ALSTON & BIRD LLP

WWW.ALSTON.COM

Energy & Sustainability ADVISORY ■

**SEPTEMBER 18, 2013**

# What Georgia Electric Suppliers and Economic Developers Should Know About Electric Service Rights to New Premises Locating in Wholly New Municipalities or Consolidated/Annexed Areas

With 159 counties (second only to Texas for most in the country)[1] and 536 municipalities,[2] including seven consolidated governments,[3] the trend in Georgia favoring decentralization and a tailored, local government is nothing new. Recently, though, it seems to be rising. In fact, in the last eight years, Georgia has witnessed the incorporation of seven new cities—Sandy Springs in 2005, Johns Creek and Milton in 2006, Chattahoochee Hills in 2007, Dunwoody in 2008, Peachtree Corners in 2011 and Brookhaven in 2012—all in the Atlanta metropolitan area,[4] and, currently, the

---

1 *Paul T. Hellmann, Historical Gazetteer of the United States* 215 (2013).

2 *See* U.S. Census Bureau, *2012 Census of Governments: Organization Component Preliminary Estimates* (July 23, 2012), http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf; H.R. 636, 151st Gen. Assemb., Reg. Sess. (Ga. 2012), *available at* http://www.legis.ga.gov/Legislation/20112012/127755.pdf (incorporating the City of Brookhaven).

3 Though consolidated in different ways, these include the Consolidated Government of Columbus (formed in 1970), the Unified Government of Athens-Clarke County (formed in 1990), the Augusta-Richmond Consolidated Government (formed in 1995), the Cusseta-Chattahoochee Unified Government (formed in 2003), the Georgetown and Quitman County Unified Government (formed in 2006), the Unified Government of Webster County (formed in 2008) and Echols County, which has no municipalities within its borders. *See* Nat'l Assoc. of Counties, *Reshaping County Government: A Look at City-County Consolidation* 13 (Feb. 2012), available at http://www.naco.org/newsroom/pubs/Documents/County Management and Structure/Reshaping County Government A Look at City-County Consolidation.pdf; U.S. Census Bureau, 2007 Census of Governments, Individual State Descriptions: 2007, at 73 & n.1, 80 (Nov. 2012), *available at* http://www2.census.gov/govs/cog/isd_book.pdf.

4 *See* H.R. 636, 151st Gen. Assemb., Reg. Sess. (Ga. 2012), *available at* http://www.legis.ga.gov/Legislation/20112012/127755.pdf (Brookhaven); H.R. 396, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), *available at* http://www.legis.ga.gov/Legislation/20112012/115080.pdf (Peachtree Corners); S. 82, 149th Gen. Assemb., Reg. Sess. (Ga. 2008), *available at* http://www.legis.ga.gov/Legislation/20072008/82799.pdf (Dunwoody); S. 553, 148th Gen. Assemb., Reg. Sess. (Ga. 2007), *available at* http://www.legis.ga.gov/Legislation/20052006/64898.pdf (Chattahoochee Hills); H.R. 1321, 148th Gen. Assemb., Reg. Sess. (Ga. 2006), *available at* http://www.legis.ga.gov/Legislation/20052006/59054.pdf (Johns Creek); H.R. 1470, 148th Gen. Assemb., Reg. Sess. (Ga. 2006), *available at* http://www.legis.ga.gov/Legislation/20052006/60909.pdf (Milton); H.R. 37, 148th Gen. Assemb., Reg. Sess. (Ga. 2005), *available at* http://www.legis.ga.gov/Legislation/20052006/49639.pdf (Sandy Springs).

Georgia General Assembly is considering proposals to incorporate four more in Dekalb County by the end of 2014.[5] Moreover, these developments are in addition to numerous other bills and resolutions seeking to consolidate existing governments and annex new territories.[6] Yet, for most Georgians—at least those outside the specifically impacted areas—these changes will not impact their substantive legal rights. However, for Georgia electric suppliers that understand their rights under the Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1 to 46-3-15 (the "Territorial Act"), such changes can significantly increase or restrict the potential for load growth (particular for new large load premises). Additionally, state and local elected officials and economic developers should pay particular attention to annexations and certain consolidations as they can have the effect of limiting the potential to attract large, energy-cost-sensitive economic development opportunities as the competitive process (and resulting incentive electric service rates and terms) is greatly reduced or potentially eliminated in certain circumstances.

The Territorial Act, enacted in 1973, provides a comprehensive regulatory scheme governing retail electric service in Georgia. In passing the Territorial Act, the General Assembly implemented a plan to establish "assigned areas" (meaning enclosed geographic areas assigned to only one electric supplier) in an effort to assure efficient, economical and orderly retail electric service, inhibit duplication of lines, foster the extension and location of lines in a manner compatible with the environment and protect and conserve lines lawfully constructed.[7] For the most part, either through specific assignments required by the Territorial Act (such as assignments of geographic areas inside the corporate limits of municipalities in existence on March 29, 1973)[8] or more flexible negotiations that occurred shortly after its passage involving the Georgia Public Service Commission and all electric suppliers within a particular area,[9] the vast majority of the territory in each of Georgia's 159 counties was divided into assigned areas and assigned to only one electric supplier. With limited exceptions, the electric supplier assigned generally has the exclusive right to furnish service to new "premises"[10] locating within its assigned area.[11]

---

5 *See* S. 278, 152d Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* http://www.legis.ga.gov/Legislation/20132014/136801.pdf (proposing the City of Stonecrest); S. 277, 152d Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* http://www.legis.ga.gov/Legislation/20132014/136793.pdf (proposing the City of Dekalb); S. 275, 152d Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* http://www.legis.ga.gov/Legislation/20132014/136508.pdf (proposing the City of Lavista Hills); S. 270, 152d Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* http://www.legis.ga.gov/Legislation/20132014/135802.pdf (proposing the City of Lakeside).

6 *E.g.*, H.R. 286, 152d Gen. Assemb., Reg. Sess. (Ga. 2013), *available at* http://www.legis.ga.gov/Legislation/20132014/133584.pdf (consolidating the governments of the City of Hawkinsville and Pulaski County).

7 *See* O.C.G.A. §§ 46-3-2, 46-3-3(1).

8 *See id*. §§ 46-3-3(7), 46-3-5.

9 *See id*. §§ 46-3-4.

10 "Premises" is a term of art under the Territorial Act, meaning:

> the building, structure, or facility to which electricity is being or is to be furnished, provided that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer shall together constitute one premises; provided, however, that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one premises if the permanent service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; provided, further, that an outdoor security light, or an outdoor sign requiring less than 2200 watts, shall not constitute a premises.

*Id*. § 46-3-3(6).

11 *See id.* §§ 46-3-3(1), 46-3-4 to 46-3-5; *see*, *e.g.*, *id*. § 46-3-8 (providing exceptions to assigned supplier's otherwise exclusive service rights). For a general presentation on the rules and exceptions of the Territorial Act, *see* Peter K. Floyd, Georgia Territorial Electric Service Act 101 (Aug. 25 & 27, 2009), *available at* http://www.alston.com/files/Event/48475ca7-9c0b-41d5-ae86-78e285b4277b/Presentation/EventAttachment/60bd5baf-b4a0-4225-84c3-0789858b2125/GA%20Territorial%20Electric%20Service%20Act%20Presenta.pdf.

## Rules for New Premises Locating in a Wholly New Municipality or Consolidated/ Annexed Area

For new premises locating in wholly new municipalities or consolidated, annexed or otherwise merged geographic areas, the Territorial Act provides several noteworthy rules and exceptions that can substantially impact the rights of Georgia electric suppliers. For the most part, these rules fall into one of three categories: (1) the general rules for new premises locating in wholly new municipalities, (2) the general rules for new premises locating in geographic areas annexed to a municipality—including the merger, consolidation or other combination of an existing municipality and one or more other geographically defined political subdivision (so long as the resulting political subdivision constitutes a municipality)—and (3) the exceptions to the general rules, including, notably, the large load exceptions.

### *Wholly New Municipalities*

Under the Territorial Act, a wholly new municipality formed after March 29, 1973, is a subset within the broader political subdivision termed a "municipality," which under O.C.G.A. § 46-3-3(5) means:

(A) Any geographically defined political subdivision of this state, other than a county, performing or authorized to perform multiple and substantial municipal functions, specifically including either the function of furnishing retail electric service or the function of granting to electric suppliers street franchise rights for use in furnishing retail electric service;

(B) Any geographically defined political subdivision, or agency thereof, of this state if at any relevant time it lawfully furnishes retail electric service; and

(C) Any political subdivision of any other state that furnishes retail electric service within this state.

In general, for wholly new municipalities, the Territorial Act seeks to preserve the status quo.[12] Specifically, Section 46-3-6 of the Act provides that for geographic areas included within the initial limits of a wholly new municipality formed after March 29, 1973, "[a]ny portion of such geographic area then already assigned to an electric supplier shall continue to be so assigned," and "[a]ny portion of such geographic area which is then unassigned shall continue to be so unassigned."[13] Section 46-3-6 is subject to the provisions of O.C.G.A. § 46-3-8(d), however, which allows the

---

[12] It's important to point out the qualifications placed upon the Territorial Act's definition of "wholly new municipality," which provides that:

> "Wholly new municipality" means a municipality initially coming into existence after March 29, 1973, but not one resulting from the reincorporation of all or any portion of a geographic area theretofore contained in a previously existing municipality or from the merger, consolidation, or any other combination of two or more political subdivisions which are counties or incorporated cities.

O.C.G.A. § 46-3-3(13). Under this definition, while a consolidated or unified government may or may not constitute a "municipality" under the Territorial Act, *compare Troup County Elec. Membership Corp. v. Ga. Power Co.*, 229 Ga. 348, 353, 191 S.E.2d 33, 37 (1972) (refusing to declare the unified government formed by the consolidation of Columbus and Muscogee County governments to be a municipality), *with Athens-Clarke County v. Walton Elec. Membership Corp.*, 265 Ga. 229, 230, 454 S.E.2d 510, 512 (1995) (declaring that the Unified Government of Athens-Clarke County is "something other than a county" and therefore constitutes a "municipality" under the Territorial Act), it will not constitute a "wholly new municipality" because the new government will have been formed through the merger, consolidation or some other combination of previously existing counties or municipalities. *See, e.g., id*. (explaining that the Unified Government of Athens-Clarke County was formed through the consolidation of a preexisting county and municipality).

[13] Unassigned areas are areas that were not assigned to any electric supplier following the passage of the Territorial Act. These areas are classified as either an "Unassigned area-B," meaning an unassigned area that the Commission has declared to be an unassigned area-B, or an "Unassigned area-A," meaning an unassigned area that the Commission has not declared to be an unassigned area-B. *See id.* § 46-3-3(11)-(12). In general, any electric supplier may serve a new premises locating in an unassigned area-B if chosen by the consumer; however, if only one electric supplier has a line—either in existence on March 29, 1973, or thereafter lawfully constructed to serve new premises under the Territorial Act—within 500 feet of the new premises, then that electric supplier has the exclusive right to serve such premises. *See id*. § 46-3-3(12).

Commission—based on "public convenience and necessity"—to assign unassigned areas to any electric supplier or reassign already assigned areas to another electric supplier.

### *Consolidated/Annexed Areas*

For geographic areas annexed to a municipality—including the *merger, consolidation or other combination* of an existing municipality and one or more other geographically defined political subdivisions (so long as the resulting political subdivision constitutes a municipality)—the Territorial Act provides that for such areas immediately theretofore within the limits of a municipality or wholly new municipality, the rights and restrictions applying to electric suppliers located therein will continue to be governed by O.C.G.A. § 46-3-5 (for municipalities) and O.C.G.A. § 46-3-6 (for wholly new municipalities).[14] As such, if the annexation is to (or is contiguous to) an assigned area within a municipality in existence on March 29, 1973, then such area shall continue to be so assigned.[15] Similarly, if the annexation is to (or is contiguous to) a wholly new municipality that is already an assigned area, then, likewise, such area will continue to be so assigned.[16]

However, for areas annexed by something other than the merger, consolidation or other combination of a previously existing municipality and one or more other geographically defined political subdivisions in which the resulting political subdivision constitutes a municipality, then while previously assigned areas will continue to be so assigned, for previously unassigned areas, the primary supplier within the annexing municipality can initiate a process and, through it, be declared the assigned electric supplier under the Territorial Act.[17] However, there are very few remaining unassigned areas.

### *Large Load Premises Exceptions*

Of the numerous exceptions to the general exclusive service area rule in the Territorial Act, one of the most significant (and frequently disputed) exceptions is commonly called the "large load" premises exception, though it should more accurately be called "large load" premises exceptions since there are several variations of the exception.[18] And, while the most common large load exception related to incorporated areas allows the primary supplier within a municipality (if chosen by the consumer) to serve new large load premises locating anywhere in the municipality if chosen by the consumer, or allow a secondary supplier within the municipality (if chosen by the consumer) to serve new large load premises locating at least partially within 300 feet of the lines of such secondary supplier, two other large load exceptions are specifically relevant to large load premises locating in a wholly new municipality or a consolidated/annexed geographic area. First, for large load premises locating in the initial corporate limits of a "wholly new municipality," under the Territorial Act "any electric supplier" can serve the premises if chosen by the consumer (as if the newly incorporated area were still in the unincorporated county area).[19] Second, for large load premises locating in a geographic area "annexed in any manner" to a municipality after March 29, 1973, then similarly "any electric

---

[14] *Id.* § 46-3-7(1).

[15] *See id.* § 46-3-7(2)(A), (C).

[16] *See id.* § 46-3-7(2)(B), (C).

[17] *See id*. § 46-3-7(2)(D).

[18] A "large load" premises means one or more new premises, if utilized by one consumer, having single-metered service and a connected load that, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment). *Id*. § 46-3-8(a).

[19] *See id*. § 46-3-8(a)(3).

supplier owning lines in [the] municipality" can serve the new premises if chosen by the supplier.[20]

### *Consolidations/Annexations: Load Growth and Economic Development Risks*

Electric suppliers and economic developers should give careful consideration to this "annexed in any manner" variation, as significant potential new customer opportunities could be forever foreclosed if an area is annexed in this manner, including certain consolidations of entire formerly unincorporated county areas depending on the legal method used to effect consolidation. Reducing the potential suppliers from "all suppliers" to a handful, obviously, is harmful to the then-excluded electric suppliers. It also limits the potential to attract energy-cost-sensitive economic development opportunities as the competitive process (and resulting incentive electric service rates and terms) is greatly reduced or potentially eliminated (if there is only one electric supplier with lines in the area). State and local elected officials should take this into consideration in determining whether to annex or consolidate areas, and in determining what form a consolidation takes legally (annexation or some other form). Electric suppliers should take note of potential annexations and consolidations in their service areas (and potential future service areas) as certain strategies may be used at low cost to affect whether and/or how an area is annexed or consolidated, or to locate lines in the affected area prior to annexation (*e.g.*, potentially a short line connecting a solar panel or existing transmission line to a street light or sign, but not a line extended solely to serve a large load premises).[21]

---

[20] *See id.* § 46-3-8(a)(4). An exception applies for large load premises locating "outside the limits of a municipality," in which case the Territorial Act provides that "any electric supplier" may serve the load if chosen by the consumer. *See id.* § 46-3-8(a)(5).

[21] *See Walton Elec. Membership Corp. v. Ga. Power Co.*, No. 5800-U at 4-5 (Initial Decision, Aug. 9, 1996) (holding that under "the restriction of O.C.G.A. § 46-3-8(e)(1) . . . because the Little Ten Line would not have been constructed except to serve a large load customer, it does not acquire any service rights").

---

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Peter K. Floyd
404.881.4510
peter.floyd@alston.com

Ryan J. Hebson
404.881.4836
ryan.hebson@alston.com

Sean A. Atkins
202.239.3072
sean.atkins@alston.com

Brian A. Betancourt
212.210.9402
brian.betancourt@alston.com

James E. Croker, Jr.
202.239.3309
jim.croker@alston.com

William H. Hughes, Jr.
404.881.7273
bill.hughes@alston.com

Kenneth G. Jaffe
202.239.3154
kenneth.jaffe@alston.com

Michael N. Kunselman
202.239.3395
michael.kunselman@alston.com

Blanche L. Lincoln
202.239.3601
blanche.lincoln@alston.com

C. Michelle Marlo
213.576.1095
michelle.marlo@alston.com

Bradley R. Miliauskas
202.239.3405
bradley.miliauskas@alston.com

Jamil E. Nasir
202.239.3192
jamil.nasir@alston.com

Stephen C. Palmer
202.239.3360
stephen.palmer@alston.com

G. Christian Roux
202.239.3113
213.576.1103
chris.roux@alston.com

Richard P. Sparling
202.239.3077
richard.sparling@alston.com

James H. Sullivan, Jr.
212.210.9522
james.sullivan@alston.com

W.J. "Billy" Tauzin
202.684.9844
billy.tauzin@alston.com

Michael E. Ward
202.239.3076
michael.ward@alston.com

Ambrea Watts
202.239.3613
ambrea.watts@alston.com

Della Wager Wells
404.881.7891
della.wells@alston.com

Andrea Wolfman
202.239.3943
andrea.wolfman@alston.com