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NORTH GEORGIA EMC,

Petitioner,

v.

CITY OF CALHOUN,

Respondent.

DOCKET# Docket No. 55200
DOCUMENT# 217484

ORDER ON PETITION OF NORTH GEORGIA EMC v. CITY OF CALHOUN

Following the passage of the Act in 1973, North Georgia EMC ("NGEMC" or "North Georgia"), Georgia Power Company, and the City of Calhoun (the "City") entered into a binding Territorial Agreement ("Agreement") on April 8, 1975. A true and correct copy of the Agreement is attached as **Exhibit A.** This Agreement has been the subject of numerous Commission and Judicial proceedings over the past 45 years between the two electric suppliers.

North Georgia filed its Petition on May 26, 2023, claiming that the City has extended its electric lines and supplied electric service to a new premises in violation of the parties' territorial agreement and North Georgia EMC's rights under the Territorial Act.

Thereafter, three Briefing rounds were submitted: Initial Briefs on October 6, 2023; Response Briefs on November 13, 2023; and Reply Briefs on November 21, 2023. The Parties delivered their oral arguments before the Hearing Officer on December 8, 2023.

On June 26, 2023, this matter was assigned to the Commission's undersigned Hearing Officer for hearing and initial decision pursuant to the provisions of O.C.G.A. §§ 50-13-13 and

50-13-17. By their agreement to schedule the Proceedings and an Oral Argument, counsel for the parties waived statutory or regulatory deadlines for the rendering of a decision in this case.

Findings of Facts

1.

In its Petition, NGEMC's points to the provision of the Agreement that delineated a large geographical area beyond which the City agreed not to "extend its lines at any time.":

> 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; south of the southern boundary of LL's #303, 303, 301, 300, 299, and 298; and west of a line that extends along the west boundary of LL's #298, 297, 262 to the city limit line just below LL #243; thence west to the center line of Ga. 53 Spur, thence along the center line of Ga. 53 Spur to Terrell Farm Road; thence along the present city limit line to where it intersects center line of the Oothcalooga Creek as it presently exists; thence along center line of the creek to where it intersects center line of the Oostanaula River as it now exists; thence north along center line of the river as it presently flows to the center line of Georgia Highway 143; thence along the present city limit line to the center of the Oostanuala River; thence along center line of Oostanaula River as it presently flows to point of beginning where the center line of the river intersects north boundary of LL #97. *Agreement* p. 2.

2.

NGEMC refers to this geographical area as the "Outer Boundary." *Petition* p. 3. For purposes of this Order the area will be referred to as "the Box," consistent with all previous Orders. Shown in yellow on **Exhibit B** attached hereto.

3.

On May 1, 2022, Calhoun annexed the Michael's Carpet Building, which is located east of I-75 and is thus located outside of the Box. *Stipulations,* p. 2, Para. 4-5. After legally 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.,* Para. 6. These facts are not in dispute. Having satisfied all requirements in the Annexation Provision and acting in reliance on the *Order Denying City of Calhoun's for Declaratory Ruling, Docket No. 42514, May 17, 2022*, ("2022 Ruling") and the prior precedent cited therein, Calhoun began providing electric service to the Michael's Building on May 24, 2023. *Id.,* Para. 7. *Stipulated List of Undisputed Facts("Stipulation"),* September 19, 2023.

4.

North Georgia claims that the City has extended its electric lines and supplied electric service to the new Michael's Carpet building (the "Premises") located at 980 Bellwood Road, Calhoun, Georgia, which is beyond the Box, in violation of the Agreement.

5.

NGEMC concedes that municipal boundaries can be enlarged by annexation. The Agreement provides:

> The City further agrees it will not serve electricity to any area in Gordon County or the State of Georgia until said area has been legally annexed to the City of Calhoun and all municipal services provided including: fire protection, garbage collection, water, police protection, planning and zoning, city schools, and sanitary sewers. Also, property owners in such area must be paying, or subject to pay, city taxes. NGEMC agrees that sanitary sewer will only be provided where feasible and, if feasible, construction on said sanitary sewer services must be under construction within twelve months from date of annexation and must be completed in a reasonable period of time. *Agreement* p. 2

6.

The Agreement also addressed the effect of the Annexation Provision of city services on North Georgia's electric service rights: "After legal annexation and the provision of services as provided above, NGEMC will relinquish all its corridor rights inside the annexed area but will retain its right to serve existing customers." *Id.* p.3.

7.

Calhoun denies all allegations in the Petition that Calhoun has violated the Territorial Act, Territorial Agreement, or any other law. Calhoun states that it is operating in full compliance with this Commission's prior 2022 Ruling. The City claims that the 2022 Ruling conclusively resolved the question presented in NGEMC's present Petition: whether Calhoun may extend electric services to certain properties when it has (i) legally annexed an area; and (ii) provided municipal services to that area. The 2022 Ruling specifically held, as follows:

> 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. *Petition for Declaratory Ruling,* Para 37. The City claims that this question, too, has already been answered by the Commission.
>
> In Docket 14496, the City pointed out that **the Hearing Officer noted multiple times that the Agreement permitted "the expansion of the Box by CALHOUN's annexation of and provision of municipal services to a new**

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

The Commission adopted the prior Hearing Officer's Findings of Fact and affirmed his Conclusions of Law as well as his ultimate conclusion in a Final Order on March 4, 2004. Docket 14496 Final Order, p. 15. **Because the prior Commission Order has already addressed this issue, no declaratory relief is warranted.** *2022 Ruling*, (emphasis added.)

8.

The City contends that NGEMC was entitled to seek reconsideration by the full body of the PSC and, if needed, judicial review of the 2022 Ruling when first issued. Under O.C.G.A. § 50-13-17, in a contested case, when the initial hearing officer of the PSC makes an initial decision and that initial decision is not contested within thirty days from the date of notice of the initial decision, it becomes the final decision of the agency. Under O.C.G.A. § 50-13-19, a party who is aggrieved by the PSC's final decision must file a petition for judicial review before the Fulton County Superior Court within thirty days of the final decision. A party is "aggrieved" when they have "an interest in the agency decision that has been specially and adversely affected thereby." *Georgia Power Co. v. Campaign for Prosperous Georgia,* 255 Ga. 253 (1985). Given that the 2022 Ruling recognized Calhoun's right to expand the Box based on the Annexation Provision, the City claims that NGEMC was therefore aggrieved by that decision and thus legally permitted to seek agency reconsideration and judicial review. *Initial Brief of the City of Calhoun*, p. 9.

9.

North Georgia reasons that, as the prevailing party, NGEMC was not required (or entitled to) appeal. "The City did not appeal either and North Georgia EMC had no obligation to ask for 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. *Response Brief of North Georgia EMC,* p.3.

10.

The City argues that in deciding not to seek reconsideration, NGEMC instead waited to levy a collateral attack against the 2022 Ruling in its May 26, 2023 Petition. "Applicable law provides that an aggrieved party must exhaust its remedies at the agency level – here, requesting reconsideration of the 2022 Ruling by the full PSC within thirty days of the initial decision. *See,*

e.g., *Carnes v. Crawford*, 246 Ga. 677 (1980) (denying a request for judicial review on the grounds that the plaintiff had failed to first request an full agency review of the initial decision and thus had failed to exhaust their administrative remedies); *Dep't of Public Safety v. Maclafferty*, 230 Ga. 22 (1973) (same); *Alexander v. Dep't of Revenue*, 316 Ga. App. 543 (2012) (same). By failing to request agency review, NGEMC failed to exhaust its administrative remedies and is now precluded from relitigating this issue under the theory of collateral estoppel. *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003) ("Under Georgia law, administrative decisions may have a collateral estoppel effect in a subsequent judicial proceeding.").

As held in *Macon Water Auth.:*

> There are four requirements for application of the doctrine of collateral estoppel: (1) both proceedings must involve the same parties or their privies; (2) the issue must have been actually litigated and determined in the first proceeding; (3) that determination must have been essential to the judgment in the first proceeding; and (4) the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question. *Initial Brief of The City of Calhoun*, p.10.

11.

North Georgia also argues that an interpretation that the City can extend outside the Box would render the provision that the City "shall not extend its lines at any time" superfluous. NGEMC states that such a reading is contrary to fundamental principles of contract construction. *See, e.g.*, *Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100, 839 S.E.2d 306, 309 (2020) ("Courts should not render any language in a contract as superfluous.") (citations omitted). *NGEMC Petition,* p. 10-11.

12.

The City contends that it's request for declaratory relief is for the sole reason that the PSC had already interpreted the Agreement in favor of Calhoun. *2022 Ruling*, p. 8. Because the prior Commission Order has already addressed this issue, no declaratory relief was warranted. 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). *Reply Brief of City of Calhoun*, pp. 8 -9.

13.

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.

14.

The City suggests that 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. *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.'"). The City claims that NGEMC's mischaracterization of the Agreement creates the false impression that the Box limits the Annexation Provision when the opposite is true. *Id.,* p. 8.

15.

North Georgia further asserts that the City's reliance on Dicta from a previous Commission on a Declaratory Ruling that was denied is misplaced. NGEMC explains that in the *City of Calhoun's Petition for Declaratory Ruling*, Docket No. 42414, the City sought two declaratory rulings: (1) a declaratory ruling that the Territorial Agreement was not actually adopted by the Commission, and (2) if the Agreement had been adopted, then a declaratory ruling that under the Agreement, the City "has the right to extend its lines outside of the Box when it has (a) legally annexed the property; and (b) provided municipal services to the property." (City's Petition for Declaratory Ruling ¶ 37). North Georgia noted that the Commission explicitly *denied* both requests. *In re: City of Calhoun*, Docket No. 42514 (Order Denying City of Calhoun's Petition for Declaratory Ruling May 17, 2022) ("Declaratory Ruling Order").

16.

North Georgia EMC v. City of Calhoun, Docket No. 14496 (Initial Decision May 28, 2003 the "*Kerry Foods*" case) concerned the City's extension of electric service to a new food manufacturing facility constructed outside the Box by Kerry Foods. *Id.* at 16. The City argued it could service the premises due to the large load exception set forth in O.C.G.A. § 46-3-8. The Hearing Officer in that case ruled that the City had failed to demonstrate that the Kerry Foods building would have a connected load of 900 kW or greater. (Initial Decision 36-37). However, as cited previously, the Hearing Officer included, in his Order, several conclusive references to the expansion of the Box through annexation with the provision of the requisite municipal services.

17.

North Georgia insists that the Hearing Officer's statements about "expanding" the "Box" were classic non-binding dicta, which "is not binding on anyone for any purpose." *Alexander v. State*, 313 Ga. 521, 529, 870 S.E.2d 729, 737 (2022) (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)). *See generally Zepp v. Brannen,* 283 Ga. 395, 397, 658 S.E.2d 567 (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). *Petition*, p.13.

18.

The City submits that the PSC's discussion of the Annexation Provision was not dicta. *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. *Calhoun's Reply Brief,* p.7.

Conclusions of Law

19.

The Hearing Officer concludes as a matter of law that NGEMC squandered its opportunity to test the validity of the 2022 Order by failing to submit a request for reconsideration by the full Commission, and if confirmed, a request for judicial review (O.C.G.A. § 50-13-17, O.C.G.A. § 50-13-19 and *Georgia Power Co. v. Campaign for Prosperous Georgia,* 255 Ga. 253 (1985)).

20.

The Hearing Officer concludes as a matter of law that the 2022 Ruling's embracement and adoption of the findings and conclusions in Docket No. 14496 is conclusive and controlling in the present proceeding (*Order Denying City of Calhoun's for Declaratory Ruling, Docket No. 42514, May 17, 2022*). The City is permitted, upon annexation and provision of municipal services, to lawfully extend its electric service outside the Box.

21.

The Hearing Officer concludes as a matter of law that North Georgia's contention that the City has extended its electric lines and supplied electric service to a new premises in violation of the parties' Territorial Agreement has met all four requirements of the doctrine of collateral estoppel: (1) both proceedings must involve the same parties or their privies; (2) the issue must have been actually litigated and determined in the first proceeding; (3) that determination must have been essential to the judgment in the first proceeding; and (4) the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question. *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003) and therefore prevented from relitigating an issue in a subsequent lawsuit when a prior judgment already conclusively decided the issue.

22.

The Hearing Officer concludes as a matter of law that the Commission in the 2022 Ruling denied the Declaratory Request because the question had already been specifically decided in the 2003 Kerry Case (*North Georgia EMC v. City of Calhoun*, Docket No. 14496,Initial Decision May 28, 2003). Accordingly, the Commission's 2022 Ruling correctly

found that the Commission had already considered this same question and issued binding precedent, not dicta, on the matter.

****

ORDERING PARAGRAHPS

WHEREFORE IT IS ORDERED that, for the foregoing findings, North Georgia EMC's Petition is hereby denied.

ORDERED FURTHER, that all Findings of Fact and Conclusions of Law contained herein are incorporated by reference and adopted by the Hearing Officer.

ORDERED FURTHER, that a motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Final Order, unless otherwise ordered by the Commission; and

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Hearing Office on the 13th day of February 2024.

Nancy Gibson

2/13/24

Date

EXHIBIT A

TERRITORIAL AGREEMENT BETWEENCITY OF CALHOUN, NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION ANO GEORGIA POWER COMPANY

Georgia Power agrees to sell to NGEMC its poles, lines, and customers on Lovers Lane Road from Dews Pond Road south. Also, Georgia Power Company agrees to sell to NGEMC its poles, lines, and customers on road S-2670 from L & N Railroad east. Georgia Power Company also agrees to relinquish its corridor rights to NGEMC on its lines east of I-75 on Dews Pond Road and NewTown Road and related lines that pull off these roads, but shall retain the right to serve its existing customers on these lines or any customers of like type which may later be located on property occupied by its existing customers.

Georgia Power Company relinquishes its corridor rights within the Calhoun city limits as of this date except as shown below, but retains the right to serve all customers it

is now serving inside the city and any customers of like type which may later be located on property occupied by its existing customers.

Georgia Power Company agrees to sell to the City of Calhoun a portion of its 3-phase line that extends south to serve Criterion Mills and Burton Carpet and Rugs and sells the two customers also. The portion of line to be sold extends from a point approximately 1600 feet south of the center of Del-Js Pond Road south to the end of the line.

On the east side of Calhoun and west of I-75, NGEMC grants to Georgia Power Company exclusive rights on the 1600-foot and 800-foot line corridors that it has under the 1938 agreement with NGEMC and subsequent amendments. Likewise, Georgia Power

Company agrees to have these corridors reduced to 600 feet (300 feet either side of line) along the major roads, where lines were originally under the agreement, at such time as the City of Calhoun annexes any portion of these lines and provides other utilities to the area in accordance with paragraphs #8 and #9.

The City of Calhoun and NGEMC agree to grant an area to the northwest of town as an exclusive assignment to Georgia Power Company. This includes areas now within the city limit that fall within the exclusive area. That area is described as follows:

beginning at a point on center line of the Oostanaula River as it now exists, and the north land lot line of LL #170 proceed east along the north land lot line of LL #170 and LL #169 to the center line of present U. S. Highway 41; thence north along center line of U. S. Highway 41 to center line of the L & N Railroad; thence north along center line of the L & N Railroad to center line of the OostanauJa River; thence south along center line of the river as it presently flows to point of beginning.

Within this exclusive area, NGEMC agrees to sell to Georgia Power Company its poles and lines along U. S. 41 from I-75 north and all customers except the Brown residence which is the last residence on east side of U. S. Highway 41 at the Oostanaula River. NGENC shall also retain its customer east of U. S. Highway 41, the Calhoun Chemical Company. This exclusive area is shown on attached map, labeled "Exhibit A," and is bounded thereon in green.

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; south of the southern boundary of LL's #303, 302,301, 300, 299, and 298; and west of a line that extends along the west boundary of LL's #298, 279, 262 to the city limit line just below LL #243; thence west to the center line of Ga. 53 Spur; thence along the center line of Ga. 53 Spur to Terrell Fann Road; thence along the present city limit line to where it intersects center line of the Oothcalooga Creek as it presently exists; thence along center line of the creek to where it intersects center line of the Oostanaula River as it now exists; thence north along center line of the river as it presently flows to the center line of Georgia Highway 143; thence along the present city limit line to the center of the Oostanaula River; thence along center line of Oostanaula River as it presently flows to point of beginning where the center line of the river intersects north boundary of LL #97. This area is shown bounded in yellow on "Exhibit A" Map.

The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional consumer. The City of 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 including: fire protection, garbage collection, water, police protection, planning and zoning, city schools, and sanitary sewers. Also, property owners

in such area must be paying, or subject to pay, city taxes. NGEMC agrees that sanitary sewer will only be provided where feasible and, if feasible, construction on said sanitary sewer services must be under construction within twelve months from date of annexation and must be completed in a reasonable period of time.

It is further agreed that should the feasibility of sanitary sewer to any area be questioned by either party, the city and the cooperative will enter a joint study by a consulting engineering firm selected by mutual agreement to determine if the proposed sanitary service is feasible. To be feasible, a project must amortize itself within twenty years.

After legal annexation and the provision of services as provided above, NGEMC will relinquish all its corridor rights inside the annexed area, but will retain its right to serve existing customers.

NGEMC also agrees to give up all its corridor rights inside the present city limits, but retains the right to serve its existing customers.

The City of Calhoun and NGEMC further agree to the following division of the following specific customers and areas:

1. The city to serve McDonald's and Kentucky Fried Chicken in land Lot #274 in Gordon County.
2. The city to serve Venture Carpet's present plant on Highway 41 South.
3. The city to serve all new consumers in Spring Valley Subdivision that are in

the city limits.

4. All present consumers in Spring Valley will retain present supplier.

5. The NGEMC (with the consent of owners of Bonanza) will let t he City of Calhoun serve Bonanza on Highway 53.

6. The City of Calhoun will allow NGEMC to serve a consumer on the north side of Highway 53 to compensate for the loss of Bonanza.

7. The City will allow NGEMC serve Scottish Inn and the sottish Inn Restaurant located at the intersection of I-75 and Redbud Road.

It is agreed that the transfer of any facilities will be compensated for as mutually agreed upon.

NGEMC agrees to dismiss all complaints against the City of Calhoun it now has pending before the Georgia Public Service Commission.

NGEMC and Georgia Power agree that this agreement does not replace or modify the 1938 agreement between the parties as amended, except as specifically set forth herein, and that said 1938 agreement as amended except as specifically set forth herein or otherwise modified in writing between the parties shall continue in full force and effect.

All parties agree to abide by the rights of others within the areas as described above and shown on attached map marked "Exhibit A" and dated April 8, 1975.

CITY OF CALHOUN

By J. C. Bontte, MAYOR

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION

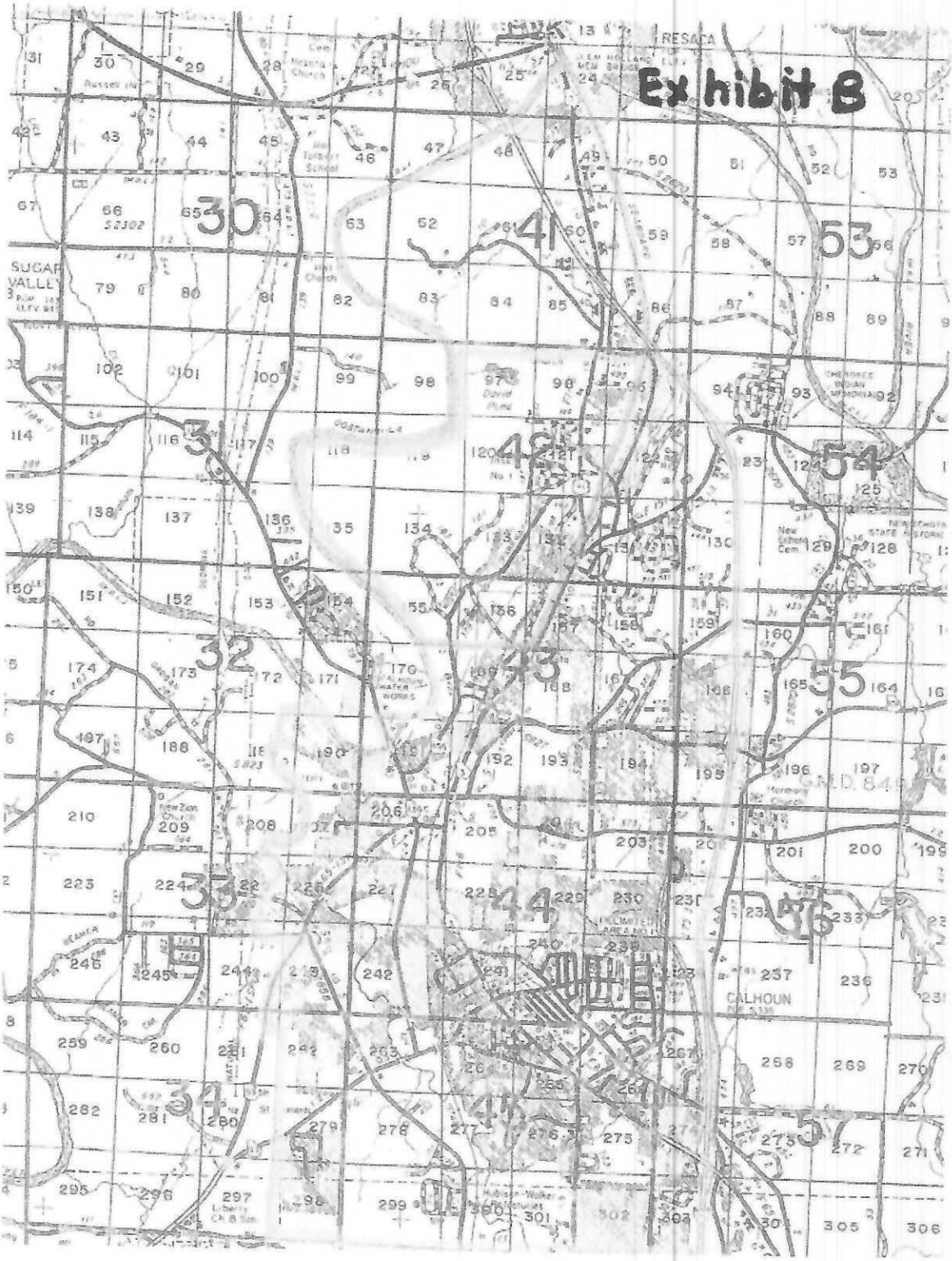
By _____ Its Manager

GEORGIA POWER COMPANY

By _____
DIV. MARKETING SUPERVISOR

April 8, 1975

Attachment


Exhibit B
RESACA
SUGAR VALLEY
CALHOUN

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Petition of North Georgia EMC v. City of Calhoun** in the above-referenced docket was filed with the Commission's Executive Secretary, an electronic copy of same was served upon all parties and persons listed below via electronic mail, or unless otherwise indicated, as follows:

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So certified, this 13th day of February 2024.

Nancy Gibson
Hearing Office