BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

CITY OF CALHOUN'S RESPONSE TO NORTH GEORGIA EMC'S APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION

I. INTRODUCTION

North Georgia Electric Membership Corporation's ("NGEMC") Application for Full Commission Review (the "Application") is the latest in a long line of attempts to depart from this Commission's prior precedent. This matter presents a purely legal dispute on a stipulated set of facts: whether the City of Calhoun ("Calhoun") has the right to provide electricity to the Michael's Carpet building located at 980 Belwood Road, Calhoun, Georgia (the "Michael's Building") after legally annexing and providing municipal services as required by the Territorial Agreement. The Commission first resolved this issue in 2003, then again in 2022, and now, most recently, in the Initial Decision rendered by Hearing Officer Gibson on February 13, 2024 (the "2024 Initial Decision").

Having squandered the opportunity to challenge those prior decisions on the merits, NGEMC now seeks to undo decades of binding precedent through a full Commission review of the 2024 Initial Decision. The 2024 Initial Decision, once again, confirms Calhoun's right to provide electric service upon annexation and provision of municipal services. Contrary to NGEMC's framing, the 2024 Initial Decision thoroughly considered the issue and consistent with

its past decisions, ruled in Calhoun's favor on several distinct grounds – both procedural and substantive – each of which is summarized in Section III.D, *infra*. To succeed in this attempt at a second (or even third or fourth) bite at the apple, NGEMC must demonstrate that each of those grounds – any one of which, alone, supports a ruling in Calhoun's favor – was in error. NGEMC has fallen far short of this bar. For these reasons, the Commission should reject NGEMC's latest attempt to relitigate this issue and should uphold the properly decided 2024 Initial Decision and the prior precedent cited therein.

II. STATEMENT OF THE ISSUE

NGEMC's Application opens with a misleading, self-serving framing of several "matters of special importance" that are purportedly before the Commission. These "matters" do not properly frame the sole issue before the Commission (one that was stipulated to by Calhoun and NGEMC): "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." *See* Notice of Hearing and Scheduling Order, Dkt. 55200. That legal question is the sole issue before the Commission.

III. FACTUAL BACKGROUND

A. The Territorial Act and Territorial Agreement

The General Assembly passed the Georgia Territorial Electric Service Act in 1973 to regulate and standardize electric service in Georgia, as described in O.C.G.A. § 46-3-1, *et seq*. (the "Territorial Act"). Under the Territorial Act, the Commission is authorized to assign monopoly geographic territories and work with electric service providers to identify historic corridor rights captured within those geographic territories. *See* O.C.G.A. §§ 46-3-4–8. The Territorial Act instructs that the territorial assignment process take the form of territorial maps showing clearly delineated boundaries and indicating which providers have primary service rights. See O.C.G.A.

§ 46-3-4(1) ("Assigned areas shall be described by defined boundaries on maps to be filed with the commission and incorporated by it in its orders.").

After passage of the Territorial Act, the Commission issued regulations encouraging electric suppliers to submit negotiated territorial assignments for approval.[1] *See* 2022 Initial Decision, p. 4 (Docket No. 42514) (hereinafter "2022 Ruling") (citing Ga. Comp. R. & Regs. 515 11-1-.01–08). Pursuant to those regulations, in April 1975, NGEMC, Calhoun, and Georgia Power Company entered into the tripartite Territorial Agreement to establish their respective service rights in Gordon County. In relevant part, the Territorial Agreement states:

> 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 ofl-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 14 3; 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. . .
>
> 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 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**

[1] As described in Calhoun's 2019 Petition, Calhoun has challenged whether the Agreement has been fully approved and adopted by the PSC. In recognition of the PSC's 2022 Ruling that the PSC previously determined it had approved the Agreement, Calhoun does not raise that challenge again here. However, should the PSC decide to reverse its opinion in the 2022 Ruling related to Calhoun's rights to expand under the Agreement, Calhoun reserves its right to assert that challenge again in any subsequent appeals or proceedings.

> **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. . . .
>
> 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 rights to serve existing customers.

See Stipulations, Exhibit 1 (emphasis added).

The Commission (and Calhoun) has referred to the territory described in the first paragraph quoted above as the "Box." *See* 2022 Ruling, p. 4, fn.1; *see also* City of Calhoun's Petition for Declaratory Relief, p. 9 (Docket No. 42514). The bolded language in the second paragraph quoted above, referred to herein as the "Annexation Provision," authorizes Calhoun to serve electricity to an area upon legal annexation and provision of the listed municipal services.

B. Docket No. 14496

In the nearly fifty years since the execution of the Territorial Agreement, the interpretation of the parties' respective rights has been the subject of frequent disputes, particularly between NGEMC and Calhoun. For example, in the early 2000's, the Commission considered several arguments related to the enforceability of the Territorial Agreement and the intent of the contracting parties. *See* Initial Decision, pp. 1-2 (Docket No. 14496) (the "2003 Initial Decision"). In the 2003 Initial Decision, the Commission made several Findings of Fact and Conclusions of Law pertaining to Calhoun's rights under the Annexation Provision.[2] The full Commission

[2] *See* 2003 Initial Decision, Conclusions of Law, ¶ 6 (". . . the Agreement provides that the bounds of the Box may from time to time be expanded by CALHOUN's annexation of, and extension of municipal service to new territory. . . . By such language, the parties clearly intended to keep CALHOUN from providing electric service outside the Box in Gordon County, although permitting the expansion of the Box by CALHOUN's annexation of and provision of municipal services to a new areas."); *see also* 2003 Initial Decision, Findings of Fact, ¶ 5 ("From the plain language above, CALHOUN has clearly limited its service in Gordon County to serving electric customers within the prescribed territory, except for specifically

ultimately affirmed and adopted the 2003 Initial Decision in 2004 (the "2004 Final Ruling" and collectively, the "*Kerry Foods* Decisions").

C. Docket No. 42514

The scope of Calhoun's annexation rights came before the PSC again in May 2019. Calhoun filed a Petition seeking, among other relief, a declaration that Calhoun "has the right to extend service lines outside of the Box when it has (a) legally annexed the property; and (b) provided municipal services to the property." *See* Calhoun's 2019 Petition, pp. 14-15 (Docket No. 42514). Calhoun further clarified this question in its 2019 Reply Brief, asking: "Whether the 'Box' is static or dynamic – that is, whether Calhoun can extend electric service outside of the Box as long as it has annexed the territory and begun providing municipal services to it." *See* Calhoun's Reply in Support of its 2019 Petition, p.4 (hereinafter "Calhoun's 2019 Reply Brief"); *see generally* 2019 Petition.

Calhoun contended that the plain language of the Territorial Agreement, as supported by the Commission's prior rulings, allows Calhoun to expand its electric services to any area that it annexes and provides municipal services. *See* Calhoun's 2019 Petition, pp. 14-15 (Docket No. 42514). Calhoun argued, consistent with the *Kerry Foods* Decisions, that the Annexation Provision authorizes Calhoun to expand the Box to provide electric services, so long as Calhoun annexed the area and provided the requisite municipal services. *Id.* Calhoun further contended that the Annexation Provision acted as an exception to the geographic limitation in the preceding paragraph of the Agreement, and that the language of the Annexation Provision referencing Gordon County and the State of Georgia necessarily contemplates expansion beyond that limitation. *See* 2019 Petition, pp. 9-10; *see also* Calhoun's 2019 Reply Brief, pp. 17-19. Calhoun explained that

named customers and subdivisions and except for CALHOUN's growth by annexation and the provision of other municipal services, as well as electricity, in the annexed territory.").

although the Commission had already answered this question in the affirmative in prior matters, the added clarity afforded by a declaratory judgment would facilitate Calhoun's long-term growth planning. *See* Calhoun's 2019 Reply Brief, pp. 18-21.

In opposition, NGEMC argued – exactly as it does here – that the Annexation Provision only applies to the area inside of the Box, and that the boundaries of the Box are immovable. *See generally* NGEMC's Opposition Brief (Docket No. 42514). After briefing by both sides, the Commission entered the 2022 Ruling, denying Calhoun's request for declaratory relief on the basis that the Commission had ***already resolved*** the issue in Calhoun's favor in prior actions. Specifically, the Commission found it had already determined that Calhoun ***did*** have the right to extend its services when the conditions in the Annexation Provision are met – and for that reason, declaratory relief was not warranted. *See* 2022 Ruling, pp. 7-8 ("This question, too, has already been answered by the Commission. . . . Because the prior Commission Order has already addressed this issue, no declaratory relief is warranted."). Notably, NGEMC did not timely challenge or appeal the 2022 Ruling, and as such, it remains the law of the land.

D. The Present Dispute (Docket No. 55220)

Following the 2022 Ruling, Calhoun conformed its conduct with this Commission's precedent. On May 1, 2022, Calhoun legally annexed the Michael's Building, which is located east of I-75. *See* Stipulations, p. 2, ¶¶ 4-5. After annexing the Michael's Building (i.e., expanding the Box), Calhoun began providing the Michael's Building with all municipal services required by the Annexation Provision (including, without limitation, fire protection, garbage collection, water, police protection, planning and zoning, city schools, and sanitary sewers). *Id.* at ¶ 6. These facts are not in dispute. Based on these undisputed facts, and by operation of the Territorial Agreement, the Box expanded beyond its pre-annexation boundaries to encompass the Michael's Building.

Having satisfied all requirements in the Annexation Provision and acting in reliance on the 2022 Ruling and the prior precedent cited therein, Calhoun began providing electric service to the Michael's Building on May 24, 2023. *Id.* at ¶ 7.

NGEMC filed its Petition on May 26, 2023. The parties stipulated to the facts and the sole legal issue before the Commission. Over the course of the next several months, the parties submitted extensive briefing whereby NGEMC collaterally attacked – as it does here – the 2022 Ruling and prior precedent cited therein and dredged up decades of unrelated disputes to paint Calhoun as a bad-faith actor. The matter was heard by the Hearing Officer on December 8, 2023.

On February 13, 2024, the Hearing Officer issued the 2024 Initial Decision denying NGEMC's Petition on numerous grounds, both procedural and substantive. The 2024 Initial Decision included the following Conclusions of Law:

1. NGEMC "squandered its opportunity to test the validity of the 2022 [Ruling] by failing to submit a request for reconsideration by the full Commission, and if confirmed, a request for judicial review." *See* 2024 Initial Decision, p. 7, ¶ 19.

2. NGEMC is collaterally estopped from pursuing its Petition because all four requirements of the doctrine of collateral estoppel are satisfied. *Id.*, at p. 7, ¶ 21.

3. NGEMC is not entitled to relitigate this issue because the 2022 Ruling's "embracement and adoption of the findings and conclusions in Docket No. 14496 [the *Kerry* Foods Decisions] is conclusive and controlling in the present proceeding." *Id.*, at p. 7, ¶ 20. That binding precedent confirms that Calhoun is "permitted, upon annexation and provision of municipal services, to lawfully extend its electric service outside the Box." *Id.*

4. The 2022 Ruling properly held "the question had already been specifically decided in the 2003 Kerry Case" and thus "correctly found that the Commission had already considered this same question and issued binding precedent, not dicta, on the matter." *Id.*, at pp. 7-8, ¶ 22.

IV. ARGUMENT

As detailed above, the Hearing Officer denied NGEMC's Petition on several independent grounds, both procedural (i.e., collateral estoppel) and substantive (i.e., premised on binding precedent). Each of these grounds, alone, warrant denying NGEMC's Petition and holding in favor of Calhoun. To overturn the 2024 Initial Decision, NGEMC first bears the burden to show that each of the Hearing Officer's Conclusions of Law was in error, and then that its interpretation of the Territorial Agreement and applicable law should prevail. NGEMC has not satisfied that high bar.

Specifically, in order to rule in NGEMC's favor, the Commission must first find as follows: the Hearing Officer erred (1) in finding that NGEMC failed to exhaust its administrative remedies with regard to the 2022 Ruling; (2) in finding that NGEMC is collaterally estopped from relitigating the present issue; (3) in finding that the 2022 Ruling and the *Kerry Foods* Decisions are binding precedent (and/or became binding precedent when adopted in the 2022 Ruling); and (4) in interpreting the Territorial Agreement and applying applicable law. Only upon overturning the Hearing Officer on each of those grounds should the Commission then consider the legal arguments set forth in NGEMC's Application.

For the reasons set forth below, the Commission should uphold the Hearing Officer's 2024 Initial Decision on all grounds. The Hearing Officer has thoroughly considered this matter on numerous occasions over the past five years and is steeped in the history of the dispute. On every occasion, the Hearing Officer has reached the same conclusion: the Annexation Provision

undeniably entitles Calhoun to provide electricity to the Michael's Building. Calhoun respectfully requests that the Commission uphold the 2024 Initial Decision and put an end to NGEMC's collateral attacks once and for all.

A. NGEMC is Procedurally Barred from Pursuing the Present Petition

Prior to considering any of NGEMC's substantive arguments, the Commission must first determine the preliminary question of whether NGEMC's Petition is barred on procedural grounds. There are two separate and distinct procedural issues the Commission must consider: (1) whether the Petition is an impermissible attempt to seek review and reconsideration of the 2022 Ruling; and (2) whether NGEMC is collaterally estopped on the central issue of its Petition. The Hearing Officer conclusively determined that the answer to both questions is yes. On that basis, the Commission should uphold the denial of NGEMC's Petition as procedurally improper.

1. The Hearing Officer Correctly Determined that NGEMC Failed to Adequately Exhaust its Administrative Remedies.

In the 2024 Initial Decision, the Hearing Officer held that "NGEMC squandered its opportunity to test the validity of the 2022 Ruling by failing to submit a request for reconsideration by the full Commission, and if confirmed, a request for judicial review." *See* 2024 Initial Decision, p. 7, ¶ 19. In its Application, as in its prior briefing, NGEMC claims that it "was not 'aggrieved' by the 2022 Ruling because it was the prevailing party" and thus had no obligation to seek reconsideration. *See* Application, p. 21. This argument is central to NGEMC's Application. It is also based on several critical flaws in logic.

First, as discussed extensively in Calhoun's prior briefing, NGEMC's argument fatally elevates form over substance. *See generally*, Calhoun's Initial Brief, p. 12 (Docket No. 55200) (hereinafter "Calhoun's 2023 Initial Brief"); Calhoun's Response Brief, pp. 2-3 (Docket No. 55200); Calhoun's 2023 Reply Brief, pp. 2-4 (Docket No. 55200) (hereinafter the "2023 Reply

Brief"). NGEMC contends that because the Commission denied Calhoun's request for declaratory judgment in the 2022 Ruling, the Commission did not actually determine that the Box expands pursuant to the Annexation Provision. This argument ignores that the Commission denied Calhoun's request for declaratory relief for the ***sole reason*** that the Commission had already interpreted the Agreement ***in favor*** of Calhoun on this exact issue. *See* 2022 Ruling, p. 8 ("In Docket 14496, the hearing officer noted multiple times that the Agreement permitted 'the expansion of the Box by [Calhoun's] annexation of and provision of municipal services to a new areas [sic]. . . Because the prior Commission Order has already addressed this issue, no declaratory relief is warranted."). While the form of the 2022 Ruling may have been a denial of Calhoun's Petition, the substance of that ruling made clear that Calhoun has the right that is at issue in this proceeding, as confirmed again by the Hearing Officer in the 2024 Initial Decision.[3]

Second, and relatedly, NGEMC misinterprets the term "aggrieved" in O.C.G.A. § 50-13-19(a) and relies on inapplicable case law to support that interpretation. Under O.C.G.A. § 50-13-19(a), "[a]ny person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." Georgia case law has established that "[i]n 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." *See Georgia Power Co. v. Campaign for Prosperous Georgia*, 255 Ga. 253 (1985). Thus,

[3] *See* 2024 Initial Decision, p. 2, ¶ 3 ("Having satisfied all requirements in the Annexation Provision and acting in reliance on the Order Denying Calhoun's [Petition] for Declaratory Ruling, Docket No. 42514, May, 17, 2022 . . . and the prior precedent cited therein, Calhoun began providing electric service to the Michael's Building on May 24, 2023."); *see also id. at* p. 7, ¶ 22 ("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.").

under Georgia law, "aggrieved" has an expansive definition in the context of judicial reviews of an administrative decision.

NGEMC acknowledges this broad definition but then immediately attempts to redefine it to mean only the party that is not "the prevailing party," citing to a variety of cases that do not address the term "aggrieved" in the context of Georgia's Administrative Practice Act and do not deal with remotely similar procedural backgrounds. In fact, one case NGEMC relies on in its 2023 Response Brief and again in its Application, states in a concurrence that it "will ***generally*** be the case [that a prevailing party is not bound by the ruling they later seek to challenge when that ruling] … goes against a party but the ultimate judgment is in that party's favor." *See Hodges v. Grange Mut. Ins. Co*., 227 Ga. App. 897 (Pope, J., concurring) (1997). That concurring opinion NGEMC relies on notes that the court's determination was not binding because it was "not essential" to the otherwise favorable judgment. *Id.* NGEMC's argument that a "prevailing" party cannot also be "aggrieved" is belied by its own authorities.

Calhoun contends (and the Hearing Officer agreed) that the substance of the 2022 Ruling addresses precisely the issue presented by NGEMC's Petition, regardless of its form. Calhoun's 2019 Petition asked the Commission to provide clarity on the interpretation of the Annexation Provision in the Territorial Agreement because the parties had disputed its interpretation for decades. In the 2022 Ruling, the Commission plainly adopted its own prior interpretation of the Territorial Agreement in concluding that Calhoun has the right to expand the Box pursuant to the Annexation Provision. That was the ***sole*** determination in the 2022 Ruling on this issue, and the only rational reading of the 2022 Ruling.[4] The Commission did not provide an alternative basis for

[4] *See* 2024 Initial Decision, p. 7, ¶ 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."

denying Calhoun's request. NGEMC's argument that it was not aggrieved by the 2022 Ruling but is now aggrieved by Calhoun doing exactly what the 2022 Ruling permitted Calhoun to do defies credulity.

Finally, O.C.G.A. § 50-13-17(a), the provision of the Administrative Practice Act that addresses requests for full Commission review, does not use the term "aggrieved." The term "aggrieved" instead appears in O.C.G.A. § 50-13-19(a), which covers judicial review of a final agency decision *after* the exhaustion of all administrative remedies. O.C.G.A. § 50-13-17(a) provides for full Commission review as a right. NGEMC's argument that it did not have the right to seek full Commission review "even though [NGEMC] might have written the 2022 Ruling differently" is incorrect. If NGEMC disagreed with the substance of the 2022 Ruling – which it plainly did, given the existence of the present dispute – it could have sought full Commission review whether it was "aggrieved" within the meaning of O.C.G.A. § 50-13-19(a) or not. NGEMC chose to forego that right and waited until Calhoun had expended significant resources in relying on the 2022 Ruling before pursuing its present Petition. In doing so, NGEMC failed to exhaust its administrative remedies and the Hearing Officer's Conclusion of Law on this point is not in error.

2. <u>The Hearing Officer Correctly Determined that NGEMC is Collaterally Estopped from Relitigating this Issue.</u>

In the 2024 Initial Decision, the Hearing Officer held that NGEMC's "contention that the City has extended its electrical lines and supplied electric services to a new premises in violation of the parties' Territorial agreement has met all four requirements of the doctrine of collateral estoppel. . ." *See* 2024 Initial Decision, p. 7, ¶ 21. As outlined in *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003):

> 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.

The Hearing Officer correctly determined that all four requirements are satisfied on these facts.

NGEMC initially argues that, as a general matter, collateral estoppel cannot apply to its Petition because it was the prevailing party in the 2022 Ruling. *See* Application, p. 23. As discussed in Section IV.A.1, *supra*, and Calhoun's prior briefing, this argument is incorrect.[5]

As to the four requirements,[6] NGEMC first argues that the issue was not "actually litigated and determined" in the 2022 Ruling because 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." *See* Application, p. 23. As noted by the Hearing Officer in the 2024 Initial Decision, the 2022 Ruling "already conclusively decided the issue." *See* 2024 Initial Decision, p. 7, ¶ 21. In the 2019 Petition, Calhoun explicitly requested a ruling on the very issue that the Commission ultimately determined – the same issue at the heart of NGEMC's present Petition. *See* Calhoun's 2019 Petition, pp. 14-15, ¶ 37. As described in Section IV.A.1, and as reinforced by the Hearing Officer in 2024 Initial Decision, the Hearing Officer ***did***, in fact, consider the parties' arguments and ultimately determined the issue.

NGEMC next argues that because there was no determination, that determination inherently cannot be essential to the judgment. As described above, the determination that prior Commission precedent conclusively recognized Calhoun's right to expand the Box via the Annexation Provision is the ***only*** determination the Hearing Officer made in its denial of Calhoun's 2019 Petition. As such, that finding – the sole underpinning of the 2022 Ruling – was inherently essential to the judgment.

[5] *See generally,* Calhoun's 2023 Initial Brief, pp. 10-11; Calhoun's 2023 Reply Brief, pp. 4-7.
[6] There is no challenge to the fact that both proceedings involve the same parties.

Finally, NGEMC argues that collateral estoppel cannot apply here because NGEMC did not have a full and fair opportunity to litigate the issue. *See* Application, p. 23. NGEMC ignores the critical distinction between not having the opportunity to litigate a question and ***choosing*** not to litigate a question (at least not to the full extent that it now attempts to do so via this Petition).[7]

In the 2019 Petition, Calhoun explicitly requested a ruling on the very issue that the Commission ultimately determined – the same issue at the heart of NGEMC's Petition. *See* Calhoun's 2019 Petition, pp. 14-15, ¶ 37. In its 2019 Opposition Brief, NGEMC cited to the paragraphs of Calhoun's 2019 Petition where Calhoun requested clarity on the annexation question. *See* NGEMC's Opposition Brief, pp. 16-17 ("The City's request for other declaratory rulings on questions that might or might not arise someday under the Territorial Agreement should be rejected. (E.g., Pet. ¶¶ 35-37.) . . . If the Commission for some reason should choose to address any such hypothetical issues, NGEMC reserves the right to brief those issues fully."). In that same brief, NGEMC also made multiple references to Calhoun's request related to annexation as part of "alternative rulings" or "other issues" that Calhoun raised. *See id*. at pp. 3-4, 16-17. Plainly, NGEMC was aware of Calhoun's argument regarding the Annexation Provision in 2019, which was fully set forth in Calhoun's briefing, and NGEMC had the opportunity to – and in fact, did – oppose it. The fact that NGEMC did not fully brief the issue then or has since invented new legal arguments that it failed to assert in its 2019 Opposition Brief, does not avoid the application of collateral estoppel.

NGEMC further complains that Calhoun first cited to the 2003 Initial Decision in its 2019 Reply Brief, purportedly denying NGEMC of the opportunity to respond. *See* Application, p. 24 (citing Ga. Comp. R. & Regs. r. 515-2-1-.12(1)). This argument fails because it was NGEMC, ***not***

[7] *See* Calhoun's 2023 Reply Brief, pp. 4-5.

Calhoun, that first cited *Kerry Foods* in its Opposition Brief. Given that NGEMC first cited the prior precedent, Calhoun was plainly entitled to respond in its 2019 Reply Brief and NGEMC cannot credibly argue that it lacked the chance to litigate a matter that it raised. And again, if NGEMC believed that the Commission wrongly relied on and adopted the *Kerry Foods* Decisions' interpretation of the Annexation Provision in the 2022 Ruling, or more generally that the Commission had improperly considered Calhoun's arguments as to the Annexation Provision, NGEMC had the opportunity to fully litigate the issue by requesting a rehearing before the full Commission or seeking judicial relief. In fact, as quoted above, NGEMC specifically reserved its right to do so but failed to follow through.

For these reasons, and as further described in Calhoun's briefing before the Hearing Officer, the Hearing Officer properly held that NGEMC's Petition should be denied due to the doctrine of collateral estoppel.[8] NGEMC's Application fails to show any error in this finding.

B. The Hearing Officer Correctly Determined that the Commission's Prior Precedent is Controlling on this Issue

Only if the Commission is persuaded that the Hearing Officer erred in dismissing NGEMC's Petition due to its failure to exhaust remedies and due to collateral estoppel should the Commission consider the balance of NGEMC's arguments. In that circumstance, NGEMC has nevertheless failed to establish that the Hearing Officer erred in finding that the 2022 Ruling (and the prior precedent cited therein) is not conclusive and controlling in the present proceeding.

NGEMC goes to great lengths in its Application to argue that the Hearing Officer did not resolve its Petition "on the merits," arguing that "[t]his appeal gives the Commission an opportunity to . . . decide these important questions on the merits, something that has not been done to date." *See* Application, p. 3. This argument is nonsensical. NGEMC's Petition presents a

[8] *See generally,* Calhoun's 2023 Initial Brief, pp. 10-11; Calhoun's 2023 Reply Brief, pp. 4-7.

purely legal question concerning a limited set of stipulated facts. Resolving the Petition "on the merits" required only that the Hearing Officer interpret and apply the law, including the Commission's prior precedent, to those stipulated facts. That is exactly what the Hearing Officer did in the 2024 Initial Decision.

When NGEMC asks the Commission to rule "on the merits," what it really asks is that the Commission ignore all prior precedent and improperly treat this as a matter of first impression. In fact, NGEMC goes so far as to argue in Section IV.D of its Application that the "Initial Decision's reliance on prior Commission decisions is misplaced." *See* Application, p. 17. The Hearing Officer properly applied the law (i.e., this Commission's binding precedent) to the stipulated facts, and in doing so ruled in Calhoun's favor "on the merits," despite NGEMC's claims otherwise.

1. The Hearing Officer Correctly Determined that the Findings and Conclusions in *Kerry Foods* are Conclusive and Controlling in Favor of Calhoun.

In the 2022 Ruling (and again in the 2024 Initial Decision), the Hearing Officer determined that the Commission had previously determined that Calhoun does have the right to expand the limits of the Box to provide electrical services upon annexation and the provision of municipal services. NGEMC argues that the relevant sections in the *Kerry Foods* Decisions are non-binding dicta. According to NGEMC, the references to the annexation provision in the *Kerry Foods* Decisions are "statement[s] in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *See* NGEMC's Petition, p. 13 (citing *Zepp v. Brannen*, 283 Ga. 395, 397, 658 S.E.2d 567 (2008)). A plain reading of the *Kerry Foods* Decisions show this is not the case, and the 2022 Ruling confirms it.

The 2003 Initial Decision dealt with a question of exceptions to the limitation on Calhoun's right to service different retail customers. *See* Initial Decision, pp. 1-2 (Docket No. 14496) (the "2003 Initial Decision"). The retail customer in question was outside of the Box. As part of the

Hearing Officer's 2003 analysis into whether Calhoun had a right to provide that customer with electric services, it engaged in an extensive analysis of the terms of the Territorial Agreement and considered whether any exception applied. The Hearing Officer repeatedly cited the clear exception to the Box's limitations – that the Box could be expanded from time to time by annexation – as the foil to Calhoun's arguments related to the other exception. The Hearing Officer ultimately found that unlike the annexation exception which was clear from a plain reading of the Territorial Agreement, Calhoun's positions involved reading in other exceptions that the Hearing Officer ruled were not present in the Territorial Agreement.

The Hearing Officer's reliance on the Annexation Provision in addressing Calhoun's arguments could not be clearer than on page 16 of the 2003 Initial Decision. The Hearing Officer, in explaining the basis for why it found the other exceptions to be inapplicable, stated:

> In the Territorial Agreement (Exhibit P-2) and on the Territorial Map (Exhibit P-1) in this proceeding, Calhoun clearly and unequivocally agree that it 'shall not extend its lines at any time' outside the clearly delineated border described in the Agreement and referred to in this proceeding as 'the Box.' Such contractual language is not ambiguous or otherwise open to multiple interpretations, **even though the Agreement provides that the bounds of the Box may from time to time be expanded by CALHOUN's annexation of, and extension of municipal service to new territory.** Moreover, on pages 2 and 3 of such Territorial Agreement, such restrictive language that 'the City of Calhoun shall not extend its lines at any time' beyond the Box is repeated and clarified further by the following statements: 'The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional customer. The City of Calhoun further agrees it will not serve electricity to any area of Gordon County or the State of Georgia until such area has been legally annexed to the City of Calhoun and all municipal services provided . . . .' By such language, the parties clearly intended to keep CALHOUN from providing electric service outside the Box in Gordon County, **although permitting the expansion of the Box by CALHOUN's annexation of and provision of municipal services to new areas.**

See 2003 Initial Decision, Conclusions of Law, ¶ 6 (emphasis added).

Additionally, in the next paragraph, the Hearing Officer goes on to rule that because of the clear language cited above, "the Commission need not and will not refer to parole evidence to elucidate such plain and clear meaning of the Territorial Agreement language." *Id.*, at ¶ 7. The Hearing Officer's interpretation of the Annexation Provision and its significance was fundamental to its interpretation of the Territorial Agreement and the 2003 Initial Decision. On request for reconsideration, the full Commission confirmed the Hearing Officer's interpretation, and cited to the above section of the 2003 Initial Decision as demonstrating the parties' intent. *See* 2004 Final Ruling, p. 6 (Docket No. 14496). Accordingly, the 2022 Ruling (and the 2024 Initial Decision) correctly found that the Commission has already considered this question and issued binding precedent, not dicta, on the matter.

2. <u>The Hearing Officer Correctly Determined that the 2022 Ruling is Conclusive and Controlling in favor of Calhoun in this Petition.</u>

Moreover, even if (contrary to the determination in the 2022 Ruling) the findings and conclusions related to the Annexation Provision in the *Kerry Foods* Decisions were non-binding dicta (they are not), "the 2022 Ruling's embracement and adoption of the findings and conclusions in [*Kerry Foods*] is conclusive and controlling in the present proceedings." *See* 2024 Initial Decision, p. 7, ¶ 20. Under Georgia law, although dicta is not binding, a court may later find it persuasive and choose to adopt it. *See Morgan County v. Gay*, 352 Ga. App. 555, 564 n.7. Here, the Commission based its 2022 Ruling ***entirely*** on its adoption of the interpretation of the Annexation Provision in the *Kerry Foods* Decisions.

Additionally, Hearing Officer Gibson once again affirmed the adoption of the *Kerry Foods* Decisions' reasoning in her 2024 Initial Decision. As such, to overturn the 2024 Initial Decision because it is predicated on non-binding dicta, the Commission will also have to find first that the

interpretation of the Annexation Provision in *Kerry Foods* Decisions is dicta (it is not) ***and moreover*** that the 2022 Ruling did not adopt the relevant findings and conclusions it expressly adopts therein (it did). There is no basis for such a finding.

In sum, NGEMC's argument requires the Commission to unwind multiple layers of binding precedent, first by overturning the 2024 Initial Decision, then the 2022 Ruling, and finally the *Kerry Foods* Decisions. On each and every occasion, the Commission has unambiguously upheld Calhoun's rights under the Annexation Provision. While NGEMC now hopes for a different outcome, it has advanced no persuasive reason why the Commission should depart from decades of its own binding precedent.

C. NGEMC's Contractual, Statutory, and Historical Arguments are Meritless

If ***and only if*** the Commission finds that the Hearing Officer erred on the above grounds should it even consider the remainder of NGEMC's Application, which largely rehashes its arguments from its prior briefing. The majority of NGEMC's Application is a verbatim recitation of its Petition, rather than an actual rebuttal of the Hearing Officer's Conclusions of Law. This is an "Application for Full Commission Review of *Hearing Officer's Initial Decision*," yet NGEMC does not address the central conclusions of the Hearing Officer's Initial Decision – that NGEMC's Petition should be denied on procedural and precedential grounds – until the middle of page seventeen in its Application. For the first seventeen pages, NGEMC simply repeats its Petition and includes occasional accusations that the Hearing Officer did not consider the implications of NGEMC's arguments. Calhoun submits that because the Hearing Officer properly held the Conclusions of Law discussed above, the Commission does not need to address the substance of NGEMC's legal positions. However, to avoid the appearance of conceding any of NGEMC's contractual, statutory, or historical arguments – all of which are meritless – Calhoun will briefly

rebut these arguments here.[9] Calhoun also addressed these arguments in detail in its prior briefing, all of which is incorporated herein by reference.[10]

1. NGEMC Misinterprets the Plain Text of the Agreement.

NGEMC repeatedly quotes and places enormous significance on the Agreement's language that "the City of Calhoun shall not extend its lines at any time . . . [,]" contending that phrase prevents Calhoun from ever extending lines beyond the original boundaries of the Box. NGEMC's position is, in essence, this language should be read in a vacuum as unconditional and therefore not subject to the Annexation Provision. However, the Annexation Provision ***immediately follows*** the language that NGEMC so heavily relies on, and as the PSC has repeatedly determined over the years, 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.

In its prior briefing, NGEMC argued otherwise by misleadingly reversing the order of the two provisions, making it appear that the Annexation Provision appears first and is limited by the definition of the Box. *See* NGEMC's Response Brief, p. 3 (". . .although the City may be permitted to extend service within the expanded city limits by legally annexing and providing municipal services to those areas, the City may 'not extend its lines' beyond the Outer Boundary 'at any time.'"). NGEMC's mischaracterization of the Agreement creates the false impression that the Box limits the Annexation Provision when the opposite is true, and the Hearing Officer was not persuaded by this misleading attempt. NGEMC's Application also vastly misstates Calhoun's

[9] Should the Commission decide to reverse the 2024 Initial Decision and depart from its prior precedent in the *Kerry Foods* Decisions and 2022 Ruling by considering NGEMC's contractual and legal arguments, Calhoun reserves the right to supplement its briefing with a full rebuttal of NGEMC's contract interpretation, as well as to assert the grounds underlying Calhoun's 2019 Petition, including whether the Agreement has been fully approved and adopted by the Commission. Again, Calhoun contends that these matters have been fully resolved by the Commission in prior proceedings but must be entitled to fully brief those matters if NGEMC succeeds in disturbing this established precedent.

[10] *See generally,* Calhoun's 2023 Initial Brief, pp. 11-16; Calhoun's 2023 Response Brief, pp. 5-7; Calhoun's 2023 Reply Brief, pp. 7-10.

position. Calhoun does not contend that the Box "simply disappears," but rather that the Box expands upon annexation and provision of municipal services.[11]

NGEMC's interpretation also renders portions of the Territorial Agreement superfluous – the very thing it accuses Calhoun of doing. The Annexation Provision states that "[Calhoun] further agrees it will not serve electricity to any area in Gordon County or the State of Georgia until said area has been legally annexed to the City of Calhoun and all municipal services provided . . . ." *See* Calhoun's 2023 Initial Brief, p. 4 (quoting the Annexation Provision of the Agreement). NGEMC's claim that the Box (which is entirely within the limits of Gordon County and the State of Georgia) is the absolute limit of Calhoun's service would render that language superfluous if, as NGEMC contends, Calhoun cannot expand the Box. Calhoun's interpretation – confirmed by the PSC in the *Kerry Foods* Decisions 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).

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

In its briefing papers, NGEMC half-heartedly argued that this entire dispute is moot because annexation does not change anything even if the interpretations of the PSC and Calhoun are correct. Now, in its Application, NGEMC heavily relies on this statutory argument. Despite NGEMC's Hail Mary to undercut the entirety of this proceeding, this argument plainly fails on its face for several reasons.

[11] *See* 2003 Initial Decision, p. 14, ¶ 25 (referring to the Box as "ever-expanding" upon Calhoun's annexation and provision of services).

NGEMC's argument is that O.C.G.A. § 46-3-7 controls how annexations impact electric service to newly annexed areas, and that under O.C.G.A. § 46-3-7(2)(d), annexation through any mechanism other than merger, consolidation, or other combination of previously existing municipalities does not change the electric supplier if an electric supplier had already been assigned to that area. NGEMC then argues that only the PSC has the authority to re-assign assigned territory and only through a set process. Finally, NGEMC argues that this process of the Parties agreeing via contract on a set process for reassigning, without the need for applications and hearings before the Commission, "would result in grossly inefficient and uneconomical rendering of electrical service. . ."

In its Application, NGEMC's first argument related to this position is that "[n]owhere 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." *See* Application, pp. 14-15. This is simply just a reframe of NGEMC's plain language arguments. As outlined elsewhere in this Response, that argument is unavailing.

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

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

NGEMC now argues that the Annexation Provision in the Agreement is unenforceable because the PSC's interpretation allowing Calhoun to expand the Box was not something NGEMC could agree to under the terms of O.C.G.A. § 46-3-7(2)(d). If this is correct, and the parties lacked the authority to agree to the PSC's interpretation of the Agreement, the result would be a mutual mistake of law as to a material term of the Agreement such that the Agreement should be voidable. *See* O.C.G.A. § 13-5-4 ("If the consideration upon which a contract is based was given as a result of a mutual mistake of fact or of law, the contract cannot be enforced.").

NGEMC's final argument in the Application on this theory is that the Annexation Provision, as interpreted by Calhoun and the Commission, would defeat a key legislative purpose of the Territorial Act, namely assuring "the efficient, economical, and orderly rendering of retail electric service within the state." NGEMC goes into no detail on this argument other than to claim, without support, that Calhoun and the Commission's interpretation of the Annexation Provision "would result in grossly inefficient and uneconomical rendering of electrical service. . ." *See* Application, p. 17. First, there are no facts before the PSC that would allow for relief on this argument, even if true, as it would require the Commission to assume facts about "gross inefficiency" that are not in evidence. Moreover, even if NGMEC had factual support for this argument (it does not), this argument is illogical as the Annexation Provision actually increases the efficient and orderly transferring of electric services. Rather than the Commission having to decide each time whether such transference is appropriate, the Parties agreed to an established set of criteria in the Territorial Agreement that must be met prior to the reassignment of territory, which were approved and adopted by the Commission. Through this set of criteria, the

Commission and the parties need only look at whether those objective requirements have been met (here, they have) rather than engage in prolonged administrative proceedings or litigation each time a dispute arises related to whether reassignment is appropriate. This clearly is in the interest of the efficient, economical, and orderly rendering of retail electric service.

3. NGEMC's Attempt to Paint Calhoun as a Bad Faith Actor is Unfounded.

Finally, throughout NGEMC's Application (like in its prior briefing), NGEMC throws in a stream of barbs aimed at making it appear that throughout the nearly 50-year history of this Agreement, Calhoun has done everything in its power to avoid the obligations of the Agreement, while NGEMC has always performed dutifully. This strategy is a historic favorite of NGEMC, having been employed in numerous other proceedings, and is at odds with NGEMC's insistence that the Commission should decide its Application "on the merits." *See, e.g.*, NGEMC's 2019 Brief Opposing the City of Calhoun's Petition for Declaratory Relief, pp. 1-2 (Docket No. 42514). NGEMC's contentions are a gross misrepresentation of the long contractual relationship between the parties and the history of disputes before the PSC and have no bearing on the "merits" on this dispute.

Throughout the history of the Agreement, both NGEMC ***and*** Calhoun have sought the PSC's guidance in interpreting and enforcing its terms. This is unsurprising given that the entirety of the Agreement, not including exhibits, is a mere *four pages*. These four pages have guided the two parties for nearly fifty years. During that time, technology has changed, the electric market has changed, and the population has changed. ***Both parties*** have responded to these changing circumstances and to prior PSC decisions, and both have attempted to ensure protection of their contractual rights and the advancements of their interests. The reality is that both parties have advanced successful and unsuccessful arguments before the PSC. Given the lack of relevance to

this dispute, Calhoun will not respond blow-by-blow to NGEMC's historical recitation, but points the Commission to its briefing before the Hearing Officer for a detailed response to this argument.[12]

Here, it is NGEMC – not Calhoun – that is attempting to shirk prior precedent and revisit an issue the PSC has already decided at least twice. NGEMC failed to timely challenge the 2022 Ruling, then sat back while Calhoun devoted time and resources to acting on the 2022 Ruling by annexing and providing municipal services to the Michael's Building. Only after that did NGEMC file its Petition challenging the PSC's prior interpretation.

NGEMC's arguments in this action were available to NGEMC in 2019. The fact that NGEMC now wishes for a different outcome, or that it had timely sought reconsideration or appeal, does not entitle it to now waste the PSC's time and resources by filing a second, duplicative action to retread the same path. This strategy by NGEMC serves only to needlessly squander taxpayer dollars and introduce further uncertainty in the decades-long history of PSC decisions interpreting the Agreement.

V. CONCLUSION

In sum, this Application is a last-ditch attempt by NGEMC to relitigate an issue which the Commission has conclusively decided on numerous occasions. Calhoun respectfully requests that the Commission deny NGEMC's Application and uphold the 2024 Initial Decisions because it is based on decades of binding precedent, which NGEMC has waived its right to challenge or appeal, and because NGEMC's substantive contentions have no merit. Finding otherwise would reward NGEMC's attempts to serially relitigate this same issue in hopes of eventually obtaining a different result.

[12] *See* Calhoun's 2023 Response Brief, pp. 5-7.

Respectfully submitted this 19th day of April 2024.

/s/ Peter K. Floyd

Peter K. Floyd (Ga. Bar No. 001115)
Michael H. Shanlever (Ga. Bar No. 141292)
Hannah S. McLean (Ga. Bar No. 699756)
Christopher E. Johnson (Ga. Bar No. 113494)
ALSTON & BIRD LLP
1201 West Peachtree Street; Suite 4900
Atlanta, GA 30309-3424
(404) 605-0567
peter.floyd@alston.com
mike.shanlever@alston.com
hannah.mclean@alston.com
chris.johnson@alston.com

George P. Govignon (Ga. Bar No. 303290)
City Attorney
City of Calhoun, Georgia
GOVIGNON LAW OFFICE
109 North Wall Street
Calhoun, Georgia 30701
(706) 629-7070
govignonlawoffice@gmail.com

Brad Carver
HALL BOOTH SMITH, P.C.
191 Peachtree Street, NE; Suite 2900
Atlanta, GA 30303
BCarver@hallboothsmith.com

Attorneys for the City of Calhoun

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **CITY OF CALHOUN'S RESPONSE TO NORTH GEORGIA EMC'S APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION** in the above-referenced docket was filed with the Commission's Executive Secretary via the Commission's Alternative Electronic Filing Procedures and via Certified Mail, an electronic copy of the same was served upon all parties and persons listed below via electronic mail, or unless otherwise indicated, as follows:

Sallie Tanner
Executive Secretary
GEORGIA PUBLIC SERVICE COMM.
244 Washington Street, SW
Atlanta, GA 30334
stanner@psc.state.ga.us

Rob Trokey
Director, Electric Unit
GEORGIA PUBLIC SERVICE COMM.
244 Washington Street, SW
Atlanta, GA 30334
rtrokey@psc.state.ga.us

Nancy G. Gibson
GEORGIA PUBLIC SERVICE COMM.
244 Washington Street, SW
Atlanta, GA 30334
ngibson@psc.state.ga.us

James A. Orr
Lee A. Peifer
Benjamin E. Reed
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE Suite 2300
Atlanta, GA 30309-3996
jamesorr@eversheds-sutherland.com
leepeifer@eversheds-sutherland.com
benreed@eversheds-sutherland.com

Henry C. Tharpe, Jr.
THARPE LAW FIRM, LLC
225 W. King Street
Dalton, GA 30722
htharpe@daltongalaw.com

Honorable James F. Palmer
Mayor, City of Calhoun
P.O. Box 248
Calhoun, GA 30703
jpalmer@calnet-ga.net

Respectfully submitted this 19th day of April 2024.

/s/ Hannah McLean
Peter K. Floyd (Ga. Bar No. 001115)
Michael H. Shanlever (Ga. Bar No. 141292)
Hannah S. McLean (Ga. Bar No. 699756)
Christopher E. Johnson (Ga. Bar No. 113494)
ALSTON & BIRD LLP
1201 West Peachtree Street; Suite 4900
Atlanta, GA 30309-3424
(404) 605-0567
peter.floyd@alston.com
mike.shanlever@alston.com
hannah.mclean@alston.com
chris.johnson@alston.com