

On Friday, August 8, 2003, the Enforcement Bureau of the Federal Communications Commission (“Commission”) released the latest in a series of pole attachment decisions, *Cable Television Assoc. of Georgia v. Georgia Power Co.*, PA 01-002 (“CTAG”). Like the decisions that have preceded it in the last several weeks, the CTAG decision is yet another setback for utilities trying to craft sensible business contracts with attaching entities.

## Summary

On January 17, 2001, CTAG filed a pole attachment complaint on behalf of its members with the Commission challenging the *prospective* effect of the master facilities agreement Georgia Power sought to execute with the parties attached to its facilities. Georgia Power challenged CTAG’s Complaint on two preliminary grounds, arguing that the matter was not ripe for adjudication because the rates, terms, and conditions of the agreements had not been negotiated, much less taken effect, and that CTAG had failed to establish a *prima facie* case. To the specifics of the Complaint, Georgia Power defended the agreement on grounds that the terms were reasonable, and were further supported by the utility’s safety concerns.

In the decision, the Commission first denied Georgia Power’s claim that the Complaint failed to establish a *prima facie* case, noting that although “the Complaint’s allegations arguably could have been more detailed,” the pleading as a whole, including the exhibits from which the Commission could better understand CTAG’s grievances, “as a whole sufficiently identifies the factual basis of the allegations.” *Id.* ¶ 8. The Commission also denied Georgia Power’s claim of ripeness, holding that “section 224 expressly provides that the Commission has jurisdiction to determine the reasonableness of the terms of attachment,” even if, apparently, those terms have yet to take effect: “nothing in the statute requires attachers to wait until the terms are enforced before contesting their reasonableness.” *Id.*

Turning to the merits of the CTAG Complaint, the Commission first disposed of Georgia Power’s general defense that many of its terms and conditions were reasonable and necessary in light of safety concerns. Although the Commission held that it “emphatically share[s] Georgia Power’s concern about safety,” it nonetheless found that “the record does not support [Georgia Power’s] assertions that the host of new contract provisions are necessary to preserve safe operations.” *Id.* at ¶ 12. Specifically, the Commission found that whatever safety concerns Georgia Power possessed, nothing in the record established that any CTAG member had injured persons or Georgia Power’s property.

The remainder of the CTAG decision concerns eleven specific terms in the new contract:

1. Overlapping. The new contract required attaching entities to obtain prior written consent from Georgia Power before overlapping their facilities. The Commission rejected this provision as inconsistent with a prior Commission Order holding that prior *approval* was not required. The Commission failed to note, however, that this Order also indicated that utilities would be free to request prior *notice*. The Commission did not, however, order the clause stricken, but rather ordered the parties to negotiate in light of this precedent. *Id.* ¶ 13.

2. Inspection Rights. The Commission approved of Georgia Power's periodic inspection of its poles to ensure compliance with applicable safety standards. *Id.* ¶ 15. However, in an apparent break from prior precedent, the Commission held that the pole owner could recover the costs such inspections from attachers only to the extent the costs were included in the FERC maintenance accounts factored into the annual pole attachment rental formula. The Commission also held that targeted safety inspections triggered as a result of "any violation" under the new contract were unreasonable. The Commission ordered the parties to negotiate a reasonable provision based on inspections resulting from "a safety violations." *Id.* With regard to these targeted safety inspections, the Commission held that the attacher that had committed the safety violation could be asked to bear the inspection costs.

3. Administration Fees. A provision of the Georgia Power contract required attaching entities to reimburse the utility for general administrative fees incurred in performing and enforcing the agreement. CTAG challenged these provisions as open-ended, unspecified, and in excess of the authorized pole attachment rate. *Id.* ¶ 17. The Commission agreed. These expenses, the Commission held, are already calculated in the pole attachment formula.

4. Make-Ready Costs. The Commission rejected Georgia Power's requirement that attaching entities pay an up-front fee of \$150 to cover make-ready costs, subject to a return of any overpayment. The Commission also rejected Georgia Power's practice of prohibiting attachment prior to paying of the fee. The Commission held that a utility may only recover "actual" costs of make-ready, and it therefore required Georgia Power to allow attachments and first "incur the costs attendant to make-ready, and then seek reimbursement for its actual make-ready costs." *Id.* ¶ 20.

5. Unauthorized Attachment Fees. Georgia Power's contract established various payments for unauthorized attachments to its poles, including back rent, interest, an administrative fee, and costs. The Commission agreed with Georgia Power that penalties are not *per se* unreasonable, and that penalties for unauthorized attachment may exceed the pole attachment rate. *Id.* ¶ 22. The Commission found, however, that Georgia Power's payment provisions were unreasonable. First, the Commission held that requiring back rent to the date of the last inspection was too punitive because Georgia Power had no fixed rule as to the dates of inspections, and therefore unauthorized attachment fees from recent attachments would "grossly overcompensate Georgia Power." *Id.* Second, the Commission held that Georgia Power could collect only "reasonable" out-of-pocket expenses resulting from unauthorized attachments. *Id.* ¶ 23. Finally, the Commission deferred on deciding whether the ten percent administrative fee/penalty was unreasonable.

6. Rights-of-Way and Easements. The new Georgia Power contract provided that the right to use rights-of-way obtained from private landowners would be granted for additional compensation. For the first time ever, the Commission announced that a utility was not entitled to specific compensation for use of its privately obtained rights-of-way. The Commission stated that no additional compensation was required because Section 224 requires access to any right-of-way owned or controlled by the utility. *Id.* ¶ 26. Georgia Power argued that despite the access requirements, not permitting additional compensation would be a taking, in violation of

the Fifth Amendment. The Commission disagreed, however, noting that the Section 224 rental rate has been held to provide just compensation.

7. Security Issues. CTAG challenged several provisions of the new contract which required cable operators to furnish a bond, to grant access to financial records, and to provide a security interest in the equipment installed, to Georgia Power. The Commission found that these provisions gave Georgia Power “unfettered access to sensitive financial information and unilateral authority to determine” the creditworthiness of an attaching entity. *Id.* ¶ 29. These provisions, the Commission found, were arbitrary and could lead to anticompetitive conduct.

8. Indemnities/Limits of Liability. CTAG challenged the limitation of liability, six-month limitation on the bringing of claims, and control of legal defense provisions of Georgia Power’s contract. The Commission agreed that these provisions were unreasonable, and held that the indemnification provision should be reciprocal because each party should take responsibility for its own conduct. The Commission added that CTAG members should not be required to bring their claims in a shorter period of time than that allowed by applicable statutes of limitation, or to relinquish their rights to defend claims against them. *Id.* ¶ 31.

9. Force Majeure. The Commission ordered Georgia Power to make the *force majeure* provision reciprocal.

10. Rates. The new Georgia Power contract included a provision that allowed the utility to “true up” rental rates at year end. CTAG challenged the provision on the ground that the Commission’s Rules require 60-day notice of rate increases. Georgia Power argued that a true-up could result in a refund or an increase, and that, in any event, the notice of the potential increase was well in advance of 60-days. The Commission disagreed, holding that “[b]lanket notice of a *possible* rate increase is not equivalent to notice of an *actual* rate increase.” *Id.* ¶ 36.

11. Assignments. CTAG argued that the provisions in the new contract requiring Georgia Power’s approval of an assignment by an attachers should be reciprocal. Georgia Power defended the provision by noting that it must know the identity of the parties on its facilities, and that, therefore, cable operators should not be permitted identical rights of assignment without notice and consent. The Commission agreed with Georgia Power, and also found the provision similar to the prior agreements, which CTAG conceded were “model[s] of reasonableness.” *Id.* ¶ 37.

12. Termination. The Commission found that the new contract, which had no fixed term and permitted termination with 90-days notice, gave insufficient protections to the attaching entities, and ordered the parties to negotiate a more reasonable termination provision. *Id.* ¶ 38.

## **Analysis**

The CTAG decision is the latest in a string of cases recently released by the Commission that make it harder for utilities to protect their core business interests from possible problems arising from the provision of pole attachments. Although this decision of the Enforcement Bureau is not binding precedent within the FCC, and does not by its own weight require pole owners to

conform their contracts to the decision, pole owners would be well advised to review the terms of their existing pole attachment or master facilities license agreements and identify potential problematic terms which could lead an attacher to seek to renegotiate or litigate.

After having had some time to digest this decision and discuss it with many in the industry, we would like to share some thoughts. First, all pole owners are likely to be affected by some significant unfavorable positions taken by the Commission in *CTAG*. The Commission's particularly problematic holdings include: (1) prohibiting utilities from charging attachers directly for a *pro rata* share of the costs of periodic plant inspections, and allowing recovery of such costs only to the extent they are recovered in the FERC maintenance accounts included in the annual attachment fee formula; (2) prohibiting pole owners from recovering compensation for private rights-of-way separate from and additional to annual pole attachment fees; (3) forcing utilities to front the construction costs of make-ready and seek to recover those costs only after the attacher's facilities are in place; (4) mandating reciprocal liability and *force majeure* provisions that ignore customary landlord-tenant allocations of risk and the vastly different positions of the contracting parties; and, (5) possibly prohibiting the practice of billing annual fees in advance subject to a "true-up" once a utility's FERC Form 1 data has been finalized. Although there are other troubling aspects of this decision, the above are the most troubling, because they contravene prior Commission holdings, the plain language of the Pole Attachments Act, the Just Compensation Clause and/or generally accepted commercially reasonable practices.

But perhaps the most troubling aspect of the Commission's decision is that it found jurisdiction to decide the case in the first place. As noted above, the new contract had yet to be negotiated, much less executed. Therefore, the Commission agreed to hear a complaint related to terms that had yet to be solidified. The Commission's decision, therefore, is an alarming book-end to the already-troubling "sign and sue" practice of attaching entities. Now attaching entities can simply bring a proposed contract to the Commission and ask it to approve it *a priori*, as if it were a tariff. Or the attacher can simply sign the agreement without objecting, and then file a complaint before the Commission.

There were a few bright spots in the decision. The Commission, for the first time,: (1) expressly approved a pole owner's charging an attacher for the direct costs of a plant inspection necessitated by a safety violation; (2) expressly held open the possibility that a ten-percent penalty of the amount owed for back rent on unauthorized attachments, plus interest, is reasonable; (3) rejected the cable companies' inflammatory rhetoric of calling the utility industry "anti-competitive" as "irrelevant" and "unnecessary histrionics"; (4) refused to consider the cable owners' arguments about notice of pole replacement and drop pole provisions because they had failed to raise them in pre-Complaint negotiations; (5) upheld a utility's right to retain the power to reasonably consent to an attacher's transfer of its rights and obligations under a pole attachment agreement; and, (6) "emphatically" shared the utility's concerns over safety.

On balance, however, the Enforcement Bureau does not seem to be manifesting in its decisions its stated intent to reach out to pole owning utilities and decide cases fairly based upon a full and accurate record.