BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

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

NORTH GEORGIA EMC'S REPLY IN SUPPORT OF APPLICATION FOR FULL COMMISSION REVIEW

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I. ARGUMENT

North Georgia EMC agrees that the question before the Commission is "[w]hether 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." For two independent reasons, the answer to that question is a resounding "no," and the Initial Decision's holding to the contrary should be reversed.

First, the 1975 Territorial Agreement between North Georgia EMC and the City of Calhoun unequivocally provides that the City "shall not extend its lines at any time" beyond a fixed, specifically-delineated Outer Boundary. Territorial Agreement (attached as Exhibit A to Petition of NGEMC) at 2. In particular, the City may not extend its lines "east of I-75." *Id.* The Michael's Carpet building is indisputably east of I-75. Stipulated List of Undisputed Facts ("Stipulated Facts"), No. 4. That alone warrants reversal of the Initial Decision. To avoid this result, the City continues to misapply the Annexation Provision. The City does not deny that on multiple occasions over the years, the City has represented *to this Commission* that the Annexation Provision applies only within the Outer Boundary. Now, however, the City asserts that the fixed Outer Boundary can be "expanded" through annexation. The City does not deny that under this interpretation, the entire 195-word, meticulously-crafted Outer Boundary provision would be rendered totally meaningless.

Second, the City has admitted its extraordinary position that annexation beyond the Outer Boundary constitutes a full *reassignment* of electric service territory—from North Georgia EMC to the City. The City claims this unilateral right to reassign territory whenever it chooses and in any direction. The City's "reassignment" argument cannot stand under controlling provisions of the Territorial Act. The General Assembly placed reassignment of electric service territory within the exclusive domain and discretion of the Commission. O.C.G.A. § 46-3-8(d). Only the Commission may reassign territory, and only upon finding a breach of the tenets of public

convenience and necessity by the electric supplier to whom the territory has been assigned (none of which has occurred here). *Id.* The Territorial Agreement does not grant the City this power. Nor could it: neither electric suppliers nor the Commission can change the law set down by the General Assembly. Because it is undisputed that the Michael's Carpet building is located in North Georgia EMC's assigned area, North Georgia EMC has the exclusive right to serve it, further warranting reversal.

Given the total lack of merit in the City's substantive positions, it is not surprising that the City does all it can to convince the Commission to look only at the City's procedural defenses, and not the merits. And although the Initial Decision was decided on procedural grounds, relying on extraneous, non-binding language in prior decisions, the Commission is not bound by the Initial Decision and should decide this case on the merits. Moreover, none of the City's procedural defenses (based on the baseless assertion that prevailing parties must appeal) even theoretically apply to the City's novel reassignment argument. No prior case has addressed this issue, much less ruled that North Georgia EMC's territory is reassigned to the City upon the City's unilateral annexation/provision of municipal services, with no finding of a breach of the tenets of public convenience and necessity and with zero involvement on the part of the Commission.

The Commission is faced with the City's claim that it may seize North Georgia EMC's assigned electric service territory at any time, in any direction, and without agreement or Commission approval. The parties' Territorial Agreement plainly prohibits this by the creation of the Outer Boundary, and the City's claim contravenes the Territorial Act's exclusive grant of reassignment authority to the Commission. The Commission therefore should reject the City's

claim and rule that the City does not have the right to serve the Michael's Carpet building in this case, which is indisputably "east of I-75" and within North Georgia EMC's assigned territory.

A. The Commission Conducts an Independent and *De Novo* Review on Appeal From the Initial Decision.

The City mischaracterizes the Commission's review in this proceeding by claiming that North Georgia EMC has the burden to disprove each of the Hearing Officer's conclusions of law. *See, e.g.*, City's Resp. at 8 ("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."); *id.* at 19 ("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 . . . .") (emphasis in original). This is simply incorrect. When the full Commission reviews a case after a hearing officer's initial decision, the Commission's review is *de novo*—it makes its determination anew and independent of the Hearing Officer's determination. Under O.C.G.A. § 50-13-17(a), "[o]n review from the initial decision of the representative, the agency shall have all the powers it would have in making the initial decision and, if deemed advisable, the agency may take additional testimony or remand the case to the hearing representative for such purpose." Thus, the Commission "is not constrained to the hearing officer's initial decision in issuing an order of the full Commission." *Pub. Serv. Tel. Co. v. Ga. PSC*, 755 F. Supp. 2d 1263, 1281 (N.D. Ga. 2010).

Accordingly, North Georgia EMC does not have the burden of disproving or otherwise showing error as to the Hearing Officer's various findings (although it has plainly done so). In this proceeding, the Commission reviews the record and makes its own independent determination of the issues.

B. The City's Novel "Reassignment by Annexation" Theory Cannot Salvage its Case.

As demonstrated in the proceeding below—but not addressed by the Hearing Officer—in addition to the "shall not extend its lines" prohibition in the Territorial Agreement, controlling provisions of the Territorial Act prohibit the City from serving the Michael's Carpet building. Specifically, because the building is located in North Georgia EMC's assigned service area, North Georgia EMC has the exclusive right to serve it under the Territorial Act. The City's preposterous assertion that this area has been reassigned to the City through unilateral annexation (and with no involvement on the part of the Commission) cannot stand.

The following undisputed facts and principles of law govern this issue:

- Pursuant to the Territorial Act, the Commission was authorized and directed to assign geographic areas of the state to electric suppliers. O.C.G.A. § 46-3-4.
- The geographic area in Gordon County was assigned by the Commission in Docket No. 2833-U on September 2, 1975. *See* Stipulated Facts, Exhibit 2.
- The Michael's Carpet building is located in North Georgia EMC's assigned area. Stipulated Facts, No. 4.
- Under the Territorial Act, the electric supplier to whom a geographic area has been assigned (the "assignee" electric supplier) "shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in [the Territorial Act.]" O.C.G.A. § 46-3-3(1).
- There is no contention (nor could there be) that any exception to this rule of exclusive assignment, like the large load exception, applies here.
- The Territorial Act expressly provides that municipal annexation (except by merger of cities or the like, which is not applicable here) does not alter the Commission's assignment of territory. O.C.G.A. § 46-3-7(2)(D).

Faced with these undisputed facts and legal principles, the City seeks to circumvent North Georgia EMC's exclusive, statutory right to serve the Michael's Carpet building by arguing that area assigned by the Commission to North Georgia EMC is reassigned to the City upon the City's annexation/provision of municipal services in such area. Notably absent from the

City's brief is O.C.G.A. § 46-3-8(d), which explicitly addresses reassignment of territory under the Territorial Act. This section provides that if the Commission "determines that an assignee electric supplier has breached the tenets of public convenience and necessity therein," then the Commission "may" (but is not required to) "reassign all or any portion of an area assigned to that assignee electric supplier to another electric supplier." In this code section, the General Assembly established the sole standard for reassignment (a breach of the tenets of public convenience and necessity), provided that the Commission would be required to determine that such a breach occurred before considering a reassignment (which would require notice and a hearing),[1] and vested in the Commission the sole authority and discretion to reassign territory upon making such a determination.

The City would radically change the law on reassignment set down by the General Assembly. The City argues:

> [T]he 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 . . . rather than engage in prolonged administrative proceedings or litigation each time a dispute arises related to whether reassignment is appropriate.

City's Resp. at 23–24. The "criteria" referred to by the City are annexation and the provision of municipal services (and taxation) therein. Thus, the City's stunning position is that the parties agreed—and the Commission approved—(1) changing the statutory standard for reassignment set down by the General Assembly in the Territorial Act, (2) eliminating the statutory

[1] Not surprisingly, notice and a hearing would be required before the Commission would be authorized to order the extreme remedy of reassigning an electric supplier's territory for breach of the tenets of public convenience and necessity. *See* O.C.G.A. § 46-3-13 ("the commission shall have authority and jurisdiction, *after notice* to all affected electric suppliers and other interested parties, *and after a hearing*, to enforce the provisions of this part by appropriate orders.") (emphasis added).

requirement that the Commission make a determination that North Georgia EMC breached the tenets of public convenience and necessity before considering a reassignment, (3) dispensing with the requirement of a reassignment hearing, and (4) stripping the Commission of its authority (and discretion) with regard to reassignments. According to the City, the parties agreed—and the Commission approved—that in lieu of the strict statutory mandates of the reassignment statute, reassignment of North Georgia EMC's assigned area occurs whenever the City annexes/provides municipal services in such an area, with no regard for whether North Georgia EMC breached the tenets of public convenience and necessity, no hearing to consider evidence of an alleged breach, no determination of such a breach by the Commission, and no exercise of discretion by the Commission in determining whether reassignment is an appropriate remedy. In fact, the Commission is cut out of the process altogether. The City simply decides it wants to take North Georgia EMC's assigned territory for itself and does so. Not only could the City seize the Michael's Carpet building in this case, but *any* territory from North Georgia EMC, whenever and wherever it chooses, without Commission approval. For many reasons, the City's argument is fatally flawed.

1. North Georgia EMC and the City Did Not Agree to, or Even Address, Reassignment in the Territorial Agreement.

Nothing in the Territorial Agreement even remotely supports the City's position. Indeed, there is no mention whatsoever of "reassignment" anywhere in the Territorial Agreement. The Territorial Act, adopted in 1973 (Ga.L.1973, p. 200 *et seq.*), expressly addresses reassignment of territory. In stark contrast, the Territorial Agreement, dated April 8, 1975, is notably silent on this subject. The complete absence of any reference to "reassignment" in the Agreement completely negates the City's position.

Moreover, to accept the City's position would require finding that the parties not only addressed reassignment directly, but *agreed to*: (1) displace the statutory standard (breach of the tenets of public convenience and necessity) with a new standard—unilateral annexation/provision of municipal services by the City; (2) remove the requirement that the Commission make a determination of such breach; (3) eliminate the Commission's exclusive authority to order a reassignment and discretion in determining whether reassignment is appropriate; and (4) hand over reassignment authority to the City and cut the Commission out of the process altogether. Again, nothing in the Territorial Agreement in any way reflects such an agreement.

2. The Commission Did Not Adopt and Approve Reassignment by Unilateral Annexation.

Obviously recognizing that North Georgia EMC and the City could not have simply agreed to displace the mandatory reassignment provisions of the Territorial Act (and they didn't), the City seeks cover by asserting that the new reassignment "criteria" proposed by the City were "approved and adopted by the Commission." City's Resp. at 23. But this contention is based solely on the Commission's approval of the Territorial Agreement (nearly fifty years ago), and it cannot credibly be asserted that with such approval the Commission intended to rescind the strict reassignment standard set down by the General Assembly, give the City the unilateral right to reassign North Georgia EMC's territory to itself upon annexation/provision of municipal services, and hand over to the City the Commission's reassignment authority.

3. In any Event, the Commission Would Have Had No Authority to Change the Law on Reassignments.

Not only did the Commission *not* change the law on reassignments by approving the Territorial Agreement, it would have had no authority to do so. First, it is beyond the province of

the Commission to enact or change laws. Under the Georgia Constitution, only the General Assembly has authority to make laws. *See* Ga. Const. Art. II, Section I, para. 1 ("The legislative power of the state shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."). In O.C.G.A. § 46-3-8(d), the General Assembly enacted the law on reassignment of territory, including the standard for reassignment: before any reassignment may be ordered, the Commission must first make a determination that the assignee electric supplier has breached the tenets of public convenience and necessity. This is the legislative standard set down by the General Assembly, and when courts consider a statute, "we must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (2013) (citation omitted).

The Commission, even if it wanted to, cannot change that standard. *See N. Fulton Med. Ctr. v. Stephenson*, 269 Ga. 540, 543–44 (1998) ("It is well established that administrative agencies . . . are not authorized to enlarge the scope of, or supply omissions in, a properly-enacted statute. *Nor may administrative agencies* change a statute by interpretation, or *establish different standards within a statute that are not established by a legislative body.*" (emphasis added)); *Calhoun v. N. Ga. EMC*, 233 Ga. 759, 769 (1975) ("The Public Service Commission is delegated the authority only to apply the standards set forth in the [Territorial] Act, to make rules and regulations according to such standards and to administer them."). Thus, the standard set down in the reassignment statute—a determination by the Commission that North Georgia EMC has breached the tenets of public convenience and necessity—is the law. Neither the parties nor the Commission had any authority to change that law.

Second, the Commission would have had no authority to delegate to the City the authority vested in the Commission by the General Assembly with respect to reassignments. That

would have been a further change in the law. The General Assembly delegated to the Commission, not the City, the authority to determine both whether a breach of the tenets of public convenience and necessity had occurred, and if so, whether to order a reassignment of territory. The General Assembly manifestly did not delegate such authority (under any standard or criteria) to the City, a self-interested competitor of North Georgia EMC.[2] Thus, again, even if it wanted to, the Commission could not change the law set down by the General Assembly and hand over to the City the Commission's authority and discretion over reassignment matters. The law is that the Commission, and only the Commission, can reassign territory. Because the Commission has not reassigned the Michael's Carpet building area to the City, it remains assigned to North Georgia EMC, which has the exclusive right to serve it.

4. No "Mutual Mistake" Occurred Which Would Render the Agreement Voidable.

In a confusing argument, the City apparently contends that if the Commission had interpreted the Territorial Agreement as somehow overriding O.C.G.A. § 46-3-7(2)(D) (annexations do not change territory assignments), and if the parties lacked authority to agree to this interpretation, then this would have been a "mutual mistake of law as to a material term of the Agreement," making the Agreement "voidable." City's Resp. at 23. The City's position is totally off-base. For the doctrine of "mutual mistake" to apply, the party asserting mistake (here, the City) must demonstrate that the contract was *based on* a mutual mistake of fact or law. *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.") (emphasis added). *See also*

[2] Also, any such attempted delegation of authority by the Commission to the City would have been unauthorized. *See Chatham Ass'n of Educators, Teacher Unit v. Bd. of Pub. Educ. for City of Savannah & Cnty. of Chatham*, 231 Ga. 806, 807 (1974) ("Without specific legislative authorization, a school board has no authority, by contract or otherwise, to delegate to others the duties placed on the board by the Constitution and laws of Georgia.").

Restatement (Second) of Contracts, § 152 (defining mutual mistake as "a mistake of both parties *at the time a contract was made* as to a basic assumption on which the contract was made.") (emphasis added). In other words, the City must demonstrate that at the time the parties entered into the Territorial Agreement (1975), they were operating under a mutual mistake of fact or law as to a matter on which the contract was based, such that the Agreement cannot be enforced. The City alleges no such mistake. Instead, the City asserts that any mistake did not occur until decades later when the Hearing Officer (not the parties) ostensibly interpreted the Agreement. Nor does the City allege any "mutual" mistake. While the City has flip-flopped over the years, North Georgia EMC has never taken the position that the Agreement overrides O.C.G.A. § 46-3-7(2)(D). The defense of mutual mistake has no application here.[3]

5. The Commission Should Reject the City's Attempt to Repudiate the Reassignment Provision in the Territorial Act in the Name of "Efficiency."

The City's "efficiency" argument is nothing short of breath-taking. The City asserts that rather than be bothered with (1) a mandatory hearing on whether North Georgia EMC has breached the tenets of public convenience and necessity, (2) a determination by the Commission that such a breach has occurred, and (3) whether, if so, a reassignment of territory from North Georgia EMC to the City is the appropriate remedy—all as required by law—it would be more efficient for the City to be the sole arbiter of reassignments. City's Resp. 23–24. The City would decide whether and when to take over North Georgia EMC's territory and the only question would be whether the City has annexed/provided municipal services in the annexed area. If so,

[3] Also erroneous is the City's contention that North Georgia EMC makes a "moot[ness]" argument. City's Resp. at 21. North Georgia EMC's position is that even if the City's interpretation of the Territorial Agreement were correct, the City still would have no right to serve the Michael's Carpet building because it is located in North Georgia EMC's assigned area, thereby giving it the exclusive right to serve the building. This is not a mootness argument, but rather, a separate, independent ground for reversal of the Initial Decision.

then the annexed area would be automatically reassigned to the City, and the Commission would have no role at all. This, the City asserts, would avoid the prospect of "prolonged administrative proceedings" regarding reassignments. City's Resp. at 23–24. While this would undoubtedly be more "efficient" from the City's point of view—since it would enable the City to reassign North Georgia EMC's territory to itself by municipal fiat—that is not the law. Instead, the General Assembly adopted very specific, statutory criteria that must be met before a reassignment of territory can occur. While the City asserts that a reassignment hearing might be "prolonged," the General Assembly did not provide that the mandatory hearing/determination required for reassignment could be skipped if it takes longer than one party desires. Furthermore, the Territorial Act policy of assuring "the most efficient, economical, and orderly rendering of retail electric service" (relied on by the City) was one of the principles underlying the *assignment* of territory, not the *reassignment* of territory. *See* O.C.G.A. § 46-3-2. And the non-statutory reassignment process proposed by the City—unilateral reassignments through annexations whenever the City feels like it—would result in grossly inefficient and uneconomical rendering of electric service, and replace order with chaos.

6. No Prior Commission or Hearing Officer Decision Has Addressed the City's Novel Theory of Reassignment Through Unilateral Annexation.

While the City argues, incorrectly, that the interpretation of the Territorial Agreement is the subject of prior Hearing Officer/Commission rulings (and subject to collateral estoppel), it cannot credibly be asserted that any prior Hearing Officer/Commission decision ruled that territory assigned to North Georgia EMC is reassigned to the City upon the City's unilateral annexation/provision of municipal services, with no finding of a breach of the tenets of public convenience and necessity and with zero involvement on the part of the Commission. No prior case addressed or even raised this issue, much less ruled on it. Thus, whatever "collateral

estoppel" or "prior precedent" arguments the City may assert with respect to the Territorial Agreement issue, they have absolutely no bearing on the reassignment issue.

7. Because the Michael's Carpet Building Is Located in North Georgia EMC's Assigned Service Territory, Which Has Not Been Reassigned to the City, the City Has No Right to Serve It.

As demonstrated above, it is undisputed that the Michael's Carpet building is located within the geographic area assigned to North Georgia EMC in Docket No. 2833. North Georgia EMC therefore has the exclusive right to serve it under the Territorial Act. The City's attempt to have North Georgia EMC's territory reassigned to itself—on a theory of "reassignment by annexation"—directly contradicts the express provisions of Territorial Act and the General Assembly's decision to vest reassignment authority exclusively with the Commission. The Commission should reject the City's "reassignment by annexation" theory and rule that the City has no right to serve the Michael's Carpet building.

C. The Territorial Agreement Plainly Bars the City from Providing Electric Service to the Michael's Carpet Building, Which is "east of I-75."

As demonstrated in North Georgia EMC's application for Commission review, the Outer Boundary and the City Limits Boundary set forth in the Territorial Agreement are two distinct geographical restrictions which address different situations, using different terms, to effectuate different purposes. North Georgia EMC Application at 9. The City does not dispute this. Nor does the City deny that under its interpretation, the words "shall not extend its lines at any time" in the Outer Boundary provision would be effectively replaced with the words "*has the right to* extend its lines anytime" the City annexes property/provides municipal services therein. *Id.* at 10–11. Moreover, the City does not deny that under its interpretation, the Territorial Agreement would operate exactly the same way with or without the Outer Boundary Provision, thus rendering it meaningless. *Id.* at 11. Finally, the City does not deny that it has represented to this

Commission on multiple occasions that any annexation rights it may have can arise only *within* the Outer Boundary—the polar opposite of the position it now takes.[4]

Instead, the City's position is that the meticulously-crafted, 195-word Outer Boundary paragraph—with its detailed references to land lots, numbered roadways, and named waterways—should be given no meaning or effect because otherwise an 8-word phrase in one sentence of the Annexation Provision ("in Gordon County or the State of Georgia") would be rendered superfluous. City's Resp. at 21. But whatever meaning the City would ascribe to this general geographic reference, it cannot credibly be read to nullify the Outer Boundary provision. If that were the parties' true intent, they would not have undertaken the painstaking effort of crafting, mapping, and documenting the Outer Boundary provision to begin with. *See* O.C.G.A. § 13-2-3 ("The cardinal rule of construction is to ascertain the intention of the parties.").

The City's nonsensical interpretation violates not only the cardinal rule of contract construction, but several others. First, as demonstrated in North Georgia EMC's initial brief, the City's interpretation would render the entire Outer Boundary paragraph meaningless. *See Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100 (2020) ("Courts should not render any language in a contract as superfluous." (citations omitted)). Second, a contract must be interpreted so as to "give the greatest effect possible" to all its provisions. *Sofran Peachtree City, L.L.C. v. Peachtree City Holdings, L.L.C.*, 250 Ga. App. 46, 50 (2001). The "greatest effect

[4] *See* North Georgia EMC Application at 12–14 (description of *Advance Auto* and *Mohawk* cases in which the City took the express, unequivocal position that it is only inside the Outer Boundary that the Annexation Provision applies.). Also, while the City states that its current interpretation was "confirmed by the PSC in the *Kerry Foods* Decisions" (City's Resp. at 21), the City seems to have forgotten that it maintained its long-standing, prior interpretation even *after Kerry Foods*, representing in its judicial appeal of that case that "[t]he 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).

possible" is to give effect to the precisely delineated 195-word paragraph which sets forth the Outer Boundary, not cast it aside in favor of an 8-word county/state reference.

Third, "where two constructions are possible, one unreasonable and the other reasonable," effect must be given to "the reasonable construction which would serve to put into effect the evident purpose of the agreement." *Whitney v. Hagan*, 65 Ga. App. 849, 850 (1941) (internal citation omitted). A construction which leads to an absurd result should be avoided. *Nat'l Sur. Corp. v. Wright*, 70 Ga. App. 838, 841 (1944). Here, it is not only unreasonable but patently absurd to interpret the Territorial Agreement as meaning that by including the county/state reference in the Annexation Provision, the parties intended to nullify the Outer Boundary provision and give the City the unchecked right, upon annexation/provision of municipal services, to extend electric service anywhere it likes in North Georgia EMC's territory.

Fourth, "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." *Ga. Farm Bureau Mut. Ins. Co. v. Gaster*, 248 Ga. App. 198, 199 (2001). Here, both the Outer Boundary provision and Annexation Provision can be given effect and harmonized by interpreting them as North Georgia EMC does here and as the City did for decades before its latest about-face: it is only inside the Outer Boundary that the Annexation Provision applies.

Finally, even if the Outer Boundary provision and Annexation Provision could not be reconciled, "[i]t is a well established rule in the construction of contracts that in the event of such a conflict, the first provision prevails." *Wilner's Inc. v. Fine*, 153 Ga. App. 591, 594 (1980). As the City itself emphasizes, the Outer Boundary provision appears first, and is followed by the

Annexation Provision. City's Resp. at 20. Thus, even if the two provisions were irreconcilable (they aren't), the Outer Boundary provision would prevail.[5]

When, as required under Georgia law, the Outer Boundary is given effect according to its plain terms, it unequivocally prohibits the City from serving the Michael's Carpet building, which is indisputably east of I-75. Stipulated Facts, No. 4. For this separate, independent reason, the decision below should be reversed.

D. The City's Procedural Defenses Are Misplaced.

In the case at hand, the Hearing Officer chose not to consider the merits of the parties' arguments regarding the Territorial Agreement and "reassignment" issue. Instead, she based her decision entirely on procedural grounds, relying on her prior 2022 Order and another case (*Kerry Foods*) decided by Hearing Officer Tucker. *See In re City of Calhoun*, Docket No. 42514 (the "2022 Order") and *North Georgia EMC v. City of Calhoun*, Docket No. 14496 (Initial Decision May 29, 2003) (the "*Kerry Foods*" case). And while the City takes great liberties in describing those cases, the City cannot avoid the actual rulings in those decisions.

1. The 2022 Order.

In the proceedings that gave rise to the 2022 Order, the City petitioned for a declaratory ruling that the Territorial Agreement had not been adopted by the Commission and, in the alternative, a ruling that the City had the right to extend its lines beyond the Outer Boundary when it had annexed property and provided municipal services to the property. North Georgia

[5] The City's assertion that in a prior brief North Georgia EMC "misleadingly revers[ed] the order" of the two provisions is incorrect. City's Resp. at 20. The City relies on a sentence in NGEMC's response brief in the proceeding below (which did not reverse anything), and fails to acknowledge that in NGEMC's petition and initial brief—both of which preceded its response—NGEMC quoted the Outer Boundary and Annexation Provision at length, and in that order, and also attached the four-page Territorial Agreement to its petition. The only thing misleading is the City's statement to the Commission that NGEMC reversed the order of the two provisions.

EMC argued that the City was not entitled to such a ruling and Hearing Officer Gibson agreed. She explicitly *denied* the City's petition, stating, in the ordering paragraph: "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." 2022 Order at 8.

Notably, while reimagining what the 2022 Order actually said, the City acknowledges this ruling in its Response: "the Commission denied Calhoun's request for declaratory relief . . . ." City's Resp. at 10. The City further admits that "the form of the 2022 Ruling may have been a denial of Calhoun's Petition . . . ." The 2022 Order not only "may have been" a denial of the City's Petition, it explicitly *was* a denial of that petition. In denying the City's request for declaratory ruling, the Hearing Officer gave North Georgia EMC exactly what it asked for.

2. The Kerry Foods Order.

The sole issue in *Kerry Foods* was whether the City had the right to provide electric service to a Kerry Foods facility located beyond the Outer Boundary if that facility met the large load exception of the Territorial Act (O.C.G.A. § 46-3-8(a)). No facts were presented in *Kerry Foods* 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, would nullify the Outer Boundary (by "expanding" the "Box"). Nor was the "expansion" idea relevant to the issue to be decided. Thus, Hearing Officer Tucker's statements regarding "expansion" were simply extraneous, non-binding language. And the City's contention that in the 2003 *Kerry Foods* decision, the Commission resolved whether the City has the right to serve the Michael's Carpet building is simply not true. City's Resp. at 1.

Also incorrect is the City's assertion that the extraneous "expansion" language was "fundamental" to the *Kerry Foods* decision. *Id.* at 18. That language had no bearing on the

application of the large load exception to the Kerry Foods facility (the sole issue in the case) and was classic, non-binding dicta. *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 at hand'" (citation omitted).)

The City's position is not helped by its circular argument that even if the *Kerry Foods* commentary is dicta, the dicta was adopted by the Hearing Officer in the 2022 Order denying the City's petition for a declaratory ruling. City's Resp. at 18. Even if the Hearing Officer agreed with and "adopted" the dicta in *Kerry Foods* for her own reasoning in writing the 2022 Order, that does not make *Kerry Foods* itself binding precedent, and it changes nothing about the 2022 Order. The only ruling in the 2022 Order is that the City was not entitled to a declaratory ruling. And, again, the Hearing Officer merely referred to the *Kerry Foods* dicta in the 2022 Order—she did not adjudicate the issue of annexation beyond the Outer Boundary on the merits.

Accordingly, in both the 2022 Order and the present case, the Hearing Officer's reliance on non-binding dicta about "expanding" the "Box" from *Kerry Foods* is misplaced. And the Commission is plainly not bound by that dicta. *See Alexander v. State*, 313 Ga. 521, 529 (2022) (dicta is "not binding on anyone for any purpose.").

3. North Georgia EMC Had No Right or Obligation to Appeal the 2022 Order to Preserve Its Rights in This Case.

While the City criticizes North Georgia EMC's authorities, the City fails to cite any authority for the proposition that, even though it was the prevailing party, North Georgia EMC nevertheless was obligated to appeal the extraneous "expansion" language in the 2022 Order. As the U.S. Supreme Court has held: "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." *Cal. v. Rooney*, 483

U.S. 307, 311 (1987). Accordingly, courts "'review[] judgments, not statements in opinions.'" *Id.* (quoting *Black v. Cutter Lab'ys*, 351 U.S. 292, 297 (1956)).

Nor does the City have any legal authority to support the idea that North Georgia EMC was "aggrieved" by such language in the 2022 Order and therefore waived its right to challenge the City's service to the Michael's Carpet building in this case. *See* City's Resp. at 10–12. Citing just one case, the City claims that the term "aggrieved" has "an expansive definition in the context of judicial reviews of an administrative decision." *Id.* at 10–11 (citing *Ga. Power Co. v. Campaign for a Prosperous Ga.*, 255 Ga. 253 (1985)). But that case held that ratepayers adversely affected by a Commission decision setting higher rates were "aggrieved" and could challenge that decision. *Id.* at 258. The case hardly stands for the City's proposition that parties who win but might question certain language in an order are "aggrieved" and must appeal that language. Under the City's theory, a ratepayer who asks the Commission not to increase rates, and then *prevails* when the Commission declines to order a rate increase, nevertheless is "aggrieved" and must appeal language in the Commission's order that another party might seek to use in a subsequent case. That is plainly not the law.

The City's next argument that the "aggrieved" standard applies only on judicial review under O.C.G.A. § 50-13-19(a), and not on application for full agency review under O.C.G.A. § 50-13-17(a), is a red herring. First, the Court of Appeals has recognized that the "aggrieved" concept *does* apply to parties seeking agency review under O.C.G.A. § 50-13-17. *Alexander v. Dep't of Revenue*, 316 Ga. App. 543, 543–45 (2012) ("a person aggrieved by the initial decision can make application to the agency under O.C.G.A. § 50-13-17 for review of that initial decision."). In any event, again, the City cites no authority for the idea that a party who prevails in an initial decision is obligated to appeal language in that decision to the full agency.

In advancing its contorted, unsupported argument that North Georgia EMC, the prevailing party, should have appealed, the City has lost sight of the fact that *it lost*. As the losing party, the City clearly had a right to appeal the 2022 Order. And if the City wanted a clear declaration of its rights with respect the Outer Boundary, it should have done so. Especially if the City thought that the 2022 Order's reference to the *Kerry Foods* expansion language supported granting, rather than denying, its request for declaratory relief, then it was unquestionably the City—not North Georgia EMC—that should have sought further review.[6]

4. The City's Collateral Estoppel Defense Fails.

The City attempts to flip the burden onto North Georgia EMC to *disprove* all the technical elements of collateral estoppel, but it is the City that maintains the burden to prove each element. *See Glen Oak, Inc. v. Henderson*, 258 Ga. 455, 458 (1988) (as affirmative defenses, the party invoking the defenses of res judicata and collateral estoppel bears the burden of proof); *cf. Rintoul v. Tolbert*, 341 Ga. App. 688, 692 (2017) ("The party invoking the doctrine of res judicata has the burden of proving the defense."). Accordingly, if the Commission finds that the City failed to establish any of the required elements of collateral estoppel, the defense cannot shield the City from a decision in this case. The City cannot establish at least four of these elements.

a. Collateral Estoppel Does Not Apply Against the Prevailing Party.

The City cites no authority in response to the fundamental, common sense principle that collateral estoppel does not apply against the party that prevailed in the prior proceeding. As

[6] In yet another misstatement of NGEMC's position, the City states that NGEMC is seeking "review and reconsideration of the 2022 [Order] . . . ." City's Resp. at 9. This is not true at all. NGEMC did not appeal the ruling in that case because it *won*. And NGEMC is not seeking review and reconsideration of the 2022 Order now. It seeks review of the Hearing Officer's Initial Decision in the present case.

stated in *Restatement (Second) of Judgments* § 28(1) cmt. a)—cited with approval in *Hodges v. Grange Mut. Ins. Co*, 227 Ga. App. 897, 899 (1997) (Pope, J. concurring)—"[i]f review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of [issue preclusion] is inapplicable by its own terms." The City's incomplete, bracketed alteration of another sentence in the concurring opinion does nothing to undermine the Restatement principle. City's Resp. at 11. Because North Georgia EMC obtained a judgment in its favor, collateral estoppel does not apply as to references in the 2022 Order to extraneous statements in the *Kerry Foods* decision.

b. The Issue Was Not "Actually Litigated and Determined."

On the required element that the issue was "actually litigated and determined," the City relies on the Hearing Officer's statement that the 2022 Order "already conclusively decided the issue." City's Resp. at 13 (citing Initial Decision at 7); *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003). But the Hearing Officer's retroactive depiction of the 2022 Order does not constrain the Commission's independent review in this case, and the argument is a nonstarter.

Critically, the City fails to respond to North Georgia EMC's actual argument, which is that the issue was not "actually litigated and determined" because the only ruling in the 2022 Order was a *denial* of the City's petition for a declaratory ruling, and so there was not (and could not have been) any adjudication on the merits or a final preclusive ruling on the substantive rights of the parties. The City does not respond to North Georgia EMC's cited authority, nor cite any authority to support its assertion of this element of collateral estoppel. *See* North Georgia EMC Application at 23 (citing *Empire Fire & Marine Ins. Co. v. Metro Courier Corp.*, 234 Ga. App. 670, 673 (1998)); City's Resp. at 13.

c. No Determination of the Issue Was Essential to the 2022 Order.

The City returns to its "substance over form" interpretation of the 2022 Order to argue that the Hearing Officer must have construed the Annexation Provision of the Territorial Agreement in order to find that the City was not entitled to a declaratory ruling. City's Resp. at 13. The City again seeks to reimagine the 2022 Order, which merely referenced the dicta from *Kerry Foods* and did not make any actual determination of the City's rights to serve new premises by annexation beyond the Outer Boundary. The Hearing Officer did not adjudicate the issue in the 2022 Order, so there is no determination with preclusive effect on this case.

d. North Georgia EMC Did Not Have a Full Opportunity to Litigate the Issue.

The City also fails to prove the required element that "the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question." *Macon Water Auth.*, 262 Ga. App. at 227. The City does not deny that in its petition for declaratory judgment (that led to the 2022 Order), the City failed to comply with the Commission's mandatory requirement that it set forth "[t]he full text of the statute, rule, [or] order upon which ruling is requested." Ga. Comp. R. & Regs. 515-2-1-.12(1)(b). 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. The City's contention that it should be excused from complying with the Commission's rules regarding declaratory petitions because North Georgia EMC cited *Kerry Foods* in its brief is both wrong and misleading. As the City well knows, North Georgia EMC did not cite *Kerry Foods* for anything having to do with the issue of annexation beyond the Outer Boundary, but rather, regarding whether the City had the right to serve large loads beyond the Outer Boundary. *See, e.g.*, North Georgia EMC's Brief Opposing City of Calhoun's Pet. for Declaratory Ruling at 3–4 (*In re City of Calhoun*, Docket

No. 42514, July 3, 2019) (describing the Commission's rejection of the City's attempts to "renege on its contractual promise" and "cherry pick" large load customers).

The City then argues that North Georgia EMC could have responded to the City's reply brief arguments by appealing the Initial Decision to the full Commission. City's Resp. at 15. But this argument is entirely circular, because North Georgia EMC *won*—the City was *denied* its declaratory ruling and there was no adverse final ruling for North Georgia EMC to appeal. If any party should have appealed, it was the City, who *lost*.[7]

II. CONCLUSION

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

Respectfully submitted, this 10th day of May, 2024.

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[7] The City's assertion that North Georgia EMC "sat back" while the City "devoted time and resources to acting on the 2022 Ruling" is baseless. City's Resp. at 25. This case came before the Hearing Officer on stipulated facts, none of which even remotely supports this contention. In fact, as stipulated by the parties, the City began providing electric service to the Michael's Carpet building on or about May 24, 2023. See Stipulated Facts, No. 7. As reflected in the Commission's docket, North Georgia EMC filed its petition two days later, on May 26, 2023.

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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 REPLY IN SUPPORT OF APPLICATION FOR FULL COMMISSION REVIEW 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 10th day of May, 2024.

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