BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

REPLY BRIEF OF RESPONDENT CITY OF CALHOUN

I. INTRODUCTION

In keeping with its Petition and Initial Brief, NGEMC's Response Brief continues to ignore the substance of the PSC's prior determinative ruling on the very issue presented by NGEMC's Petition. NGEMC once again fails to explain any factual or legal basis to distinguish this dispute from the 2022 Ruling.[1]

As Calhoun has explained, the legal question posed 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 expand the Box when it has legally annexed property and provided the requisite municipal services. Despite the PSC's substantive ruling in 2022 ***allowing*** Calhoun to do just that, NGEMC contends it was not able to seek review of that decision and should be permitted to do so via this action. NGEMC's arguments, including its ongoing attempts to relitigate its interpretation of the Territorial Agreement despite the 2022 Ruling, as well as NGEMC's failure to seek review of that decision, do not provide a basis for NGEMC to serve the Michael's Building and its Petition should be denied.

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

II. ARGUMENT

A. The 2022 Ruling Resolved the Question at Issue in Calhoun's Favor

NGEMC's numerous arguments all fail for the same reason: the PSC already decided the question raised in NGEMC's Petition in its 2022 Ruling. NGEMC contends that because the PSC denied Calhoun's request for declaratory judgment in that action, the PSC did not determine that Calhoun could expand the Box pursuant to the Annexation Provision. NGEMC blatantly puts form over substance, ignoring that the PSC denied Calhoun's request for declaratory relief for the ***sole reason*** that the PSC had already interpreted the Agreement ***in favor*** of Calhoun. *See* 2022 Ruling, p. 8 ("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 [sic]. . . Because the prior Commission Order has already addressed this issue, no declaratory relief is warranted.").

Critically, the PSC did not provide an alternative basis for denying Calhoun's request. For example, the PSC did not decide that the issue was too speculative or that a determination would not impact the parties' future actions. The PSC was well-aware of the parties' differing interpretations of the Agreement and knew the parties ***would*** rely on the 2022 Ruling. Calhoun's 2019 Petition asked the PSC to provide clarity on the interpretation of the Agreement because the parties had disputed its interpretation for decades. The PSC did just that via the 2022 Ruling and unlike NGEMC, Calhoun has followed the PSC's ruling.

B. NGEMC's Arguments Challenging the Precedential Effect of the 2022 Ruling are Each Without Merit

Attempting to avoid the PSC's 2022 Ruling at any cost, NGEMC relies on inapposite comparisons to dissimilar cases and legal concepts, none of which change the conclusion that the PSC has already decided the issue in Calhoun's favor and NGEMC failed to seek review.

1. The PSC decided the precise issue presented by NGEMC's Petition.

First, NGEMC argues that the PSC "did not decide the issue in this case." *See* NGEMC's Response Brief, pp. 5-7. The sole question presented in NGEMC's Petition is whether Calhoun has the right under the Agreement to extend electrical services to the Michael's Building by expanding the Box pursuant to the Annexation Provision. That was exactly the question the PSC quoted in its 2022 Ruling in determining there was already certainty on the issue and Calhoun could serve properties it annexes and provides municipal services, even if doing so requires expansion of the Box.[2] NGEMC once again provides no explanation as to why the PSC's conclusion in the 2022 Ruling is at all different than the question presented here.[3]

2. NGEMC was obliged to seek review of the 2022 Ruling because it was the party whose interests were aggrieved.

Second, NGEMC argues that as the "prevailing party," it had no obligation or duty to seek review of the 2022 Ruling. Under Georgia law, "[a]ny person who has exhausted all administrative

[2] 2022 Ruling, p. 7 ("In its Petition, the City also asks that '[i]f the PSC determines that the Agreement was adopted in its entirety as part of the PSC's Order in 1975, the City 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.'").

[3] NGEMC's lengthy cite to *Baker v. City of Marietta*, 271 Ga. 210 (1999) does not aid NGEMC's argument. In *Baker*, the trial court was considering a preliminary injunction and a request for declaratory judgment. When ruling on the preliminary injunction, the court determined that the plaintiff had failed to meet the requirements to challenge the actions of the defendant. The court then ruled on the request for declaratory judgment which considered a related, but unnecessary, constitutional challenge. The Georgia Supreme Court reversed the decision as to the declaratory judgment on the grounds that the constitutional challenge was moot because the denial of the preliminary injunction resolved the controversy between the parties without any need to consider the constitutional challenge. Here, NGEMC does not challenge the procedural propriety of the PSC's ruling, but instead challenges the reasoning behind the ruling.

remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. . . ." *See* O.C.G.A. § 50-13-19(a). NGEMC contends, without support, that a party opposing a request for declaratory judgment cannot be "aggrieved" if the request is denied. Under Georgia case law, 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). Through the denial of Calhoun's request for declaratory judgment in the 2022 Ruling, Calhoun obtained the very benefit it sought and NGEMC opposed. NGEMC's interests were "specially and adversely affected thereby" as is apparent by NGEMC now challenging Calhoun's actions in accordance with the 2022 Ruling. *Id*.

It is inconceivable that the 2022 Ruling did not adversely affect NGEMC. NGEMC was aggrieved by the 2022 Ruling and filed this Petition essentially attempting to obtain a reversal.[4]

3. NGEMC is collaterally estopped from challenging the 2022 Ruling.

NGEMC's attempted rebuttal of Calhoun's collateral estoppel argument fairs no better. First, NGEMC argues that it cannot be collaterally estopped because it did not have the full opportunity to litigate this issue in the 2019 proceedings. NGEMC ignores the critical distinction between not having the opportunity to litigate a question and ***choosing*** not to litigate a question. In the 2019 Petition, Calhoun explicitly requested a ruling on the very issue that the PSC ultimately determined – the same issue at the heart of NGEMC's Petition. *See* Calhoun's 2019 Petition, pp. 14-15, ¶ 37. In its 2019 Opposition Brief, NGEMC cited to the paragraphs of Calhoun's 2019 Petition where Calhoun requested clarity on the annexation question. *See* NGEMC's Opposition Brief, pp. 16-17 ("The City's request for other declaratory rulings on questions that might or might

[4] NGEMC's flawed reasoning is further highlighted by its contention that it was Calhoun's obligation to appeal the 2022 Ruling, suggesting Calhoun would have to seek review of a determination that gave Calhoun the exact relief it sought: clarity that it could extend its services by expanding the Box pursuant to the Annexation Provision. *See* NGEMC's Response Brief, p. 9.

not arise someday under the Territorial Agreement should be rejected. (E.g., Pet. ¶¶ 35-37.) . . . If the Commission for some reason should choose to address any such hypothetical issues, NGEMC reserves the right to brief those issues fully."). In that same brief, NGEMC also made multiple references to Calhoun's request related to annexation as part of "alternative rulings" or "other issues" that Calhoun raised. *See id*. at pp. 3-4, 16-17. Plainly, NGEMC was aware of Calhoun's argument regarding the Annexation Provision in 2019, which was fully set forth in Calhoun's briefing, and NGEMC had the opportunity to oppose it. The fact that NGEMC did not fully brief the issue then or has since invented new legal arguments that it failed to assert in its 2019 Opposition Brief does not avoid the application of collateral estoppel.

Additionally, once it became clear from the 2022 Ruling that the PSC had considered Calhoun's arguments, NGEMC again had the opportunity to fully litigate the decision by requesting a rehearing before the full PSC or seeking judicial relief. In fact, as quoted above, NGEMC had specifically reserved its right to do so. However, NGEMC chose to forego that opportunity and instead waited until Calhoun had expended significant resources following the PSC's determination before improperly challenging the ruling through its present Petition.

NGEMC's case law fares no better. For example, the case that NGEMC cites for the "fundamental principle that collateral estoppel does not apply against the prevailing party in the prior proceeding" does not stand for the cited proposition. *See, e.g., Hodges v. Grange Mut. Ins. Co*., 227 Ga. App. 897 (Pope, J., concurring) (1997). In fact, the very sentence prior to the one quoted by NGEMC in that case's concurrence states that it "will ***generally*** be the case [that a prevailing party is not bound by the ruling they later seek to challenge when that ruling]… goes against a party but the ultimate judgment is in that party's favor." *See id.* at 899 (emphasis added). The court recognized that while this is "generally" the case, it is not the rule. The concurrence

noted that the court's determination was not binding because it was "not essential" to the otherwise favorable judgment. *Id.* (emphasis added). NGEMC's reliance on *Hodges* is therefore misplaced for two reasons: (1) as described above, NGEMC did not obtain a favorable judgment on the question at issue in the 2022 Ruling; and (2) the PSC's determination that Calhoun unmistakably had the right to expand the Box based on the Annexation Provision was essential to its conclusion.

NGEMC's argument that the parties did not actually litigate the issue is likewise incorrect. In the 2022 Ruling, the PSC adopted its own prior interpretation of the Territorial Agreement in concluding that Calhoun has the right to expand the Box pursuant to the Annexation Provision. That was the *sole* determination in the 2022 Ruling on this issue. It is therefore beyond dispute that the PSC considered and determined the same issue presented by NGEMC's Petition here.

NGEMC relies on *Empire Fire & Marine Ins. Co. v. Metro Courier Corp.*, 234 Ga. App. 670, 673 (1998) to support its position that the issue was not litigated and determined in the prior proceeding, and therefore there could not have been a determination essential to the proceeding. *See* NGEMC's Response Brief, pp. 10-11. This case is inapposite. In *Empire Fire*, the court declined to grant declaratory relief because it refused to predetermine a potential future dispute when the contested act had already occurred such that a determination would not impact either party's actions going forward. *See Empire Fire*, 234 Ga. App. at 673. On the contrary, Calhoun's 2019 Petition plainly set forth a present dispute that would impact future actions, and the PSC issued a determination in Calhoun's favor based on the PSC's prior precedent.

Moreover, Georgia law also states that "collateral estoppel only precludes those issues that actually were litigated and decided in the previous action, ***or that necessarily had to be decided in order for the previous judgment to have been rendered***." *See Ruth v. Herrmann*, 291 Ga. App. 399 (2008) (emphasis added). Here, it is indisputable that the PSC had to adopt its prior

interpretation of the Territorial Agreement to render its 2022 Ruling. That was the PSC's express, stated basis underlying the 2022 Ruling, and therefore NGEMC is collaterally estopped from seeking a differing determination through the present Petition.

Finally, NGEMC contends that the PSC's reliance on and adoption of the 2003 and 2004 reasoning from *Kerry* as part of the 2022 Ruling does not resolve NGEMC's current Petition because the PSC's discussion of the Annexation Provision in *Kerry* was dicta.[5] For the reasons stated in Calhoun's Initial Brief, the PSC's discussion of the Annexation Provision was not dicta. *See* Calhoun's Initial Brief, pp. 12-15. Moreover, even if the discussion in *Kerry* was dicta, the PSC's reliance on and adoption of the prior interpretation in the 2022 Ruling now makes it binding precedent. Under Georgia law, although dicta is not binding, a court may later find it persuasive and choose to adopt it – as the PSC did in 2022. *See Morgan County v. Gay*, 352 Ga. App. 555, 564 n.7. Here, the PSC's 2022 Ruling was based ***entirely*** on its acceptance of the interpretation of the Annexation Provision in *Kerry*. As such, the PSC's interpretation of the Annexation Provision in *Kerry* is binding because it was later relied on and adopted in the 2022 Ruling.[6]

C. NGEMC Misinterprets the Plain Text of the Agreement

As set forth above, it is unnecessary and improper to relitigate the PSC's interpretation of the Agreement after the 2022 Ruling. However, solely to avoid any appearance of acquiescence, Calhoun maintains that NGEMC's contractual argument misinterprets the Agreement.[7]

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[5] NGEMC further complains that Calhoun first cited to *Kerry* in its reply brief, not the 2019 Petition. *See* NGEMC's Response Brief, p. 12 (citing Ga. Comp. R. & Regs. r. 515-2-1-.12(1)). This argument fails because it was NGEMC that first cited *Kerry* in its Opposition Brief. Given that NGEMC first cited the case, Calhoun was plainly entitled to respond in its Reply Brief and NGEMC cannot credibly argue that it lacked the chance to respond to a case that it first cited.

[6] Once again, if NGEMC believed that the PSC wrongly relied on and adopted the *Kerry* interpretation of the Annexation Provision in the 2022 Ruling, NGEMC's remedy was to seek review at that time, which it failed to do.

[7] Should the PSC decide to re-open the 2022 Ruling and consider NGEMC's contractual arguments, Calhoun reserves the right to supplement its briefing with a full rebuttal of NGEMC's contract interpretation, as well as a rebuttal of all other arguments previously reserved.

First, NGEMC repeatedly quotes and places enormous significance on the Agreement's language that "the City of Calhoun shall not extend its lines at any time . . . [,]" contending that prohibition prevents Calhoun from ever extending lines beyond the original boundaries of the Box. NGEMC's position is, in essence, this language should be read in a vacuum as unconditional and therefore not subject to the Annexation Provision. However, the Annexation Provision ***immediately follows*** the language that NGEMC so heavily relies on, and provides a clear, express exception to the Box's limitation if Calhoun annexes property and provides municipal services, thus expanding the Box to encompass the newly annexed property.

NGEMC argues otherwise by misleadingly reversing the order of the two provisions, making it appear that the Annexation Provision appears first and is limited by the definition of the Box. *See* NGEMC's Response Brief, p. 3 (". . .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.'"). NGEMC's mischaracterization of the Agreement creates the false impression that the Box limits the Annexation Provision when the opposite is true.

NGEMC's interpretation also renders portions of the Agreement superfluous – the very thing it accuses Calhoun of doing. The Annexation Provision states that "[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 . . . ." *See* Calhoun's Initial Brief, p. 4 (quoting the Annexation Provision of the Agreement). NGEMC's claim that the Box (which is entirely within the limits of Gordon County and the State of Georgia) is the absolute limit of Calhoun's service would render that language superfluous if, as NGEMC contends, Calhoun cannot expand the Box. Calhoun's interpretation – confirmed by the PSC in

Kerry and adopted in the 2022 Ruling – is that these provisions must be harmonized and read together, not in the way advanced by NGEMC which would render the Annexation Provision superfluous. *See Argo v. G-Tec Servs., LLC*, 338 Ga. App. 608, 609-610 (2016) ("Courts should not render any language in a contract as superfluous, and any construction that renders portions of the contract language meaningless should be avoided.") (internal quotations omitted).

D. <u>O.C.G.A. § 46-3-7 Does Not Apply to the Annexation at Issue</u>

Finally, NGEMC, half-heartedly argues that this entire dispute is moot because annexation does not change anything even if the interpretations of the PSC and Calhoun are correct. NGEMC's argument is that O.C.G.A. § 46-3-7 controls how annexations impact electric service to newly annexed areas, and that under O.C.G.A. § 46-3-7(2)(d), annexation through any mechanism other than merger, consolidation, or other combination of previously existing municipalities does not change the electric supplier if an electric supplier had already been assigned to that area. NGEMC then concludes that only the PSC has the authority to re-assign assigned territory.

NGEMC's argument now conveniently ignores a position that it has repeatedly advocated for in prior disputes and which the PSC just affirmed in 2022: that the PSC has ratified the Territorial Agreement between the parties. The PSC's determination that it has adopted and approved the Agreement fully disposes of this argument. *See* 2022 Ruling, p. 6 (". . . the Commission adopted and approved the Agreement and its provisions."). Further, as described in the PSC's 2022 Ruling, the Territorial Act authorized the PSC to approve contracts. *Id.*, p. 5-6. Should the PSC continue to hold, as it did in 2022, that the PSC adopted and approved of the Agreement and the terms therein, then the PSC has expressly authorized this process of transferring

the right to provide electric service by expanding the Box when Calhoun annexes, provides municipal services and collects taxes.[8]

III. CONCLUSION

For the reasons stated herein, as well as those outlined in Calhoun's Initial Brief and Response Brief, the PSC should refuse to accept NGEMC's attempt to relitigate a decided issue and should thus deny NGEMC's Petition.

Respectfully submitted this 21st day of November 2023.

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[8] To the extent the PSC determines that the Annexation Provision is unenforceable under O.C.G.A. § 46-3-7, Calhoun reserves the right to raise additional arguments concerning the implications of that determination, including the effect of such a determination on the enforceability of the Agreement as a whole.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY 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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