BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

REPLY BRIEF OF NORTH GEORGIA EMC

The City's response brief offers no response at all to North Georgia EMC's plain reading of the Territorial Agreement as it applies to the facts of this case. Even as the City doubles down on its misplaced, incorrect contentions regarding prior Commission "precedent," it cannot escape the fact that the ruling on which its entire argument hinges was decided *against* the City. The City's continued mischaracterizations of that ruling are unavailing, and its threat to file more litigation if the Commission considers and addresses the present case on the merits should be rejected.

I. ARGUMENT

A. The City Offers No Alternative to North Georgia EMC's Plain Reading of the Territorial Agreement.

In its Initial Brief, North Georgia EMC demonstrated that the Outer Boundary and City Limits Boundary are two distinct geographical restrictions in the Territorial Agreement that address different situations, using different terms, to effectuate different purposes. North Georgia EMC's Initial Br. at 4-5, 7-8. North Georgia EMC further explained how the City's interpretation would totally rewrite the Outer Boundary provision, as follows:

Provision as written in Territorial Agreement

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

Provision as revised by the City

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

Id. at 8-9. North Georgia EMC supported its position with citations to settled Georgia law holding that re-writing contracts in this manner or in a way that would render contractual terms superfluous, as under the City's "interpretation," would violate bedrock principles of contract construction. *Id.* at 9-10. *See, e.g.*, *Bearhoff v. Craton*, 350 Ga. App. 826, 834 (2019) (courts are "not at liberty to ignore the specific terms of the parties' written agreement and rewrite or revise a contract under the guise of construing it." (internal citations omitted)); *Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100 (2020) ("Courts should not render any language in a contract as superfluous." (citations omitted)).

Accordingly, as North Georgia EMC further demonstrated, the only construction of the Territorial Agreement that gives effect to both the Outer Boundary and Annexation Provision is that (1) the City shall not extend its lines at any time beyond the Outer Boundary, and (2) inside the Outer Boundary, the City may have the right to serve electric customers if within the city limits or upon annexation and the provision of certain delineated City services. North Georgia EMC's Initial Br. at 10. *See Ga. Farm Bureau Mut. Ins. Co. v. Gaster*, 248 Ga. App. 198, 199 (2001) ("The contract is to be considered as a whole, and each provision is to be given effect and interpreted so as to harmonize with the others."). North Georgia EMC quoted from multiple City filings to show that this is, in fact, precisely how the City has long construed the parties' Agreement. North Georgia EMC's Initial Br. at 10-12, 17-18.

The City does not even attempt to respond to these arguments, presumably because it can offer nothing credible to the contrary. The City's failure to address North Georgia EMC's plain reading of the Territorial Agreement, supported by settled Georgia law, should be dispositive.

B. The Declaratory Ruling Order Did Not Decide the Issue in This Case.

Apparently unable to offer any alternative to North Georgia EMC's plain reading of the Territorial Agreement, the City resorts instead to repetitive arguments about the Declaratory Ruling Order (in Docket No. 42514). But try as it might to put a self-serving spin on that order, the City simply cannot change the undisputed fact that the Declaratory Ruling Order *denied* the City's request for declaratory relief.

Contrary to the City's assertion, the Declaratory Ruling Order did not establish a "precedent" on the "identical issue" raised in the present case (City's Resp. at 2) (which is a good thing for the City, since it lost on all declaratory rulings it sought in that case). As confirmed from the first to the last words of the City's own petition in that case, the City sought a declaratory ruling. *See, e.g.*, City's Pet. at 1 ("In Re: City of Calhoun's Petition for Declaratory Ruling"); *id.* at 15 (request for declaratory judgment in prayer for relief). Indeed, the Declaratory Ruling Order primarily concerned the City's attempt to have the entire Territorial Agreement declared unenforceable. As to the City's alternative request for a declaration that it had the "right to extend electric service lines outside of the Box" (City Pet. at 14-15), the Declaratory Ruling Order *denied* that request because the City did not meet the minimum legal requirements for stating a declaratory judgment claim. Docket No. 42514, Declaratory Ruling Order, at 8. As a result, the Commission did not even have jurisdiction to grant such a request. *See, e.g.*, *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' . . . .").[1]

Moreover, even if the City's petition had passed legal muster for jurisdictional purposes, it would have presented, at best, a "what if" hypothetical question about potential rights, unmoored from any facts—*regardless* of the City's attempt to support that petition with non-fact-based dicta from another case. The City's petition in Docket No. 42514 did not raise any "*real* issues presented by *real* parties in *real* time which focuses judicial decision making in ways that making speculative pronouncements about hypothetical questions cannot." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J. concurring) (emphasis added).

This case, by contrast, presents a real, concrete issue: "Whether the City of Calhoun has the right to serve the Michael's Carpet building located at 980 Belwood Road, Calhoun, Georgia, east of I-75." Notice of Hearing and Scheduling Order at 4 ("Matter At Issue") (Docket No. 55200) (hereinafter "Scheduling Order"). The City is providing electric service to the Michael's Carpet building. The building is located beyond the Outer Boundary and within an area recently annexed by the City. North Georgia EMC has filed a petition challenging that service. North Georgia EMC seeks a non-hypothetical, non-advisory ruling on whether the City is entitled to serve a specific premises at a specific location under an accrued set of stipulated facts—which is ripe for resolution by the Commission.

Apparently recognizing that a request for declaratory relief is not the same as a challenge to the extension of electric service to a specific premises, the City asserts that North Georgia

[1] The City continues to make unfounded assertions regarding the briefing, and opportunity to brief, the City's alternative request for declaratory ruling in Docket No. 42514. *See* North Georgia EMC's Resp. at 11-13. And needless to say, North Georgia EMC does not agree that the City accurately (much less fully) "summarized NGEMC's position." City's Resp. at 2.

EMC is "seeking a declaration of the parties' respective rights under the Annexation Provision." City's Resp. at 4. But North Georgia EMC seeks no such declaration, or any declaratory ruling at all. Instead, North Georgia EMC filed a petition challenging the City's extension of service to a specific premises (the Michael's Carpet building) and asking the Commission to "[f]ind and determine that the City is in violation of the provisions of the Territorial Act and the Territorial Agreement by extending its lines and electric service to the Premises"; to determine that North Georgia EMC is the sole lawful supplier of electric service to the Premises; and to order the City to transfer service to North Georgia EMC. *See* North Georgia EMC's Pet. at 20 (prayer for relief). In no sense is this a request for declaratory relief. Nor is it transformed into one by the presence of a "legal question." City's Resp. at 4. Nearly every case involves one or more legal questions.

Like its initial brief, the City's response brief mischaracterizes the Initial Decision in Docket No. 42514. The Hearing Officer in that case did *not* "decid[e] the issue in Calhoun's favor." City's Resp. at 4. Quite the opposite: in the Declaratory Ruling Order, the Hearing Officer *denied* the City's request for a declaratory ruling regarding potential rights it might have "to extend electric service lines outside of the Box." Docket No. 42514, Declaratory Ruling Order at 7, 8. Nor did the Declaratory Ruling Order hold "that the Agreement entitles Calhoun to extend its service into newly annexed parcels within the ever-expanding Box" or "confirm[] Calhoun's interpretation of the Agreement," as the City contends. City's Resp. at 1, 3. No such statements can be found in the Declaratory Ruling Order.

Also baseless is the City's contention that North Georgia EMC seeks "a second bite at the apple" and attempts to "collaterally attack" the Declaratory Ruling Order. City's Resp. at 3, 4. Having prevailed in that case, North Georgia EMC is not seeking to do either. Instead, North

Georgia EMC seeks to enforce the Territorial Agreement with respect to the City's extension of service to the Michael's Carpet building.

C. The City Cannot Mask its Repeated Attempts to Renege on the Contractual Terms of the Territorial Agreement.

The City claims that the litigation between the parties regarding the Territorial Agreement simply reflects "both parties hav[ing] advanced successful and unsuccessful arguments before the PSC." City's Resp. at 5. But there is a stark difference: North Georgia EMC has consistently sought to *enforce* the Territorial Agreement while the City has repeatedly tried to *back out* of the Agreement, in the process directly contradicting stipulations and representations it has made to the Commission. As demonstrated in North Georgia EMC's Initial Brief—and not denied by the City—the City has argued that contractual commitments the City voluntarily made in the Territorial Agreement cannot be enforced against the City because (1) the Agreement was never actually approved by the Commission; (2) the City's contractual commitments would violate the antitrust laws; and (3) the City could not waive rights it agreed to give up in the Territorial Agreement. North Georgia EMC's Initial Br. at 7. Even now, the City threatens to bring yet another action challenging the Agreement's enforceability unless it wins here. City's Resp. at 7.

In contrast, as demonstrated in the very cases relied upon in the City's Response Brief, North Georgia EMC has expressly sought to enforce the provisions of the Territorial Agreement. City's Resp. at 5-6. *See, e.g.*, *N. Ga. EMC v. City of Calhoun*, Docket No. 3718 (1989) (water intake case) (North Georgia EMC sought to enforce the City's promise not to extend its lines past I-75); *City of Calhoun v. N. Ga. EMC*, Docket No. 5090 (1995) (*Advance Auto* case) (North

Georgia EMC sought to enforce its right under the Territorial Agreement to continue serving "existing customers" after annexation).[2]

The City's repeated efforts to renege on the Territorial Agreement have not been lost on the Commission. *See, e.g.*, Docket No. 14496, Initial Decision at 19 (2003) ("for the Commission to accept Calhoun's argument here, the Commission would have to overturn in large part the regulatory scheme it has administered under the Territorial Act since 1975. Why? Because Calhoun wants to renege on its contractual promise and cherry pick a large load customer."); *id.* at 31 ("To permit a disgruntled electric supplier to abrogate or terminate the Territorial Agreement reached through negotiation with two (2) other electric suppliers and approved by the Commission would undermine the Commission's jurisdiction under the Territorial Act . . . [and] result in unnecessary confusion and chaos among electric service providers and the consuming public . . . ."); Docket 42514, Declaratory Ruling Order at 7 (referencing the "seemingly unending attempts by the City to circumvent its contractual commitments").[3] Unfortunately, the City's attempts to renege on its contractual promises, and contradict prior representations it has made to the Commission, have not come to an end.

Also groundless is the City's assertion that North Georgia EMC "sat back" while the City provided municipal services to the Michael's Carpet building. City's Resp. at 6. As noted above, the present case has been submitted to the Commission on stipulated facts. *See* Scheduling Order

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[2] The City's accusation that "NGEMC has continued to try to serve new customers in Calhoun's undisputed territory, in direct contravention of the PSC's order [in the *Advance Auto* case]" is baseless. This case has been submitted to the Commission on stipulated facts. *See* Scheduling Order at 3 ¶ 4. Nothing in the parties' Stipulated List of Undisputed Facts supports the City's contention. Moreover, if the City really believed that North Georgia EMC has been violating a Commission order, the City certainly could have challenged that alleged conduct.

[3] In light of these rulings, the City's professed concern about having to spend taxpayer dollars on litigation regarding the Territorial Agreement rings hollow. *Cf.* City's Resp. at 6, 8.

at 3 ¶ 4. Nothing in the parties' Stipulated List of Undisputed Facts supports the City's contention. In fact, the City began providing electric service to the Michael's Carpet building on May 24, 2023 (Stip. ¶ 7), and North Georgia EMC filed its petition challenging that service two days later, on May 26, 2023.

D. The Commission Should Disregard the City's Threat to File More Lawsuits If It Loses Here.

The Commission should reject out of hand the City's threat to file yet more lawsuits—and once again challenge the enforceability of the Territorial Agreement—if the Commission "overturn[s]" the Declaratory Ruling Order. City's Resp. at 7. North Georgia EMC is not asking the Commission to overturn the Declaratory Ruling Order, and has no reason to do so, since that order *denied* the City's request for declaratory relief. Specifically, the Commission denied the City's petition in that case because the City had failed to satisfy the threshold uncertainty requirement to justify declaratory relief. Docket No. 42514, Declaratory Ruling Order at 8. North Georgia EMC has now brought a direct, concrete challenge to the City's extension of electric service to a specific premises at a specific location under an accrued set of facts. There is no need for the Commission to "overturn" the declaratory ruling in Docket No. 42514 to decide North Georgia EMC's claim here.

In any event, if the City yet again seeks to challenge the enforceability of the Territorial Agreement, on old or new grounds, or pursues other questions raised in its 2019 petition in Docket No. 42514, the Commission is well-equipped to deal with such claims if and when they are ripe.[4]

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[4] The City may now regret that it "chose not to seek reconsideration," even though it "may not have necessarily agreed with the outcome" of the Commission's rulings in the Declaratory Ruling Order (City's Resp. at 7), but that strategic decision does not mean the Commission should cave to the City's threat of more litigation if it does not get its way in the present case.

II. CONCLUSION

For the foregoing reasons, the Commission should grant North Georgia EMC's request for relief in this case and order the City to transfer service to the Michael's Carpet building to North Georgia EMC.

Respectfully submitted, this 21st 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 **REPLY 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 21st day of November, 2023.

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