

No. A25A0407

In the
Court of Appeals of Georgia

State of Georgia,

Appellant,

v.

Dovetel Communications, LLC; Truvista Communications of Georgia,
LLC; and Parker Fibernet, LLC,

On Appeal from the Superior Court of Fulton County
Superior Court Case No. 2023CV388057

BRIEF OF APPELLANT

David R. Cook	435130	Christopher M. Carr	112505
<i>Special Ass't Attorney General</i>		<i>Attorney General</i>	
		Logan B. Winkles	136906
		<i>Deputy Attorney General</i>	
		Alkesh Patel	583627
		<i>Sr. Ass't Attorney General</i>	
Cook & Associates		Office of the Attorney General	
3330 Cumberland Blvd., St. 185		40 Capitol Square, SW	
Atlanta, Georgia 30339		Atlanta, Georgia 30334	
(770) 818-4442		(404) 458-3236	
cook@cookassociateslegal.com		apatel@law.ga.gov	
		<i>Counsel for Appellant</i>	

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INTRODUCTION

The Georgia Constitution provides a very limited waiver of sovereign immunity for declaratory judgment actions in which a State department exceeds its authority or violates the law. GA. CONST. Art. I, § 2, ¶ 5. But in an unprecedented expansion of this sovereign immunity waiver, the trial court issued a declaratory judgment – not based on an unlawful or unconstitutional act – but to prevent the State from breaching a contract. Neither the Georgia Constitution nor Georgia precedent permits such an expansive waiver of sovereign immunity.

The Georgia Department of Transportation issued several permits to DoveTel Communications, LLC d/b/a SyncGlobal Telecom, TruVista Communications of Georgia, LLC, and Parker FiberNet, LLC – all of whom are telecommunications providers – to “construct, operate and maintain” certain wires, fibers, and other telecom equipment along state road rights-of-way. [V2-4–5 at ¶¶ 1-3 & 11; V2-7 at ¶ 11.] The permits were expressly revocable at the Department’s discretion and did not “operate to create or vest any property right in the [permit] holder.” [V2-286–349 at ¶¶ 5 & 8; e.g., V3-70, V3-79 & V3-88.]

While the permits authorize the telecom providers to install and maintain telecom equipment, the Department and the telecom providers also entered into contracts, between 1999 and 2012, providing for permit fees. [V2-28–50.]

In 2021, the Department amended its rules and regulations to, *inter alia*, increase the fee for telecom permits. Ga. Comp. R. & Regs. 672-11-.04 (Adopted Feb. 24, 1986; Amended Sept. 13, 2021; Nov. 11, 2021.) [V2-289 at ¶ 13.] As a result, the Department notified the telecom providers of the need to enter new contracts to reflect the requirements and fee structure of the new rules. [V2-104.] On October 3, 2023, the Department notified the telecom providers that, regardless of whether a new contract was negotiated, all new permits issued after January 1, 2022, would be subject to the new rules and increased fees. [Id.] The Department, however, did not revoke a permit or terminate any contract with the telecom providers, but merely required that permits issued after January 1, 2022, comply with the new rules. [Id.]

In response, the telecom providers sought a court order to declare its contracts with the Department are valid and enforceable, avoiding the new regulatory fees. [V2-4–114 at ¶¶ 93-95.] But rather than addressing any question for which sovereign immunity *might* be waived (i.e., some way in which the Department exceeded its authority or violated the law), the trial court instead construed and declared the contracts’ durations – a decision that exceeds the sovereign immunity waiver for government acts “outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States.” [V3-198–228.] The trial court then compounded its error by *enjoining* the State from “interfering with [the telecom

providers'] contractual rights" [V3-228], even though the Constitution expressly prohibits a trial court from entering an injunction until *after* awarding declaratory relief. GA. CONST. Art. I, § II, ¶ V.

The trial court's error has state-wide repercussions and causes deep constitutional concerns. Foremost, the trial court's orders create an unprecedented rule that, under Paragraph V(b), parties can seek declaratory relief against the State in contract cases even when the State *has not* violated a law or acted outside the scope of lawful authority. The trial court's orders also allow private parties to use the State's rights-of-way without regard to regulatory changes, safety concerns, or increases in cost of maintaining the rights-of-way. In essence, the trial court's summary judgment order curtails the authority of future sessions of the General Assembly and the State Transportation Board. This Court should reverse.

JURISDICTION

The trial court's orders denying the State's motion to dismiss and granting summary judgment to appellees were entered on August 1, 2024. The State filed its notice of appeal on August 30, 2024. This Court has jurisdiction under O.C.G.A. § 5-6-34(a)(1) because this is a case not reserved to the Supreme Court's exclusive jurisdiction, *see* Ga. Const. Art. VI, § VI, ¶ III; O.C.G.A. § 15-3-3.1(a).

ENUMERATION OF ERRORS

1. The trial court's orders exceeded the waiver of sovereign immunity in Paragraph V(b).
2. The trial court erred in declaring the contracts are not terminable at will and in failing to apply the rule against binding successors.
3. The trial court failed to construe the contracts in conformity with the Department's current regulations.
4. The trial court's summary judgment order could place the Department in violation of Section 253 of the Communications Act.

STATEMENT

A. Factual Background

The Department issued various permits to the telecom providers. [V3-68–95.] While the locations and type of utilities subject to the permits vary, the permits themselves are form documents containing virtually identical terms. [Id.] Specifically, the permits authorize the telecom providers to “construct, maintain and operate the following described utility facility within” a certain right of way. [V3-69; V3-78; V3-87]. The permits also contain “General Provisions,” which provide that “this *license* is for permissive use only and the placing of utility facilities upon public property pursuant to this permit shall not *operate*

to create or vest any property right in the holder.” [V2-286–349 at ¶¶ 5 & 8 & Ex. A, B & C; e.g., V3-70, V3-79 & V3-88 (emphases added).] The General Provisions also note that the permit “may be revoked at the pleasure of the Department upon thirty (30) days written notice to the utility.” [Id.]

In addition to the permits, between 1999 and 2012, the Department also entered separate contracts with the telecom providers that provide for permit fees and work ancillary to installation of facilities. [V2-28–34; V2-35–43; V2-44–50.] While the terms of the contracts vary slightly among the telecom providers, each contract provided that the telecom providers would pay an annual permit fee, which included \$294.00 per permit, to defray the Department’s administrative costs incurred in overseeing utilities on its public rights-of-way. [V2-30; V2-37; V2-46.]

The contracts also provided that they will “remain in force and effect until [the Department] and [the telecom provider] enter into a subsequent agreement regarding the subject matter hereof.” [V2-33 at § 14; V2-42 at § 14; V2-49 at § 13]. Based upon that language, which the trial court referred to as the “Duration Clause,” the telecom providers contend that the Department must be enjoined from terminating the contracts or applying the fee established by the amended regulations. [V2-26; V3-206]

In 2021, for the first time in nearly three decades, the Department amended its rules and regulations to, *inter alia*, increase the permit fees

for use of the Department's rights-of-way. [V2-10–11 at ¶¶ 30 & 31.] To ensure that its contracts reflected the new rule, the Department began negotiating new agreements with various communications utilities. [V2-12–13 at ¶¶ 40 – 43.] On October 3, 2023, the Department notified communications utilities that “any communication utility provider that has not executed or made arrangements to execute a new [contract] with the Department, will be required to adhere to [the Department's] requirements for all permits issued on or after January 1, 2022, in accordance with the current Rule.” [V2-104]. Importantly, however, the Department has not terminated any contracts or revoked or suspended any permit. [V2-80.]

In response to the Department's final notice, the telecom providers brought this declaratory judgment action seeking a declaration that (a) the “Duration Clause” in the contract is a valid, enforceable, and constitutional provision; (b) that the contracts are perpetual and cannot be unilaterally terminated by the Department; and (c) the contracts provide a perpetual easement. [V2-26.]

B. Proceedings Below

In October 2023, the telecom providers filed their verified petition seeking declaratory relief and alleging a waiver of sovereign immunity under Paragraph V(b). [V2-4–114.] The State answered and

moved to dismiss.¹ [V2-149–167; V2-168–189.] On February 12, 2024, the telecom providers filed a motion for summary judgment, and the trial court heard oral arguments on all pending motions. [V2-214–237; V3-232–319.] On August 1, 2024, the trial court entered an order denying the State’s motion to dismiss, granted the telecom providers’ motion for summary judgment, and “enjoined [the State] from interfering with Petitioners’ contractual rights” under the contracts. [V3-180–197; V3-198–228.] On August 30, 2024, the State filed its notice of appeal. [V2-1–3.]

STANDARD OF REVIEW

The grant of summary judgment is reviewed under a *de novo* standard of review, with all evidence viewed in the light most favorable to the nonmovant. *Whitehead v. Green*, 355 Ga. App. 610, 614 (2022). The denial of a motion to dismiss raising sovereign immunity grounds is also reviewed *de novo*. *Munro v. Dep’t of Transp.*, 368 Ga. App. 785, 786 (2023).

¹ The arguments supporting the State’s enumerations of error were raised in its initial and reply brief supporting its motion to dismiss (V2-168–189; V2-264–285), its response to the telecom providers’ motion for summary judgment (V3-366–396), and its statement of material facts and theories of defense (V3-397–426).

SUMMARY OF ARGUMENT

The trial court's orders and injunction are erroneous for at least four reasons. *First*, the trial court's summary judgment order exceeded the waiver of sovereign immunity in Paragraph V by declaring that the contracts are valid and enforceable contracts and enjoining the State from terminating the contracts or enforcing its regulations. Paragraph V(b) does not permit the trial court to grant declaratory relief or enjoin the State for potential breaches of contract, but is limited to declarations that the State acted "outside the scope of lawful authority or in violation of the laws or Constitution of this State or the Constitution of the United States." GA. CONST. Art. I, § II, ¶ V(b). *Second*, the contracts are terminable at will because they contain indefinite durations, and consequently, the trial court's ruling to the contrary violates the rule against binding successor governments. *Third*, the trial court failed to construe the contract in conformity with the current regulations. *Fourth*, the trial court's decision could put the Department in violation of the federal Communications Act, 47 U.S.C. § 253. For those reasons, this Court should reverse.

ARGUMENT

- I. **The trial court's summary judgment order exceeded the waiver of sovereign immunity in Paragraph V(b).**
 - A. **Paragraph V(b) does not waive sovereign immunity for a declaratory judgment to interpret contracts.**

Under a recent constitutional amendment, the State has

waived sovereign immunity for declaratory relief from acts of the State that are “outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States.” GA. CONST. Art. I, § II, ¶ V(b). Here, the trial court did not declare that the State violated Georgia’s laws or Constitution. [V3-227–228.] Instead, the trial court noted that the “main dispute between the parties . . . is simply the interpretation” of contracts. [V3-207–208.] But Paragraph V(b) does not waive sovereign immunity for an alleged breach of contract.² *Compare Starship Enterprises of Atlanta, Inc. v. Gwinnett County*, 319 Ga. 293, 301 (2024) (applying Paragraph V(b) to an act (ordinance) that allegedly violated the Georgia Constitution); *Kuhlman v. State*, 317 Ga. 232, 235-6 (applying Paragraph V(b) to an act (denial of application) that allegedly violated O.C.G.A. § 16-1-131(d)).

Sovereign immunity is a harsh doctrine and waiver of it must be strictly interpreted. *Lathrop v. Deal*, 301 Ga. 408, 418 (2017). “The doctrine of sovereign immunity, as enshrined in our Constitution, bars suits against the State and its employees in their official capacities unless a statute or the Constitution itself specifically waives that

² The State has waived sovereign immunity as to “any act ex contractu for the breach of any written contract,” GA. CONST. Art. I, § II, ¶ IX, but the telecom providers have not elected to proceed under that waiver. Instead, the telecom providers proceed exclusively under Paragraph V(b). [V2-5 at ¶ 5.]

immunity.” *State v. SASS Group, LLC*, 315 Ga. 893 (2023). This applies to claims for declaratory and injunctive relief. *See Lathrop*, 301 Ga. at 409. Unless the State has waived sovereign immunity, a court lacks subject-matter jurisdiction to adjudicate the claim. *McConnell v. Dep’t of Labor*, 302 Ga. 18, 19 (2017).

“The party seeking to benefit from the waiver of sovereign immunity bears the burden of proving such waiver.” *Tyson v. Board of Regents*, 212 Ga. App. 550, 551 (1994) (citing *Bd. of Regents of the Univ. Sys. of Ga. v. Doe*, 278 Ga. App. 878, 881 (2006)) (citations omitted). Waivers of sovereign immunity “are in derogation of the common law and thus are to be strictly construed against the finding of a waiver.” *Centennial Vill., LLC v. Fulton County Sch. Dist.*, 359 Ga. App. 616 (2021). Implied waivers are not favored. *Dep’t of Transp. v. Mixon*, 312 Ga. 548, 551 (2021). It must be clear from the statute or constitutional provision upon which the claimant relies “that immunity is waived and the extent of such waiver.” *Georgia Lottery Corp. v. Patel*, 353 Ga. App. 320, 322 (2019).

Here, the telecom providers failed to meet their burden because, even though the petition alleged a violation of law, the telecom providers abandoned that position. [V3-206 at n.1.] Instead, the exclusive basis for declaratory relief was the potential breach of the contracts. [V3-207–208; V3-227–228.] While such declaratory relief could arguably be a remedy in declaratory judgment actions between

private parties, Paragraph V(b) is not so expansive. *See, e.g., Ga. Dep't of Labor v. RTT Assoc., Inc.*, 299 Ga. 78, 82 (“General rules of contract law that might otherwise support a claim . . . between private parties, however, will not support a claim against the state or one of its agencies if the contract is not in writing so as to trigger the waiver of sovereign immunity.”).

Rather than grappling with whether the Department had exceeded its authority or violated some law by demanding the telecom providers comply with the new regulations, the trial court greatly expanded the limited waiver contained in Paragraph V(b) to opine on the meaning and interpretation of contracts and simply declared as a matter of law that the contracts are valid and enforceable. [V3-207–208; V3-227–228.] But that is not an unlawful or unconstitutional act on behalf of the Department. At most, the telecom providers allege that the Department “attempt[ed] to force Petitioners to sign a new agreement” [V2-15 at ¶ 51]. That is not an alleged unlawful or unconstitutional act.³

There is no allegation that the Department terminated any agreement. [V3-202 (“GDOT is not terminating any contracts.”)]. Additionally, there is no dispute that the permits themselves “may be revoked at the pleasure of the department upon thirty (30) days written

³ *See Lovell v. Raffensperger*, 318 Ga. 48, 50 (2024) (“[I]n order to take advantage of Paragraph V’s limited waiver of sovereign immunity, a plaintiff must comply with the provisions of Paragraph V(b)(2).”).

notice to the utility.” [V2-286–349 at ¶¶ 5 & 8; e.g., V3-70, V3-79 & V3-88.] At most, the Department directed the telecom providers to renegotiate the contracts to comply with the amended regulations. [V2-12 at ¶¶ 38 & 41–43.] Moreover, the only allegations of a violation of law or the Constitution were abandoned by the telecom providers, as recognized by the trial court. [V3-206 at n.1; V3-276–277.] Thus, the trial court declined to rule that the Department exceeded its lawful authority or violated the laws or Constitution and, therefore, exceeded the limited waiver of sovereign immunity in Paragraph V(b). For this reason, this Court should reverse. *See Satcher v. Columbia County*, 319 Ga. 633, 636-37 (2024) (reversing “the injunction issued in this case [that] exceeds the scope of the sovereign immunity waiver”).

B. The trial court erred in granting injunctive relief that was unnecessary to enforce its judgment.

The trial court further erred by entering injunctive relief simultaneously with its declaratory judgment. [V3-227–228.] Paragraph V(b) provides a limited waiver of sovereign immunity for declaratory judgment actions. GA. CONST. Art. I, § II, ¶ V(b)(1). That is, it waives sovereign immunity “so that a court awarding declaratory relief . . . may, *only after awarding declaratory relief*, enjoin such acts to enforce its judgment.” *Id.* (emphasis added). Here, the trial court issued both declaratory and injunctive relief, which violates the plain language of

Paragraph V(b) waiving sovereign immunity for injunctions only after awarding declaratory relief.

Before Paragraph V(b) was enacted, sovereign immunity barred injunctive relief against the State. *Lathrop*, 301 Ga. at 408. And while Paragraph V(b) provides a limited waiver for injunctive relief, it does so only to “the extent that citizens obtain a favorable ruling on their claim for declaratory relief” and need an injunction to “enforce the court’s judgment.” *State v. SASS Group, LLC*, 315 Ga. 893, 894 (2023). An injunction is a harsh remedy. *Deerlake Homeowners Association, Inc. v. Brown*, 361 Ga. App. 860, 862 (2021). And it “is axiomatic that government officials are presumed to act in accordance with the law.” *Smith v. Northside Hospital, Inc.*, 302 Ga. 517, 524 (2017). Thus, there is good reason that the citizens of Georgia limited the waiver of sovereign immunity for injunctive relief only to the extent necessary to enforce a previously entered order.

But here the trial court ignored Paragraph V(b)’s plain language and enjoined the State, Department, and any officer or employee thereof “from interfering with Petitioners’ contractual rights.” [V3-228]. Because there had been no previous order granting declaratory relief, this was not necessary to enforce an order as there had been no waiver of sovereign immunity under Paragraph V. The trial court’s injunction should be reversed.

II. The trial court erred in declaring the contracts were not terminable at will.

Under Georgia law, an agreement without a fixed duration – an indefinite duration – is terminable at will by either party. *Voyles v. Sasser*, 221 Ga. App. 305, 305 (1996); *Blackstock v. Atlanta Newspapers, Inc.*, 94 Ga. App. 313, 314 (1956); *Coffee v. Gen. Motors Acceptance Corp.*, 5 F.Supp. 2d 1365, 1376 (S.D. Ga. 1998) (applying Georgia law).

The court in *CAG Food Servs., LLC v. Shaver Foods, LLC* – a federal case applying Georgia law – distinguished contracts with definite and indefinite durations. It held that a contract contains an indefinite duration when it terminates upon an “event [that] may never occur.” No. 1:18-CV-2753-RWS, 2019 WL 12762541, at *3 (N.D. Ga. Mar. 19, 2019). But when the contract may be terminated upon “a specified event that guarantees an end date,” the contract contains a definite duration. *Id.* Thus, when considering whether a contract has a definite or indefinite duration, courts must differentiate between an “event [that] may never occur” and a “specified event that guarantees an end date.” *Id.*

In applying Georgia law, the Eleventh Circuit Court of Appeals offered an exception to the general rule that indefinite-duration contracts are terminable at will. *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1280–81 (11th Cir. 2003). Contracts with indefinite durations are not terminable at will if they contain express

failure-to-perform or default conditions that authorize termination. *Id.* (citing *Coffee v. General Motors Acceptance*, 5 F.Supp.2d 1365 (S.D. Ga.1998)). In *Iraola & CIA*, which also interpreted Georgia law, the Eleventh Circuit held that the express failure-to-perform or default conditions must be “reasonably objective, measurable conditions” that put the parties on notice that the failure to meet these conditions would result in termination. *Id.* at 1281. For the exception to apply, the express performance or default conditions must be “written, precisely formulated, and readily understood.” *Id.*

Here, the contracts contain no definite duration. [V2-33 at § 14; V2-42 at § 14; V2-49 at § 13.] The contracts provide that they “. . . shall remain in force and effect until Department and [telecom provider] enter into a subsequent agreement regarding the subject matter thereof.” [Id.] As such, the contracts will not end on a date certain, and the parties may never agree to enter into another agreement. Moreover, there is no termination provision for failure to perform or default.⁴ Therefore, the contracts are indefinite in duration and terminable at will.

⁴ The trial court relied heavily on *GAPIII, Inc. v. Seal Indus., Inc.*, 338 Ga. App. 101 (2016), applying New York law, to conclude that the contracts were not terminable at will. However, the contract at issue in *GAPIII* contained an express termination provision. *Id.* In contrast, the contracts here contained no termination provision, but included a provision to merely enter into another agreement. [V2-33 at § 14; V2-42 at § 14; V2-49 at § 13.]

The trial court erred in holding that the contracts are of definite duration. [V3-214–222; V3-227–228]. The trial court’s summary judgment order confuses (i) contracts with ambiguous contract language with (ii) contracts with indefinite durations. [V3-214–217.] Specifically, the trial court relied on *State of Ga. v. Fed. Def. Program, Inc.* and three cases cited therein. 315 Ga. 319 (2022) (citing *Alexis, Inc. v. Werbell*, 209 Ga. 665 (1953); *Mori Lee, LLC v. Just Scott Designs, Inc.*, 325 Ga. App. 625 (2014); *Triple Eagle Assoc. v. PBK, Inc.*, 307 Ga. App 17 (2010)). However, even though the cited cases use the words “indefinite,” “definite,” and “duration” – they actually considered the uncertainty, vagueness, or ambiguity of language used in a contract – not the duration of the contract.

Here, the contract *language* is not vague or ambiguous. However, the contract *duration* is not fixed and is, as a result, indefinite. As such, the contracts are terminable at will.

III. Even if the contracts are not terminable at will, they are amended as a matter of law to conform with the new regulations.

Applying Georgia law, the contracts are terminable at will. But even if the contracts lasted forever, they are deemed amended to conform to the Department’s new regulations. Contracts in regulated industries are deemed amended by subsequent reasonable regulations. *All Star, Inc. v. Georgia Atlanta Amusements, LLC*, 332 Ga. App. 1, 8–9

(2015). This is because parties who enter a regulated industry, like the telecommunications and utility sphere, are “presumed to contract with the knowledge that, regardless of the terms they agree to, subsequent reasonable regulation might require them to amend one or more of those terms.” *Id.* Specifically, contracts are deemed amended to account for changes in regulatory fees. *All Star*, 332 Ga. App. at 9–12 (citing *Union Dry Goods Co. v. Ga. Pub. Svc. Corp.*, 248 U.S. 372 (1919) and *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)).⁵

In *Union Dry Goods*, the Georgia Public Service Commission entered a contract to sell electricity at a rate for a five-year period. 248 U.S. 372, 374-5. After one year, the Railroad Commission of Georgia increased the rate, and the Public Service Commission applied the new rate to the contract. *Id.* at 373. The customer sought an injunction arguing the rate increase impaired its contract rights. *Id.* at 374. The Supreme Court disagreed because the contract was entered within a rate-regulated industry and the State had appropriately exercised its police power in regulating such rates. *Id.* at 375.

⁵ Even though these cases address the adjustment of fees, their rationale applies equally to any regulatory changes, such as maintenance or safety requirements. *See All Star, Inc.*, 332 Ga. App. At 8-9 (noting contracts are subject to the State’s police powers to protect the health and safety of the public).

Here, the contracts are related to a regulated industry [V2-6–8, at ¶¶ 9–11, 15–17], and the telecom providers knew or should have known that the Department had the authority to regulate the placement of utility facilities and set the associated fees. O.C.G.A. § 32-6-174; *see All Star*, 332 Ga. App. at 9. Thus, in enjoining the Department from enforcing its contracts, as conformed to the amended regulations, the trial court failed to account for the principles of *All Star, Inc.* and *Union Dry Goods*. As such, this Court should reverse the trial court’s ruling.

IV. The trial court’s interpretation of the contracts unlawfully binds future, successor members of the Department’s governing body.

Next, the trial court’s declaratory judgment and injunction violates the rule against binding successor governing bodies. Contracts of state and local governments may not extend beyond the term of the members of the governing body. *Madden v. Bellew*, 260 Ga. 530, 531 (1990); *Aven v. Steiner Cancer Hospital*, 189 Ga. 126, 127 & 132-3 (1939). While a statute expressly adopts this principle for municipalities,⁶ “[t]his rule is not of a statutory origin, and is not peculiar to Georgia. It is a codification of a principle . . . , which is applicable generally to legislative or governmental bodies.” *Madden*, 260 Ga. at 531 (applying the rule to counties) (citing *Williams v. West Point*, 68 Ga. 816 (1882); *see also*

⁶ O.C.G.A. § 36-30-3 (“One council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government.”).

Horne v. Flores, 557 U.S. 433, 449 (2009)). Here, the contracts arise from the Department's express authority under O.C.G.A. §§ 32-6-170 and 32-6-174. But as interpreted by the trial court, the contracts contravene the uniform fee structure set by regulations passed pursuant to such statutes. Ga. Comp. R. & Regs. 672-11-.04. Because the use of public property, and the establishment of uniform fees for the use thereof, is a governmental function of the Department, the contracts cannot bind the Department in perpetuity.

In declaring the contracts effective forever, the trial court misinterpreted the two cases it relied on for its holding. First, the trial court cited *State v. State Toll Bridge Authority*, 210 Ga. 690 (1954), for the proposition that the State is bound by any contract it lawfully enters – even perpetual contracts. [V3-223–225.] Based on this single case, contrary to decades of precedent, the trial court created a sweeping exception to the rule against binding successors – a rule founded on constitutional principles. But the trial court misinterprets *State Toll Bridge*.

There, the contractual rights at issue were expressly authorized by both a constitutional amendment and act of the General Assembly. *State Toll Bridge*, 210 Ga. at 695. Because the rule against binding successors is constitutional, a mere enactment by the legislature would not suffice. See 1983 GA. CONST. Art. I, § II, ¶ V(a) (authorizing declaratory relief against legislative acts in violation of the

Constitution). Here, no such constitutional amendment or act of the legislature authorizes the contracts to bind the Department in perpetuity.

Furthermore, the trial court's interpretation of *State Toll Bridge* ignores decades of case law that applies the rule against binding successors. Thus, the constitutional rule against binding successors prohibits the contracts from undermining the Department's ability to set rates for use of its rights-of-way, along with updating maintenance and safety rules. Additionally, the trial court misapplied *Georgia v. Trustees of Cincinnati Southern Railway* to end-run the rule against binding successors. [V3-224–225.] First, in that case, the U.S. Supreme Court did not even contemplate the rule against binding successors. *Cincinnati S. Ry.*, 248 U.S. 26, 26–29 (1918). Instead, the Supreme Court applied a common-law equitable principle to hold that the State of Georgia granted a perpetual easement to the railroad, which could not be revoked by the State. *Id.* Unlike the contracts here, the Supreme Court considered the Georgia statute in question to effect a conveyance

of property, which could not be revoked unless the right to revoke was reserved explicitly in the instrument.⁷ *Id.*

Put simply, the rule against binding successors forbids the trial court's ruling that the contracts can bind the governing body of the Department in perpetuity.

V. The Trial court's decision could place the Department in violation of 47 U.S.C. § 253.

By declaring the contracts to be effective forever and ignoring the impact of amended regulations, the trial court also erred in concluding a static fee within the contracts would not lead to a violation of Section 253 of the Communications Act. [V3-225–226.] Under Section 253, the Department has the right to “manage the public right-of-way or to require fair and reasonable compensation from telecommunication providers, on a competitively neutral and nondiscriminatory basis. . . .” 47 U.S.C. § 253(c). However, the effect of the trial court's summary

⁷ It is not clear why the trial court would rely on cases that contemplate the distinction between revocable licenses and irrevocable, perpetual grants of property rights. Because the telecom providers abandoned their property-rights claim, the trial court declined to rule on it. [V3-206 at n.1.] If the trial court is resurrecting the property rights claim under the guise of the rule against binding successors, then the trial court has committed another error that justifies reversal. The telecom providers' property rights claims are based in equity, and such claims are not permitted against the State. *Georgia Dep't of Cmty. Health v. Data Inquiry, LLC*, 313 Ga. App. 683, 687 (2012).

judgment order likely would lead to price disparities between telecommunication providers and further limit the Department’s ability to manage and maintain its rights-of-way in conformity with Section 253. Thus, the trial court erred, and its decision should be reversed.

CONCLUSION

For the reasons set out above, this Court should reverse the orders of the court below.

Respectfully submitted.

Rule 24 Certification: This submission does not exceed the word count limit imposed by Rule 24.

/s/ David R. Cook

David R. Cook 435130
Special Ass’t Attorney General

Christopher M. Carr 112505
Attorney General

Logan B. Winkles 136906
Deputy Attorney General

Alkesh Patel 583627
Sr. Ass’t Attorney General

Cook & Associates
3330 Cumberland Blvd., St. 185
Atlanta, Georgia 30339
(770) 818-4442
cook@cookassociateslegal.com

Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3236
apatel@law.ga.gov
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with, Georgia Court of Appeals Rule 6(b), I certify that there is a prior agreement with counsel for Appellees, Avery S. Jackson, to allow documents in a .pdf format sent via email to suffice for service. I also certify that I have, on this day, sent by email a copy of the foregoing APPELLANT BRIEF to the following counsel of record:

Richard G. Tisinger, Jr.
Avery S. Jackson
TISINGER VANCE, P.C.
100 Wagon Yard Plaza Carrollton
Carrollton, Georgia 30117
770-214-5119
rtisingerjr@tisingervance.com
ajackson@tisingervance.com

Sean Stokes
KELLER AND HECKMAN LLP
1001 G Street NW, Suite 500 West
Washington, DC 20001
202-434-4100
stokes@khlaw.com

Counsel for Appellees

/s/ David R. Cook
Cook & Associates
3330 Cumberland Blvd., St. 185
Atlanta, Georgia 30339
(770) 818-4442
cook@cookassociateslegal.com

Counsel for Appellant