Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
The Cable Television Association of Georgia, *et al.*,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. PA 01-002
	)	
Georgia Power Company,	)	
	)	
Respondent.	)	
	)	

ORDER

Adopted: August 7, 2003 **Released: August 8, 2003**

By the Chief, Enforcement Bureau:[1]

I. INTRODUCTION

1. In this Order, we grant in part a complaint filed by the Cable Television Association of Georgia ("CTAG") and certain of its members (collectively, the "Cable Operators")[2] against Georgia Power Company ("Georgia Power"), pursuant to section 224(b)(1)

[1] Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau, and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, Order, 17 FCC Rcd 4672 (2002).

[2] CTAG is an industry trade association acting on behalf of the following members: Alltel Teleview, Inc.; Blackshear TV Cable, Inc.; Charter Communications; City of Covington, Georgia; Comcast Cable Communications, Inc.; Cox Communications, Inc.; Insight Communications Co.; InterMedia Partners, L.P.; James Cable Partners; MCC Georgia, LLC; MediaOne Enterprises, Inc.; MediaOne of Colorado, Inc.; MediaOne of Greater Florida, Inc.; Northland Cable Television, Inc.; Northland Cable Properties Seven Limited Partnership; Northland Cable Properties Eight Limited Partnership; Northland Premier Limited Partnership; RGW Communications, Inc.; Southeast Cable TV, Inc.; Suburban Cable, Inc.; US Cable of Coastal-Texas, L.P.; and Waycross Cable Co., Inc. Complaint, File No. PA 01-002 (filed Jan. 17, 2001) ("Complaint"), Exhibit 1; Supplement, File No. PA 01-002 (filed Feb. 6, 2001) ("February 6 Supplement"), Exhibit 1; Supplement, File No. PA-01-002 (filed Sept. 5, 2001) ("September 5 Supplement"), Exhibit 1; Motion to Substitute Parties, File No. PA 01-002 (filed Dec. 6, 2001) at 2. On March 8, 2002, the original complainants endeavored to add Time Warner Cable and Flint Cable TV, Inc. as complainants. Supplement, File No. PA 01-002 (filed Mar. 8, 2002) ("March 8 Supplement"). *See also* Motion for Leave to File Supplement, File No. PA 01-002 (filed Mar. 8, 2002). Georgia Power objected to the amendment (although it did not object to two similar amendments made in the February 6 and September 5 Supplements), arguing that the March 8 Supplement unnecessarily protracts the proceeding, and that, through the March 8 Supplement, the Cable Operators are attempting to "bootstrap by supplemental pleading an entirely new issue [*i.e.*,

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of the Communications Act of 1934, as amended ("Act").[3] In short, the Complaint alleges that Georgia Power imposed unjust and unreasonable conditions of attachment and failed to negotiate in good faith with the Cable Operators regarding reasonable terms and conditions of a pole attachment agreement, and requests that the Commission order Georgia Power to comply with section 224 by providing the Cable Operators access to Georgia Power's facilities on reasonable terms and conditions.

2. As explained below, we conclude that the Complaint satisfies the Commission's rules and is ripe for review. We further find that some of the terms and conditions of attachment imposed by Georgia Power are unjust and unreasonable. We therefore order Georgia Power to bargain in good faith with the Cable Operators regarding just and reasonable terms to replace those terms declared unjust and unreasonable in this Order. Until the parties reach agreement, their prior pole attachment agreements will continue in effect, retroactive to the dates on which they were cancelled.

II. BACKGROUND

3. Georgia Power provides electrical power service in Georgia and elsewhere.[4] The Cable Operators attach their cables to Georgia Power's utility poles in order to provide cable television services to consumers.[5] Toward that end, as far back as 1990, the Cable Operators and Georgia Power entered into pole attachment agreements governing the terms and conditions of attachment to Georgia Power's poles.[6] On June 30, 2000, Georgia Power informed the Cable Operators that it was "updating its pole attachment agreements that predate the Telecommunications Act of 1996 ["1996 Act"]" and replacing those contracts with a uniform

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Georgia Power's imposition of a $53.35 rate] that was not raised in the Complaint and as to which Georgia Power has had no opportunity to respond." Opposition of Georgia Power Company to Supplement, File No. PA 01-002 (filed Mar. 21, 2002) ("Opposition to March 8 Supplement") at 2-3. We disagree with Georgia Power that addition of two cable operators is inappropriate. *See Florida Cable Telecommunications Ass'n, Inc. v. Gulf Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 9599, 9599, n.2 (Enf. Bur. 2003) (allowing the addition of cable operators who are "similarly-situated aggrieved complainants"). However, the Cable Operators cannot, via the March 8 Supplement, challenge Georgia Power's new annual pole attachment rate. *See RCN Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co.*, Order, 16 FCC Rcd 11857, 11858, ¶ 4 (Cable Servs. Bur. 2001) (describing appropriate means of introducing new issues in pole attachment complaint proceedings). As discussed *infra* section III.B.10., the Complaint objects to Georgia Power's alleged refusal to negotiate over a proposed contract provision allowing "retroactive rate adjustments." Complaint at 17, ¶¶ 91-95. The pleading does not contest imposition of a $53.35 annual rate. Complaint at 3-4 n.7 (complainants reserve their "right . . . to challenge this unlawful rate with the Commission"). Indeed, the Cable Operators appear to concede this fact, and subsequently have explained that they "separately and informally asked Georgia Power to clarify its intentions regarding the rate increases and the bases therein." Reply to Georgia Power's Opposition, File No. PA 01-002 (filed Apr. 2, 2002) ("Reply to Opposition to March 8 Supplement") at 4-5.

[3] 47 U.S.C. § 224(b)(1).

[4] Complaint at 2, ¶ 2.

[5] Complaint at 2, ¶ 5.

[6] *See* Complaint, Exhibit 3 (prior pole attachment agreements); February 6 Supplement, Exhibit 3 (prior pole attachment agreements); September 5 Supplement, Exhibit 3 (prior pole attachment agreements); March 8 Supplement (prior pole attachment agreements). When discussing the parties' prior pole attachment agreements, this Order, for convenience, hereafter will cite only Exhibit 3 to the Complaint. Such citation, however, should be understood to refer also to the several supplements that have augmented the contents of Exhibit 3.

new contract ("New Contract").[7] According to Georgia Power, it had been using the New Contract to govern its relationships with "all new cable and telecommunications companies since 1996," and, "to avoid unfair discrimination" and to promote administrative efficiency and consistency, it wished to have "pre-1996 attaching parties" sign the New Contract as well.[8] The June 30 Letter also stated that, if the Cable Operators did not execute the New Contract by December 31, 2000, Georgia Power would "deem" the Cable Operators "to have accepted the full terms and conditions [of the New Contract] . . . and such terms and conditions [would] govern such attachments and all future attachments."[9] The parties met for two hours on October 12, 2000 to discuss the terms of the New Contract,[10] but were unable to resolve their differences. Subsequent correspondence between the parties was not fruitful.[11]

4. The record reflects that the Cable Operators generally advocated retaining provisions from their prior pole attachment agreements with Georgia Power, and asked the utility to clarify and explain its position on a variety of the New Contract's terms.[12] The Cable Operators also asked Georgia Power to extend their prior agreements on a month-to-month basis.[13] In response, Georgia Power clarified two clauses and deleted two clauses that it found to be either unnecessary or drafted in error.[14] Georgia Power declined to make additional changes proposed by the Cable Operators, contending that the New Contract's provisions were reasonable, and that altering the New Contract's terms would result in "treat[ing] CTAG's members differently" than "numerous . . . other entities" that had agreed to the New Contract's terms.[15] Moreover, Georgia Power refused to extend the prior contracts on a month-to-month basis, and stated its intention to apply the New Contract's terms as of December 31, 2000, regardless of whether the Cable Operators had executed the agreement by then.[16] In addition,

[7] Complaint at 4, ¶ 13 & Exhibit 5 (Letter dated June 30, 2000 to Cable Operators from J. Darryl Wilson, Joint Use Coordinator, Georgia Power) ("June 30 Letter").

[8] Complaint, Exhibit 5 (June 30 Letter).

[9] Complaint, Exhibit 5 (June 30 Letter).

[10] Complaint at 5, ¶ 17; Response of Georgia Power Company, File No. PA 01-002 (filed Feb. 16, 2001) ("Response") at 32; Reply, File No. PA 01-002 (filed Mar. 15, 2001) ("Reply") at 7.

[11] *See* Complaint, Exhibit 5 (various memoranda and correspondence between counsel for the Cable Operators and counsel for Georgia Power).

[12] *See* Complaint, Exhibit 5 (various memoranda and correspondence between counsel for the Cable Operators and counsel for Georgia Power).

[13] Complaint, Exhibit 5 (December 14, 2000 Memorandum from Paul Glist, counsel for the Cable Operators, to David Armistead, counsel for Georgia Power ["December 14 Memorandum"]) at 3; Complaint, Exhibit 5 (December 22, 2000 letter to J. Darryll Wilson, Joint Use Coordinator, Georgia Power, from Scott Colavolpe, Contract Administration Manager, Law & Government Affairs, AT&T Broadband ["December 22 Letter"]); Complaint, Exhibit 5 (December 28, 2000 letter to J. Darryll Wilson, Joint Use Coordinator, Georgia Power, from Scott Colavolpe, Contract Administration Manager, Law & Government Affairs, AT&T Broadband ["December 28 Letter"]).

[14] Complaint, Exhibit 5 (November 1, 2000 letter to Paul Glist, counsel for the Cable Operators, from David Armistead, counsel for Georgia Power ["November 1 Letter"]) at 1-2.

[15] Complaint, Exhibit 5 (November 1 Letter) at 1.

[16] Complaint, Exhibit 5 (December 20, 2000 Letter to Paul Glist, counsel for the Cable Operators, from David H. Armistead, counsel for Georgia Power ["December 20 Letter"]) at 5; Complaint, Exhibit 5 (December 29, 2000 letter to Scott Colavolpe, AT&T Broadband, from J. Darryll Wilson, Joint Use Coordinator, Georgia Power ["December 29 Letter"]).

Georgia Power maintained that it would not permit additional new attachments until the Cable Operators executed the New Contract.[17]

5. The Cable Operators filed the Complaint on January 17, 2001. The Complaint alleges that Georgia Power violated section 224 of the Act by imposing unjust and unreasonable provisions in the New Contract,[18] and refusing to negotiate in good faith regarding those provisions.[19] In addition to declaratory relief, the Complaint requests that the Commission order Georgia Power (1) to comply with section 224 and negotiate in good faith just and reasonable terms in a new pole attachment agreement; (2) to reinstate and extend the parties' prior agreements until the parties successfully negotiate a new agreement; (3) to cease and desist from denying the Cable Operators access to Georgia Power's facilities unless the Cable Operators accept the New Contract; and (4) to refund all amounts paid, plus interest, that are in excess of just and reasonable charges.[20]

6. Georgia Power filed its Response on February 16, 2001. As a threshold matter, the Response argues that the Complaint should be dismissed, because the Complaint's allegations are unsupported and therefore do not establish a *prima facie* case, and because the case is not ripe for adjudication.[21] In addition, the Response contends that the terms of the New Contract are reasonable (especially in light of widespread safety violations allegedly perpetrated by the Cable Operators), and that Georgia Power negotiated with the Cable Operators in good faith.[22]

7. The Cable Operators filed a Reply on March 15, 2001. The Reply argues, *inter alia*, that Georgia Power's concern for safety and pole integrity is really a "smokescreen" raised for the first time in litigation and designed to mask the utility's true motive – to promote its "telecommunications affiliates' service offerings . . . [which] are among the most diverse and aggressive, if not the most, of any electric utility."[23]

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[17] Complaint, Exhibit 5 (December 20 Letter) at 5; Complaint, Exhibit 5 (December 29 Letter). For simplicity, we describe the activity that Georgia Power prohibited as new attachments, although the utility appears to have disallowed overlashing and certain expansion activities as well. *See* Reply, Exhibit 6 (February 13, 2001 e-mail to Cable Operators from J. Darryll Wilson, Joint Use Coordinator, Georgia Power).

[18] Complaint at 7-18, ¶¶ 29-99. The provisions relate to the following subject matters: overlashing, inspection rights, administrative fees, make-ready work, unauthorized attachment fees, drop poles, rights-of-way and easements, security interests, indemnities/limits of liability, worker releases, *force majeure*, rates, assignments, and termination.

[19] Complaint at 4-6, ¶¶ 13-22.

[20] Complaint at 19, ¶ 105.

[21] Response at 4-6.

[22] Response at 6-32.

[23] Reply, Summary. Approximately five months after the Cable Operators filed their Reply, Georgia Power moved to Strike the portions of the Reply in which the Cable Operators allegedly "mis-characteriz[e] the electric utility industry as anti-competitive and the cable television industry as pro-competitive." Motion for Leave and Motion to Strike, File No. PA 01-002 (filed Aug. 9, 2001) ("Motion to Strike") at 3. According to Georgia Power, the Reply "repeatedly makes impertinent, immaterial, and inflammatory 'factual' allegations without support." Motion to Strike at 3. We agree with Georgia Power that certain portions of the Reply (*e.g.*, pages 42-55) are largely irrelevant to resolving this dispute and, indeed, merely add unnecessary histrionics. We are not relying on those portions of the Reply in reaching our conclusions herein. Nevertheless, we deny the Motion to Strike, because it was not timely

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III. DISCUSSION

A. The Complaint Satisfies the Commission's Rules and Is Ripe for Review.

8. Georgia Power argues that the Commission should dismiss the Complaint, pursuant to sections 1.1404 and 1.1409 of the Commission's rules,[24] because the Cable Operators have not met their burden of establishing a *prima facie* case that the terms and conditions at issue are unjust and unreasonable.[25] Although the Complaint's allegations arguably could have been more detailed, the pleading as a whole sufficiently identifies the factual basis of the allegations.[26] Moreover, the Cable Operators attached their prior agreements with Georgia Power;[27] the New Contract;[28] correspondence between the parties regarding the negotiations and the New Contract's provisions;[29] and two Declarations that affirm the Complaint's factual allegations.[30] Viewing this information as a whole, we find that the Complaint establishes a *prima facie* case.

9. We also reject Georgia Power's contention that this dispute is not ripe for resolution, because the Complaint's allegations lack factual concreteness, and because there is not an "actual threat of injury, constituting denial of access for reasons other than meritorious capacity, safety, reliability, or engineering concerns . . . ."[31] Georgia Power is correct that the Cable Operators contest the New Contract provisions in their incipiency, rather than as enforced. This posture, however, does not preclude the Cable Operators from challenging the New Contract at this juncture, as section 224 expressly provides that the Commission has jurisdiction to determine the reasonableness of the terms of attachment.[32] Indeed, nothing in the statute requires attachers to wait until terms are enforced before contesting their reasonableness. The parties have well-defined disagreements as to whether specific sections of the New Contract are

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filed. Georgia Power's assertion that it waited five months in order to see whether the Cable Services Bureau would strike the Reply *sua sponte* (Reply in Support of Motions for Leave and to Strike, File No. PA 01-002 (filed Aug. 31, 2001) at 2) strains credulity, given the multitude of filings in this proceeding beyond those countenanced by the Commission's rules.

[24] 47 C.F.R. §§ 1.1404, 1.1409(b).

[25] Response at 4-5.

[26] Complaint at 4-6, ¶¶ 13-21; at 6-7, ¶¶ 24-26; at 7, ¶¶ 30-31; at 8, ¶¶ 33-34; at 9, ¶¶ 37, 40; at 9-10, ¶¶ 42-44; at 11, ¶¶ 49, 51-52, 54; at 12, ¶¶ 56, 59-61; at 13, ¶¶ 63, 65, 67-68; at 14, ¶¶ 70-73; at 15, ¶¶ 75-78; at 16, ¶¶ 80, 83, 85-86, 88-89; at 17, ¶¶ 91, 94, 96-97; at 18, ¶¶ 99-100.

[27] Complaint, Exhibit 3 (pole attachment agreements).

[28] Complaint, Exhibit 6 (New Contract).

[29] Complaint, Exhibit 5 (various memoranda and correspondence between counsel for the Cable Operators and counsel for Georgia Power).

[30] Complaint, Exhibit 7 (Declaration of Nancy Horne ["Horne Declaration"]), Exhibit 8 (Declaration of Harris L. Bagley ["Bagley Declaration"]). These declarations are based on "knowledge, information and belief." Section 1.1405(l) of the Commission's rules requires affiants to have "actual knowledge of the facts." 47 C.F.R. § 1.1404(l). Nevertheless, given that the declarants attest that they directly were involved in the events narrated in the Complaint, and given that Georgia Power has provided a detailed response to all of the Complaint's allegations, we find that Georgia Power has not been prejudiced by any alleged deficiencies in the declarations.

[31] Response at 5-6.

[32] 47 U.S.C. § 224(b)(1).

lawful. Moreover, Georgia Power has prohibited the Cable Operators from making new attachments since January 2001.[33] Thus, the issues in dispute are sufficiently crystallized for us to rule.[34] The Complaint, which challenges the terms of Georgia Power's New Contract, is thus clearly ripe for decision. We determine below on a claim-by-claim basis the extent to which the Cable Operators are able to demonstrate that a particular term is unreasonable on its face (and without the benefit of factual history regarding enforcement of the term).[35]

B. Several Provisions of the New Contract Are Unjust and Unreasonable.

10. In the Complaint, the Cable Operators claim that a number of the New Contract's terms and conditions are unjust and unreasonable, in violation of section 224 of the Act.[36] As discussed below, with respect to certain provisions, we agree. Before explaining our rationale, however, we address Georgia Power's principal defense to the Cable Operators' claims – preservation of safety.

1. Georgia Power's Safety Defense

11. Georgia Power contends that the terms and conditions of the New Contract are warranted in light of numerous violations of safety and prudent engineering procedures that the Cable Operators have committed.[37] According to Georgia Power, the New Contract implements

[33] Complaint at 6-7, ¶¶ 21-27; Complaint, Exhibit 5 (December 20 Letter) at 5; Complaint, Exhibit 5 (December 29 Letter); Reply at 15-16; Reply, Exhibit 5 (Declaration of Scott S. Colavolpe ["Colavolpe Declaration"]) at 3-4, ¶¶ 11-13; Reply, Exhibit 7 (Reply Declaration of Mark W. Fowler ["Fowler Reply Declaration"]) at 2, ¶ 5; Reply, Exhibit 15 (Declaration of Timothy M. Gregory ["Gregory Declaration"]) at 2, ¶ 5, at 4, ¶ 11.

[34] *See Texas Cable & Telecommunications Ass'n v. Entergy Services, Inc*., Order, 14 FCC Rcd 9138, 9142, ¶ 12 (Cable Servs. Bur. 1999) ("*TCTA v. Entergy*") (finding a dispute concerning a proposed pole attachment agreement to be ripe where the parties reached an impasse in their negotiations); *Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion and Order, 18 FCC Rcd 5484, 5485, ¶ 4 (Enf. Bur. 2003) ("A complaint alleging denial of access, in this case due to an allegedly excessive attachment rate, is valid and ripe for review under the Pole Attachment Act and the Commission's rules.").

[35] The Complaint challenges the reasonableness of a number of terms and conditions and, concomitantly, claims that Georgia Power failed to negotiate in good faith. Because we address the reasonableness of each of the challenged provisions below, we need not address separately whether the provision was negotiated in good faith. Rather, where we determine that the term is unreasonable, we order Georgia Power to negotiate in good faith with the Cable Operators to reach agreement as to a reasonable provision.

[36] In this regard, the Cable Operators challenge provisions of the New Contract pertaining to notice of pole replacements (Complaint at 11, ¶ 51) and the treatment of drop poles (Complaint at 12-13, ¶¶ 58-64). Georgia Power argues that neither of these subjects was raised in the parties' pre-Complaint negotiations (Response at 18, 20, 22), and the Cable Operators do not refute this assertion in their Reply. In addition, the Cable Operators contend generally (*i.e.*, without identifying a particular provision of the New Contract or explaining relevant factual context) that the New Contract "allows Georgia Power to refuse responsibility for its own subsequent make-ready costs." Complaint at 11, ¶ 49. It similarly appears that the parties did not address this issue in their pre-Complaint negotiations. The Commission's pole attachment complaint rules apply "when parties are unable to arrive at a negotiated agreement . . . ." *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12111, ¶ 10 ("*Pole Attachments Reconsideration Order*"). We order the parties to negotiate in good faith concerning these issues, in addition to the other issues identified in this Order.

[37] Georgia Power argues that the Cable Operators have an "abysmal record" of "blatant . . . [and] rampant" safety violations (Response at 7, 8); that, over a period of years, the Cable Operators have committed in Georgia 15,684 recorded violations of the National Electric Safety Code ("NESC") and accepted industry construction standards (Response at 7); that, over a three-year period, fifteen percent of all construction locations inspected on behalf of

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"sound industry-recognized procedures for ensuring attachments to utility poles are made in a safe and efficient manner without compromising the integrity of vital electric service operations."[38] Georgia Power claims that the New Contract "holds attaching entities responsible for the costs and rights associated with their violations, an element necessary to discourage violations and imprudent practices" and to make Georgia Power and its customers "whole for diligently policing and maintaining a safe distribution system."[39] Georgia Power also suggests that the fact that some attachers have signed the New Contract indicates the justness and reasonableness of its provisions.[40]

12. While we emphatically share Georgia Power's concern about safety, the record does not support its assertions that the host of new contract provisions are necessary to preserve safe operations. As an initial matter, we are struck by the fact that Georgia Power did not emphasize during the course of negotiations regarding the New Contract its grave concerns about the Cable Operators' purported failure to adhere to safety standards.[41] If many contractual provisions were in fact drafted in response to serious safety issues, Georgia Power undoubtedly would have explained its reasoning to the Cable Operators.[42] Moreover, as the Cable Operators persuasively argue, the Response exhibits relating to safety fall short of establishing a record of recent safety violations by the Cable Operators to justify the terms of the New Contract.[43]

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Georgia Power had to be shut down because of severe safety violations; and that, according to the Georgia Public Service Commission, Georgia cable television companies in general have hit gas pipelines over 1,400 times, because they violated the "24 inch tolerance zone required by law" (Response at 8).

[38] Response at 3.

[39] Response at 3.

[40] Response at 3-4, 12, 15, 17, 27. While average, typical, or standard conduct can be evidence of what is just and reasonable, it is not conclusive. *See, e.g.*, *Local Competitive Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16072, ¶ 1151 (1996) ("*Local Competition Order*") ("industry codes also will be presumed reasonable if shown to be widely-accepted objective guides for the installation and maintenance of electrical and communications facilities") (subsequent history omitted). Because attachers may have varying abilities to mount a legal challenge to the New Contract, we do not view a willingness to sign the New Contract, standing alone, as evidence of the reasonableness of its terms.

[41] Reply, Summary at 1; Reply, Exhibit 1 (Reply Declaration of Nancy Horne ["Horne Reply Declaration"]) at 6, ¶ 17 ("Georgia Power did not raise safety issues as a concern while discussing unauthorized attachments, or other provisions for that matter. Georgia Power also never discussed safety violations by CTAG members as a reason for imposing significantly more burdensome and objectionable terms in the new agreement."); Reply, Exhibit 2 Bagley Declaration at 3, ¶ 7 ("Georgia Power has never informed me or my staff of Comcast safety violations"); Reply, Exhibit 15 (Declaration of Timothy M. Gregory ["Gregory Declaration"]) at 4, ¶ 12 ("During the more than three years that I have served as [Comcast's safety point of contact for five counties], I have received no reports of safety code violations from Georgia Power, with the exception of minor incidents arising from natural phenomena such as severe storms, strong winds or accidents. In those limited instances, Comcast acted promptly to correct the problem."). *But cf.* Reply, Exhibit 5 (Colavolpe Declaration) at 2, ¶ 8 ("Safety and network reliability were discussed [at the October 12, 2000 meeting between the parties] but were not the specific overriding themes of the session.").

[42] *See* 47 U.S.C. § 224(f)(2) (a utility may deny access "for reasons of safety").

[43] *See* Reply at 18-20. Specifically, a spreadsheet submitted by Georgia Power purportedly documenting recent safety violations contains no dates (*see* Response, Exhibit B (Declaration of David Thompson ["Thompson Declaration"]), Exhibit 4 (Shutdowns of Companies as a Result of Violations)), and a summary of violations purportedly committed in large part by AT&T/MediaOne contains dated information that calls into question the report's accuracy (*see* Response, Exhibit B (Thompson Declaration), Exhibit 6 (FCC Complaint Post Inspection
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Indeed, Georgia Power cannot point definitively to a single incident of property damage or personal injury caused by one of the Cable Operators. The closest Georgia Power comes is to say that "a blatant NESC violation" by an un-named cable company was "the probable cause" of a fire,[44] and that, in the past few years "there has been a noticeable increase of serious injuries or fatalities to cable workers or the contractors working for cable companies."[45] Thus, while it may be the case that the Cable Operators' attachments have caused safety violations,[46] we do not have a record in this case on which to find that such violations are as recent, widespread and egregious as Georgia Power claims, or that the contract provisions Georgia Power has proposed were justified in preventing such violations from recurring.

2. Overlashing

13. Overlashing involves an attacher tying communication conductors to existing, supportive strands of cable on poles, which enables attachers to replace deteriorated cables or expand the capacity of existing facilities while reducing construction disruption and associated expense.[47] The parties' prior contracts allowed the Cable Operators to overlash without notice to Georgia Power, or on one day's notice, unless the overlashing would create a bundle exceeding six inches in diameter.[48] The New Contract provision challenged by the Cable Operators requires Georgia Power's written consent to any overlashing, which the utility may take up to 30 days to grant or deny.[49] This new provision is unjust and unreasonable on its face. The Commission has expressly articulated a policy promoting overlashing, and stated that "neither

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Report)). Moreover, we cannot tell from the latter exhibit which attaching entity is responsible for the alleged violations. *Compare* Response, Exhibit B (Thompson Declaration) at 2 ¶ 16 ("Exhibit 6 portrays the number of poles with violations committed by cable companies in specific nodes within a particular hub."), *with* Reply at 19 & Exhibit 8 (Declaration of James J. Yates ["Yates Declaration"]) at 5, ¶ 15 ("Georgia Power's attitude has always been that if there is a violation on a pole to which AT&T Broadband is attached, then AT&T Broadband is responsible for the violation . . . According to USS, AT&T Broadband is responsible for taking only 643 of the actions necessary to clear violations on poles located in Hub C1. Georgia Power and the telephone company are responsible for the other 867 actions needed.").

[44] Response at 8 n.24; Response, Exhibit B (Thompson Declaration) at 4, ¶ 17.

[45] Response, Exhibit K (Declaration of Michael E. Davis ["Davis Declaration"]) at 6, ¶ 23.

[46] The Cable Operators appear to acknowledge that their attachments sometimes caused unsafe conditions, but they urge that such problems always have been solved in the normal course of business under the parties' prior agreements. Reply at 21-23; Reply, Exhibit 3 (Declaration of William B. Durand ["Durand Declaration"]) at 5, ¶ 13; Reply, Exhibit 8 (Declaration of James J. Yates ["Yates Declaration"]) at 1-2, ¶ 4.

[47] *Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12140, ¶ 73. *See also Implementation of Section 703(E) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807, ¶ 62 (1998) ("*Telecom Order*") ("We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities. We think that overlashing is an important element in promoting the policies of Sections 224 and 257 to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.") (footnotes omitted).

[48] Complaint, Exhibit 3 (prior pole attachment agreements), § 6; Reply, Exhibit 1 (Horne Reply Declaration) at 4, ¶ 10.

[49] Complaint, Exhibit 6 (New Contract), §1.1.

the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."[50] Georgia Power is therefore ordered to negotiate in good faith a reasonable provision consistent with Commission precedent.

3. Inspection Rights

14. The parties' prior agreements required the Cable Operators to pay the costs of periodic pole surveys to occur every five years.[51] Under the New Contract, the Cable Operators must reimburse Georgia Power for the cost of periodic inspections – not more frequently than every 12 months or a shorter interval recommended by "NESC or any other industry standard."[52] The Cable Operators are also liable for a pro rata share of the cost of non-periodic inspections – that is, whenever Georgia Power either discovers or reasonably suspects any violation of the Agreement.[53] The Cable Operators characterize the New Contract as giving Georgia Power "a near-infinite source of unreasonable leverage over cable operators, readily susceptible to utility abuse."[54]

15. We agree with Georgia Power that it has the right to inspect its poles to ensure they are compliant with applicable safety standards. Consequently, we do not consider unreasonable a provision allowing inspections when Georgia Power "discover[s] a safety violation during the previous regular inspection."[55] Nor, in our view, is it unreasonable for the attacher that is responsible for the violation to bear the cost of such an inspection. The New Contract, however, is phrased more broadly. Rather than allowing inspections upon the discovery of a "safety violation," it provides for inspections when there is "*any* violation of this Agreement."[56] While Georgia Power seeks to justify the provision based solely on safety concerns,[57] this provision is far broader and, in our view, unreasonable. We therefore order Georgia Power to negotiate in good faith a reasonable provision.

16. The Cable Operators proffered no evidence that the New Contract's provision for routine inspections no more frequently than every twelve months is unreasonable. In contrast, Georgia Power presented evidence that such an interval is consistent with industry standard.[58] We therefore have no basis on this record to find that the yearly inspection right is unreasonable. Regardless of frequency, however, costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher

[50] *Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12141, ¶ 75.

[51] Complaint, Exhibit 3 (prior pole attachment agreements), § 8; Reply at 33.

[52] Complaint, Exhibit 6 (New Contract), § 5.

[53] Complaint, Exhibit 6 (New Contract), § 5.

[54] Complaint at 9, ¶ 36. *See also* Reply at 33-34.

[55] Response at 12.

[56] Complaint, Exhibit 6 (New Contract), § 5 (emphasis added).

[57] *See* Response at 12, 13.

[58] Response, Exhibit K (Davis Declaration) at 4, ¶ 12.

in accordance with the Commission's formula.[59] Consequently, we find the New Contract's provision requiring the Cable Operators to pay for routine pole inspections to be unreasonable.

4. Administrative Fees

17. The Cable Operators challenge a section of the New Contract requiring payment of Georgia Power's "reasonable costs and expenses in the enforcement of this agreement."[60] In addition, this provision requires the Cable Operators to pay for "administrative services not otherwise required to be performed by Georgia Power under this agreement, including . . . services related to credit facilities or consents . . . [and fees for] outside counsel and allocated costs of inside counsel . . . incurred in connection with any of the foregoing."[61] The Cable Operators assert that these fees are unreasonable because they are "unspecified and open-ended" and allow Georgia Power to recover "an excessive pole attachment rate."[62]

18. We agree that this provision of the New Contract is unreasonable. Through the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by a utility.[63] Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses.[64] A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses. The allocated portion of administrative expenses covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement. Georgia Power has not argued persuasively that recovering these costs through direct reimbursement rather than through the annual rental rate is preferable or reasonable.[65]

19. The Cable Operators also contest an up-front fee Georgia Power imposes for make-ready work, which the utility estimates will average $150 per pole.[66] According to Georgia Power, it applies this fee to the "actual make-ready construction costs, management and inspection costs, and engineering costs required to put any attachment on a pole."[67] Since

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[59] *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4393 ¶ 41 (1987) (a "separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs"). There is no suggestion in the record that costs of routine inspections are not included as part of Georgia Power's annual pole attachment rate calculated in accordance with the Commission's formula.

[60] Complaint, Exhibit 6 (New Contract), § 16.6.

[61] Complaint, Exhibit 6 (New Contract), §16.6.

[62] Complaint at 9-10, ¶¶ 42, 45. *See also* Reply at 34.

[63] When calculating the administrative portion of the carrying charges, the Commission allocates the total plant administrative expenses to yield a reasonable estimate of the administrative expenses related to poles. *Nevada State Cable Television Ass'n v. Nevada Bell*, Order on Reconsideration, 17 FCC Rcd 15534, 15539, ¶ 13 (Enf. Bur. 2002).

[64] *See* 18 C.F.R. pt. 101, Accounts 920, *et seq*.

[65] *See, e.g.*, *TCTA v. Entergy*, 14 FCC Rcd at 9143, ¶ 14.

[66] Complaint at 10, ¶ 44; Response at 15-16.

[67] Response at 15.

December 2000, Georgia Power has refused to allow certain attachments unless this fee is paid up front.[68]

20. In deciding an analogous question under section 224(h) of the Act, the Commission stated that "a utility may require an inquiring entity to *reimburse* the utility, on an *actual cost* basis, for the *actual* labor and administrative costs incident to providing maps, plats, and other data to entities making inquiries regarding access . . . ."[69] Applying the Commission's rationale to the instant matter, we find to be unreasonable Georgia Power's up-front make-ready fee, as well as the utility's practice of denying access to its poles until such fee is paid. Georgia Power first should incur the costs attendant to make-ready, and then seek reimbursement for its actual make-ready costs.

5. Unauthorized Attachment Fee

21. The Cable Operators challenge a provision in the New Contract that requires them to pay, for each unauthorized attachment, back rent (owed from the time of the last inspection of the poles to which the unauthorized attachment was made); ten percent of the back rent as an administrative fee; interest at eight percent above the prime rate; and Georgia Power's out-of-pocket expenses, including legal fees.[70] According to the Cable Operators, this provision is unjust and unreasonable, because it subjects them to "near-unlimited liability" for unauthorized attachments.[71] Georgia Power claims that unauthorized attachments are a "serious problem throughout Georgia,"[72] and pose significant safety hazards, because loading calculations will not have incorporated the additional weight on poles.[73] Georgia Power further argues that the more onerous penalty provisions provide the Cable Operators a needed incentive to follow the utility's application process.[74]

22. Penalties for unauthorized attachments are not *per se* unreasonable.[75] "Although an unauthorized attachment penalty may exceed the annual pole attachment rate, the amount of the penalty and the circumstances under which it is imposed must be just and reasonable."[76] We find the New Contract's unauthorized attachment fee to be unreasonable in several respects.

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[68] Complaint at 6-7, ¶¶ 23-26, at 10, ¶ 46; Complaint, Exhibit 8 (Bagley Declaration) at 2, ¶ 8.

[69] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185*, Order on Reconsideration, 14 FCC Rcd 18049, 18086, ¶ 107 (1999) (emphasis added).

[70] Complaint, Exhibit 6 (New Contract), § 4.2.

[71] Complaint at 12, ¶ 54-55. *See also* Reply at 36-37.

[72] Response at 18 & Exhibit F (Declaration of Obie Youngblood ["Youngblood Declaration"]) at 2, ¶ 9; Exhibit G (Declaration of Ron Marshall ["Marshall Declaration"]) at 2, ¶ 5; Exhibit K Davis Declaration at 4-5, ¶¶ 16-18. Neither the Response nor the declarations accuse the Cable Operators specifically of making unauthorized attachments.

[73] Response at 18.

[74] Response at 18.

[75] *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colo.*, Order, 15 FCC Rcd 11450, 11457, ¶ 10 (Cable Servs. Bur. 2000) ("*Mile Hi Bureau Order*"), *review denied*, 17 FCC Rcd 6268 (2002) ("*Mile Hi Commission Order*"), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[76] *Mile Hi Bureau Order*, 15 FCC Rcd at 11457, ¶ 10.

First, there is no evidence in the record demonstrating how frequently Georgia Power inspects its poles. Therefore, a hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate Georgia Power if an unauthorized attachment were installed long after the last inspection. While providing for calculation based on the date of the last inspection might be a reasonable proxy where no other information is available, it precludes the use of more precise information regarding attachment, which would permit an accurate calculation of back rent. Alternatively, if the use of actual attachment dates is not practical, a reasonable maximum period could be included to ensure that the back rent assessment is not unreasonable. Thus, Georgia Power must negotiate a provision that allows for such a reasonable calculation under appropriate circumstances.

23. Second, while it is appropriate for Georgia Power to recover out-of-pocket expenses directly attributable to unauthorized attachments, those expenses must be reasonable. A provision allowing recovery of all out-of-pocket expenses, without regard to their reasonableness, is overbroad.

24. Finally, there is insufficient record evidence allowing us to conclude that the ten-percent administrative fee, which Georgia Power states is a penalty,[77] and the interest provision, are either reasonable or unreasonable on their face. We will look closely at application of provisions such as these in the specific circumstances presented, and we will consider evidence of industry practice to determine whether their application is reasonable. We may conclude that application of such provisions is reasonable only in extraordinary situations of egregious conduct by an attacher. In any event, because of the other flaws identified with the unauthorized attachment provision described herein, Georgia Power is ordered to negotiate in good faith a reasonable provision relating to fees and expenses for unauthorized attachments.

6. Rights-of-Way and Easements

25. Section 6 of the New Contract states that the Cable Operators have "acquired and shall continue to acquire in [their] own name and at [their] expense any and all easements," but clarifies that the New Contract does not give the Cable Operators "any right to use Georgia Power's rights-of-way which must be separately agreed upon for further consideration."[78] The Cable Operators argue that, pursuant to section 621 of the Act,[79] they have the right to "use pre-existing compatible utility easements for the installation of their cable facilities."[80] According to the Cable Operators, the New Contract deprives them of that right, because they must reach a separate agreement with Georgia Power to obtain access to any easements.[81]

26. We agree with the Cable Operators, albeit on alternative statutory grounds. Section 224 of the Act expressly mandates that "[a] utility shall provide a cable television system

[77] Response at 19. *See Mile Hi Commission Order*, 17 FCC Rcd at 6272, ¶ 10 (general contract principles prohibit the enforcement of unreasonable penalties for breach of contract). As discussed *supra*, section III.B.1., we reject Georgia Power's assertion that the Cable Operators have committed recent, widespread safety violations.

[78] Complaint, Exhibit 6 (New Contract), § 6.

[79] 47 U.S.C. § 541.

[80] Complaint at 13, ¶ 66.

[81] Reply at 38.

. . . with nondiscriminatory access to *any* . . . right-of-way owned or controlled by it.[82]

27. Georgia Power argues that not requiring the Cable Operators to pay for "piggybacking" on the utility's private easements would violate the Fifth Amendment, because it would constitute a taking.[83] We agree with the Cable Operators, however, that because the Commission's rate formula assures that Georgia Power receives just compensation under the Constitution, [84] the utility is not entitled to additional payment for private easements.[85]

7. Security Interests

28. The Cable Operators object to section 9 of the New Contract, which deals with security interests. Specifically, the Cable Operators argue that sections 9.1 (requiring the Cable Operators to furnish a bond to Georgia Power in an indeterminate amount), 9.2 (granting Georgia Power access to the Cable Operators' financial records, so that Georgia Power can make a creditworthiness determination), and 9.3 (giving Georgia Power a security interest in the Cable Operators' equipment, depending on creditworthiness) are unjust and unreasonable terms.[86]

29. We agree with the Cable Operators. To be sure, Georgia Power has an interest in ensuring that the Cable Operators actually pay the amounts owed to Georgia Power. The "creditworthiness matrix" established in section 9 of the New Contract, however, gives Georgia Power unfettered access to sensitive financial information and unilateral authority to determine whether an attacher is creditworthy. Based on this determination, Georgia Power, by itself, assesses whether posting of a bond is appropriate and, if so, in what amount. These type of open-ended provisions invite arbitrary and anticompetitive conduct that is antithetical to the principles underlying section 224. Moreover, Georgia Power fails to explain why provisions of the parties' prior pole attachment agreements (*e.g.*, requiring the Cable Operators to provide evidence of insurance coverage or to post a bond in a definite amount)[87] afforded the utility insufficient protection.

8. Indemnities/Limits of Liability

30. The Cable Operators object to several aspects of the New Contract's provisions concerning indemnities/limits of liability, namely sections 8.1 (requiring the Cable Operators to

[82] 47 U.S.C. § 224(f)(1) (emphasis added).

[83] Response at 22 (citing *Media General*, 991 F.2d at 1175; *Cable Holdings*, 953 F.2d at 602).

[84] *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987) (finding that it could not be seriously argued that a rate providing for the fully allocated recovery of costs is confiscatory); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1360 (11th Cir. 2002) ("before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.").

[85] *Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12162, ¶ 123 ("utility enjoys full use of its land rights, and an attacher's physical occupation of a portion of space on a pole does not restrict the utility's use of land for its distribution network").

[86] Complaint at 14, ¶¶ 70-74 & Exhibit 6 (New Contract), §§ 9.1, 9.2, 9.3; Reply at 39-40.

[87] *See* Complaint, Exhibit 3 (prior pole attachment agreements) at 17, ¶ 30.

indemnify Georgia Power from and against liability, but not vice versa), 8.2 (placing a six-month limitation on claims against Georgia Power), and 8.4 (allowing Georgia Power to control the defense of claims against the Cable Operators).[88] Georgia Power's arguments in defense of these provisions miss the mark, and we find the provisions to be unreasonable.

31. As an initial matter, Georgia Power relies generally on the Cable Operators' allegedly poor safety practices as a justification for the challenged provisions, claiming that it should not be required to pay for damages it did not cause.[89] As explained above,[90] however, the record in this case does not support the safety defense. In any event, the Cable Operators do not contend that indemnification provisions generally are unreasonable; instead, they claim that these particular provisions are unreasonable. Second, Georgia Power argues that, because of mandatory access, a non-reciprocal indemnification provision is warranted given that the Cable Operators allegedly pose a "far greater, and unwanted, risk" to Georgia Power in the pole attachment process.[91] A reciprocal indemnification provision, however, simply would result in each party assuming responsibility for losses occasioned by its own misconduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the "bad actors," then the Cable Operators more frequently would be called upon to indemnify. Finally, Georgia Power offers no response to the Cable Operators' argument that they should not be forced to bring claims in a shorter period than required by law or to relinquish their right to defend claims against them. We cannot discern any rational basis to support those contractual provisions.[92]

9. *Force Majeure*

32. The Cable Operators complain that the New Contract's *force majeure* clause should be, but is not, reciprocal.[93] Specifically, according to the Cable Operators, they should not be liable to pay rent for pole space, if a pole is unusable because of a *force majeure*.[94] In response, Georgia Power asserts that the clause appropriately is one-sided, because a *force majeure* should not permit the Cable Operators to "escape responsibility" for carrying out their obligations to ensure compliance with safety, reliability and engineering concerns.[95] Without such a clause and in the event of a *force majeure*, Georgia Power contends, it would be required to "assume" the Cable Operators' obligations to attend to safety and reliability issues.[96]

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[88] Complaint at 15, ¶¶ 75-79 & Exhibit 6 (New Contract), §§ 8.1, 8.2, 8.4; Reply at 41.

[89] Response at 24-25.

[90] *See* section III.C.1., *supra*.

[91] Response at 24.

[92] The Cable Operators also challenge a related provision of the New Contract requiring workers to sign a release in Georgia Power's favor. Complaint at 16, ¶¶ 80-84 & Exhibit 6 (New Contract), § 2.4; Reply at 42. The provision is substantially similar to provisions contained in the parties' prior pole attachment agreements, which the Cable Operators describe as "model[s] of reasonableness." Reply at 28. The provision, however, should be clarified to provide that a such a release would not apply when Georgia Power is grossly negligent or commits willful misconduct.

[93] Complaint at 16, ¶¶ 88-89 & Exhibit 6 (New Contract), § 15; Reply at 43.

[94] Reply at 43.

[95] Response at 28.

[96] Response at 28.

33. This argument is a *non sequitur*. By definition, a *force majeure* is an event that can be neither anticipated nor controlled.[97] Thus, it makes little sense to speak in terms of the Cable Operators "escaping responsibility" when safety violations occur due to circumstances beyond their anticipation or control. In the event of a *force majeure* that affects one party's attachments, we anticipate that the party immediately would take steps to bring its attachments into a safe condition.

34. We believe it is unreasonable for the *force majeure* clause not to be reciprocal. In the event, for example, that a pole is rendered unusable because of inclement weather, the Cable Operators should be no more responsible for paying rental for unusable pole space than Georgia Power should be responsible in damages for the fact that the pole is unusable.

10. Rates

35. The Cable Operators contest the New Contract's provision regarding rate adjustments,[98] which allows Georgia Power at the end of every year to adjust the rate for the current year via a "true-up" process.[99] The Cable Operators contend that this provision contravenes the Commission's clear rule requiring 60 days' advance notice of any pole attachment rate increase.[100] Georgia Power asserts that there is "no reason to presume a rate increase from this provision," and that, if there is a rate increase, notice of "any possible increase" has been given more than 60 days in advance.[101]

36. We agree with the Cable Operators that the rate provision is unreasonable. Section 1.1403(c)(2) of the Commission's rules states that a "utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to . . . [a]ny increase in pole attachment rates . . ."[102] Blanket notice of a *possible* rate increase is not equivalent to notice of an *actual* rate increase. Accordingly, the New Contract's true-up provision is unreasonable.

11. Assignments

37. The Cable Operators argue that the assignment provision of the New Contract is unreasonable, because it is not reciprocal, or, at a minimum, does not include an exemption for "affiliate transfers or . . . transfers to parties that have existing pole attachment agreements."[103] We find no merit in this claim. First, we are persuaded by Georgia Power's argument that, in order to maintain the safety and reliability of its pole plant, it must ascertain the identity of all attachers, and that reciprocity is not required, because the Cable Operators do not have the same obligation to ensure the operational integrity of the utility pole infrastructure.[104] Second, the

[97] Black's Law Dictionary 254 (Pocket Edition 1996).

[98] Complaint at 17, ¶¶ 91-95 & Exhibit 6 (New Contract), § 7.1.

[99] Response at 29.

[100] Complaint at 17, ¶ 92.

[101] Response at 29.

[102] 47 C.F.R. § 1.1403(C)(2).

[103] Complaint at 17, ¶ 96; Reply at 45. *See* Complaint, Exhibit 6 (New Contract), § 16.1.

[104] Response at 30.

clause obligates Georgia Power not to withhold unreasonably or deny its consent to assignments,[105] so the Cable Operators are by no means barred from assigning their rights.[106] Finally, the New Contract's assignment clause is essentially the same as the assignment provision of the parties' prior agreements,[107] which the Cable Operators describe as "model[s] of reasonableness."[108]

12. Termination

38. The parties' prior agreements had terms of at least five years and were terminable on six months' notice by either party.[109] The New Contract has no fixed term and is terminable at any time by Georgia Power on 90 days' notice, "to the extent not prohibited by law."[110] The Cable Operators assert that the shorter notice provision is unjust and unreasonable, because, given that Georgia Power now allegedly requires agreements to be for a term of one year, parties will be negotiating a new contract every year after nine months into their current contract.[111] Georgia Power argues that it needs flexibility in the newly "deregulated power industry," and that "ninety days is more than enough time to negotiate the terms of a new agreement."[112] These justifications, in our view, are strained. Specifically, it is unclear how deregulation of the power industry translates into a need to terminate contracts on less notice than in the past. Moreover, given the difficulties the parties have had in negotiating the New Contract, we are not sanguine that ninety days is a sufficient time frame to re-negotiate a contract. Accordingly, we order the

[105] Complaint, Exhibit 6 (New Contract), § 16.1.

[106] In considering requests for assignment in connection with affiliate transfers and transfers to incumbent attachers, we fully expect Georgia Power, absent extraordinary circumstances, to grant its consent expeditiously.

[107] *See* Complaint, Exhibit 3 (prior pole attachment agreements), § 27.

[108] Reply at 28.

[109] Complaint, Exhibit 3 (prior pole attachment agreements), § 29.

[110] Complaint, Exhibit 6 (New Contract), § 10.

[111] Complaint at 18, ¶ 101; Reply at 46.

[112] Response at 31. Georgia Power also argues that it negotiated in good faith about this position, because it amended the termination clause as it originally appeared in the New Contract to state that it may exercise termination rights only to the extent not prohibited by law. Response at 31. *See* Complaint, Exhibit 5 (November 1 Letter) at 2. It is hardly a negotiation concession, however, for a party to clarify in a contract that it will obey the law.

parties to negotiate based on business needs and industry practice a reasonable termination clause.

IV. CONCLUSION AND ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the relief requested in the Complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

40. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, 1.1410, and 1.1415 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, 1.1415, that Georgia Power cease and desist from enforcing the New Contract's provisions found by this Order to be unreasonable, and that Georgia Power refund to the Cable Operators, retroactive to the date the Complaint was filed, any amounts paid pursuant to the unreasonable provisions.

41. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, 1.1410, and 1.1415 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, 1.1415, that Georgia Power resume negotiations with the Cable Operators, that Georgia Power bargain in good faith with the Cable Operators concerning the New Contract's provisions found by this Order to be unreasonable, and that, pending negotiations, the parties' prior pole attachment agreements remain in effect, retroactive to the date Georgia Power canceled the agreements, until the earlier of (a) the execution of a mutually-acceptable pole attachment contract or (b) one year from the date of release of this Order.

42. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311, 1.1410, and 1.1415 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1410, 1.1415, that in the event the parties cannot reach an agreement one year from the date of release of this Order, they shall file a joint report to with the Chief of the Market Disputes Resolution Division of the Enforcement Bureau, summarizing the status of the negotiations, including a description of the issues that remain in dispute and the parties' respective positions concerning those issues.

43. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the Motion For Leave to File Motion to Substitute Parties, File No. PA 01-002 (filed Dec. 6, 2001); Motion to Substitute Parties, File No. PA 01-002 (filed Dec. 6, 2001); Motion for Leave to File Supplement, File No. PA 01-002 (filed Mar. 8, 2002); Motion for Leave to File Supplement, File No. PA 01-002 (filed Mar. 27, 2002); Motion for Leave to File Surreply and Surreply Regarding Supplement, File No. PA 01-002 (filed Apr. 17, 2002), ARE GRANTED.

44. IT IS FURTHER ORDERED, pursuant to sections 0.111, 0.311, and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.1401-1.1418, that the Motion For Leave and Motion to Strike, File No. PA 01-002 (filed Aug. 9, 2001), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau