

IN THE COURT OF APPEALS  
STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
Appellant,	:	
	:	
v.	:	Appeal Case No.: A25A0407
	:	
DOVETEL COMMUNICATIONS,	:	
LLC, F/K/A SYNCHRONET	:	
GLOBAL, LLC, D/B/A	:	
SYNCGLOBAL TELECOM;	:	
TRUVISTA COMMUNICATIONS	:	
OF GEORGIA, LLC; AND	:	
PARKER FIBERNET, LLC,	:	
	:	
Appellees.	:	

---

**BRIEF OF APPELLEES**

---

Avery S. Jackson  
 Georgia Bar No. 095503  
 Richard G. Tisinger, Jr.  
 Georgia Bar No. 713110  
 Tisinger Vance, P.C.  
 100 Wagon Yard Plaza  
 Carrollton, Georgia 30117  
 (770) 834-4467 (Telephone)  
 (770) 834-0360 (Facsimile)  
[ajackson@tisingervance.com](mailto:ajackson@tisingervance.com)  
[rtisingerjr@tisingervance.com](mailto:rtisingerjr@tisingervance.com)  
 Counsel for Appellees

Sean A. Stokes  
 District of Columbia Bar No. 430298  
 Keller & Heckman, LLP  
 1001 G Street NW  
 Suite 500  
 Washington, DC 20001  
 (202) 434-4193 (Telephone)  
[stokes@khlaw.com](mailto:stokes@khlaw.com)  
 Counsel for Appellees (Pro Hac Vice)

## **INTRODUCTION**

Appellees, as regulated telecommunications companies, provide telecommunications services to customers in areas of Georgia pursuant to certificates of authority issued by the Georgia Public Service Commission. (V2-7). The Georgia Department of Transportation (the “Department” or “GDOT”), as an agency of the State of Georgia (“Appellant”), entered into a “Right-of-Way Permit Contract” with Appellees on November 23, 2005, April 16, 2012, and March 25, 1999, respectively (the “ROW Contracts”), regarding the installation of facilities within the public right-of-way. (V3-561-562). Each of the ROW Contracts provides: “This contract and agreement ... shall remain in force and effect until [GDOT] and the [Appellees] enter into a subsequent agreement regarding the subject matter hereof” (the “Duration Clause”). (V3-562-563). Appellees, in reliance on the ROW Contracts, and in the performance of their duty to serve the public, have expended significant sums of money, time, and effort in the installation of wires, cable, and equipment in the public right-of-way for decades to expand Broadband internet in Georgia. (V2-17). Appellees have further engaged in long-term future business planning, making significant generational investments in the public right-of-way, in reliance on the Duration Clause in the ROW Contracts. (Id.)

The State Transportation Board recently passed a new rule increasing the standard fee schedules for new right-of-way agreements but also allowed GDOT to

individually negotiate alternative fees with individual providers. See, Ga. Comp. R. & Regs. 672-11-.04 (Adopted Feb. 24, 1986; Amended Sept. 13, 2021; Nov. 11, 2021) (the “New Rule”). (V3-563-564). The new rule contains a grandfather clause for prior existing agreements like the ROW Contracts. (V3-563). This grandfather clause does not contain any provision that the prior agreements provide for annual adjustments of the fee. (Id.).

GDOT’s Chief Engineer testified to the State Transportation Board (the “Board”), when the Board was considering adopting the New Rule, that “GDOT is not terminating any contracts” and “[i]f there is a fee schedule set forth in the contract, it will remain.” (V3-564). Immediately after the Chief Engineer stated “GDOT is not terminating any contracts,” she further stated, “These agreements will remain in full force and effect if desired by both parties.” (Id.).

Despite GDOT’s prior express assurances, GDOT now desires to do, and is attempting to do, the very thing it expressly promised to the Board and the providers that it would not do--terminate the existing contracts. (V3-568-569). GDOT seeks to not only impose the new fee schedule on Appellees, who have prior existing contracts, but, even more egregiously, GDOT attempts to terminate Appellees’ existing ROW Contracts and force Appellees to enter into new right-of-way use agreements on vastly different and one-sided terms. (Id.). GDOT also threatens to disrupt Appellees’ permitting operations if the new agreements were not signed by

a deadline. (V3-568). In addition, GDOT stated that even if Appellees refused to enter into the new agreements, then GDOT would unilaterally impose the terms of the new agreements on the Appellees. (V3-568).

GDOT claims the right to unilaterally terminate the ROW Contracts, leaving Appellees with no agreements to use the public right-of-way or force Appellees to enter into new one-sided agreements on unfavorable terms. (V3-569). GDOT also claims that the Duration Clause in the ROW Contracts is contrary to constitutional principles and is unenforceable against GDOT. (Id.). To protect Appellees' businesses and investments from GDOT's bureaucratic overreach, Appellees brought this action seeking a declaratory judgment that the ROW Contracts are valid and enforceable against GDOT and that the ROW Contracts are not unilaterally terminable at will by GDOT. (V2-4-114). The Trial Court granted summary judgment on these issues in favor of Appellees. (V3-562-591).

### **STATEMENT OF CASE**

Appellees have the “right to construct, maintain, and operate their lines and facilities upon, under, along, and over the public roads and highways and rights of way of this state with the approval of the county or municipal authorities in charge of such roads, highways, and rights of way.” O.C.G.A. § 46-5-1(a)(1). Additionally, Appellees have the “right to construct, maintain, and operate their lines through or over any lands of this state.” Id.

GDOT has the authority to make reasonable regulations concerning the maintenance of public rights-of-way pursuant to O.C.G.A. § 32-6-2. Likewise, GDOT has the authority to promulgate reasonable regulations governing the installation, construction, and maintenance of equipment and appliances of any utility in, on, along, over, or under any part of the state highway system or any public road project. O.C.G.A. § 32-6-174. GDOT requires permits and accompanying fees for the installation of any public utility facilities within the public rights-of-way. Ga. Comp. R. & Regs. 672-11-.01(2).

GDOT, as agency of the State of Georgia empowered to contract in that name pursuant to O.C.G.A. § 32-2-1, *et. seq.*, negotiated, drafted, and entered into the individual ROW Contracts with Appellees to allow Appellees to proceed with the installation of its facilities within the public right-of-way under the jurisdiction of GDOT. (V3-561-562). By their terms, the ROW Contracts are to remain in effect and cannot be terminated until the parties enter into a subsequent agreement regarding the same subject matter. (V3-562-563).

The ROW Contracts established a blanket lump sum permit fee in the amount of \$294 annually for each permit for the use of the public right-of-way. (V2-172). GDOT referred to these form agreements with the \$294 annual permit fee as falling within the “294” category. (V2-12, 244). For approximately twenty years GDOT has

issued these permits and Appellees have paid the annual utility permit fees pursuant to the ROW Contracts. (V2-219).

In 2021, for the first time since first adopting regulations in 1986, GDOT amended its rules under Chapter 672-11-.04 relating to the installation, relocation, and management of utilities on public rights-of-way. See, Ga. Comp. R. & Regs. 672-11-.04 (Adopted Feb. 24, 1986; Amended Sept. 13, 2021; Nov. 11, 2021). While the New Rule provides generally for a new fee schedule, it also contains an “Alternative Procedure for Assessing Fees”, which provides: “The Department and a Communications Utility may have previously entered into an agreement for payment of an annual lump sum amount prior to the adoption of this Chapter. Such agreements will remain in full force and effect if desired by the Communications Utility and the Department or may be renegotiated.” Ga. Comp. R. & Regs. 672-11-.04 (Effective November 11, 2021).

GDOT’s Chief Engineer testified to the State Transportation Board, at its August 2021 board meeting, regarding the Board’s consideration of the proposed New Rule. (V3-564). GDOT’s Chief Engineer presented the following power point slide to the State Transportation Board regarding existing Agreements like the ROW Contracts with Appellees:



## Comments: Existing Agreements

### Comments:

- The rules should state that all agreements will be made available for public inspection. Otherwise, utilities cannot monitor whether their agreement with GDOT is discriminatory.
- GDOT is terminating all current contracts that it has with any utility. This means that utilities will pay more. Also, the agreed upon payment schedules will change.
- Individual agreements offer ambiguous definition of what is acceptable and brings uncertainty.

### Responses:

- As has always been the case, all agreements are subject to production under the Open Records Act. There is no need to repeat the provisions of the Open Records Act in these Rules.
- GDOT is not terminating any contracts. These agreements will remain in full force and effect if desired by both parties. If there is a fee schedule set forth in the contract, it will remain.
- Fees in any agreement must be based upon a reasonable approximation of the average cost to GDOT associated with the administration of the permits.

97

(V3-565). The State Transportation Board enacted the New Rule based in part on GDOT's responses to the comments and testimony from GDOT's staff that GDOT was not terminating any existing agreements. (Id.).

On May 4, 2023, GDOT notified communications providers under the "294" category, including Appellees, regarding the New Rule, GDOT's desire not to continue under any old agreements, like the ROW Contracts, and the need to enter into a new standard form right-of-way agreement. (Id.). GDOT sent another notice to the Appellees and other utility providers on May 31, 2023, requesting the Appellees and other utility providers move forward with executing a new proposed standard form Right-of-Way Use Agreement. (Id.). GDOT again sent a notice to the Appellees and other utility providers on September 6, 2023, requesting the Appellees

and other utility providers move forward with executing a new proposed standard from Right-of-Way Use Agreement (the “Proposed ROW Agreement”). (V3-566).

The new standard form Proposed ROW Agreement contains certain provisions that substantially change the terms of Appellees’ business relationship with GDOT as has been in place under the ROW Contracts for decades. (V3-566). The Proposed ROW Agreement terminates the prior ROW Contracts, limits the terms of the new agreement to five years, expressly allows GDOT to unilaterally terminate the agreements with no cause upon 30 days’ notice, and expressly disclaims that previously approved permits, as well as subsequently approved permits, create, grant or vest Appellees with any property rights. (Id.).

The Proposed ROW Agreement, in “Exhibit A” the “Right of Way Use Fees Schedule,” sets forth a new application fee not contained in the ROW Contracts and also increases the annual permit fee by \$6. (V3-567). Despite Appellant’s characterization, the slight increase in annual permit fees by only \$6 is not why Appellees brought this lawsuit. (V3-567-568). Appellees have stated many times prior to and during this lawsuit that they are willing to negotiate a new fee schedule under the terms of the existing ROW Agreements. (V3-591). The Appellees object to GDOT forcing them to sign the Proposed ROW Agreement that would effectively take, remove, and cut off Appellees’ current contract rights, property rights, and other vested rights to maintain their facilities in the public right-of-way. (V2-4-114).

Interestingly, under Section V of the “Right of Way Use Fees Schedule,” the Proposed ROW Agreement also provides for individually negotiated rates contained in prior agreements entered into by GDOT with other specific providers many decades ago. (V3-567). GDOT’s new Proposed ROW Agreement states:

**BY NEGOTIATED RATE**

This rate is specific to the Georgia Electric Membership Corporations and the Georgia Telephone Association companies as originally negotiated an entered into agreements in 1988 and 1991, respectively. A starting rate was determined during the original negotiations with an annual increase of either 4% or 5%, respectively.

(Id.). Thus, in the very same Proposed ROW Agreement that GDOT is insisting the Appellees must execute in order to avoid disparate treatment among communications users of the rights-of-way, GDOT is itself proposing to allow a different sub-class of communications providers to continue to utilize a prior negotiated agreement from decades ago. In effect, discriminating against the Appellees. (Id.).

GDOT also claims that the Trial Court’s Order allows private parties to use the State’s rights-of-way without regard to regulatory changes, safety concerns, or increases in the cost of maintaining the rights-of-way. This is simply untrue as the ROW Agreements expressly state that GDOT “will continue to regulate the locations, operation and maintenance of Company facilities on public right of way pursuant to the Utility Accommodation Policy and Standards Manual, current

edition, as the same may be amended from time to time...” (V2-30,37). The ROW Contracts even contemplate removal and relocation of lines or other facilities due to road construction and other reasons. (V2-31,38,47). The Appellees have never claimed otherwise.

GDOT claims that the Proposed ROW Agreement was initially sent to Appellees as a starting point for review, discussion, and negotiation. (V3-416). When Appellees offered to negotiate changes to the fee structure under, and keeping the other terms contained in the existing ROW Contracts, GDOT’s counsel threatened that the duration of the ROW Contracts was contrary to constitutional principles and that the ROW Contracts were unenforceable against GDOT. (V3-567). When Appellees refused to sign away their contractual rights, property rights, and vested rights by entering into the Property ROW Agreement, GDOT sent a notice to Appellees stating:

... each of you received a third notification package with a draft agreement related to changes in Department Rule 672-11, .... **A deadline of September 15, 2023, was given to avoid potential disruption to your permitting operations.** Several attempts have been made to engage providers so that we can enter into a new agreement that reflects the current Rule.

... the Department has communicated and met with many providers to enter into a new Right of Way (ROW) Use agreement. ... **Although we have been flexible and afforded ample time for this process to occur voluntarily, the Department has reached a point where agreements must be finalized.**

...To those providers that remain outstanding, the Department will enforce the requirements of Rule 672-11 with, or without a new ROW Use agreement.

Therefore, **effective November 1, 2023, any communication utility provider that has not executed or made arrangements to execute a new Right of Way Use agreement with the Department, will be required to adhere to its requirements** ... All application and annual permit fees invoiced to date, which have outstanding balances must be paid in full by November 1, 2023, to avoid having permitting privileges suspended until such time as payment is received. ...

(V3-568). Therefore, in order to avoid having its contractual permitting rights superseded, Appellees had no choice but to file this action in the Superior Court of Fulton County seeking declaratory relief from GDOT's actions, which are outside the scope of lawful authority, in violation of the laws and the Constitution of this State, and in violation of the Constitution of the United States. (V2-4-114).

### **JURISDICTION**

Appellant presents a novel argument concerning the waiver of sovereign immunity found in Article I, Section II, Paragraph V (b) (2) of the Georgia Constitution, which is generally within the Supreme Court of Georgia's exclusive jurisdiction. State Dep't of Corr. v. Developers Sur. & Indemn. Co., 295 Ga. 741 (2014). Such questions have recently been transferred to the Georgia Supreme Court. See First Ctr., Inc. v. Cobb Cnty., 318 Ga. 271, 271 (2024); Starship Enterprises of Atlanta, Inc. v. Gwinnett Cnty., 319 Ga. 293, 294 (2024).

## ARGUMENT AND CITATION OF AUTHORITY

**I. Appellant incorrectly claims that the Trial Court Order exceeds the waiver of sovereign immunity in Paragraph V(b).**

**A. Paragraph V waives sovereign immunity for Appellees’ claims against Appellant.**

The State of Georgia has waived sovereign immunity from suits for declaratory relief for *alleged acts* of state agencies that were outside the scope of lawful authority or in violation of the laws or the Constitution of this State. Ga. Const. art. I, § 2, ¶ V(b)(1)(“Paragraph V”); Kuhlman v. State, 317 Ga. 232, 234–36 (2023). Under Paragraph V of the Georgia Constitution:

Sovereign immunity is hereby waived for *actions* in the superior court *seeking* declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state ... 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. ... Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.

Ga. Const. art. I, § 2, ¶ V(b)(1). In Kuhlman v. State, the Georgia Supreme Court found that a complaint that alleged a state board was “in violation of the laws ... of this state,” was sufficient to bring the claim within the constitutional waiver of sovereign immunity of Paragraph V. See, 317 Ga. 232 (2023).

Appellees filed this action in the superior court seeking declaratory relief from past, current, and prospective acts of GDOT alleged to be outside the scope of lawful

authority, in violation of the laws and the Constitution of this state, and in violation of the Constitution of the United States. (V2-9, 25). Appellees argue that GDOT's actions to unilaterally impair, modify, or terminate Appellees' rights under the ROW Contracts, among other actions by GDOT, impairs the Appellees' contract and property rights and interests under the ROW Contracts. (V2-14-15).

Specifically, Appellees argue that the Georgia and U.S. constitutions prohibit the State from passing a law impairing the obligations of contracts and cited to U.S. Const., art. I, § 10, cl. 1.; Ga. Const. 1983, art. I, § I, ¶ X; and O.C.G.A. § 1-3-5. (V2-17). Appellees further argue that Georgia's Constitution prohibits laws from applying retroactively so as to impair vested rights, citing to Deal v. Coleman, 294 Ga. 170 (2013). (V2-18-19). Appellees further asserted that “[a] state or any of its departments entering into contracts lays aside its attributes of sovereignty, and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and are controlled by the same laws”, citing Regents of Univ. Sys. of Georgia v. Blanton, 49 Ga. App. 602 (1934). (V2-17).

Appellant seemed to assert, in its Motion to Dismiss, that Appellees must prove the merits of their case at the initial threshold stage. (V2-175). Appellant further asserted that “[Appellees] fail to show a violation of law”. (V2-264). Appellant's reasoning was that “[t]he agreements are terminable at will, so even if

[GDOT] were to terminate them, no violation would occur.” (Id.).

However, the Trial Court found all that is required by Paragraph V, based under Kuhlman v. State, is that Appellees’ Petition *seeks* declaratory relief for past, current, and prospective acts of GDOT that are *alleged* to be outside the scope of lawful authority of the State or agency, or in violation of the laws of the State of Georgia, the Constitution of the State of Georgia, or the Constitution of the United States. (V3-548-549). Then on summary judgment, the Trial Court found that under the laws of the State of Georgia, the ROW Contracts are valid and enforceable contracts that are binding on GDOT. (V3-561-590). The Trial Court also found, citing to numerous authorities, that it was outside the scope of lawful authority and against the laws of the State of Georgia for GDOT to unilaterally terminate the ROW Contracts. (Id.).

Because the Court found that GDOT did not have lawful authority to unilaterally terminate the ROW Contracts, it was unnecessary for the Trial Court to address whether GDOT’s actions violated any other laws of the State of Georgia, the Constitution of the State of Georgia, or the Constitution of the United States. (V3-568-569, 640).

**B. Paragraph V waives sovereign immunity for injunctive relief after an award of declaratory relief.**

Now, for the first time on appeal, Appellant claims that the Trial Court erred in granting injunctive relief and that the injunctive relief was unnecessary to enforce

its judgment. Paragraph V provides: “Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment.” Ga. Const. art. I, § 2, ¶ V. The Trial Court, in its Order, first awarded declaratory relief and then, only after awarding such declaratory relief, went on to enjoin certain acts to enforce its judgment. (V3-591). This provision in Paragraph V was clearly intended to prevent a waiver of sovereign immunity for temporary or interlocutory injunction relief prior to or during the course of a lawsuit before the court reaches the merits of the declaratory relief sought. Once the Trial Court awarded the declaratory relief, the Trial Court could then enjoin such acts to enforce its judgment as allowed by Paragraph V.

**II. The Trial Court correctly determined that the ROW Contracts were not terminable at will by GDOT.**

“A state or any of its departments entering into contracts lays aside its attributes of sovereignty, and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and are controlled by the same laws. Where there is an act of the state Legislature authorizing a contract by a state department, the courts have power to enforce the contract against the state.” Regents of Univ. Sys. of Ga. v. Blanton, 49 Ga. App. 602 (1934). The “appellate courts have held that ‘enforcing agreements generally serves the public interest by encouraging the right and freedom

to contract,’ and ‘this public interest is implicated even more when the State is a party to the contract, because if the State cannot be trusted to honor its agreements in these circumstances, it will substantially undermine the public's confidence in its government.’” State v. Fed. Def. Program, Inc., 315 Ga. 319, 349 (2022) (upholding a trial court’s grant of an interlocutory injunction to enforce a contract against the State).

Contrary to the clear and unambiguous language of the ROW Contracts, GDOT asserts that the ROW Contracts are terminable at will by GDOT because the ROW Contracts “are of an *indefinite duration* and are, thus, terminable at will.” GDOT asserts that “an agreement without *a fixed duration – an indefinite duration* – is terminable at will by either party.”

The Georgia Supreme Court has very recently upheld a similar contract duration provision against the State of Georgia where the State similarly argued the agreement did not provide a “‘specific termination date’ and that, therefore, ‘if the conditions are never met, then the Agreement could conceivably enjoin executions in Georgia forever.’” State v. Fed. Def. Program, Inc., 315 Ga. 319, 343–44 (2022). In analyzing and interpreting the duration and termination provisions of the contract involving the State of Georgia, the Court in Fed. Def. Program cited to the following contract cases involving private parties: Alexis, Inc. v. Werbell, 209 Ga. 665, 670-71 (1) (f), 75 S.E.2d 168 (1953) (holding that a contract providing that it would be

binding so long as the corporation existed was enforceable); Mori Lee, LLC v. Just Scott Designs, Inc., 325 Ga. App. 625, 630 (2), 754 S.E.2d 616 (2014) (holding that an agreement providing that it “would continue for as long as both parties conducted business” was not rendered void by “this indefinite duration”); Triple Eagle Assoc., Inc. v. PBK, Inc., 307 Ga. App. 17, 22-23 (2) (a), 704 S.E.2d 189 (2010) (holding that “the phrase ‘suitable period of time’” did not render a settlement agreement unenforceable). Citing to the recent Georgia case law set out above, a leading contract law treatise summarizes the law in Georgia as follows: “The fact that an agreement by its terms is of *indefinite duration* does not render the agreement void.” § 5:1. Certainty, Ga. Contracts Law and Litigation § 5:1 (2d ed.).

This Court has also already considered a case with a nearly identical duration/termination language as the ROW Contracts. GAPIII, Inc. v. Seal Indus., Inc., 338 Ga. App. 101, 111–112 (2016) (upholding language that states “the agreement shall continue in full force and effect until terminated by mutual consent of the parties hereto”). This Court expressly found that the indefinite duration did not make the agreement terminable at will by one of the parties. *Id.* In GAPIII, a management services provider, GAPIII, brought action seeking declaratory and injunctive relief as to its rights under a Management Services Agreement (“MSA”) with industrial company (“Seal”), after Seal unilaterally terminated their agreement. Similar to the duration provision at issue in the instant case, “the MSA state[d] that

the agreement ‘shall continue in full force and effect until terminated by mutual consent of the parties hereto.’” The Court in GAPIII, stated “[w]e further hold that because the MSA contains a termination provision, that agreement remains in effect as to all parties, including GAPIII, until terminated in accordance with that provision.” While “[t]he MSA contains a choice of law provision stating that it will be governed by New York law,” the Court stated that the “[r]elevant New York law regarding the interpretation of contracts is similar, if not identical, to Georgia law.” The Court in GAPIII stated: “Here, the plain language of the MSA provides that it remains in effect ‘until terminated by mutual consent of the parties hereto.’” The Court held that “where termination has been provided for in the contract, even if continuous performance is a possibility, courts should not refuse to enforce such contracts or read into them different conditions of termination.” Id.

Here, just like the duration provision in GAPIII, the ROW Contracts provide that they “shall remain in full force and effect until [GDOT] and the [Appellees] enter into a subsequent agreement regarding the subject matter hereof.” GDOT’s argument that it can terminate the ROW contracts at will runs counter to the clear and unambiguous language of the ROW Contracts. The ROW Agreements, just like the MSA in GAPIII, contain “provisions under which the contract might terminate at any time.” Id. Therefore, since “termination has been provided for in the contract,

even if continuous performance is a possibility, courts should not refuse to enforce such contracts or read into them different conditions of termination.” Id.

Appellant contends that two Georgia appellate court cases support Appellant’s proposition that a contract for indefinite period is terminable at either party’s will: Voyles v. Sasser, 221 Ga. App. 305 (1996) and Blackstock v. Atlanta Newspapers, Inc., 94 Ga. App. 313 (1956). Both are distinguishable.

Voyles dealt with ambiguous and vague future acts in an insurance agency agreement. The court in Rental Equip. Grp., LLC v. MACI, LLC, 263 Ga. App. 155, 157–58 (2003) stated that Voyles is “distinguished on the law and facts from this case, because those cases dealt with future promised conduct of vague, indefinite, and uncertain duration with an indefinite financial obligation and ambiguous duties, which were unstated.” The Court in Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 440 (2005) stated that Voyles involved a situation in which the promises involved “unenforceably vague future acts.”

The Blackstock Court also did not deal with a written contract with an express duration and/or termination provision. The Blackstock Court only assumed and did not decide that a contract even existed. The Blackstock Court only found that notice was not given of the intent to cancel or terminate the contract and thus no cause of action was set forth. Thus, Voyles and Blackstock are not applicable to the instant

situation and are distinguishable from the case law cited above concerning written contracts with express duration or termination provisions.

In further support of its argument, Appellant also cites to three Federal cases interpreting Georgia law: Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274 (11th Cir. 2003), Coffee v. Gen. Motors Acceptance Corp., 5 F. Supp. 2d 1365 (S.D. Ga. 1998), and CAG Food Servs., LLC v. Shaver Foods, LLC, 1:18-CV-2753-RWS, 2019 WL 12762541, at \*2 (N.D. Ga. Mar. 19, 2019)(unreported). The Court in Iraola, cited Coffee and stated: “Although the Georgia Supreme Court had not ruled on the effect of performance conditions, the Coffee court noted that Georgia law requires that contracts be interpreted to give effect to each of its provisions.” The Court in Iraola concluded that when a contract of indefinite duration contains enumerated performance conditions, termination is not authorized so long as the party subject to the performance conditions continues to perform as specified.

The Court in Coffee expressly held that the agreement in that case did not have a fixed term of duration and was not terminable at will because of the termination conditions expressed in the written agreement. Coffee v. Gen. Motors Acceptance Corp., 5 F. Supp. 2d 1365, 1377 (S.D. Ga. 1998) (holding that if the parties' agreement is construed to be terminable at will, the enumeration of the contingencies in the agreement would be rendered meaningless). The Court in Coffee tried to distinguish the prior precedent in Orkin Exterminating, Inc. v. F.T.C.,

849 F.2d 1354, 1361 n. 7 (11th Cir.1988) because the Court in Coffee was not clear if the Orkin Court was applying Georgia or New York law. However, the Georgia court in GAPIII has now stated that the “[r]elevant New York law regarding the interpretation of contracts is similar, if not identical, to Georgia law.” In Orkin, the Eleventh Circuit stated that although contracts of indefinite duration are generally terminable at will, “[t]his rule does not apply ... to cases in which the disputed agreement provides for termination or cancellation upon the occurrence of a specified event.” All of these cases actually support enforcement of the Duration Clause in the ROW Contracts because there is an express provision providing for termination only upon the occurrence of a specified event.

Appellant puts the most emphasis on the unreported Federal district court opinion in CAG Food Servs., LLC v. Shaver Foods, LLC, 1:18-CV-2753-RWS, 2019 WL 12762541, at \*2 (N.D. Ga. Mar. 19, 2019), which, unlike the instant case, dealt with an agreement in which the plaintiff in the case admitted the agreement itself did not contain an express basis for termination. Thus, CAG Food Servs. is not a case where there is an express duration or termination clause in a written agreement like in the instant case.

The important factor in the cases from Georgia and other similar jurisdictions is not whether there is set duration time period or an exact termination date, but whether there is an ascertainable event of termination, even if that event may never

come to pass. The ROW Contracts plainly and clearly define an ascertainable event of termination. This Duration Clause in the ROW Contracts, which states the contract remains in effect “*until [the parties] enter into a subsequent agreement regarding the subject matter hereof*”, is sufficiently definite and ascertainable from its language about the time for performance and the conditions under which it will terminate. Additionally, almost identical provisions have been upheld by the Georgia courts, such as “*until terminated by mutual consent of the parties hereto*”<sup>1</sup>, “*as long as both parties conducted business*”<sup>2</sup>, and “*so long as the corporation existed*”<sup>3</sup>. Therefore, the Trial Court correctly held that the ROW Contracts are enforceable pursuant to their terms and that the ROW Contracts shall remain in effect until the parties enter into a subsequent agreement regarding the subject matter of the ROW Contracts.

**III. Appellant incorrectly asserts that even if the ROW Contracts are not terminable at will, they are amended as a matter of law to conform with the new regulations.**

Appellant asserts that the “contracts are related to a regulated industry” and that “contracts in regulated industries are deemed amended by subsequent reasonable regulations”. However, the Trial Court did not reach the issue of whether the New Rule and GDOT’s interpretation and enforcement of the New Rule violated

---

<sup>1</sup> GAPIII, Inc. v. Seal Indus., Inc., 338 Ga. App. 101, 111–12 (2016).

<sup>2</sup> Mori Lee, LLC v. Just Scott Designs, Inc., 325 Ga. App. 625, 630 (2) (2014).

<sup>3</sup> Alexis, Inc. v. Werbell, 209 Ga. 665, 670-71 (1) (f) (1953).

the Contracts Clause because it found that the New Rule expressly allows for existing individually negotiated agreements with providers. Both the New Rule and GDOT expressly contemplated grandfathering in prior existing agreements such as the ROW Contracts. Therefore, the Trial Court determined that the terms of the ROW Contracts already conform with the new regulations.

If the New Rule did impair Appellees' ROW Contracts, then further analysis would have been required by the Trial Court, as the U.S. Constitution prohibits any state from passing a law impairing the obligation of a contract, and this prohibition is specifically included in the Georgia Constitution and in Georgia statutes. U.S. Const., art. I, § 10, cl. 1.; Ga. Const. 1983, art. I, § I, ¶ X.; O.C.G.A. § 1-3-5 (collectively referred to as the "Contracts Clause"). The test for whether a law unconstitutionally impairs a contractual relationship under the Contracts Clause has been stated as follows:

The threshold inquiry thus is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Total destruction of contractual expectations is not necessary for a finding of substantial impairment...

If a state law substantially impairs a contractual relationship, the State must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the

legislation's adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

(quotes and citations omitted) Capital One Pub. Funding, LLC v. Lunsford, 1:18-CV-3938-LMM, 2018 WL 9877380, at \*5 (N.D. Ga. Oct. 19, 2018); Polo Golf & Country Club Homeowners Ass'n, Inc. v. Cunard, 306 Ga. 788, 792 (2019).

First, in the instant case, Appellant seeks to terminate Appellees' existing written ROW Contracts and replace them with a completely new Proposed ROW Agreement. The new Proposed ROW Agreement makes substantial changes to material terms such as: it expressly terminates the prior ROW Contracts; it limits the terms of the new agreement to five years; it expressly allows GDOT to unilaterally terminate the agreements with no cause upon 30 days' notice; and expressly disclaims that previously approved permits, as well as subsequently approved permits, create, grant, or vest Appellees with any property rights. the Appellant has stated that it will enforce the requirements of the New Rule and the Proposed ROW Agreements with or without the Appellees entering into the Proposed ROW Agreement. GDOT's interpretation and implementation of the New Rule would significantly impair Appellees' rights under the existing ROW Contracts.

Second, GDOT does not have a significant and legitimate public purpose for the impairment. States' "sovereign power ... to safeguard the welfare of their citizens

... has limits when its exercise effects substantial modifications of private contracts.” Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978). If a state law substantially impairs a contractual relationship, the State must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Capital One Pub. Funding, LLC v. Lunsford, 1:18-CV-3938-LMM, 2018 WL 9877380, at \*5 (N.D. Ga. Oct. 19, 2018).

In support of its claimed right to terminate or alter the ROW Contracts at will, Appellant cites to three cases: All Star, Inc. v. Georgia Atlanta Amusements, LLC, 332 Ga. App. 1 (2015); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983); Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372 (1919). Appellant claims these cases support Appellant’s argument that contracts in regulated industries are subject to subsequent reasonable regulations. However, all three cases dealt with private contracts between a regulated public service company and the individual consumers or patrons of the public service company as to rates for the service furnished. In the case, the courts found only the regulated fees might be subject to subsequent modification by the state or municipality, where the state or municipality was acting within its powers, by general rate regulations, without unconstitutionally impairing the obligation of the contracts. See Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U.S. 372 (1919).

In All Star, Inc. v. Georgia Atlanta Amusements, LLC, 332 Ga. App. 1 (2015), the Court actually found that the statutory scheme regulating the coin-operated amusement machine business did not void the parties' private written lease agreements that existed prior to the enactment of the law, which provided for a revenue split of other than 50/50, and thus the agreements were enforceable and could serve as the basis for a tortious interference with contracts claim; however, the parties to the contract were required to split the revenue realized on an equal basis as provided by the new law for the duration of the contract term.

Contrary to Appellant's asserted arguments, the Court in Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 412 n.14 (1983), specifically distinguished public contracts, like the ROW Contracts, from the private contracts that were at issue in that case. Id. (citing Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623, 1647–1648 (1980) (distinguishing public from private contracts)). The Court in Energy Reserves stated:

When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.

Id. The Court in Energy Reserves further stated that “[i]n the present case, of course, the stricter standard ... does not apply because [the state] has not altered its own contractual obligations.” In the instant case, the stricter standard would apply.

GDOT claims without citation that “[e]ven though these cases address the adjustment of fees, their rationale applies equally to any regulatory changes, such as maintenance or safety requirements.” The ROW Contracts expressly state that GDOT “will continue to regulate the locations, operation and maintenance of Company facilities on public right of way pursuant to the Utility Accommodation Policy and Standards Manual, current edition, as the same may be amended from time to time....” There are no rules or regulations that GDOT is asserting or that Appellees dispute concerning any maintenance or safety requirement.

In this case, unlike the cases Appellant cited to regarding regulated industries, the State itself is a contracting party. Thus, there is no deference to the executive or legislative judgment as to the necessity and reasonableness of a particular measure.

Appellant cites to Ga. Comp. R. & Regs. 672-11-.01 as providing GDOT’s rationale behind the changes to fee structure under the New Rule, i.e. to defray its appropriate share of GDOT’s costs of administration and incremental costs of operation occasioned by Appellees’ facilities on public rights-of-way. However, the negotiated annual fee in lieu of permit fees contained in the ROW Contracts provide

the exact same rationale in the language of the ROW Contracts as the rationale for the prior negotiated fee.

Appellant does not cite to or even attempt to propose any rationale as to terminating the ROW Contracts or for imposing the other significant changes contained in the new Proposed ROW Agreement. It appears that GDOT is attempting to terminate the ROW Contracts and impose the new Proposed ROW Agreement on Appellees based on nothing more than GDOT's desire to improve its contractual position and its control over Appellees and their facilities located in the public right-of-way.

Even if a legitimate public purpose was identified by GDOT for the impairment of the ROW Contracts, then the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Capital One Pub. Funding, LLC v. Lunsford, 1:18-CV-3938-LMM, 2018 WL 9877380, at \*5 (N.D. Ga. Oct. 19, 2018). Thus, the Trial Court in that case would have to determine what reasonable modifications shall be made to the ROW Contracts.

GDOT's complete termination of the existing ROW Contracts and enforcement of the completely new terms of the Proposed ROW Agreements on the Appellees violates the Contracts Clause. However, even if the ROW Agreements

were between private regulated parties and GDOT's actions did not violate the Contracts Clause, the required action would be a minor adjustment of the current contract fee schedule and not termination or replacement of the entire contract. All Star, Inc. v. Georgia Atlanta Amusements, LLC, 332 Ga. App. 1, 10 (2015) (“Provided that the government has acted in furtherance of a legitimate public interest, parties to private contracts will be required to adjust their contractual ‘rights and responsibilities’ to accommodate the law, so long as the required adjustment is a reasonable means of furthering the public purpose at issue”).

However, as the Trial Court found, this analysis is unnecessary as the ROW Contracts are grandfathered in under the New Rule. At most, the New Rule only applies to a change in the fee schedules with new agreements and does not even address any other changes sought to be imposed by GDOT, much less compel termination of or changes to the existing ROW Contracts.

**IV. Appellant wrongly contends that the Trial Court’s decision unlawfully binds future successor members of GDOT’s governing body.**

Appellant cites to O.C.G.A. § 36-30-3(a), which provides that “[o]ne council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government.” Appellant also cites to Madden v. Bellew, where the Supreme Court of Georgia held “that the principle stated in O.C.G.A. § 36–30–3 applies to counties as fully as it applies to municipalities.” 260 Ga. 530, 531 (1990). The Madden Court stated that the principle “is a codification of a

principle stated in Williams v. West Point, 68 Ga. 816 (1882), which is applicable generally to legislative or governmental bodies.”

In Williams v. West Point, the general rule of law was stated as “[a] municipal corporation may bind itself by, and cannot abrogate, any contract which it has the right to make under its charter, but one council cannot, by ordinance, bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government.” 68 Ga. 816 (1882). Thus, even at the earliest pronouncement of the rule by the courts in Georgia, it was acknowledged that a government can bind itself by, and cannot abrogate, any contract which it has the right to make under its charter or governing authority. Here, GDOT is expressly permitted to enter into the ROW Contracts by statute and its own rules and regulations.

In addition, “[t]he provision in Georgia law which prevents one city council from binding by ordinance its successors ‘so as to prevent free legislation in matters of municipal government’ (O.C.G.A. § 36–30–3) does not apply to construction contracts, which typically extend beyond the term of the office entering into the contract for the municipality.” City of Atlanta v. Brinderson Corp., 799 F.2d 1541, 1542 (11th Cir. 1986). The District Court in the same case had found that:

This provision has a long and tumultuous history. Although once strictly construed (whereby any contract restricting any governmental or legislative function of a city was declared void), the statute has now, uncertain

parameters. However, the Supreme Court of Georgia has shown an increasing liberalization of the statute.

If the rule of OCGA § 36–30–3 be too rigidly applied, there would be few contracts which municipalities in this State could legally enter into, since contracts, by definition, must be binding, and many of them, to be practical and effective, must extend beyond the existing councils' terms because of the nature of their subject matter.

The weight of authority in Georgia holds that a municipal corporation may make a valid contract extending beyond the term of the officers entering into the contract for the municipality. In Brown v. City of East Point, 246 Ga. 144, 268 S.E.2d 912 (1980), the Supreme Court of Georgia held that the prohibition contained in OCGA § 36–30–3 does not apply to contracts made by virtue of express authority granted in city charters.

City of Atlanta v. Brinderson Corp., 799 F.2d 1541, 1544 (11th Cir. 1986) (citations omitted). Here, the ROW Contracts between GDOT and Appellees regarding the installation of certain facilities within the public right-of-way are made by virtue of express legislative authority granted to GDOT by statute and are also the type of contracts that typically extend beyond the term of the public office entering into the contract.

“The courts have uniformly held that in the very nature of things the construction of telegraph lines and similar works necessarily implies permanency and perpetuity of use, and that, where same are constructed under a license or agreement in which the period of the grant is not limited, a perpetual easement is

necessarily granted.” W. Union Tel Co v. Georgia R.R. & Banking Co, 227 F. 276, 281 (S.D. Ga. 1915) (citing among others City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913)). In City of Owensboro, cited above, Mr. Justice Lurton stated as follows:

The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state (citing several cases). If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power without violating the prohibitions placed in the Constitution for the protection of property rights.

(Id.). Thus, the ROW Contracts in this case are proprietary in nature and are the type that are expected to extend beyond the term of the legislature. Moreover, as previously stated, the ROW Contracts were grandfathered in under the New Rule.

The Georgia Supreme Court has also stated that, while generally any act of the legislature is subject to repeal by a future legislature, so long as the repealing act does not violate the provisions of the State and Federal Constitutions against laws

which impair the obligation of contracts, once a contract, grant, or agreement is accepted and the contemplated expenditure made, the contract between the State and the other parties is no longer subject to repeal by future legislatures. State v. State Toll Bridge Auth., 210 Ga. 690, 703–04 (1954) (holding that the expressed limitation on future legislatures to allow the erection of a competing bridge was by virtue of the bondholders acquired vested contract rights, and not because of any restriction placed by the legislature in enacting the legislation). The Georgia Supreme Court stated:

“[i]f the argument of the [State of Georgia that no limitation in a contract or property grant can bind a future legislature] were carried to its logical conclusion, the General Assembly could never authorize the making of a contract as to the sale or lease of the property of the State. The act in question being in the exercise of its constitutional power by the General Assembly, was equivalent to a contract, and when performed is a contract executed, and whatever rights are thereby created a subsequent legislature can not impair.”

Id.

Appellant admits that the ROW Contracts arise from GDOT’s express authority under O.C.G.A. §§ 32-6-170 and 32-6-174. However, Appellant claims, without citation, that “[b]ecause the rule against binding successors is constitutional, a mere enactment by the legislature would not suffice” to allow a contractual limitation against the State.

Here, just like in State v. State Toll Bridge Auth., the rule against binding successors does not apply to contracts for the sale, lease, or use of the property of the State or property interests. In addition, when Appellees relied on the contract terms and expended significant resources and funds constructing, installing, and maintaining wires, cables, equipment, and facilities in the public right-of-way under and pursuant to the contract terms, Appellees' rights vested such that a subsequent legislature cannot impair. Lastly, Appellant's are estopped from relying on the prohibition against binding successors because GDOT expressly promised that it was not terminating any existing contracts or changing any existing fees when the New Rule was adopted.

**V. Appellant incorrectly contends that the Trial Court's decision could place GDOT in violation of 47 U.S.C. § 253.**

Appellant asserts, without citing any authority, that the Trial Court's Order enforcing the previously entered into ROW Contracts, "likely would lead to price disparities between telecommunication providers and further limit [GDOT's] ability to manage and maintain its rights-of-way in conformity with Section 253." Appellant cites only to Section 253 of the Communications Act, which merely states:

**(c) State and local government authority**

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-

way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C.A. § 253.

First, GDOT has admitted it has various categories of contracts and agreements with various providers and the contracts or agreements can be of varying durations. GDOT's New Rule even expressly states that "[n]otwithstanding otherwise applicable requirements of 47 U.S.C. § 253", GDOT may waive the Application Fee and/or Annual Permit Fee for certain types of providers. Ga. Comp. R. & Regs. 672-11-.04(2)(d).

Second, in specifically addressing discriminatory concerns of these waivers related to 47 U.S.C. § 253, GDOT's Chief Engineer stated that: "47 U.S.C. § 253 applies only to Telecommunication Services (not information services such as Broadband) and is therefore inapplicable". (V3-589). Appellees are also providing information services such as Broadband. (V2-4-114).

Third, GDOT's New ROW Agreement also provides in Exhibit "A", which is GDOT's new proposed "Right of Way Use Fees Schedule", various fee schedules and fee calculations that it seeks to impose on Appellees, but GDOT includes a specific section allowing for different rates for two specific providers that were negotiated in existing agreements between the providers and GDOT.

Thus, GDOT has expressly allowed, by rule and by practice, the price disparities that GDOT now complains "likely would" occur under the Trial Court's

Order enforcing the ROW Contracts. If anything, GDOT is discriminating against Appellees by trying to terminate the ROW Contracts while continuing to allow and operate under other prior agreements with other providers.

**CONCLUSION**

For the foregoing reasons, Appellees respectfully request this Court affirm the Trial Court's grant of summary judgment to Appellees.

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

This 16th day of December, 2024.

TISINGER VANCE, P.C.

By: /s/ Avery S. Jackson

Avery S. Jackson  
Georgia Bar No. 095503  
Richard G. Tisinger, Jr.  
Georgia Bar No. 713110  
Counsel for Appellees

100 Wagon Yard Plaza  
Carrollton, Georgia 30117  
(770) 834-4467  
[ajackson@tisingervance.com](mailto:ajackson@tisingervance.com)  
[rtisinger@tisingervance.com](mailto:rtisinger@tisingervance.com)

KELLER & HECKMAN, LLP

By: /s/ Sean A. Stokes

Sean A. Stokes  
District of Columbia Bar No. 430298  
Counsel for Appellees (Pro Hac Vice)

Keller & Heckman, LLP  
1001 G Street NW  
Suite 500  
Washington, DC 20001  
(202) 434-4193  
[stokes@khlaw.com](mailto:stokes@khlaw.com)

**CERTIFICATE OF SERVICE**

I certify that there is a prior agreement with counsel for Appellant, David R. Cook, to allow documents in a .pdf format sent via email to suffice for service, in accordance with Rule 6(b). I also certify that I have this day sent by email a copy of the foregoing **BRIEF OF APPELLEES** to the following counsel of record:

David R. Cook  
Special Assistant Attorney General  
3330 Cumberland Boulevard, Suite 185  
Atlanta, Georgia 30339  
Telephone: (770) 818-4442  
[cook@cookassociateslegal.com](mailto:cook@cookassociateslegal.com)

This 16th day of December, 2024.

TISINGER VANCE, P.C.

Tisinger Vance, P.C.  
100 Wagon Yard Plaza  
P. O. Box 2069 (30112)  
Carrollton, Georgia 30117  
(770) 834-4467  
[ajackson@tisingervance.com](mailto:ajackson@tisingervance.com)  
[rtisingerjr@tisingervance.com](mailto:rtisingerjr@tisingervance.com)

BY: /s/ Avery S. Jackson  
Avery S. Jackson  
Georgia State Bar No. 095503  
Richard G. Tisinger, Jr.  
Georgia State Bar No. 713110  
Counsel for Appellees

KELLER & HECKMAN, LLP

Keller & Heckman, LLP  
1001 G Street NW  
Suite 500  
Washington, DC 20001  
(202)434-4193  
[stokes@khlaw.com](mailto:stokes@khlaw.com)

BY: /s/ Sean A. Stokes  
Sean A. Stokes  
District of Columbia Bar No. 430298  
Counsel for Appellees (Pro Hac Vice)