BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

NORTH GEORGIA EMC'S APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION

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Pursuant to O.C.G.A. § 50-13-17(a), North Georgia Electric Membership Corporation ("North Georgia EMC") brings this application for full Commission review of the Hearing Officer's Initial Decision in this matter.

I. REQUEST FOR ORAL ARGUMENT

Because of the importance of this case under the Territorial Act, North Georgia EMC respectfully requests that the Commission specially set this matter for oral argument. Matters of special importance raised in this appeal include the following:

- Whether the Commission should adopt the City's interpretation of a long-standing territorial agreement between the parties, even though that interpretation contradicts the City's prior representations to the Commission and would render a key section of the agreement meaningless.
- Whether the City has the right—unilaterally and without Commission involvement—to reassign to itself, through annexation, territory that the Commission assigned to North Georgia EMC.
- Whether North Georgia EMC was required to appeal to challenge language (but not the outcome) in a decision in which North Georgia EMC was the prevailing party.

II. SUMMARY OF ARGUMENT

The City of Calhoun claims the sole right to serve a new Michael's Carpet building located within North Georgia EMC's assigned service territory. The City claims it has this right because it annexed the building into its municipal limits and provided the building with other municipal services (fire protection, garbage collection, etc.). But the City's claim conflicts with *both* an April 8, 1975 Territorial Agreement between North Georgia EMC, the City, and Georgia Power Company (the "Territorial Agreement") *and* the provisions of the Georgia Territorial Electric Service Act, O.C.G.A. § 46-3-1 *et seq.* (the "Territorial Act").[1]

[1] A copy of the Territorial Agreement is attached hereto as Exhibit A and also attached as Exhibit A to the Petition that North Georgia EMC filed in this matter on May 26, 2023.

Under the Territorial Agreement, North Georgia EMC and the City agreed to an ultimate Outer Boundary beyond which the City promised not to "extend its lines at any time." The Michael's Carpet building in this case is indisputably located beyond this Outer Boundary. That fact alone warrants a decision here in North Georgia EMC's favor.[2]

In an effort to avoid that result, the City misapplies a separate provision of the Territorial Agreement which addresses the City's rights upon annexation and the provision of municipal services inside the annexed area. As the City has represented to this Commission multiple times over the years, this annexation provision applies only *within* the Outer Boundary. But under the City's new-found interpretation of the agreement (which the Initial Decision endorses), upon annexation the Outer Boundary simply disappears. That interpretation would render the Outer Boundary provision meaningless, completely erasing the 195-word paragraph meticulously describing the Outer Boundary with references to fixed roads, waterways, and lot numbers. At the very least, it would effectively re-write 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 Initial Decision
>
> > "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**."

Such re-writing of an agreement is prohibited under settled Georgia law.

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[2] In other disputes between North Georgia EMC and the City, and in the Initial Decision, the Outer Boundary has sometimes—though not consistently—been called "the Box." To prevent confusion here, North Georgia EMC uses the phrase "Outer Boundary."

But that is not all; in addition to violating the parties' Territorial Agreement, the City's argument also violates the Territorial Act itself. The City's new position is that upon annexation and the provision of municipal services, area previously assigned to North Georgia EMC is effectively *reassigned* to the City. This would violate two key provisions of the Territorial Act regarding annexation and reassignment of territory. The Territorial Act unequivocally provides that municipal annexation does not alter territorial assignments. O.C.G.A. § 46-3-7(2). Also, under the Territorial Act, once territory is assigned by the Commission to an electric supplier, *only the Commission* has authority to reassign it (and only upon a finding that the tenets of public convenience and necessity have been breached). O.C.G.A. § 46-3-8(d). The City's position would usurp the Commission's reassignment authority and permit the City to unilaterally reassign North Georgia EMC's assigned territory to itself whenever and wherever it chooses—regardless of the Commission's prior assignments, regardless of North Georgia EMC's existing rights, and regardless of the Commission's exclusive statutory authority to reassign territory under Georgia law.

If allowed to stand, the Initial Decision would thus contravene the plain words of the Territorial Agreement and express provisions of the Territorial Act. This appeal gives the Commission an opportunity to prevent those errors and decide these important questions on the merits, something that has not been done to date. Instead, the Initial Decision incorrectly held that North Georgia EMC should have appealed from a decision *it had won* in another case and was therefore "collaterally estopped" from asserting its rights in this case. But as the prevailing party in that other case, North Georgia EMC was not required or even *permitted* to appeal from a decision in its favor, and thus collateral estoppel cannot be used as a shortcut to avoid addressing the underlying issues here. This case should be decided on the merits with a decision in North

Georgia EMC's favor, in keeping with the Territorial Agreement and as required by the Territorial Act.

III. FACTUAL BACKGROUND

A. The parties' Territorial Agreement contains two geographical restrictions applicable to the City.

North Georgia EMC and the City entered into a Territorial Agreement on April 8, 1975, after the passage of the Territorial Act in 1973. Stipulated List of Undisputed Facts (the "Stipulation") ¶ 2, Ex. 1.[3] The Commission approved a territorial assignment map for Gordon County on September 2, 1975, in Docket No. 2833-U. *Id.* ¶ 3, Ex. 2.

The Territorial Agreement was a bargained-for exchange of promises under which North Georgia EMC gave up some of its substantial rights under the Territorial Act. In exchange, the City also gave up certain rights. These terms are reflected in two geographical restrictions applicable to the City: (1) the Outer Boundary; and (2) the City Limits Boundary.

1. The Outer Boundary

First, the Territorial Agreement delineated a large geographical area beyond which the City agreed not to "extend its lines at any time." Territorial Agreement at 2. The parties described the perimeter of this area in detail, using land lot numbers, named waterways, and state and federal highways:

> *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 Farm Road; thence along the present city limit line to where it intersects center

[3] North Georgia EMC and the City filed the Stipulation in this proceeding on September 19, 2023. Georgia Power Company was also a party to the Territorial Agreement but is not a party to this proceeding. *See* Stipulation ¶ 2, Ex. 1.

> 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.

Id. (emphasis added). This perimeter is the Territorial Agreement's Outer Boundary.

Under the Outer Boundary provision, the City agreed never to extend its lines "at any time" beyond the specifically delineated perimeter of this area, including "east of I-75." Because the Michael's Carpet building is located east of I-75 (an undisputed fact), it is beyond the Outer Boundary.

2. The City Limits Boundary and the Annexation Provision

The Territorial Agreement also describes a second geographical perimeter: the municipal boundary of the City of Calhoun. Specifically, the Agreement provides:

> The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional consumer.

Territorial Agreement at 2. This distinct boundary will be referred to as the "City Limits Boundary."

Recognizing that municipal boundaries can be enlarged by annexation, the parties addressed the effect of potential annexations on the City's electric service rights under the Territorial Agreement. In the provision immediately following the sentence describing the City Limits Boundary, the agreement provides:

> 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 [North Georgia EMC] 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.

Id. at 2–3. This will be referred to as the "Annexation Provision."

The Annexation Provision is written in terms of a prohibition, *i.e.*, the City "will not serve electricity to any area . . . ." The prohibition remains in place "until" the City annexes an area, provides specified city services therein, and subjects the property owners in such area to city taxation. If and only if those conditions are met, then the "will not serve" prohibition is lifted, meaning the City is no longer prohibited from providing electric service in such an area within the new city limits. The Territorial Agreement also addressed the effect of such annexation and provision of city services on North Georgia EMC'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.* at 3.

Accordingly, the City agreed both (1) that it was prohibited from extending its lines *at any time* beyond the Outer Boundary, and (2) that *within* that Outer Boundary, it was prohibited from extending service beyond the City Limits Boundary unless and until the City had annexed an area and provided certain city services therein.

B. The Territorial Act restricts the City's right to provide service in areas assigned to North Georgia EMC.

In addition to the Territorial Agreement's restrictions on the City's ability to extend electric service to new areas, statutory restrictions applicable to geographic territories assigned under the Territorial Act also apply. In July 1975 (a few months after the Territorial Agreement was signed), the parties agreed to and signed a territorial assignment map (Stipulation, Ex. 2), which depicts the agreed-upon areas in Gordon County to be assigned to the City, North Georgia EMC, and Georgia Power. The assignment of territory as depicted on the territorial map was

approved by the Commission on September 2, 1975, in Docket 2833-U. Stipulation ¶ 3. And the Territorial Act provides that inside an assigned area, "the assignee electric suppler shall have the *exclusive* right to extend and continue furnishing service to new premises, except as otherwise provided in this part." O.C.G.A. § 46-3-3(1) (emphasis added). Thus, per operation of the Territorial Act and assignment by the Commission, North Georgia EMC has the exclusive right to provide electric service to new customers locating in its assigned area (subject to Territorial Act exceptions not applicable here).

C. The City improperly extended service beyond the Outer Boundary to the Michael's Carpet building.

This dispute concerns the City's extension of service to the Michael's Carpet building, which is located beyond the Outer Boundary and in North Georgia EMC's exclusive assigned territory. Despite the parties' agreement that the City would "not extend its lines at any time . . . east of I-75," the City has done exactly that, extending its lines to a new Michael's Carpet building located *east of I-75* (beyond the Outer Boundary). Stipulation ¶ 4. The City began providing electric service to the Michael's Carpet building on or about May 24, 2023. *Id.* ¶ 7. Because the City has no right to serve the Michael's Carpet building, North Georgia EMC filed a petition with the Commission, challenging this improper extension of service.

The City's position—that the Annexation Provision of the Territorial Agreement permits the City to serve the Michael's Carpet building, even though the building is beyond the Outer Boundary—contradicts the plain meaning of the Territorial Agreement, the City's own history of interpreting the agreement, and the Territorial Act. North Georgia EMC has the exclusive right to serve the Michael's Carpet building, and the City's extension of service east of I-75 violates both the parties' Territorial Agreement and Georgia law.

D. The City continues a long history of trying to renege on its contractual commitments under the Territorial Agreement.

This case is the latest in a series of attempts by the City to renege on the Territorial Agreement. Although North Georgia EMC has consistently abided by its contractual commitments under the Territorial Agreement, the City has been trying to back out of its obligations for decades. In the process, the City has not hesitated to contradict written stipulations and representations it has made to the Commission. The City's arguments over time have included the following:

- Even though the City agreed to relinquish its right to serve customer-choice loads in the Territorial Agreement, it had no right to do so. (Docket No. 14496.)
- The City's agreement to contract away the right to serve customer choice loads would violate federal antitrust laws. (*Id.*)
- The Commission never actually approved the Territorial Agreement, and the City's stipulations to the contrary should be disregarded. (Docket No. 42514.)

The Commission has rejected all of these arguments (and more).

Undeterred, the City is once again trying to back out of its Agreement. Contradicting representations it has made to the Commission, and discarding its decades-long interpretation of the Territorial Agreement, the City now contends that it has the right to serve the Michael's Carpet building located *beyond* the Outer Boundary—specifically, east of I-75—on the ground that the City has annexed the Michael's Carpet building. The City's newest theory is that under the Territorial Agreement, if the City annexes and provides municipal services to a piece of property, the Outer Boundary's restriction that the City "shall not extend its lines at any time" simply disappears. What's more, the City contends that its annexation—of an area assigned to North Georgia EMC by this Commission—results in a *reassignment* of that territory from North Georgia EMC to the City. The Initial Decision, which endorses the City's position, should be reversed.

IV. ARGUMENT AND CITATION OF AUTHORITIES

A. The Territorial Agreement plainly bars the City from extending its lines "east of I-75," but the Initial Decision ignores that prohibition and makes the Outer Boundary meaningless.

The Initial Decision's erroneous conclusion that the City may expand its service territory by annexation beyond the Outer Boundary is not based on an independent analysis or determination of the meaning of the Territorial Agreement in the specific circumstances of this case. It is instead based entirely on *prior* Commission proceedings in which these issues manifestly were *not* decided on the merits. The Initial Decision's reliance on such proceedings is misplaced. When the Territorial Agreement itself is actually considered, as it must be under Georgia law, its clear meaning prohibits the City from extending service to the Michael's Carpet premises here.

1. The Initial Decision does not honor the distinction between the Outer Boundary and the City Limits Boundary.

First, as discussed above, the Outer Boundary and the City Limits Boundary are two distinct geographical restrictions set forth in the Territorial Agreement. *They address different situations, using different terms, to effectuate different purposes.* The Outer Boundary is a geographical perimeter described by means of land lot numbers, named waterways, etc. The parties unambiguously agreed that the City "shall not extend its lines at any time" beyond the Outer Boundary. This fixed the permanent outer limits beyond which the City may not extend its lines—*regardless* of any annexations or other changes to the City's municipal boundaries.

By contrast, the City Limits Boundary is not described by means of land lot numbers, waterways, etc. Instead, it is described simply as "the boundaries of the City of Calhoun." Such municipal boundaries are, by nature, subject to change by annexation, because municipalities in Georgia can annex property and thereby change their corporate limits. The parties therefore

addressed the effect of such an annexation, agreeing in the Annexation Provision that the prohibition against serving beyond the City Limits Boundary would remain in place "until" an area had been annexed and municipal services provided therein.

Unlike the City Limits Boundary, the Outer Boundary is fixed. It is not subject to change by annexation or the provision of municipal services. Quite the opposite: the parties expressly agreed that the City would be prohibited from extending its lines beyond the Outer Boundary "at any time," which would obviously include at the time of any annexation.

2. The Initial Decision would erroneously permit the City to rewrite or even erase the Outer Boundary provision from the Territorial Agreement.

Second, by not rejecting the City's position that it can move beyond the Outer Boundary simply by complying with the Annexation Provision, the Initial Decision essentially rewrites the "at any time" prohibition in the Outer Boundary provision. The Territorial Agreement states that the City "*shall not* extend its lines *at any time*" beyond the Outer Boundary. The meaning of that provision is clear. As the City itself has acknowledged, the parties agreed that the City would never, at any time, extend its lines "in any direction of the compass" beyond the Outer Boundary. *See* Proposed Order submitted by City of Calhoun at 2, *North Georgia EMC v. City of Calhoun* (Docket No. 5628-U Dec. 21, 1995) (discussed below).

Yet under the City's proposed interpretation and the Initial Decision, the phrase "*shall not* extend its lines" in the Outer Boundary provision would effectively be replaced with its polar opposite, as if that provision said that the City "*has the right to* extend its lines." And instead of being prohibited from extending its lines "at any time" beyond the Outer Boundary, the City would assume the right to do so "whenever it annexes property and provides municipal services therein." Under this rewritten version of the Territorial Agreement, the City would be free to extend its lines *anywhere* beyond the Outer Boundary at *many* times, whenever it annexed

property and provided municipal services therein. Such a construction is impermissible under bedrock principles of contract construction. The terms used by parties in a contract must be given their intended meaning; they cannot be rewritten through "interpretation." *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") (citation omitted).

Moreover, if the Initial Decision stands, it would render the entire Outer Boundary provision meaningless. The City is undisputedly restricted from extending its lines outside the 1975 City Limits Boundary until it complies with the Annexation Provision by annexing an area and providing municipal services therein. According to the City, it is likewise restricted from extending its lines beyond the Outer Boundary—but *only* until it complies with the Annexation Provision. That identical reading of two very different provisions is wrong. If annexation and the provision of municipal services permitted the City to provide electric service *anywhere*, not just within the expanded City Limits Boundary but also beyond the fixed Outer Boundary, then the Outer Boundary would serve no purpose at all. The Territorial Agreement would operate exactly the same way with or without the Outer Boundary provision. 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 (2020) ("Courts should not render any language in a contract as superfluous.") (citation omitted).

The Annexation Provision—which applies only to the *City Limits* Boundary—thus cannot be applied (as the City argues) to a premises like the Michael's Carpet location, which may be within the new city limits but is still beyond the *Outer* Boundary. The only interpretation of the Territorial Agreement that gives effect to both the Outer Boundary and the Annexation Provision,

as required by Georgia law, is that even if the Annexation Provision allows the City to serve electricity to certain new customers as the City Limits Boundary expands through annexation, the Annexation Provision cannot give the City *carte blanche* to ignore the Outer Boundary. *See* O.C.G.A. § 13-2-2(4) ("The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part."); *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."). And in fact, this is how the City itself has historically interpreted the agreement.

B. The City has previously recognized that its annexation service rights arise only within the Outer Boundary.

Despite its position in this case, the City has long construed the Outer Boundary as an ultimate limit, beyond which the City cannot extend its lines "at any time." For example, in a case involving an Advance Auto Parts store, here's how the City described the Territorial Agreement to this Commission:

> 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, *City of Calhoun v. N. Ga. EMC* (Docket No. 5090-U Sept. 23, 1994) (the "*Advance Auto*" case) (emphasis added).[4] The City unequivocally represented to this Commission that it is only "inside of" the Outer Boundary that the Annexation Provision applies.

[4] The City qualified this statement by excepting customer choice loads above 900 kW, but in a subsequently decided case discussed below (*North Georgia EMC v. City of Calhoun*, Docket No. 14496), it was held that the City could not extend its lines beyond the Outer Boundary to serve such large loads.

Otherwise, the City agreed that "outside of" the Outer Boundary the City would not extend its lines.

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). The Mohawk facility in that case was beyond the Outer Boundary, in an area annexed by the City, and in North Georgia EMC's assigned area. Initial Decision at 1 (Docket 5628) (July 10, 1996); Joint Stipulations of Fact ¶ 6 (Oct. 25, 1995); Proposed Order at 3, ¶ 3 (Dec. 21, 1995). While the City initially claimed the right to serve the Mohawk facility under the so-called "large load" exception (O.C.G.A. § 46-3-8(a)), the City later conceded that the facility did not qualify as a large load. Post Hearing Stipulation ¶ 1 (Dec. 21, 1995). Thus, *just like the Michael's Carpet building in this case*, the Mohawk facility was located within an area annexed to the City, beyond the Outer Boundary and within North Georgia EMC's assigned territory, and the premises did not qualify for the large load exception. So did the City assert the right to serve the Mohawk facility? *No.* After conceding that the large load exception did not apply, the City threw in the towel and expressly urged the Commission to rule that the City had *no right* to serve the new 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, ¶ 5 (Dec. 21, 1995). The hearing officer then accepted the City's proposal, holding that only North Georgia EMC could serve the new Mohawk facility and ordering the City to transfer service to North Georgia EMC. Initial Decision at 7 (July 10, 1996).

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 to order the City to transfer service to North Georgia EMC.

The City's current position, contrary to the one it took in the *Mohawk* case, is just another about-face in the City's long pattern of attempts to renege on its contractual commitments under the Territorial Agreement. The only reasonable outcome consistent with *Mohawk* here would be to reverse the Initial Decision on the ground that the Territorial Agreement means what it says: the City cannot extend its lines beyond the Outer Boundary "at any time."

C. The City's municipal annexation does not (and cannot) reassign service territory from North Georgia EMC to the City.

The Initial Decision in this case did not address at all North Georgia EMC's argument that the *Territorial Act*—not just the Territorial Agreement—prohibits the City from serving the Michael's Carpet building. (*See* Pet. of North Georgia EMC ¶¶ 44–47; Initial Br. of North Georgia EMC at 18–20; Response Br. of North Georgia EMC at 19.) This was squarely presented as an additional, independent reason for ruling in North Georgia EMC's favor, and it is yet another reason to reverse the Initial Decision.

The City's position is that when the City annexes and provides municipal services in an area beyond the Outer Boundary, the annexed property is effectively reassigned from North Georgia EMC to the City. For example, the City argues that under the Agreement, the Commission "has expressly authorized" a "process of transferring the right to provide electric service by expanding the Box when Calhoun annexes, provides municipal services and collects taxes." *See* Reply Br. of Respondent City of Calhoun at 9–10. But the Commission authorized no such thing. Nowhere in the Agreement did the Commission authorize the City, via annexation, to

blow past the Outer Boundary and unilaterally reassign to itself any and all areas assigned by the Commission to North Georgia EMC.

Moreover, the City's position runs headlong into contravening provisions of the Territorial Act. Section 46-3-7 of the Georgia Code addresses the effect of annexation on territorial assignments. Subsections (1) and (2)(A), (B), and (C) of that statute address annexations to "wholly new municipalities" (coming into existence after March 29, 1973) and annexations that result from mergers, consolidations, or other combinations of municipalities. None of these subsections applies here. And subsection (2)(D) provides that for all other annexations, "so much of such geographic area, if any, as was already assigned to any electric supplier *shall continue to be so assigned*." O.C.G.A. § 46-3-7(2)(D) (emphasis added); *accord Marietta Bd. of Lights & Water v. Ga. Pub. Serv. Comm'n*, 182 Ga. App. 702, 704 (1987) ("The statutory scheme created by O.C.G.A. § 46-3-7(2)(D) is clear and unambiguous—if an unincorporated area is annexed in the manner provided in that subsection and with respect to that area an assignment to electrical suppliers previously has been made, then that assignment remains unaffected by the subsequent annexation. . . .").

Thus, an annexation of the type here results in no change to territorial assignments. The annexed area continues to be assigned to the electric supplier to whom it was assigned prior to annexation. In the present case, this means the annexed area which includes the Michael's Carpet building remains assigned to North Georgia EMC.

Furthermore, any reassignment of territory is strictly limited under the Territorial Act. First, only the Commission has authority to reassign territory. *See* O.C.G.A. § 46-3-8(d) (if certain requirements are met, "the *commission* may . . . reassign" territory (emphasis added)). Thus, any reassignment of territory could be accomplished *only* by Commission order. This

makes sense, because only the Commission had authority to assign territory in the first instance. *See, e.g.*, O.C.G.A. § 46-3-4. Second, the Commission's authority to reassign territory is strictly circumscribed. The Commission is authorized to reassign territory only "[i]f it determines that an assignee electric supplier has breached the tenets of public convenience and necessity therein." O.C.G.A. § 46-3-8(d)(1). Obviously, the Commission has made no such determination here; nor would it have any basis for doing so.

Accordingly, the City's annexation of the Michael's Carpet building does not (and cannot) change the underlying territorial assignment. The Commission assigned such area to North Georgia EMC in Docket No. 2833-U. This means that, absent some exception not applicable here, North Georgia EMC retains the exclusive right—before and after annexation—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.").

Surely the Commission, by approving the Territorial Agreement, did not intend to hand over to the City the Commission's statutory authority to reassign territory, thereby permitting the City, by the unilateral act of annexation, to take over North Georgia EMC's territory. Indeed, this would have violated the express provisions of the Territorial Act vesting such authority exclusively with the Commission.[5]

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[5] Moreover, any such delegation by the Commission to the City of the right to reassign territory would have been an unlawful delegation of the Commission's discretionary authority regarding the assignment and reassignment of service territory. *See* O.C.G.A. § 46-3-8(d) (authorizing the Commission to reassign territory if certain requirements are met); *cf. Chatham Ass'n of Educators, Teacher Unit v. Bd. of Pub. Educ. for City of Savannah & Cty. of Chatham*, 231 Ga. 806, 807 (1974) ("Without specific legislative authorization, a school board has no authority, by

Finally, one of the express legislative purposes underlying the assignment of territory in the Territorial Act was "to assure the most efficient, economical, and orderly rendering of retail electric service within the state." O.C.G.A. § 46-3-2. The City's position, which would permit the City to ignore the Commission's assignment of territory in Docket No. 2833 and reassign territory to itself at will, would result in grossly inefficient and uneconomical rendering of electric service, and could replace order in areas potentially subject to annexation with chaos.

The Initial Decision did not address these fundamental conflicts with the Territorial Act, but they cannot be avoided in this case. The Commission should rule that because the City cannot unilaterally reassign service territory by annexation whenever and wherever it chooses, the City has no right to serve the Michael's Carpet building.

D. The Initial Decision's reliance on prior Commission decisions is misplaced.

The Commission should similarly reject the Initial Decision's misplaced reliance on prior decisions for the proposition that the City is permitted to serve the Michael's Carpet building. Instead of examining the merits of the parties' arguments in this case, the Initial Decision relies entirely on the misapplication of two prior cases (which likewise did not reach the merits): one before the same Hearing Officer in which the City's request for a declaratory ruling was *denied* (*In re City of Calhoun*, Docket No. 42514 (the 2022 Order)); and another in which the question of whether the City has the right to acquire service territory beyond the Outer Boundary was not even an issue, much less decided (*North Georgia EMC v. City of Calhoun*, Docket No. 14496 (Initial Decision May 29, 2003) (the "*Kerry Foods*" case)). Neither prior case controls the outcome of this proceeding.

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contract or otherwise, to delegate to others the duties placed on the board by the Constitution and laws of Georgia.").

1. The 2022 Order denying the City's request for a declaration of its purported right does not support the City's assertion of such right.

In Docket No. 42514, the City sought to escape the Territorial Agreement altogether by petitioning for a declaratory ruling that the Agreement had not been adopted by the Commission at all—despite the City's repeated representations to the contrary in earlier cases. In the alternative, the City sought a declaratory ruling that if the Agreement *had* been adopted, then the City "has the right to extend electrical service lines outside of the Box when it has (a) legally annexed the property; and (b) provided municipal services to the property." *In re City of Calhoun*, Docket No. 42514 (City's Pet. for Declaratory Ruling ¶ 37 (filed May 1, 2019)). North Georgia EMC argued that the City was not entitled to a declaratory ruling *at all*, and North Georgia EMC won the relief it sought in that case when the Hearing Officer explicitly *denied* the City's petition altogether. 2022 Order at 8 ("WHEREFORE, IT IS ORDERED, that the City of Calhoun's Petition for Declaratory Ruling is denied as there is no discernable or plausible uncertainty present in the pleading.").

Thus, the City's request for a declaratory ruling for the same right that it advances in the current dispute—the right to extend its lines beyond the Outer Boundary to a premises that has been annexed and receives municipal services—was *denied* by the Commission. The Commission's decision *denying* the City's request for the declaration of a purported right obviously provides no support for a subsequent *assertion* of such right.

a. *Kerry Foods* did not decide the question here and the dicta in that case is not binding precedent.

Even so, the Hearing Officer in the present case concluded that the 2022 Order "embrace[d] and adopt[ed] . . . the findings and conclusions *in Docket No. 14496*." Initial Decision at 7 (emphasis added). Docket No. 14496 is the *Kerry Foods* case, which also was decided in favor of North Georgia EMC and against the City. That case concerned the City's

extension of electric service to a new food-manufacturing facility. *Kerry Foods*, Initial Decision at 16 (May 29, 2003). The City argued that although the facility was located beyond the Outer Boundary, it could be served under the large load exception set forth in O.C.G.A. § 46-3-8. The City represented to the Commission that, *except* for customers that could be served under O.C.G.A. § 46-3-8, the Territorial Agreement "*should be interpreted as precluding it from serving any electric customers located outside of the* [*Outer Boundary*]." City's Post-Hearing Br. at 5 (Nov. 12, 2002) (emphasis added). This is consistent with the City's representations to the Commission in the *Advance Auto* and *Mohawk* cases described above.

The Hearing Officer in *Kerry Foods* rejected the City's argument that the Outer Boundary provision was subject to the exceptions set forth in O.C.G.A. § 46-3-8. He also ruled, alternatively, that the City had failed to demonstrate that the Kerry Foods building would have a connected load of 900 kW or greater. *Kerry Foods*, Initial Decision at 36–37 (May 29, 2003). The Initial Decision in the present case did not rely on the actual *ruling* in the *Kerry Foods* case to conclude that the City has the right to serve the Michael's Carpet building—because the ruling was limited to the large load exception. Instead, the Initial Decision refers to the 2022 Order's reference to certain non-binding *dicta* in the 38-page *Kerry Foods* Initial Decision regarding "expansion" of "the Box." Initial Decision at 7–8.

Notably, however, no facts were presented in the *Kerry Foods* case regarding annexation or the provision of municipal services to the facility. No legal questions were raised about whether annexation and the provision of municipal services to the Kerry Foods property, or any other property, could move or erase the Outer Boundary (by "expanding" the "Box"). Nor was the "expansion" idea relevant to the issue to be decided: whether the Kerry Foods building could be served under the large load exception. The Hearing Officer's statements about "expanding"

the "Box" were classic non-binding dicta, which is "inherently unreliable"[6] and "*not binding on anyone for any purpose*." *Alexander v. State*, 313 Ga. 521, 529 (2022) (emphasis added) (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)). *See generally 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'") (citation omitted). Accordingly in this case, the Hearing Officer's reliance in the Initial Decision on any dicta about "expanding" the "Box" from *Kerry Foods* is misplaced. And the Commission is not bound by that dicta either.[7]

b. After *Kerry Foods*, the City maintained its position that it could not extend its lines beyond the Outer Boundary.

Even after the decision in *Kerry Foods*, the City did not read that decision as granting it rights beyond the Outer Boundary. In fact, it told the courts the opposite: "The Territorial Agreement limited Calhoun's *future expansion* . . . to territory annexed *within the Box* to which other city services have been provided." City's Initial Br. at 18, *City of Calhoun v. Ga. Pub. Serv. Comm'n*, No. 2004-CV-84340 (Fulton Cty. Super. Ct. June 15, 2004) (emphasis added). Thus, the City—both before and after the *Kerry Foods* decision—confirmed its long-held

[6] "[D]icta is inherently unreliable for what a court will do once faced with a question squarely and once its best thoughts, along with briefs and oral argument, are focused on the precise issue." *United States v. Teague*, 953 F.2d 1525, 1536 (11th Cir. 1992) (Edmondson, J., concurring); *see also McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J. concurring) ("Deciding real issues presented by real parties in real time focuses judicial decision making in ways that making speculative pronouncements about hypothetical questions cannot.").

[7] Also, the actual references to "expanding" the "Box" in the *Kerry Foods* case were, at best confusing. The words "expand," "expanding," and other derivations thereof do not appear in the Territorial Agreement. The Hearing Officer's statements in this regard were an apparent reference to the Annexation Provision, which applies in the context of the City Limits Boundary.

understanding that any "expansion" rights (given the more flexible City Limits Boundary) were limited to annexations *within* the Outer Boundary.

2. North Georgia EMC had no right or obligation to appeal the 2022 Order to preserve its rights in this case.

The Initial Decision purported to avoid some of the most important issues in this case by erroneously concluding that North Georgia EMC should have appealed from the 2022 Order. Initial Decision at 7. But North Georgia EMC prevailed in that case by obtaining the relief that it sought—*i.e.*, denial of the City's petition for a declaratory ruling. And prevailing parties have no obligation—and no *right*—to appeal from a decision in their favor.

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 Ga. Power Co. v. Campaign for Prosperous Ga.*, 255 Ga. 253, 257 (1985) ("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 2022 Order because it was the *prevailing party*. 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 (*In re City of Calhoun*, 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) (citations omitted). 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." *Id*. "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).

Even if North Georgia EMC might have written the 2022 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 Lab'ys*, 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. City of 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 EMC had no obligation (or right) to appeal its victory just to preserve hypothetical arguments for future disputes if the City continued to flip-flop on its interpretation of 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, lost. If the City wanted a clear declaration of its rights with respect to the Outer Boundary, it should have challenged the 2022 Order itself. Especially if the City thought that the 2022 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.

Because North Georgia EMC had no obligation or right to appeal, the Hearing Officer's application of "collateral estoppel" (or issue preclusion) to bar North Georgia EMC's claim here was error. It is a fundamental principle that collateral estoppel does not apply against the party that prevailed 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 (Second) of Judgments* § 28(1) cmt. a). Thus, even if North Georgia EMC had "lost" on an issue in the 2022 Order, which is not the case, collateral estoppel would not apply because the judgment in that case was issued in its favor.

Nor can the City show that the other required elements of collateral estoppel have been met here.

First, the issue in the present case was not "actually litigated and determined" in the 2022 Order because the denial of the City's petition was not an adjudication on the merits. *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003) (citation omitted). 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. 2022 Order 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 . . . does not operate as adjudication on the merits.").

Another element of collateral estoppel is that the determination in the prior case must have been essential to the judgment. *Macon Water Auth.*, 262 Ga. App. at 227. This element likewise is not satisfied because, as explained above, the 2022 Order did not make the purported determination relied upon by the City in the first place.

Collateral estoppel also does not apply where, as here, the party against whom the doctrine is asserted did not have a full and fair opportunity to litigate the issue in question. *Id.* North Georgia EMC did not have a full opportunity in the prior proceeding (Docket No. 42514) to litigate whether the City could extend service to the Michael's Carpet building or (for that matter) any premises beyond the Outer Boundary. Pursuant to the Commission's rules on declaratory judgment proceedings, the City, as petitioner in the prior proceeding, was required to set forth "[t]he full text of the statute, rule, [or] order upon which a ruling is requested." Ga. Comp. R. & Regs. 515-2-1-.12(1). But 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 North Georgia EMC did not have an opportunity to respond. *See* City's Reply in Support of its Pet. for Declaratory Ruling at 19 (Docket No. 42514 Aug. 13, 2019). For that reason alone, North Georgia EMC did not have a full and fair opportunity to litigate the meaning of the expansion language in *Kerry Foods* before the Hearing Officer issued the 2022 Order. The Initial Decision's conclusion *here* that the 2022 Order's unsolicited discussion of *Kerry Foods* dicta should estop North Georgia EMC from opposing the City's efforts to serve the Michael's Carpet building is wrong and fundamentally unfair.

Because the Initial Decision's conclusion that the doctrine of collateral estoppel applies to this case is erroneous, the Commission can and should decide on the merits the actual questions presented here: whether the Territorial Agreement and the Territorial Act permit the City to serve a Michael's Carpet premises inside North Georgia EMC's assigned territory and beyond the Outer Boundary. And as explained above, the answer to those questions on the merits is *no*.

V. CONCLUSION

North Georgia EMC respectfully requests that the Commission grant its application for full Commission review, specially set this matter for oral argument before the full Commission, reverse the Initial Decision, and rule that North Georgia EMC has the exclusive right to serve the Michael's Carpet building.

Respectfully submitted, this 14th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing NORTH GEORGIA EMC'S APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION 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 14th day of March, 2024.

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Exhibit A

TERRITORIAL AGREEMENT BETWEEN
CITY OF CALHOUN, NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION AND 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 Dews 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:

contd.

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 Oostanaula 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. NGEMC 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 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 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 the 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 to serve Scottish Inn and the Scottish 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. Bartlett, MAYOR

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION

By [illegible] Manager

GEORGIA POWER COMPANY

By [illegible]
DIV. MARKETING SUPERVISOR

April 8, 1975

Attachment