BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

GEORGIA POWER COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 42509**
	)	
	)	
	)	
WALTON ELECTRIC MEMBERSHIP CORPORATION,	)	
	)	
Respondent, and	)	
	)	
NESTLE PURINA PETCARE COMPANY, Intervenor.	)	

GEORGIA POWER COMPANY'S APPLICATION
FOR REVIEW OF INITIAL DECISION

In compliance with O.C.G.A. § 50-13-17(a), Georgia Power Company ("Georgia Power" or "GPC") files this Application for Review of the Initial Decision in *Georgia Power Co. v. Walton Electric Membership Corp., Respondent and Nestle Purina PetCare Co.* ("Nestle"), *Intervenor*, Ga. PSC Docket No. 42509 (Jan. 24, 2020) (the "Initial Decision"). The Initial Decision is contrary to law and should be reversed.

INTRODUCTION

After learning in March of 2019 that Walton EMC intended to serve Nestle, an existing Georgia Power customer, at a premises located in Georgia Power's assigned service territory and lawfully served by Georgia Power since 1991, Georgia Power brought this Georgia Territorial Electric Service Act ("Territorial Act" or "Act") complaint against Walton EMC. The proper interpretation and application of Sections 8(a) and 8(b) of the Territorial Act, O.C.G.A. §§ 46-3-8(a) and 46-3-8(b), is dispositive of Georgia Power's Complaint. In denying relief to Georgia Power, the Hearing Officer failed to adhere to the plain language of the Territorial Act.

Section 8(a) of the Territorial Act provides a "large load customer choice" exception to the otherwise exclusive service rights in assigned areas if "service [is to be provided] to one or more **new** premises . . . if utilized by one consumer and having single-metered service and a connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater . . . ." O.C.G.A. § 46-3-8(a) (emphasis added). As an exception to exclusive service rights, this subsection must be strictly construed. *Sawnee Elec. Mem. Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 704 (2001).

Building on the "new premises" requirement, the large load customer choice exception is expressly made subject to Section 8(b) of the Act – the "grandfather provision." Pursuant to that provision, "every electric supplier shall have the exclusive right to continue serving any premises lawfully served by it[.]" *Cent. Ga. Elec. Mem. Corp. v. Ga. Pub. Serv. Comm'n*, 351 Ga. App. 69, 72 (2019) ("*Cent. Ga. EMC*") (quoting O.C.G.A. § 46-3-8(b)).

Here, the record showed that the premises was not new, but rather was pre-existing. The record further showed that Georgia Power lawfully served the premises. Nonetheless, after expressly finding, "Georgia Power has served the Premises, including its expansions, ever since [1991]," (Initial Decision, Findings of Fact, at 4), the Initial Decision denied Georgia Power relief. The Initial Decision is erroneous because it bypassed the two separate provisions of the Territorial Act cited above that prohibit Walton EMC's service of the Nestle plant. First, the large load customer choice exception in Section 8(a) only permits service to *new premises*. Second, Section 8(b) of the Territorial Act confers upon Georgia Power an exclusive right to continue serving any premises it has lawfully served.

Upon finding Georgia Power to have continuously and lawfully served an existing premises, the Initial Decision should never have reached Walton EMC's "dismantled" and "not in substantial kind" arguments premised upon the "reconstruction clause" of Section 8(b). That

tertiary, reconstruction clause is irrelevant to this case because the first clause of Section 8(b) prohibits Walton EMC from serving Nestle, as does the absence of a new premises. To rule otherwise undermines the assignment of territories and service rights to premises established by the Territorial Act and fails to give effect to the Act's plain language and purpose.

MATERIAL FACTS AS FOUND BY THE HEARING OFFICER

The Initial Decision Correctly Found Continuous Service To An Existing Premises.

The premises at issue in this case, comprised of a building and its additions (the "Premises"), is located in Georgia Power's assigned service territory in unincorporated Hart County at 266 Industrial Park Road, Hartwell, Georgia 30643. This manufacturing and distribution warehouse facility was placed in service in 1991 and served by Georgia Power as a large load customer choice premises. (Tr. 172:19-21.) Georgia Power continually served the Premises under three owners—Dundee Mills, Springs Industries, Inc. ("Springs" or "Springs Industries") and Nestle—since 1991 and through the hearing in 2019. (Tr. 115:22-27.) The Springs Industries plant ceased manufacturing operations in 2006. (Tr. 319; Nestle Exhibit 364.) Subsequently, portions of the 190,000 square foot distribution warehouse were leased to business tenants. (Tr. 176:6-9, Tr. 468:9-18.) Those tenants initially continued to occupy the Premises following Nestle Purina's acquisition of the Premises. (Tr. 311:11-14.)

As the Initial Decision found:

> When Dundee Mills built the <u>existing facility</u> in 1991, it consisted of a 190,000 square foot <u>warehouse</u> and a 137,000 square foot <u>manufacturing facility</u> used to manufacture consumer goods, specifically towels. (Tr. 172-173). In 1999, Springs Industries ("Springs") added a weaving facility to the existing Premises, expanding the <u>manufacturing space</u> to 313,000 square feet. *(Id)*
>
> The Premises is located in an unincorporated area of Hart County, in Georgia Power's assigned service area with a connected load upon initial full operation in excess of 900 kilowatts. The Premises began production in 1991. <u>Georgia Power has served the Premises, including its expansions, ever since</u>. . . .

> In 2017, Nestle Purina purchased the existing Premises for $7 million dollars. (Tr. 318). . . .
>
> In February 2018, Nestle informed Georgia Power it did not want to use the location originally designated for a substation needed to serve Nestle's anticipated future load growth, and instead, intended to continue to take service from existing distribution lines until it had installed its full load. . . .
>
> To support operations, Nestle proceeded to implement its plan for a self-owned switchyard using its own transformers. It then requested Georgia Power to serve the switchyard from Georgia Power's primary distribution line while maintaining its original service point as well. . . .

(Initial Decision, Findings of Fact, at 4-5 (emphasis added).)

The factual findings underlined above are key and legally compelled a result different from that reached by the Hearing Officer. The Premises is now and always has been a warehousing and manufacturing facility. Nestle took service from Georgia Power and, in support of its operations, requested Georgia Power to extend service to its new switchyard in addition to maintaining its existing service to the building. Thus, it is undisputed that Georgia Power continuously served the Premises from 1991 forward.

ARGUMENT AND CITATION OF AUTHORITY

I. The Purpose of the Territorial Act.

Enacted in 1973, the Territorial Act includes an express legislative statement of its purpose:

> The public interest requires, and it is declared to be the policy of the State of Georgia, that, in order (1) to assure the most efficient, economical, and orderly rendering of retail electric service within the state, (2) to inhibit duplication of the lines of electric suppliers, (3) to foster the extension and location of electric supplier lines in the manner most compatible with the preservation and enhancement of the state's physical environment, and (4) to protect and conserve lines lawfully constructed by electric suppliers, it is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to any electric supplier . . . .

O.C.G.A. § 46-3-2.

The General Assembly determined the most efficient, economical, and orderly way of

rendering adequate and reliable electric service was to have suppliers with established public service responsibilities to premises in assigned service areas. *See* O.C.G.A. § 46-3-8(c). Accordingly, the Territorial Act grants electric suppliers exclusive service rights within their assigned areas, subject to enumerated exceptions. *See* O.C.G.A. § 46-3-3(1) ("'Assigned area' means an enclosed geographic area assigned to only one electric supplier by the commission or by this part, and inside which the assignee electric supplier shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in this part."); *Cent. Ga. EMC*, 351 Ga. App. at 72-73; *City of La Grange v. Ga. Pub. Serv. Comm'n*, 296 Ga. App. 615, 615-616 (2009).

II. The Hearing Officer's Erroneous Initial Decision Relies Upon an Old Decision That Misapplied the Territorial Act and Is Contrary to Recent Commission Precedents.

In reaching the Initial Decision in this case, the Hearing Officer relied upon the flawed analysis found in *Georgia Power Co. v. Marietta Board of Lights & Water*, Docket No. 7545-U (Initial Decision, Jan. 2, 1998) ("*MBLW*"). In *MBLW*, a case also involving the grandfather clause, the hearing officer found "it simply does not matter whether the Disputed Premises was destroyed, dismantled, reconstructed or merely remodeled." *Id.* at 8-9. There, the hearing officer correctly acknowledged he was "opening 'Pandora's Box' for customer choice with every remodeling job." *Id. MBLW* and its progeny have reassigned service rights based upon findings that a premises has been sufficiently renovated to render it no longer "in substantial kind," diverging from the governing statutory provisions and making it very difficult for electric suppliers and customers to determine their service rights and responsibilities and undermining the fundamental purposes of the Territorial Act.

By enacting O.C.G.A. § 46-3-8(b)[1], the legislature extended grandfather protection in the

1 "Notwithstanding any other provision of this part, but subject to subsections (c) and (h) of this Code section, every electric supplier shall have the exclusive right to continue serving any

first clause to existing service lawfully extended to a premises, the exact situation presented in this case. In the second clause, the subsection provides additional protection if the service to a lawfully served premises has been disconnected for any reason. The third clause further extends grandfathered service protection to a reconstructed premises that has been "destroyed or dismantled" if the premises has been reconstructed "in substantial kind" to its predecessor. Where lawfully extended service is continuously provided to a premises and therefore protected by the first clause, however, the question of whether the premises has been renovated or reconstructed "in substantial kind" need never be reached. Moreover, under O.C.G.A. § 46-3-8(a), a new premises must come into existence to trigger customer choice. The legislature did not eviscerate the requirement of a "new" premises under O.C.G.A. § 46-3-8(a) by extending grandfather rights to premises that are "destroyed or dismantled" and "reconstructed . . . in substantial kind" under O.C.G.A. § 46-3-8(b). It is, of course, a fundamental rule of statutory construction that these provisions must be read together and harmonized to give effect to each. *See, e.g., Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012).

In addition to failing to give effect to the "new premises" requirement of Section 8(a) and the grandfather right conferred by the first clause of Section 8(b), the Initial Decision makes three fundamental errors in trying to apply the convoluted theory introduced by *MBLW*. Each of these errors is inconsistent with the Commission's recent decision in *Georgia Power Co. v. Jackson Electric Membership Corp.*, Docket No. 38658-U (Nov.10, 2015) ("*Jackson EMC*"), which held: (1) a premises must be new in order to be subject to customer choice; (2) grandfather protection applies to all lawfully served premises; (3) the "reconstruction clause" is not an

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premises lawfully served by it on March 29, 1973, or thereafter lawfully served by it pursuant to this part, including any premises last and previously served by it which before or after March 29, 1973, have become disconnected from service for any reason, and including premises which before or after March 29, 1973, have been destroyed or dismantled and which are reconstructed after March 29, 1973, in substantial kind on approximately the same site." O.C.G.A. § 46-3-8(b).

exception to the grandfather clause, rather it is an extension of the grandfather clause; (4) the correct interpretation of "dismantled" is fully taken apart in an orderly way, not "partial dismantling" or removal of equipment or furnishings; and (5) the "substantial kind" standard, if applicable at all, must be applied to the "kind" or type of "premises" (*i.e.*, "the building, structure, or facility to which electricity is being or is to be furnished" as defined by § 46-3-3(6)). Although the Initial Decision quotes *Jackson EMC*, the Initial Decision ignores its ruling and analysis without explanation.

First, the Initial Decision fails to recognize that no statutory provision confers authority on the Commission or its hearing officers to grant customer choice rights where there is no new premises, or to fail to give effect to the exclusive continuous service right conferred on an electric service provider by the grandfather provision. The "reconstruction clause" merely extends the basic grandfather right to continue serving a premises to circumstances where the lawfully served premises has been "destroyed or dismantled" and then "reconstructed . . . in substantial kind." It does not create the authority to extinguish grandfather rights or to read the requirement of a "new premises" out of the statute. The Initial Decision correctly found as a fact that Georgia Power continuously served the Premises since 1991, so there is no need for Georgia Power to rely on the "reconstruction clause" to establish its exclusive continuing right to serve the Premises. Put another way, by extending grandfather rights to a reconstructed building that is in substantial kind to its destroyed or dismantled predecessor building, the General Assembly did not decide that changes to a building sufficient to change its type or kind render the building a new building or extinguish grandfathered service rights. This incorrect theory, suggested by errant language in *MBLW*, is illogical, irrational and contrary to the plain meaning and purpose of the Territorial Act.

Second, the Initial Decision erroneously dilutes the statutory requirement that a premises necessarily must be "destroyed or dismantled" before it can be "reconstructed . . . in substantial kind." A premises that merely has been renovated does not need to be "reconstructed." The phrase "destroyed or dismantled" describes a state where reconstruction is necessary. Applying alternative definitions of "dismantled" that are inconsistent with the companion term "destroyed" and with the new premises requirement violates the statutory language and intent.

Third, the Initial Decision mistakenly detaches the "in substantial kind" query from its sole purpose of comparing two different premises (*i.e.*, the building, structure, or facility being served) as required by the statute. Under the Territorial Act, the right to serve a premises extends to its additions and expansions. *Cent. Ga. EMC*, 351 Ga. App. at 72-73. Nestle's additions to the Premises did not extinguish Georgia Power's right and obligation to serve the Premises. Instead, they became a part of the Premises that Georgia Power continuously has served since 1991 and has a right to continue to serve today. Construing the reconstruction clause in a manner that avoids the express statutory requirement of a new premises as a prerequisite to the application of the large load customer choice exception, or in a manner that avoids the plain meaning of the grandfather provision, exceeds the authority of the Commission.

The Hearing Officer's erroneous construction of the Territorial Act in the Initial Decision has no basis in the statute, erodes its purpose of permanently assigning service rights, and leads inevitably to confusion. The Initial Decision ignores and fails to follow the Commission's recent analysis and decision in *Jackson EMC* in favor of *MBLW*'s improper departure from the language of the Territorial Act. As a matter of law and sound policy, when a customer occupies a premises that has been receiving electric service for years, neither the customer nor the electric supplier should be required to analyze all the future changes that might be made to the building

(or its equipment or furnishings) in order to decide whether the electric supplier has the right and obligation to serve the premises. Accordingly, the Commission should reverse the Initial Decision.

III. The Large Load Customer Choice Exception Contained in Section 8(a) of the Territorial Act Requires a New Premises and Is Expressly Subject to the Grandfather Provision Contained in Section 8(b) of the Act.

Section 8(a) of the Territorial Act, the large load customer choice exception to the general rule of exclusive service by the assigned electric service provider, states in relevant part:

> (a) Notwithstanding any other provision of this part, ***but subject to subsections (b)*** and (c) of this Code section, after March 29, 1973, ***service to one or more new premises*** (but if more than one, such premises must be located on the same tract or on contiguous tracts of land), if utilized by one consumer and having single-metered service and a connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment), may be extended and furnished, if chosen by the consumer:
>
> ….
>
> (5) By any electric supplier if the premises are located outside the limits of a municipality.

O.C.G.A. § 46-3-8(a) (emphasis added).

In addition to expressly requiring the existence of at least one "new premises" before it can even come into play, the large load customer choice exception is explicitly subject to the "grandfather provision" set forth in Section 8(b) of the Act, which provides "***every electric supplier shall have the exclusive right to continue serving any premises lawfully served by it*** . . . , including any premises last and previously served by it which . . . have become disconnected from service for any reason, and including premises which . . . have been destroyed or dismantled and which are reconstructed . . . in substantial kind on approximately the same site. O.C.G.A. § 46-3-8(b) (emphasis added).

The Initial Decision incorrectly describes and applies the relationship between these subsections. It states, "[i]n the context of an existing Premises, rather than greenfield lots, the Commission deems a Premises new when it has been (i) destroyed or dismantled and (ii) reconstructed not in substantial kind." (Initial Decision, at 9.) This statement is incongruous—a premises cannot be both "existing" and "new" at the same time. The Initial Decision correctly found the existing Premises to be the premises as constructed by Dundee Mills and Springs Industries and served by Georgia Power continuously since 1991. This period of continuous lawful service included the expansions identified by the Hearing Officer, all of which fall within the exclusive service right and responsibility of Georgia Power as the assigned electric supplier. *See Cent. Ga. EMC*, 351 Ga. App. at 72-73. Moreover, this continuous service was requested by Nestle from the time of its initial occupancy of the Premises in 2017, through the start-up of its distribution warehouse and operations center in May of 2018, and until Nestle was offered the unlawful opportunity to change suppliers by Walton EMC in March of 2019. Thus, the changes to the building the Initial Decision recites are themselves part of the lawfully served Premises, not a different premises and not a "destroyed or dismantled" premises.

A. The New Premises Requirement Is a Mandatory Prerequisite to the Application of the Large Load Customer Choice Exception.

Contrary to the Initial Decision's characterization of Commission precedent, the Commission has recognized that it must give independent effect to the requirement that service pursuant to the large load customer choice exception can only be extended to *new premises.* The Initial Decision erroneously and impermissibly reads this requirement out of the Act. In contrast, in *Jackson EMC*, the Commission recently applied the plain meaning of "new" and the statutory definition of "premises" to require that the buildings, structures or facilities receiving electric service must have only recently come into existence:

> Georgia Power has not met its burden of proving that the Facility is a "new premises" under O.C.G.A. § 46-3-8(a) (large load exception). "Premises" is defined in the Territorial Act as "the building, structure, or facility to which electricity is being or is to be furnished . . . ." O.C.G.A. § 46-3-3(6). The Facility is not new. It did not recently come into existence. *See* Merriam-webster.com, http://www.merriamwebster.com/dictionary/new (defining "new" as "having recently come into existence"). It has been in existence for more than twenty years. While AWP has removed some of the equipment inside the premises, the premises itself is largely as it has been for over two decades. Even if all the plans described by AWP come to fruition, the premises itself could not be described as "new."

Jackson EMC at 8, Conclusions of Law No. 4.

Here, the largest of the buildings occupied and used by Nestle commenced receiving service from Georgia Power under Dundee Mills' ownership in 1991, and was significantly expanded in 1999 by its new owner (Springs Industries) to add a large weaving facility. The Commission's decision in *Greystone Power Corp v. Georgia Power Co.*, Docket No. 40803 (Initial Decision Mar. 23, 2018) ("*Greystone*") applied *Jackson EMC* to find that a ten-year old warehouse that had been extensively renovated with new offices, replaced substantial flooring to install drains for food product manufacturing, and appended new additions to its sides was not "new." The Commission found the continued existence of the "old" building dispositive:

> The Commission recently defined "new" as "having recently come into existence." [citing *Jackson EMC*]. The Building in the present case is not new. It did not "recently come into existence." It was built in 2007 and has been in existence for more than ten years. (Tr. 100:1-3) While Keurig made small additions on the west side of the Building, and modifications to the interior of approximately one-third of the Building, in no sense can the premises itself, the "building, structure, or facility" be described as "new" or "having recently come into existence." The Building was thus "renovated" or "modified" perhaps, but it is not "new." . . .
>
> This undisputed fact is, by itself, dispositive of the issue in this case. GPC has not demonstrated that the Building constitutes a "new premises" as required under O.C.G.A. § 46-3-8(a), i.e., a building, structure or facility that recently came into existence. Having failed to prove that the Building is a new premises, GPC has no right to serve the Building under the large load exception.

Greystone at 4-5 (footnotes omitted).

Section 8(a) of the Act, as an exception to the general requirement of exclusive assignment, must be strictly construed against the party claiming the benefit of the exception. *Sawnee Elec. Mem. Corp.*, 273 Ga. at 704 ("[L]egislative exceptions in statutes are to be strictly construed and should be applied 'only so far as their language fairly warrants.' (citing 82 CJS 446, Statutes, § 371)). All doubts should be resolved in favor of the general statutory rule, rather than in favor of the exemption.") (citing *Faust v. Buchanan*, 123 Ga. App. 15, 18 (1970)).

The Commission may not read the requirement of a new premises out of Section 8(a). *See McKinney v. Fuciarelli*, 298 Ga. 873, 874 (2016) ("When a statute contains clear and unambiguous language, such language will be given its plain meaning and will be applied accordingly.") (quoting *Opensided MRI of Atlanta LLC v. Chandler*, 287 Ga. 406, 407 (2010)); *Couch*, 291 Ga. at 362 ("[T]he fundamental rules of statutory construction . . . require us to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage."). The Initial Decision's elimination of the requirement of a "new premises" by aggregating some changes (including additions that Georgia Power lawfully served as part of the Premises, *see Cent. Ga. EMC*, 351 Ga. App. at 72-73) and declaring an existing building that had been expanded and modified to be "not in substantial kind" to itself, and therefore to be available to be served by an interloping electric supplier, is entirely contrary to the statutory requirement that the large load customer choice exception applies only in the case of a new premises—meaning a building, structure or facility that only recently has come into existence. Thus, no principled statutory construction permits Walton EMC to serve the existing Premises, and the Initial Decision unlawfully reads the "new premises" requirement out of the Act.

B. The Primary Clause of the Grandfather Provision Applies and Requires That Georgia Power Be Permitted to Continue to Serve the Premises.

The Initial Decision repeats its failure to consider directly applicable and dispositive statutory provisions in its treatment of the grandfather provision. The Initial Decision ignores Section 8(b)'s principal clause, including its subject and its predicate: "Notwithstanding any other provision of this part, but subject to subsections (c) and (h) of this Code section, ***every electric supplier shall have the exclusive right to continue serving any premises lawfully served by it*** on March 29, 1973, or thereafter lawfully served by it pursuant to this part . . . ." O.C.G.A. § 46-3-8(b). This statutory directive is fatal to the Initial Decision's conclusion that Walton EMC can serve the existing Premises. *See Cent. Ga. EMC*, 351 Ga. App. at 72-73; *Jackson EMC* at 12, Conclusions of Law No. 5 ("The Commission has long recognized the primacy of grandfather rights under the Territorial Act . . . .").

The next two clauses in Section 8(b) are <u>additions</u> to the protection afforded by the grandfather provision to assure the interpretation of "any premises lawfully served" by the incumbent electric supplier includes both premises "that have become disconnected from service for any reason" <u>and</u> "premises which . . . have been destroyed or dismantled and which are reconstructed . . . in substantial kind on approximately the same site." The Commission has previously recognized that the reconstruction clause is an expansion of the basic grandfather right of Section 8(b) and must not be considered a "loophole" or independent basis for customer choice. *See Jackson EMC* at 13, Conclusions of Law Nos. 6 and 7. Despite quoting from *Jackson EMC*, the Initial Decision fails to follow the Commission's construction of "destroyed or dismantled" to require taking something to pieces or destroying it in an orderly way. *Id.* at 14, Conclusions of Law Nos. 9 and 10.[2]

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2 The Commission in *Jackson EMC* adopted the exact construction of "dismantled" that Georgia Power unsuccessfully urged eight years earlier in *Georgia Power Co. v. Habersham Electric*

It was error for the Initial Decision to quote *Jackson EMC* and then fail to apply its analysis and definitions of the statutory language. Any interpretation of the language of the third clause of Section 8(b) must be read *in pari materia* with the other provisions of the same statute, including the requirement that service extended under Section 8(a) may only be extended to a "new premises." *See Ins. Dep't of the State of Ga. v. St. Paul Fire & Cas. Ins. Co.*, 253 Ga. App. 551, 552 (2002) ("Language in one part of the statute must be interpreted in light of the legislature's intent as found in the whole statute."). The principle of *in pari materia* and the grammar of the sentence require the interpretation adopted by the Commission in *Jackson EMC* that a building must be taken apart and destroyed before it may be considered "dismantled." Absent an interpretation equating "dismantled" to orderly disassembly, the requirement of a "new premises" in Section 8(a) would not be given effect.

Likewise, the reference to "reconstructed" is illogical if only furnishings or equipment have been removed. The dictionary defines "reconstruct" as "to construct again: such as . . . to build or assemble (something) again." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/reconstruct.[3] Absent the correct, narrow interpretation of the terms "dismantled" and "reconstructed," the first clause of Section 8(b) would be rendered ineffectual because an electric supplier could be lawfully and continuously

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Membership Corp., Docket No.23781-U (Order Adopting and Modifying Initial Decision, September 20, 2007) ("*Habersham EMC*").

3 In *Georgia Power Co. and Southwire Co., LLC v. Carroll Electric Membership Corp.*, Docket No. 38275 (March 30, 2015) ("*Southwire*"), Georgia Power argued that it satisfied the *Habersham EMC* standard and, in addition, that the changes had ruined (destroyed) the old building. The Commission appropriately found that the old building was "destroyed or dismantled" because it was ruined and unusable as a warehouse or consumer goods manufacturing plant due to fundamental changes, including among other things changes in the foundations, pits filled with chemicals for wire-pulling equipment, the opening of the building to the environment and the elimination of climate control. The Commission found that the premises was destroyed and unsuitable for its old purposes. Here, in contrast, the Premises always was and continues to be used as a manufacturing and distribution warehouse facility and remains suitable for those purposes.

serving a premises only to discover that it had been "dismantled" (loosely defined) while taking service. By definition, the destruction or disassembly of a building ends electric service. No building can be "destroyed or dismantled" if it continues to receive retail electric service.

The General Assembly meant what it said when it used the past-tense phrase "destroyed or dismantled," and the Commission must give effect to the plain meaning of the phrase, including its specific use of the word "or." "Destroyed or dismantled" is not a present tense option available in the disjunctive; rather, the past-tense phrase describes the state of a premises no longer extant unless and until "reconstructed." The dictionary definition of "or" makes this exact distinction: "used as a function word to indicate an alternative // coffee *or* tea // sink *or* swim, ***the equivalent or substitutive character of two words or phrases*** // lessen *or* abate . . . ." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/or (emphasis added). Section 8(b) of the Territorial Act does not address opposing options, such as "sink or swim." There is a critical distinction between the use of "or" as a disjunctive between terms in the present tense, which the Georgia Supreme Court explained "is to mark an alternative and present choice, implying an election to do one of two things," *Ga. Paper Starch Co. v. State Tax Bd.*, 174 Ga. 816, 819 (1932), and the past-tense phrase "destroyed or dismantled," which is used to describe the state of a premises, not a menu of present options. *See May v. State*, 295 Ga. 388, 391 (2014) ("[C]ontext is a primary determinant of meaning."). The Initial Decision erred when it failed to construe the statutory provisions as a whole and in accordance with their plain language and grammar, which requires a "dismantled" premises to be the substantive equivalent

of a "destroyed" premises.[4] The Hearing Officer's loose interpretation of "dismantled" taken out of its statutory context is an incorrect and invalid construction and must be rejected.

The Initial Decision's reliance upon speculative future additions to the building to conclude that the Premises had been destroyed or dismantled underscores how far the Initial Decision strays from the legislative intent and plain meaning of the Territorial Act. The Initial Decision recites that "Nestle has committed $220 million to prepare the Hartwell Pet Food Facility for startup in the fall of 2019, and an additional $80 million to reach initial full operation by the second quarter of 2020." (Initial Decision at 8.) The Initial Decision goes on to conclude, "[a]t a cost of over $300 million, these substantial modifications are in keeping, if not in excess of, the plain meaning of the words 'dismantle' and 'destroy' and an accurate reflection of previous Commission interpretations of the Territorial Act's mandate of 'dismantle or destroy.'" (*Id.* at 10.)

An intention to invest money to alter a structure, however, does not comport with the plain meaning of "destroyed or dismantled." Furthermore, these terms are used in the statute in the past tense, not the present, meaning the destruction must already have happened to the premises. Thus, the language in Section 8(b) does not permit a finding that a commitment to spend in the future can render a structure destroyed or dismantled in the present. In *Jackson EMC*, the Commission correctly affirmed a definition of "destroyed or dismantled" that is impossible to satisfy while a building is still operating and receiving electric service. *See Jackson EMC* at 14-15, Conclusions of Law Nos. 9-11. If the Act's stated purpose of assuring the "most efficient, economical and orderly rendering of retail electric service within the state" is to

4 The Commission's decision in *Southwir*e is consistent with this narrow definition. The Commission found that Southwire's "dismantling" of equipment and infrastructure, in addition to the extensive changes to the building itself, were so extensive and so fundamentally altered the premises that it *ruined* and therefore *destroyed* the old building. *See Southwire* at 13-14, Conclusions of Law Nos. 10 and 11.

be given effect, the "destroyed or dismantled" clause may not be contorted into a loophole to avoid the requirement of a new premises or to avoid the statutory protection of continuous lawful service to an existing premises.

IV. <u>The Initial Decision's "Not In Substantial Kind" Analysis Is Legally Flawed.</u>

Finally, the Initial Decision found that the Nestle premises is not "in substantial kind" to the Springs Industries premises because "[t]here are countless differences between the Springs Industries and Nestle premises in terms of both physical appearance and structure, and primary purpose and function." (Initial Decision at 11.) However, the sweeping statement that there are "countless differences" makes no assessment of their significance relative to the kind of "building, structure or facility" as is required by the Territorial Act. For example, while the Initial Decision finds that Nestle applied certain finishes to assure a food safe environment, it makes no finding that this constitutes a change to the building, structure or facility and results in a different kind of building, structure or facility. In fact, the undisputed evidence showed that the existing building is now and always has been classified for building code purposes as manufacturing and storage (warehouse). Further, some of the "countless differences" are unsupported by any evidence, such as: the employee count for Springs Industries (*Id.* at 5 (citing Tr. 355, which nowhere contains the claimed "evidence")); the finding that "[t]he textile mill remained vacant for the next decade while it was listed for sale" (*Id.* at 5); and the finding that "Nestle Purina has . . . replaced the air handling systems[.]" (*Id.* at 8).

Fundamentally, the Initial Decision makes the wrong analysis under the statute. Walton EMC needed to show that it was extending service to a new premises, as opposed to an existing premises that Georgia Power lawfully has served. Walton EMC failed to make that showing, and the Initial Decision does not make those findings either. As discussed above, the effort to create a

loophole in the grandfather provision's exclusive service right—created by the primary clause of Section 8(b)—by twisting the expansion of that exclusive service right in the third clause of Section 8(b) into an exception to that right, is unsustainable. Protecting the right to serve a building that replaces a destroyed or dismantled building, so long as the reconstructed building is "in substantial kind" to its predecessor, does not mean that merely changing the use of or "kind" of the building creates a new building. An existing building receiving lawful retail electric service does not vanish because its "kind" has changed, nor is the exclusive retail electric service right and obligation extinguished. There is no basis in the statute for the Commission to make a finding that a building is or is not "in substantial kind" except when deciding if a replacement, reconstructed building should be subject to grandfather service rights despite the original premises having been "destroyed or dismantled."

By distorting, isolating, and fundamentally misconstruing the statutory language, the Initial Decision failed to give effect to the primacy of the grandfather clause and the requirement of a new premises for the large load customer choice provision to apply under the Territorial Act. As an administrative agency, the Commission only has such authority as the General Assembly has conferred. *Ga. Power Co. v. Ga. Pub. Serv. Comm'n*, 211 Ga. 223 (1954). The Initial Decision exceeds that authority by sanctioning and failing to prevent Walton EMC's unauthorized extension of service to the Premises.

CONCLUSION

For all of these reasons, to uphold the plain language and express purposes of Territorial Act, the Commission should reverse the Initial Decision.

Respectfully submitted this 21st day of February, 2020.

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