. Instead, the City tries to justify its breach of the Territorial Agreement by relying on misplaced arguments that hinge on two cases it lost and insisting that North Georgia EMC somehow waived its right to enforce the Territorial Agreement as written. These arguments should be rejected as part of yet another front in the City's unsuccessful war on the Territorial Agreement.

For one thing, the City's brief does not rebut North Georgia EMC's demonstration that the Territorial Agreement *itself* shows the City has no right to serve the premises. The Outer Boundary is a determinative fixed perimeter, beyond which the Agreement says the City "shall not extend its lines at any time." The only reasonable and legally permissible interpretation of the Territorial Agreement is one in which the Outer Boundary is not rendered superfluous (as urged by the City) but is rather enforceable as defined in the Agreement. The City's argument that a separate provision of the Territorial Agreement regarding the annexation of areas *within* the

Outer Boundary permits the City to serve the Premises *outside* that boundary is inconsistent with Georgia law and the terms of the Territorial Agreement.

Perhaps because the text of the Territorial Agreement does not support the City's position, the City relies almost entirely on technical and misguided arguments about prior "precedent" to contend that the City should nevertheless be allowed to extend its lines beyond the Outer Boundary. None of these arguments is persuasive or requires the Commission to ignore the Territorial Agreement's plain language as applied to the undisputed facts.

First, the City's argument that the Commission has already decided this issue in the City's favor, on the ground that the City's petition in the Declaratory Ruling Order (Docket No. 42514) was denied, is a nonstarter. The Commission in that case *rejected* the City's request for a declaratory ruling, so there was no adjudication on the merits at all. And the City's argument that the Declaratory Ruling Order somehow turned dicta from the earlier *Kerry Foods* decision (Docket No. 14496) into binding precedent fares no better. Dicta that was not essential to the initial decision in *Kerry Foods* did not become dispositive of the separate issues in this case, 20 years later, simply because the Hearing Officer ruled against the City in the intervening Declaratory Ruling Order.

The City's argument that North Georgia EMC waived its rights to enforce the Territorial Agreement here by failing to appeal from the Declaratory Ruling Order a year ago is also wrong. North Georgia EMC *won* in that case, on the ground that the City was not entitled to the declaratory relief sought in its petition. As the prevailing party, North Georgia EMC was not required (or entitled) to appeal. The City did not appeal either, and North Georgia EMC had no obligation to ask the full Commission or a court to reverse or revisit North Georgia EMC's

victory in that case to preserve arguments for future disputes if the City continued to disregard the Territorial Agreement.

North Georgia EMC's petition should therefore be granted because it has the exclusive right to serve the Michael's Carpet building under the Territorial Agreement. As this Hearing Officer said in the Declaratory Ruling Order, "[t]he time and resources that have been spent on the seemingly unending attempts by the City to circumvent its contractual commitments must come to an end." Docket No. 42514, May 17, 2022.[1] The City's attempt to escape from the Territorial Agreement in this case should be rejected as well.

I. ARGUMENT

A. The City Does Not Argue and Cannot Show That the Text of the Territorial Agreement Allows the City to Serve the Michael's Carpet building.

Despite the City's reluctant concession that the Territorial "Agreement has been fully approved and adopted by the PSC" (City's Initial Br. 4 n.2), the City's initial brief fails to offer any reasonable alternative to the textual interpretation of the Territorial Agreement set forth in North Georgia EMC's petition. As explained in that petition and in North Georgia EMC's initial brief, although the City may be permitted to extend service within the expanded city limits by legally annexing and providing municipal services to those areas, the City may "not extend its lines" beyond the Outer Boundary "at any time." Territorial Agreement at 2.

Unlike the variable city limits, the Outer Boundary defined in the Territorial Agreement is a definite and specific geographic area, with a detailed description of its perimeter using land lot numbers, named waterways, and highways. *See* Territorial Agreement at 2. That perimeter is the

[1] As recognized in prior cases, the City has a long history of unfounded attempts to avoid the terms of the Territorial Agreement. *See, e.g.*, *Kerry Foods* Initial Decision at 18 (Docket 14496) ("CALHOUN seeks to excuse its obvious and flagrant disregard for the plain language of the Territorial Agreement . . . .").

permanent and final boundary beyond which—regardless of any future annexations—the City has agreed that it "shall not extend its lines at any time." *Id.*

It is true that the Territorial Agreement *also* prohibits the City from extending electric service "outside the boundaries *of the City of Calhoun* . . . until said area has been legally annexed . . . and all municipal services [have been] provided." Territorial Agreement at 2–3 (emphasis added). But the expandable City Limits Boundary recognized in that Annexation Provision is not the same as the immovable perimeter of the Outer Boundary, which is delineated by fixed waterways, land lots, and roads.

In the case at hand, the Michael's Carpet building is located *inside* a newly annexed area of the City *beyond* the Outer Boundary, and the City has not cited anything other than the Annexation Provision to justify extending its lines past the Outer Boundary. But the Annexation Provision cannot help the City here, because a plain reading of the Territorial Agreement under Georgia law shows that the Outer Boundary's fixed perimeter does not expand upon annexation. (*See generally* Pet. of North Georgia EMC ¶¶ 21-27.) The City's telling failure to address this argument on its merits should be dispositive.

B. The Declaratory Ruling Order Does Not Allow the City to Serve the Premises.

Because the City is evidently unable or unwilling to address the Territorial Agreement on its own terms, the City resorts to a contorted reading of the Declaratory Ruling Order from *In re: City of Calhoun*, Docket No. 42514, a case in which the City's request for a declaratory ruling was *denied*. The City's arguments based on its misinterpretation of the Hearing Officer's Declaratory Ruling Order—including contentions that that case is binding precedent and that North Georgia EMC should be collaterally estopped from enforcing the Territorial Agreement—are distractions that should be rejected.

1. The Declaratory Ruling Order did not decide the issue in this case.

The Declaratory Ruling Order primarily concerned the City's unsuccessful attempt to have the entire Territorial Agreement declared unenforceable—not whether the City could overwrite the Outer Boundary provision merely by annexing new municipal territory:

> The Hearing Officer finds and concludes that the Commission has already determined that it adopted, approved and incorporated the Agreement . . . .
>
> The Territorial Act did not supersede the Agreement but authorized, directed and promoted the use of it . . . .
>
> . . . .
>
> As noted by NGEMC, the Commission adopted and approved the Agreement and its provisions. . . . This is in accordance with the previous Commission Orders and the Georgia Court of Appeals rulings.
>
> As noted in NGEMC's Brief, the City itself has unequivocally stipulated and acknowledged that the Commission approved and adopted the Territorial Agreement.
>
> . . . .
>
> The Hearing Officer finds and concludes that no uncertainty exists with respect to the approval of the Agreement as the Commission has already determined that the Agreement was approved by the Commission. Accordingly, no declaratory relief is warranted on this issue.

Docket No. 42514, Initial Decision at 5–7.

Although the Hearing Officer noted one of the City's alternative requests (for a declaration that it had "the right to extend electric service lines outside of the Box"), the Declaratory Ruling Order *denied* that request because "no declaratory relief [wa]s warranted." Docket No. 42514, Initial Decision at 8. That question had not been fully briefed (as explained below), and the case was not focused on any specific premises. The Hearing Officer quoted language from *Kerry Foods* about "the Box"—a term that the *Kerry Foods* initial decision had used inconsistently to refer to both the Outer Boundary *and* the City Limits Boundary (as noted in North Georgia EMC's Initial Brief, at 14–16)—and refused to decide the question given the

legal requirements for declaratory relief. Docket No. 42514, Initial Decision at 8 ("WHEREFORE, IT IS ORDERED, that the City of Calhoun's Petition for Declaratory Ruling is denied as there is no discernible or plausible uncertainty present in the pleading.").

Accordingly, the Hearing Officer's denial of the City's petition for a declaratory ruling was not an adjudication on the merits, and it certainly did not establish, as a matter of binding precedent, that the City has a right to serve customers beyond the Outer Boundary "when the conditions in the Annexation Provision are met," as the City claims. City's Initial Br. 6.

The City's assertions that "the PSC concluded that the matter had already been resolved in Calhoun's favor," and thus "agreed with Calhoun" that it "***did*** have the right to extend its services when the conditions in the Annexation Provision are met," are incorrect. City's Initial Br. 2, 6. Those statements cannot be found in the Declaratory Ruling Order, which *denied* the City's request for relief without indicating that the Hearing Officer intended to resolve future disputes about whether the City could ignore the Territorial Agreement's distinction between the malleable city limits and the fixed Outer Boundary.

Again, the Declaratory Ruling Order did not purport to declare the City's substantive rights—much less to decide "this *exact* question" with respect to the Premises here or even the Outer Boundary in general. City's Initial Br. 7. The Hearing Officer instead cited the Georgia Declaratory Judgment Act, O.C.G.A. § 9-4-1, and appropriately declined to grant the City's request for declaratory relief. Docket No. 42514, Initial Decision at 1, 8; *cf. Baker v. City of Marietta*, 271 Ga. 210, 214 (1999) ("Where the party seeking declaratory judgment does not show it is in a position of uncertainty as to an alleged right, dismissal of the declaratory judgment action is proper; otherwise, the trial court will be issuing an advisory opinion, and the Declaratory Judgment Act makes no provision for a judgment that would be advisory. . . .

Declaratory judgment will not be rendered based on a possible or probable future contingency. Entry of a declaratory judgment under such circumstances is an erroneous advisory opinion which rules in a party's favor as to future litigation over the subject matter and must be vacated." (internal citations and brackets omitted)).

The City therefore cannot rely on the Declaratory Ruling Order to establish that it has any substantive right to serve the Michael's Carpet building, which undisputedly lies beyond the Territorial Agreement's Outer Boundary. The parties' rights should be determined by applying the language of the Territorial Agreement—not according to the City's mischaracterizations of earlier cases in which it lost.

2. North Georgia EMC prevailed in the Declaratory Ruling Order and had no duty to appeal there to preserve its rights here.

The fact that the City lost in the Declaratory Ruling Order also defeats its argument that North Georgia EMC had an opportunity and obligation to appeal in that case to preserve its arguments about the Premises in this case. "[A] party to a PSC proceeding does not have an automatic right to judicial review of an agency decision." *Ga. Power Co. v. Campaign for Prosperous Ga*., 255 Ga. 253, 257 (1985). Instead, only a party "aggrieved" by a final decision in a contested case is entitled to further review. O.C.G.A. § 50-13-19(a); *see also Campaign for Prosperous Ga.*, 255 Ga. at 257 ("In the context of the Administrative Practice Act, the word 'aggrieved' has been interpreted to mean that the person seeking to appeal must show that he has an interest in the agency decision that has been specially and adversely affected thereby.").

North Georgia EMC was not "aggrieved" by the Declaratory Ruling Order because it *prevailed*. North Georgia EMC had asked the Commission there to reject the City's requests for declaratory relief. *See* North Georgia EMC's Brief Opposing City of Calhoun's Pet. for

Declaratory Ruling at 17 (Docket No. 42514, July 3, 2019). North Georgia EMC then got what it had asked for when the Hearing Officer rejected the City's petition for declaratory relief.

"A party not aggrieved by the judgment of the trial court"—or by extension an administrative agency—"is without legal right to except thereto, since he has no just cause of complaint." *Cooper Motor Lines, Inc. v. B. C. Truck Lines, Inc*., 215 Ga. 195, 195 (1959). And when a decision-maker refuses "to construe a contract" on a request for declaratory judgment, the prevailing party's "rights under its contract are in no way prejudiced by the judgment, which refused to construe such contract." *Id.* The Supreme Court of Georgia has thus held that the prevailing party in such a case "has no right" to appeal or "bring [a] writ of error." *Id.*; *cf. Morgan v. Miller*, 191 Ga. App. 803, 803 (1989) ("Assuming arguendo that the appellants had standing to seek a declaratory judgment . . . , they clearly do not have standing to appeal the trial court's ruling on that issue, inasmuch as their liability . . . , if any, is not affected by it."). "Such a party is under no duty, and therefore it is not his privilege to bring under review the correctness of the judgment or decree entered." *Ga. Music Operators Ass'n v. Fulton Cty.*, 184 Ga. 348, 350 (1937).

Setting aside other mischaracterizations of the Declaratory Ruling Order, the City's suggestion that North Georgia EMC "should have challenged the decision" on the ground that "the PSC erred in relying on nonbinding dicta" is misplaced. City's Initial Br. at 13. North Georgia EMC *prevailed* in opposing the City's request for a declaration that the City had "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." City's Pet. (Docket 42514) ¶ 37.

Even if North Georgia EMC might have written the Declaratory Ruling Order differently, any concerns about the Hearing Officer's reasoning or references to dicta from *Kerry Foods*

would not have required (or permitted) North Georgia EMC to file an appeal. As a general rule, courts "'review[] judgments, not statements in opinions.'" *Cal. v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). "The fact that [a decision-maker] reached its decision through analysis different than [a] Court might have used does not make it appropriate for th[e] Court to rewrite the . . . decision, or for the prevailing party to request . . . review." *Id.*; *see also Brown v. Atlanta*, 66 Ga. 71, 76 (1880) ("This court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party.").

Put another way: North Georgia had no obligation (or right) to appeal its victory just to preserve hypothetical arguments for future disputes if the City continued to flout the Territorial Agreement. *Cf. Rooney*, 483 U.S. at 312-13 ("There are two too many 'ifs' in that proposition to make our review appropriate at this stage."). The City, on the other hand, had lost. If the City wanted a clear declaration of its rights with respect to the Outer Boundary, it should have challenged the Declaratory Ruling Order itself. Especially if the City thought that the Declaratory Ruling Order's references to the *Kerry Foods* dicta supported granting, rather than denying, its request for declaratory relief, then it was clearly the City—not North Georgia EMC—that was aggrieved and could have sought further review.

3. Collateral estoppel does not prevent North Georgia EMC from challenging the City's breach of the Territorial Agreement.

The City relies on its misreading of the Declaratory Ruling Order and flawed appealability argument to contend that North Georgia EMC's claims are barred by collateral estoppel, but it cannot satisfy the requirements to apply that doctrine here.

First, it is a fundamental principle that collateral estoppel does not apply against the prevailing party in the prior proceeding. *See, e.g.*, *Hodges v. Grange Mut. Ins. Co.*, 227 Ga. App.

897, 899 (1997) (Pope, J., concurring) ("The availability of review for the correction of errors has become critical to the application of [the collateral estoppel] preclusion doctrine. If review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of [of issue preclusion] is inapplicable by its own terms." (quoting Restatement (2d) of Judgments, § 28(1) cmt. a.)). While North Georgia EMC did not lose on any issue, even if it had, collateral estoppel would not apply because judgment in the Declaratory Ruling Order was issued in its favor.

Second, the City cannot meet the required elements of collateral estoppel, *i.e.*,:

> (1) both proceedings must involve the same parties or their privies; (2) the issues 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.

Macon Water Auth. v. City of Forsyth, 262 Ga. App. 224, 227 (2003). The only requirement met here is the first, because both the City and North Georgia EMC were parties with respect to the Declaratory Ruling Order. But the City cannot satisfy any of the other three elements to estop North Georgia EMC from enforcing the Territorial Agreement as written.

With respect to the second element, the issue in this case was not "actually litigated and determined" in the Declaratory Ruling Order because the denial of the City's petition was not an adjudication on the merits. *Id*. In concluding that "no declaratory relief is warranted," the Hearing Officer denied the City's claims *without* reaching any potentially binding conclusions about the City's rights in connection with the Outer Boundary. Docket No. 42514, Initial Decision at 8. *See generally Empire Fire & Marine Ins. Co. v. Metro Courier Corp.*, 234 Ga. App. 670, 673 (1998) ("A dismissal of a declaratory judgment action on the ground the petitioner needs no direction from the court as to future action is a dismissal for want of subject matter

jurisdiction.") That sort of "involuntary dismissal . . . does not operate as adjudication on the merits." *Id*. And because the City's petition for declaratory ruling was denied without an adjudication on the merits in the earlier proceeding, there was no *determination* of the issues later raised in this separate case.

The third element for collateral estoppel (whether the determination required under the second element was essential to the judgment in the first proceeding) likewise is not satisfied because, as explained above, the Declaratory Ruling Order did not make the purported determination relied upon by the City in the first place.

As for the fourth collateral-estoppel element, North Georgia EMC did not have a full opportunity in the prior proceeding to litigate whether the City could extend service to this Premises or (for that matter) any premises beyond the Outer Boundary upon annexation and the provision of legal services thereto. The City's assertion that "this *exact* question was considered by the PSC," "briefed by both parties," and then "specifically answered by the PSC in Calhoun's favor" is mistaken. City's Initial Br. 7–8. For example, the City incorrectly states that North Georgia EMC "had the full opportunity to brief the issue" before the Declaratory Ruling Order because North Georgia EMC supposedly "did specifically discuss it in its Brief in two separate locations." *Id.* at 11 (citing pages 3-4 and 15-17 of North Georgia's brief in opposition).[2] But at pages 3-4 of that brief, North Georgia EMC simply addressed the City's large load argument (which the City cannot seem to let go of) and stated that various alternative rulings sought by the City "would amount to unwarranted 'advisory' opinions." North Georgia EMC's Brief Opposing City of Calhoun's Pet. for Declaratory Ruling at 3-4 (Docket No. 42514, July 3, 2019). Similarly,

[2] The City's assertion that North Georgia EMC argued in the declaratory ruling action that "the Annexation Provision only applies to the area inside of the Box" is not true. City's Initial Br. at 6. North Georgia EMC did not make that argument anywhere in its opposition brief.

at pages 15-17 of its brief, North Georgia EMC stated that "[t]he Commission should not render advisory opinions on hypothetical or abstract issues," but should instead await "concrete disputes based on an accrued set of facts." *Id.* at 16, 17.

In addition to the fact that North Georgia EMC did not brief and the Commission did not decide (in Docket No. 42514) the issue now before the Commission, North Georgia EMC did not have a "full opportunity" to litigate the issue. Pursuant to the Commission's rules on declaratory judgment proceedings, the City, as petitioner in the prior proceeding, was required set forth "[t]he full text of the statute, rule, [or] order upon which a ruling is requested." Ga. Comp. R. & Regs. r. 515-2-1-.12(1). The City was obviously aware of this requirement. *See* City's Pet. (Docket 42514) at ¶ 13 ("Following the format set forth in Ga. Comp. R, & Regs. r. 515-2-1-.12, the City sets forth the following *required elements* of its Petition." (emphasis added)). But the only orders listed in the City's petition were the Commission's 1975 order approving the Gordon County Territorial Map and a 1995 decision in a case involving the meaning of "customer" in the Territorial Agreement. *Id.* No mention was made of the *Kerry Foods* order anywhere in the City's petition.

Instead, the City argued its interpretation of the "expansion" language in *Kerry Foods* for the first time in its reply brief, to which NGEMC did not have an opportunity to respond. *See* City's Reply in Support of its Pet. for Declaratory Ruling at 19 (Docket No. 42514). For that reason alone, North Georgia EMC did not have a full opportunity to litigate the meaning of the expansion language in *Kerry Foods*, which language the City now contends, based on the

Declaratory Ruling Order, is binding precedent giving it the right to provide electric service to the Michael's Carpet building.[3] *See, e.g.*, City's Initial Br. 12.

Because the City thus cannot show that the doctrine of collateral estoppel applies, the Commission should consider and address North Georgia EMC's arguments on the merits.

C. *Kerry Foods* Does Not Allow the City to Serve the Premises.

The citation in the Declaratory Ruling Order to the non-binding and ambiguous dicta from the *Kerry Foods* case does not change the conclusion that the Declaratory Ruling Order dismissed the City's petition for a declaratory ruling and there was no adjudication in that case on the merits, or any ruling governing the City's substantive rights. The City, however, argues that the quoted language from *Kerry Foods* is not dicta, and that the 2003 decision itself is "binding precedent" as to the issue in this case. City's Initial Br. at 15.

In *Kerry Foods*, the City sought to serve a premises beyond the Outer Boundary *under the large load exception to the Territorial Act*, an exception that no party claims applies to the Michael's Carpet building in this case. There was no contention that the City had annexed or provided municipal services to the Kerry Foods building. The Hearing Officer in *Kerry Foods* ruled: (a) that the Outer Boundary provision of the Territorial Agreement was not subject to the large load exception; and (b) that in any event, the City had failed to demonstrate that the Kerry Foods building would have a connected load of 900 kW or greater to qualify for the large load exception. *Kerry Foods*, Initial Decision at 36–37.

[3] The City further mischaracterizes the declaratory ruling proceedings, stating that "[a]fter briefing by both sides, the PSC entered the 2022 Ruling." City's Initial Br. at 6. This is misleading because North Georgia EMC did not brief the issue of whether the *Kerry Foods* expansion language was binding or whether the Outer Boundary may be expanded by annexation and provision of municipal services.

No party in *Kerry Foods* raised the hypothetical question whether the City could serve the Kerry Foods building if the City had annexed and provided municipal services to the building. Accordingly, neither party argued, and the Commission did not decide, that question. In fact, the City's argument was that the Kerry Foods facility, as a purported large load premises, should be the *exception* to the general rule that the Territorial Agreement "should be interpreted as precluding [the City] from serving any electric customers located outside of the [Outer Boundary]." *See* City's Post-Hearing Br. at 5 (Docket No. 14496). The issue in *Kerry Foods* was about the applicability of the large load exception in the Territorial Act.

Although the Hearing Officer's references to the "expanding" "Box" in other parts of his opinion are internally inconsistent, those statements had no bearing on the actual ruling in *Kerry Foods* that the City could not serve a purported large load premises beyond the Outer Boundary. Therefore, those descriptions in *Kerry Foods* are non-binding dicta. *See Zepp v. Brannen*, 283 Ga. 395, 397 (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)).

The City's scattershot efforts to give this dicta substantive, binding effect all fall flat. *See, e.g.*, City's Initial Br. at 14 ("foil" argument as to "other exceptions"); *id.* (Hearing Officer's decision not to consider parole evidence); *id.* at 15 (discussion of the intent of the parties). None of these arguments change the fact that the issue whether the City had the right to extend electricity to a premises located beyond the Outer Boundary upon annexation/provision of municipal services was simply not before the Commission in *Kerry Foods*.

While the City fails to explain what "reading of the language" in the Initial Decision the full Commission supposedly "confirmed" on appeal (City's Initial Br. at 15), the full

Commission in fact made absolutely no mention of the "expansion" idea anywhere in its decision. And there is certainly nothing to support the notion that if the full Commission had in fact considered the Hearing Officer's expansion dicta, it would have deemed it to be a binding, substantive ruling on an issue not before the Commission. Indeed, the full Commission itself recognized that "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor [sic] essential to the determination of the case in hand are obiter dicta, and lack the force of adjudication." *Kerry Foods*, Final Order of Commission, at 6 n.5 (Docket 14496) (quoting *White v. State*, 213 Ga. App. 429, 430 (1994)).

Nor is there any basis for the City's assertion that even if the expansion language *was* dicta in the Hearing Officer's *Kerry Foods* decision, it nevertheless "is not dicta in the [Declaratory Ruling Order]." City's Initial Br. at 12. The City cites no authority for the idea that by quoting passages from the *Kerry Foods* decision and denying the City's request for declaratory relief, the Declaratory Ruling Order somehow transformed the *Kerry Foods* dicta into a substantive, binding, precedential ruling on the merits in favor of the City in a case it lost.

Moreover, as demonstrated in North Georgia EMC's initial brief in this matter, the dicta in *Kerry Foods* itself is far from clear, and the better interpretation is that the "expansion" concept referred to in that dicta related solely to the City's growth by annexation *within* the Outer Boundary. *See* North Georgia EMC Br. at 14-16.[4] Notably, the City does not dispute this.

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[4] The City mischaracterizes North Georgia EMC's argument when it claims that "according to NGEMC, the 'City's territory' should be understood to mean the City Limit Boundary . . . not the Box.") City's Initial Br. at 15. That is not at all North Georgia EMC's argument. The City appears to be responding to the Hearing Officer's reference to "the City's territory" in describing "the Box." *Kerry Foods* Initial Decision at 11. As explained by North Georgia EMC, 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. *See* Pet. of North Ga. EMC ¶ 34. Furthermore, North Georgia EMC does not claim that the Hearing Officer treated "the Box" and the City Limits Boundary "interchangeably." City's Initial Br. at 16. Instead, North Georgia EMC explained that

But that is not surprising, since this is how the City itself has long interpreted the Territorial Agreement, both before and after the *Kerry Foods* decision, *i.e.*, as limiting the City's expansion rights only to municipal annexations within the Outer Boundary. For example, before *Kerry Foods*, the City stated in the *Advance Auto* case (Docket No. 5090-U):

> 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 (Docket No. 5090-U, Sept. 23, 1994) (emphasis added). And after the *Kerry Foods* Initial Decision, the City argued in its appeal of the case that "the Territorial Act 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-04340, June 15, 2004 (emphasis added). So, far from *Kerry Foods* having "so clearly decided the issue in favor of Calhoun," as the City contends (City's Initial Br. at 12), the City candidly acknowledged in 2004 *after* the *Kerry Foods* decision, that any so-called "expansion" rights would apply only *within* the Outer Boundary.

Equally telling is the City's position in *North Georgia EMC v. City of Calhoun* (Docket No. 5628-U Dec. 21, 1995) (the "*Mohawk*" case). In that case, North Georgia EMC challenged the City's extension of service to two new sections of a Mohawk industrial facility. Initial Decision at 1 (Docket 5628). The City stipulated that the new Mohawk facility it sought to serve had been annexed into the corporate limits of Calhoun several years before the case was brought. (Joint Stipulations of Fact, ¶ 6 (Oct. 25, 1995)). The City described *both* the Annexation Provision and the Outer Boundary in its submission to the Commission:

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the Hearing Officer made confusing statements as to whether "the Box" referred to the City's assigned territory, the City Limits Boundary, or the Outer Boundary. *Id*. ¶¶ 34, 35.

> 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 at 1-2 (submitted by City Dec. 20, 1995). In the next paragraph, the City stated that the Territorial Agreement "allows Calhoun to serve large load consumer choice customers beyond this bounded area." *Id.* at 2. The City further acknowledged that "[t]he Mohawk facility is located in an area assigned by the Commission to North Georgia EMC." *Id.* at 3 (¶ 3).

While the City initially claimed the right to serve the two new sections of the Mohawk facility under the large load exception, the City conceded, after an evidentiary hearing, that the new sections' connected load was less than 900 kW. Post Hearing Stipulation ¶ 1 (submitted by City Dec. 20, 1995). Thus, as the City acknowledged and represented to the Commission, the Mohawk facility was located within an area annexed to the City, beyond the Outer Boundary, and within North Georgia EMC's assigned territory. Also, the connected load of the two new sections of the facility was less than 900 kW. On these facts, the City expressly urged the Commission to rule that the City had *no right* to serve the new sections of the Mohawk facility, as stated in the City's own proposed order:

> It is therefore found that under the Territorial Act the two newly constructed sections of Mohawk may only be served by North Georgia EMC. It is therefore ordered that Calhoun discontinue the provision of electric service to the two new sections of the Mohawk facility and that the parties arrange for the orderly transfer of service . . . .

Proposed Order at 6. The hearing officer did just that, holding that only North Georgia EMC could serve the new sections of the Mohawk facility and ordering the City to disconnect and transfer service to North Georgia EMC. Initial Decision at 7.

Thus, on facts remarkably similar to those presented here—a non-large-load facility located beyond the Outer Boundary in an area annexed to the City, and within North Georgia

EMC's assigned territory—the City not only conceded that it had no right to serve the facility but urged the Commission to enter such a ruling and order the City to transfer service to North Georgia EMC. If any estoppel is to apply in this case, it should be *judicial* estoppel against the City, which applies "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Greenlee v. Tideback*, 359 Ga. App. 295, 297 (2021).

Contrary to the City's assertion, North Georgia does not argue that "decades of PSC precedent are premised on a fundamental misunderstanding of the Box." City's Initial Br. at 15. Based on a review of prior cases, the *Kerry Foods* decision is the first time the phrase "the Box" was used, and the only case applying "the Box" to a disputed premises. The Hearing Officer's ruling in that case was correct: the City had no right to serve a purported large load premises located beyond "the Box." That was the only precedent arising from the case. The Hearing Officer's "expansion" language had no bearing on the ruling in that case and was manifestly not "precedent."

It is more than a little ironic that the City is asserting absolute certainty regarding the definition of "the Box." In its own petition in the 2019 declaratory ruling proceeding, the City defined "the Box" in a manner that does not align with the text of the Territorial Agreement. *See* City's Pet. at 9 n.1 (defining "the Box" based on borders "stretching" to Beamer Road, New Zion Road, Damascus Road and Belwood Road, references that appear nowhere in the Territorial Agreement).[5]

[5] In another new assertion, the City claims that the Territorial Act is "a body of law overridden by the Territorial Agreement." City's Initial Br. at 16. This is certainly not the position the City has taken in the past; nor is it based on any Commission decision.

D. The City's Expansion of its Municipal Boundary by Annexation Would Not, In Any Event, Result in the Re-assignment of Territory from North Georgia EMC to the City.

The City has absolutely no response to North Georgia EMC's alternative argument that even if the Outer Boundary could be expanded by the City's annexation and provision of municipal services (though it manifestly could not), the City still would have no right to serve the Michael's Carpet building. *See* Pet. of North Ga. EMC ¶¶ 44-47. This is because even when the Annexation Provision of the Territorial Agreement applies, it alters the parties' 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.

Accordingly, although the Michael's Carpet building has been annexed to the City (Stipulation ¶ 5), that would not change the underlying territorial assignment. As stipulated by the parties, the Michael's Carpet building is located within the geographic area shown as having been assigned to North Georgia EMC on the territorial assignment map approved by the Commission on September 2, 1975, in Docket No. 2833-U. (Stipulations ¶¶ 3, 4.) This means that, absent some exception not applicable here, North Georgia EMC retains the exclusive right to serve the Michael's Carpet building . *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 the Outer Boundary could be expanded by the City's annexation and provision of municipal services to property, which it cannot, North Georgia EMC still would have the exclusive right to serve the Michael's Carpet building.

II. CONCLUSION

For the foregoing reasons, North Georgia EMC is the sole lawful supplier of electric service to the Michael's Carpet building.

Respectfully submitted, this 10th day of November, 2023.

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CERTIFICATE OF SERVICE

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

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

This 10th day of November, 2023.

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