STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PUC-24-310

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND

Appellant

v.

PUBLIC UTILITIES COMMISSION

Appellee.

On Appeal from the Maine Public Utilities Commission

BRIEF OF APPELLEE MAINE PUBLIC UTILITIES COMMISSION

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. HISTORY OF THE MUNICIPAL EXEMPTION AT THE COMMISSION

In 2015, the Commission began to reexamine its rules regarding the attachment of utility facilities to joint-use utility poles ("poles").[1] *Maine Pub. Util's Comm'n, Inquiry into Amendment of Chapter 880 of the Commission's Rules*, No. 2015-00295, Notice of Inquiry (Me. P.U.C. Sept. 28, 2015). Since 2015, the Commission has undertaken ten inquiries and rulemakings to modernize Maine's pole attachment rules, which are codified at 65-407 C.M.R. ch. 880 (2023) ("Chapter 880").[2]

The idea of a "municipal exemption," however, predates this decade of pole attachment rule reform. In the 1993 version of Chapter 880—which was the then-current version when the Commission began its examination of Chapter 880 in 2015—the rule provided that if "make-ready expenses are caused by a municipality requesting space on the poles, each current user shall be responsible for its own costs for rearranging its facilities."[3] 65-407 C.M.R. ch. 880, § 7(A) (1993). Thus,

[1] The Commission's rules define a "joint-use utility pole" as "a utility pole on which there are circuit or electric conductor attachments by an electric utility and attachments by one or more joint-use entities." 65-407 C.M.R. ch. 880, § 1(P) (2023). Colloquially, joint-use utility poles are referred to as "telephone poles" and for convenience and ease of reading this brief will refer to joint-use utility poles simply as "poles."

[2] Commission Docket Nos. 2015-00295 (inquiry), 2017-00183 (inquiry), 2017-00247 (rulemaking), 2018-00010 (inquiry), 2019-00028 (rulemaking), 2019-00223 (inquiry), 2020-00181 (inquiry), 2020-00281 (rulemaking), 2021-00321 (inquiry), and 2023-00058 (rulemaking).

[3] "Make-ready" or "Make-ready work" is the "modification or replacement of a joint-use utility pole, or the lines or equipment on the joint-use utility pole, to accommodate additional facilities on the joint-use utility pole." 65-407 C.M.R. ch. 880, § 1(R) (2023). The 1993 version of Chapter 880 did not contain a codified definition of "make-

under this prior version of Chapter 880, the current utility users of the poles, not municipalities, bore the cost of make-ready expenses.

The municipal exemption was at issue when the Commission embarked on its modernization efforts for Chapter 880, beginning with the Commission's inquiry in 2017. *Maine Pub. Utils. Comm'n, Inquiry into Chapter 880 of the Commission's Rules*, No. 2017-00183. The municipal exemption issue was raised by the Maine Municipal Association ("MMA"), which argued for preserving the exemption. *Maine Pub. Utils. Comm'n*, No. 2017-00183, Comments of Maine Municipal Association at 1-2 (Aug. 25, 2017) (No. 2017-00183, CMS Item No. 23).[4]

In the rulemaking following the 2017 Inquiry, the Commission proposed to retain the municipal exemption but proposed language that would amend the municipal exemption to clarify that the exemption only applies when municipalities are "requesting space on the poles for non-commercial use

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ready" or "make-ready work," but the text of the rule contained a subsection with the heading "Make-Ready Work" with language that read as follows:

> An additional attacher or an existing user placing an additional attachment shall be charged reasonable expenses incurred in surveying existing poles or in moving conductors, circuitry or other equipment attached to a joint-use utility pole, for the purpose of making space available for the additional attachment ("rearrangements" or "make-ready" work).

65-407 C.M.R. ch. 880, § 7(A) (1993). Make-ready work is a one time charge for construction, as opposed to the recurring annual charge imposed by pole owners as, essentially, rent for occupying space on the pole.

[4] For the convenience of the Court, throughout this Brief the Commission will refer to filings in its administrative record that are not contained in the Appendix and are not Commission orders by the filing's "CMS Item No." The CMS Item No. corresponds to the number in the "Item No." column in the "Filings" tab of the relevant Docket in the Commission's online Case Management System, which is available at https://www.maine.gov/mpuc/online-services.

consistent with the police power of the municipality." *Maine Pub. Utils. Comm'n, Amendment to Chapter 880 of the Commission's Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2017-00247, Legislative Edit of Chapter 880 (Me. P.U.C. Sept. 27, 2017) (No. 2017-00247, CMS Item No. 3).

In the 2017 rulemaking proceeding, MMA proposed expanding the definition to expressly include municipally owned broadband within a municipality's police power, arguing that the installation of broadband infrastructure is equivalent to traditional police power functions such as the installation of roads, sewers, emergency communications lines, and traffic signals. *Maine Pub. Utils. Comm'n*, No. 2017-00247, Order Amending Rule and Factual and Policy Basis at 11 (Me. P.U.C. Jan. 12, 2018).

Other participants in the rulemaking opposed, on anti-competitive grounds, MMA's inclusion of broadband as a police power. For example, the Telecommunications Association of Maine ("TAM") argued that a municipal provider of broadband infrastructure is functionally indistinguishable from a commercial provider of the same service, and, thus, when a municipality is *de facto* competing in this marketplace it should be treated like any other market participant. *Id.*

Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"), the predecessor to Consolidated

Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE ("Consolidated" or "Appellant"), agreed with TAM's position on the municipal exemption. FairPoint stated that while it "has always allowed municipal attachment to FairPoint's utility poles at no cost for legitimate, public, protective purpose under its police power," the provision of

> communications service is not a protective public purpose under the police power, and therefore to the extent municipalities are constructing infrastructure for communications purposes, they cannot enjoy the benefit of free attachment, nor should other attachers be required to move their attachments in the right of way to accommodate this purpose.

Maine Pub. Utils. Comm'n, No. 2017-00247, FairPoint Comments at 15 (Dec. 19, 2017) (No. 2017-00247, CMS Item No. 37).

The Commission agreed with the views of TAM and FairPoint. In its order amending Chapter 880, the Commission performed the following analysis and made the following findings:

> Back in 1993, when Chapter 880 was last amended, there was not much concern that municipalities would seek to engage in activities that would compete with the entities that used joint-use utility poles; the primary consideration at the time was to allow, as the Commission stated in the 1993 [notice of rulemaking], "municipal uses." Municipal uses at the time were understood to mean, for example, connections for traffic signals, connections between municipal offices, and connections for emergency communications for police and fire and rescue; municipal activities related to the health, safety,

and welfare of its residents. In other words, "police power" activities.[5]

Today, however, more and more municipalities are seeking to either fill gaps left by the lack of options in their communities for modern telecommunications, such as high-speed broadband, or to provide additional, affordable options for those services. These are laudable goals, and, as highlighted by MMA, goals that [the] Maine Legislature has expressed in statute. 35-A M.R.S. § 9202-A.

The fact that the State and the Commission agree that increased access to broadband in Maine is an unequivocal good does not, however, mean that, in a competitive marketplace, municipalities should somehow have an advantage over other market entrants. The Commission agrees with TAM, FairPoint, the Cable Operators, and others that both the direct provision of Internet service, and the provision of "middle mile" access are in direct competition with other commercial entities that provide these services. Changing "non-competitive" to "non-discriminatory" as suggested by MMA and Franklin County does not alter the fact that municipalities would have a significant advantage over other entities providing identical services.[6] In addition, the provision of Internet service or Internet infrastructure is not, in the Commission's view, a police power function.

Accordingly, the Commission declines to provide municipalities with unfettered, free-of-charge access to

[5] "The police power is '[t]he inherent and plenary power of the sovereign to make all laws necessary to preserve the public security, order, health, morality, and justice,' and the right of a state to 'establish and enforce laws protecting the public's health, safety, and general welfare.'" *Maine Pub. Utils. Comm'n*, No. 2017-00247, Order Amending Rule and Factual and Policy Basis at 12 n. 14 (Me. P.U.C. Jan. 12, 2018) (*quoting Black's Law Dictionary* at 534 (2d Pocket Ed. 2001)).

[6] "Indeed, many, if not most, direct Internet and middle mile services are offered to the public on a non-discriminatory basis. Internet service providers such as FairPoint and the Cable Operators offer service to members of the general public, as do middle mile providers such as [Maine Fiber Company] who make their dark fiber available on an open-access basis." *Maine Pub. Utils. Comm'n*, No. 2017-00247, Order Amending Rule and Factual and Policy Basis at 12 n. 15 (Me. P.U.C. Jan. 12, 2018)

> joint-use utility poles for any competitive services such as the provision of Internet service or Internet infrastructure.

Maine Pub. Utils. Comm'n, No. 2017-00247, Order Amending Rule and Factual and Policy Basis at 12-13. The Commission then proceeded to amend Chapter 880 to make clear that the municipal exemption only applied to make-ready work necessary to create "space on the poles for non-commercial, non-competitive use consistent with the police power of the municipality." 65-407 C.M.R. ch. 880, § 7(A) (2018).

The Commission's 2018 amendments to Chapter 880 were not, however, the final word on the municipal exemption. In April of 2018, the Town of Gorham filed a complaint pursuant to the Commission's informal Expedited Pole Attachment Complaint Process (65-407 C.M.R. ch. 880, § 11 and attach. A (2019))[7] ("Rapid Response Process") with the Commission's Rapid Response Process Team ("RRPT") regarding a dispute with Appellant.[8] *Maine Pub. Utils. Comm'n, Commission Initiated Investigation into Section 7(A) of Chapter 880 of the Commission's Rules Regarding Make Ready Work*, No. 2018-00136, Order at 1

[7] The section numbers in Chapter 880 that refer to the Rapid Response Process have changed over time, but the process that was in effect in 2019 remains in effect in the current version of Chapter 880.

[8] The Rapid Response Process provides an informal, expedited, dispute resolution process for pole attachers that find themselves unable to resolve a dispute with a pole owner. 65-407 C.M.R. ch. 880, attach. A (2023). Typically, the Commission's RRPT, which is made up of designated members of the Commission's Advisory Staff assigned to the Commission's Telephone and Water Utility Industries Division, schedules an initial conference call within two business days of receipt of a complaint. *Id.* The RRPT then tailors the informal process to the needs of the parties and, if the parties are ultimately unable to come to an agreement, the RRPT will issue guidance to the parties in the form of an "RRPT Order," which is subject to review by the Commission. *Id.*

(Me. P.U.C. Mar. 13, 2019). According to the Town of Gorham's complaint, the dispute concerned charges for make-ready expenses for a fiber-optic network the Town was planning to install in Gorham. *Id.* Included with the complaint was correspondence between the Town of Gorham and Appellant regarding the dispute. *Id.* Among other things, the correspondence explained Appellant's view that the costs associated with replacing a pole are not make-ready expenses and do not qualify for the municipal exemption. *Id.* In effect, Appellant was arguing that "make-ready" referred only to the preparation of an existing pole to accommodate an additional attachment on that pole, and not the replacement of an existing pole with a new, presumably taller pole.[9]

In May of 2018, the RRPT issued guidance to the parties in the form of an "RRPT Order."[10] *Id.* at 1-2. During the informal proceeding before the RRPT, Appellant argued, in addition to its argument regarding pole replacements not qualifying as make-ready expenses, that the entire municipal exemption was the taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution. *Id.*

[9] In the Commission's experience, a pole may need to be replaced with a taller pole because there is no space available on the pole to accommodate a new attachment and still have the pole comply with applicable construction codes or engineering standards. *See, e.g.*, *Maine Pub. Utils. Comm'n*, No. 2023-00052, Tech, Conf. Tr. at 11:9-12:20 (Oct. 12, 2023) (CMS Item No. 43).

[10] Because the Rapid Response Process is non-adjudicatory and conducted on an informal, ex parte basis RRPT Orders are non-binding and only constitute guidance to the parties to the dispute. (A. 8.)

Ultimately, the RRPT recommended the Commission open an investigation on the pole replacement question but declined to provide guidance on Appellant's constitutional argument, opining that the constitutionality of a Commission rule is best addressed by a court of law and not the Commission itself. *Id.* at 2.

The Commission subsequently opened the investigation and during the investigation Appellant presented further argument regarding the constitutionality of the municipal exemption. *Id.* at 7. The Commission did not address Appellant's constitutional arguments in its order concluding the investigation.[11]

The Commission did, however, solicit discussion and comment regarding the constitutionality of the municipal exemption in a subsequent rulemaking proceeding to amend Chapter 880. *Maine Pub. Utils. Comm'n*, *Amendments to Chapter 880 of the Commission's Rules – Attachments to Joint Use Utility Poles; Determination and Allocation of Costs; Procedure*, No. 2019-00028, Notice of Rulemaking (Me. P.U.C. Mar. 22, 2019). In its notice of rulemaking, the Commission described the RRPT proceeding and pole replacement investigation described above and requested "specific comments on [Appellant's] constitutional arguments" as expressed in Appellant's exceptions to the Examiner's Report in the pole replacement investigation (*Maine Pub. Utils. Comm'n*, No. 2018-00136). *Maine Pub. Utils. Comm'n*, No. 2019-00028, Notice of Rulemaking at 5, 5 n. 6.

[11] On the pole replacement question, the Commission found that "make-ready" includes both the preparation of an existing pole for new attachments and pole replacements necessitated by new attachments. *Id.* at 10.

Shortly after the Commission commenced its rulemaking proceeding, and concomitantly with its examination of Appellant's constitutional arguments regarding the municipal exemption, the Governor, on May 16, 2019, signed P.L. 2019, ch. 217, "An Act to Establish Municipal Access to Utility Poles Located in Municipal Rights-of-Way" (the "Municipal Access Act"), which became effective on September 19, 2019. The Municipal Access Act amended Maine law to state that current attachers to poles are responsible for the costs of any make-ready work (including replacement of a pole) that is necessary to accommodate a municipal attachment to a pole for police power purposes, or "[f]or the purpose of providing broadband service to an unserved or underserved area." 35-A M.R.S. § 2524(1), (2).

In discussing the Municipal Access Act, the Commission stated that

> In its proposed amendment to [the municipal exemption], the Commission endeavored to strike a balance between the historical policy of exempting municipal, police power attachments from make-ready charges, and the burden placed on the pole owners by the need to replace a fully-loaded pole. To that end, the Commission proposed to preserve the municipal exemption for make-ready costs associated with rearranging facilities on poles, but not apply the exemption to costs associated with the replacement of poles that are necessitated by the municipal attachment. In the Commission's view, this balance preserved the important public policy served by the municipal exemption, while at the same time, not placing the entire burden of that policy on pole owners and non-municipal attachers.

> Given the enactment of the Municipal Access Act and the amendment of 35-A M.R.S. § 2524, however, the Commission's view on the matter is no longer relevant. The Legislature has clearly expressed its intention that municipalities not pay any make-ready costs, including the cost of replacing a pole, when attaching to a pole for police power purposes. In addition, the Legislature has applied the same exemption when a municipality is providing broadband to an unserved or underserved area.
>
> Accordingly, the Commission is amending [the municipal exemption in] the Rule to conform with the Municipal Access Act and the amended 35-A M.R.S. § 2524. Because this portion of the Rule is now designated by statute, the Commission declines to examine [Appellant's] constitutional arguments with regard to the Commission's originally proposed changes; if [Appellant] has similar concerns with the Municipal Access Act there are other more appropriate forums in which [Appellant] may seek relief from the statue.

Maine Pub. Utils. Comm'n, No. 2019-00028, Order Amending Rule and Statement of Factual and Policy Basis at 9 (Me. P.U.C. Nov. 6, 2019). The Commission then proceeded to amend Chapter 880 to conform the municipal exemption in the rule with the Municipal Access Act and 35-A M.R.S. § 2524. *Id.* at 9 n. 7; 65-407 C.M.R. ch. 880, § 5(A) (2019).

The Commission has twice since amended Chapter 880 but has not substantively amended the municipal exemption in the rule since 2019.[12] *Compare* 65-407 C.M.R. ch. 880, § 5(A) (2019) *with* 65-407 C.M.R. ch. 880, § 5(A) (2021) *and* 65-407 C.M.R. ch. 880, § 6(A) (2023).

[12] The Commission has in subsequent rulemakings made non-substantive editorial and scrivener's error corrections and adjustments to the section of Chapter 880 that contains the municipal exemption.

II. THE SOMERVILLE-CONSOLIDATED DISPUTE AT THE COMMISSION

A. Broadband Access in Somerville

The Town of Somerville, Maine ("Somerville" or the "Town"), is a small rural town in Lincoln County which, as of the April 1, 2020, census had a population of approximately 600 people. State of Maine, Dept. of Admin. and Fin. Servs., State Economist, Total Population for Maine Cities and Towns (2010-2019).[13] As late as 2023, high-speed Internet service in Somerville was sporadic at best: "connections [were] either non-existent, slow, unreliable, very expensive, or a frustrating combination of those attributes." (A. 84.) The recent COVID-19 pandemic brought the lack of reliable high-speed broadband access into stark relief as many children were required to attend school remotely and many residents were required to work from home. (A. 84-85.) In light of this, Somerville began exploring options to provide fast, reliable broadband in Somerville, ultimately choosing a contractor and internet service provider and applying for, and ultimately obtaining, a federal grant to fund the project. (A. 85.)

As part of the construction of the broadband project, Somerville contacted Appellant in 2022 and requested an agreement to attach to poles owned or

[13] The study is available at https://www.maine.gov/dafs/economist/sites/maine.gov.dafs.economist/files/inline-files/Total%20Population%20for%20Maine%20Cities%20and%20Towns%20%282010-2019%29.xlsx (last accessed Dec. 19, 2024)

controlled by Appellant. (A. 67.) It is the process of entering into the pole attachment agreement that gives rise to the dispute at issue in this appeal.

B. The Informal Rapid Response Process at the Commission

The crux of the dispute before the Commission—both in the formal adjudicatory investigation and the informal Rapid Response Process that proceeded that investigation—is the municipal exemption in 35-A M.R.S. § 2524 ("Section 2524"). In simplest terms, Somerville, as a municipality and pursuant to Section 2524, refused to pay Appellant for make-ready work to attach to poles and Appellant refused to enter into a pole attachment agreement without payment for make-ready.[14] (A. 67.)

As a consequence of what Somerville perceived to be a clear violation of Maine law, the Town, on February 14, 2023, filed a complaint pursuant to the Rapid Response Process. (A.7); 65-407 C.M.R. ch. 880, § 8 and attach. A (2021). The parties were unable to come to an accommodation during the informal Rapid Response Process and the RRPT issued its guidance on March 2, 2023. (A. 8 and 31-36.)

The guidance provided to the parties by the RRPT was as follows: (1) Somerville is a municipality within the meaning of Section 2524, (2) Somerville is

[14] Somerville and Appellant eventually entered into a pole attachment agreement. (A. 68.) Somerville has paid the costs for make-ready, under protest, during the pendency of the Commission proceeding and this appeal. *Maine Pub. Utils. Comm'n, Investigation into Rapid Response Decision Pertaining to Town of Somerville and Consolidated Communications*, No. 2023-00052, Direct Testimony of Christopher Johnson at 11:1-2 (May 31, 2023) (No. 2023-00052, CMS Item No. 25); *Maine Pub. Utils. Comm'n*, No. 2023-00052, Brief of the Town of Somerville at 5 (Dec. 15, 2023) (No. 2023-00052, CMS Item No. 49).

engaged in or intends to be engaged in the provision of broadband service, (3) Somerville is or will be providing broadband service to an "unserved" or "underserved" area withing the meaning of Section 2524, and (4) given the foregoing, Appellant was unreasonably refusing to comply with Section 2524. (A. 8-9 and 33-34.) The RRPT declined, however, to provide any guidance to the parties regarding the constitutionality of Section 2524. (A. 9 and 33-34.)

Shortly after the RRPT provided its guidance, Appellant requested the Commission formally resolve the dispute. (A. 9.)

C. The Formal Adjudicatory Proceeding at the Commission

As requested by Appellant, the Commission, on March 21, 2023, opened a formal adjudicatory proceeding into the dispute between Appellant and Somerville, a proceeding that lasted nearly 14 months. (A. 9.) At the outset of the proceeding, Appellant raised the constitutionality of Section 2524, and thereafter the adjudicatory proceeding contained all procedural steps common to formal adjudications at the Commission: intervention by interested parties, pre-filed testimony, discovery, legal briefing, the recommendation of the Commission's Advisory Staff, and comments and exceptions to that recommendation.[15] (A. 9-11).

[15] While parties to the proceeding were subject to sworn cross-examination at a technical conference, the parties collectively waived a full evidentiary hearing in the matter. (A. 11.)

1. The Commission's Findings of Fact and Conclusions of Law

The Commission issued its final order on June 13, 2024. (A. 7-30.) In its final order, the Commission made the following findings of fact:

- Somerville is a "municipality" as that term is used in Section 2524 and Chapter 880. (A. 13)
- Somerville is an "unserved or underserved area" as that term is used in Section 2524 and Chapter 880. (A. 13.)
- The broadband project that was the subject of the dispute (hereinafter "the Project") will provide broadband service within Somerville. (A. 13.)
- As part of the Project, Somerville will be "attaching facilities" to a "shared-use pole" as those terms are used in Section 2524. (A. 13.)
- Part of the construction work that will be undertaken by Somerville for the Project is "make-ready" work as that term is used in Section 2524 and Chapter 880. (A. 13)
- Appellant is an "owner of shared-use pole[s]" as that term is used in Section 2524. (A. 13.)
- The cost of the make-ready work for the Project was $97,624.60. (A. 14.)
- Somerville received grant funding to assist the Town in completing the Project, $278,620 of which was "earmarked for make-ready" and

included expenses related to licensing application fees and make-ready work including any needed pole replacements. (A. 14.)

In addition to the factual findings describe above, the Commission made the following conclusions of law regarding Section 2524.

- In order to qualify for the municipal exemption in Section 2524, Somerville must show (1) that Somerville is a municipality, (2) that Somerville is engaged in or intends to be engaged in the provision of broadband service; and (3) that Somerville's provision of broadband service will occur in an unserved or underserved area. (A. 21-22.)
- Somerville successfully made the above showings and, thus, was entitled as a matter of law to invoke Section 2524. (A. 22-23.)
- Somerville had invoked Section 2524 in the adjudication before the Commission. (A. 23.)
- Pursuant to Section 2524, Appellant may not charge Somerville for make-ready work associated with the Project.[16] (A. 24.)

Based on the above findings of fact and conclusions of law, the Commission ordered Appellant to refund any payment or payments that Somerville had rendered to Appellant for make-ready work for the Project. (A. 24, 29.)

[16] The Commission in its final order described the precise tasks that qualify as make-ready work for the purpose of the adjudication. (A. 23-24.)

2. Other Analysis Provided by the Commission

In addition to the above findings of fact and conclusions of law, the Commission in its order also discussed the constitutional takings issue raised by Appellant, the propriety of Somerville's use of grant funding for the Project, and whether Section 2524 unfairly discriminates against other broadband providers.

a. Somerville's Use of Grant Funding

Of the grant funding that Somerville received for the Project, approximately $278,000 of that funding was earmarked for the cost of make-ready work. (A. 25.) Appellant argued that receiving grant funding for make-ready and then not having to pay any costs associated with make-ready results in a windfall to Somerville that is against public policy. (A. 25.) The Commission's view was that, in light of Appellant's clear and sustained argument that Section 2524 is unconstitutional, "it would have been imprudent and irresponsible for Somerville to have not included make-ready costs in its grant funding as a contingency" in case a court ultimately agreed with Appellant and struck down Section 2524. (A. 26.) Further, the Commission noted that if Somerville were to ultimately prevail on the constitutional issue, the terms of its grant require the Town to return the unused funds thus negating the windfall. (A. 26.)

Appellant also argued "that enforcing Section 2524(2) when Somerville has obtained grant funding for make-ready work leads to an absurd result that the Legislature could not have envisioned when it enacted 2524(2)." (A. 27.) (internal

quotation marks and citation omitted). The Commission's view was that the receipt of grant funding for make-ready could harmonize with what the Commission perceived to be the Legislature's intent when it enacted Section 2524: the acceleration of broadband deployment in Maine. (A. 27.) Ultimately, Section 2524 could reduce the amount of grant funding for which municipalities must apply and, thus, increase the chances of the award of such funding. (A. 27.) Further, the Commission concluded that Somerville's receipt of grant funding does not lead to an absurd result as that term has been used by the Law Court. (A. 27.)

b. Discrimination and Unfair Competition

Appellant and other parties to the proceeding argued that Section 2524 puts the Town in a preferential position *vis a vis* other broadband providers that may want to offer service in Somerville. (A. 28.) The Commission stated that it understood the anti-competitive concerns raised by the parties and, indeed, the Commission itself had raised such concerns when the Commission declined to incorporate the municipal exemption into Chapter 880 in a Commission rulemaking proceeding in 2017 and 2018. (A. 28.) However, the Legislature had, in the Commission's view, effectively mooted this argument when it enacted Section 2524:

> Thus, the Commission's view on the matter of unfair competition is not relevant to this proceeding. Nor for that matter are the views of the parties. The Legislature was aware of this issue when it considered Section 2524(2), *see e.g., An Act to Establish Municipal Access*

> *to Utility Poles Located in Municipal Rights-of-way: Hearing on L.D. 1192 Before the J. Standing Committee on Energy, Utilities, and Technology*, 129th Legis. (2019) (testimony of Sarah Davis on behalf of Consolidated Communications), and the Legislature nonetheless proceeded to enact the legislation.

(A. 29.)

Accordingly, the Commission declined "to make findings that are clearly in contravention of the statute" and stated that such policy matters are best addressed by the Legislative branch. (A. 29).

ISSUES PRESENTED FOR REVIEW

1. DID THE COMMISSION CORRECTLY DETERMINE THAT 35-A M.R.S. § 2524 DOES NOT CREATE AN ABSURD RESULT WHEN A MUNICIPALITY RECEIVES CONTINGENCY GRANT FUNDING FOR MAKE-READY WORK?

2. UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, DOES 35-A M.R.S. § 2524 CONSTITUTE AN UNCONSTITUTIONAL TAKING WHEN A POLE OWNER IS REQUIRED TO PAY THE MAKE-READY CHARGES OF A MUNICIPAL BROADBAND INFRASTRUCTURE ATTACHER?

ARGUMENT

I. THE COMMISSION CORRECTLY DETERMINED THAT 35-A M.R.S. § 2524 DOES NOT CREATE AN ABSURD RESULT WHEN A MUNICIPALITY RECEIVES CONTINGENCY GRANT FUNDING FOR MAKE-READY WORK.

The Law Court's review of a Commission decision is deferential and "[o]nly when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene." *Dunn v. Public Utils. Comm'n*, 2006 ME 4, ¶ 5, 890 A.2d 269. Further, an abuse of discretion may be found where an appellant demonstrates that the decision maker exceeded the bounds of reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law. *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. A party appealing a decision committed to the reasonable discretion of a state decision maker has the burden of demonstrating that the decision maker abused its discretion in reaching the decision under appeal. *Id.*

This deferential standard of review has particular force when an agency is applying its own statute or rules, as is the case here with the Commission's application of Section 2524. *Enhanced Commc'ns of N. New Eng. v. Public Utils. Comm'n*, 2017 ME 178, ¶ 7, 169 A.3d 408 (quoting *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74); *Pine Tree Tel. & Tel. Co. v. Public Utils. Comm'n*, 634 A.2d 1302, 1304 (Me. 1993) ("This court

generally refuses to second-guess agencies on matters within their expertise."). Further, the Court upholds the Commission's interpretation unless the rule or statute plainly compels a contrary result. *Taylor v. Public Utils. Comm'n*, 2016 ME 71, ¶ 6, 138 A.3d 1214.

However, it is a well-accepted principle of statutory construction that courts and administrative agencies can disregard the plain language of a statute to avoid an absurd result. *Mullen v. Liberty Mut. Ins. Co.*, 589 A.2d. 1275, 1277 (Me. 1991); *Reed v. Secretary of State*, 2020 ME 57, ¶ 17, 232 A.2d 202. The Law Court has referred to a statutory interpretation as an absurd result when that interpretation frustrates or defeats the legislative purpose of the statute, *Mullen*, 589 A.2d at 1277, circumvents the Legislatures intent, *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 24, 252 A.3d 504, or requires the Commission to undertake meaningless action, *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, ¶ 18, 227 A.3d 1117, 1123.

A. Argument Below and on Appeal

During the Commission's adjudicatory proceeding in this matter, Appellant argued that enforcing Section 2524(2) when Somerville had obtained grant funding for make-ready work led to a result that the Legislature could not have envisioned when it enacted 2524(2). (A. 27.) As support for its argument, Appellant stated that Section 2524(2) assumes that municipalities would otherwise have to self-fund make-ready costs. (A. 27.)

Appellant expands on this justification in its brief on appeal, referring to an assumed legislative objective of "safeguarding access to poles" and making the further assumption that in enacting Section 2524 "the Legislature concluded that the cost of make-ready work acted as a barrier to municipalities gaining access to poles, and the Municipal Exemption seeks to remove that barrier by requiring pole owners to absorb those costs." (Blue Br. 36 and 37.) Appellant also argues that the Legislature assumed that municipalities would somehow be unaware of grant funding or be unable to attain such funding and "would otherwise have to self-fund make-ready costs." (Blue Br. 38.) Tellingly, Appellant provides no support for any of its assumptions in the form of legislative history or committee testimony.

Appellant then relies on these assumptions to argue that because Somerville has the funds to pay for make-ready there is no barrier that needs removing and no infrastructure access that needs safeguarding and, thus, "application of the Municipal Exemption is not required in these circumstances to achieve the legislative objective." (Blue Br. 37.) Further, Appellant argues that it is contrary to the public interest to require Appellant's shareholders to absorb Somerville's make-ready costs. (Blue Br. 37.) It is primarily Appellant's perception of the public interest being averse to economic burdens that forms the peg on which it appears to hang its absurd result hat.[17]

[17] Appellant also argues that Somerville will receive a "windfall" if it does not have to pay for make-ready. (Blue Br. 39.) Somerville stated during sworn cross examination in June of 2023 that the Town would "work out whether [unused money for make-ready] has to be paid back to [the granting agency] or can be deposited in a broadband fund with which to self-insure against a weather or another disaster." *Maine Pub. Utils. Comm'n*, No. 2023-00052,

B. Applying the Plain Language of Section 2524 to Appellant does not Create an Absurd Result

Appellant provides two justifications for its assertion that applying the plain language of Section 2524 creates an absurd result: (1) that the Appellant (or, more specifically, its shareholders) will suffer economic harm as a result of the application of Section 2524, and (2) that application of Section 2524 in the circumstances before the Commission would frustrate the legislative purpose. Both arguments are unavailing.

1. Economic Harm

This Court discussed absurd results in an economic context in *Mullen v. Liberty Mut. Ins. Co.*, 589 A.2d. 1275 (Me. 1991). In *Mullen*, the Court was considering, *inter alia*, whether a statute creates an absurd result simply because application of the statute causes economic harm. *Mullen*, 589 A.2d at 1277.[18] The Court's answer to this question was no: "That the present statutory language may cause hardship to Mullen in this case does not render the results absurd, nor does it present justification to disregard the wording of the statute." *Id.*

In the matter before the Court, it is clear that Section 2524 will place an economic burden on Appellant. The plain language of the statute compels as much

Tech. Conf. Tr. at 50:2-8 (June 29, 2023) (No. 2023-00052 CMS Item No. 46). In its brief to the Commission, filed six months after cross examination, Somerville confirmed that the terms of its grant do indeed require the return of unused funds to the granting authority. (A. 25.) Thus, even if one could categorize the use of grant funding as a contingency against a natural disaster as a "windfall"—a concession the Commission does not make—it is clear from the administrative record that Somerville is required to return the unused funds.

[18] The economic harm in *Mullen* concerned the difference between the actual monetary recovery under an automobile insurance policy and the policy limit. *Mullen*, 598 A.2d at 1276,

when it states: "an owner of a shared-use pole and each entity attaching to that pole is responsible for that owner's or entity's own expenses for make-ready work to accommodate a municipality's attaching its facilities to that shared-use pole." 35-A M.R.S. § 2524(2). Placing the economic burden of make-ready on pole owners and other attachers is the entire point of Section 2524(2) and as this Court articulated in *Mullen*, causing economic burdens or hardships does not render a statute absurd.

Further, in its brief, just as in its arguments below, Appellant baldly states that Section 2524's requirement that Appellant pay make-ready costs is contrary to the public interest without providing any explanation of why this is so. (Blue Br. 38, A. 26, A. 27 n.17.) The Commission, however, concluded that the public interest lies in Somerville not paying for make-ready. As the Commission explained:

> In the Commission's view, it would have been imprudent and irresponsible for Somerville to have not included make-ready costs in its grant funding as a contingency against a tribunal ultimately finding that Section 2524(2) is unconstitutional. This is particularly true given Consolidated's position on the matter. Consolidated has been crystal clear for several years that the municipal exemption now codified in Section 2524 is unconstitutional and should not, indeed cannot, be enforced. *Public Utilities Commission, Amendments to Chapter 880 of the Commission's Rules*, Docket No. 2019-00028, Order Adopting Rule and Statement of Factual and Policy Basis at 4 (Nov. 6, 2019) ("[Consolidated] restates arguments it has made in prior proceedings that the exemption violates both the United

> States and Maine Constitutions"); *An Act to Establish Municipal Access to Utility Poles Located in Municipal Rights-of-way: Hearing on L.D. 1192 Before the J. Standing Committee on Energy, Utilities, and Technology,* 129th Legis. (2019) (testimony of Sarah Davis on behalf of Consolidated Communications) ("The Commission is considering among other issues, the Constitutional issues raised by this government taking of private property").
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> . . .
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> Indeed, it is the Commission's view that Somerville *not* planning for the possibility that Section 2524 could be unenforceable would itself have been contrary to the public interest because should Consolidated ultimately prevail Somerville taxpayers would be left to foot the bill.

(A. 26-27.) (emphasis in original). The Commission continues to stand by this analysis.

2. Legislative Purpose

In its brief, Appellant opines that the "Legislature concluded that the cost of make-ready work acted as a barrier to municipalities gaining access to poles, and [Section 2524] seeks to remove that barrier by requiring pole owners to absorb those costs." (Blue Br. 36.) Appellant also frames the legislative purpose of Section 2524 as "safeguarding access to poles." (Blue Br. 37.) Appellant then argues that the application of Section 2524 to Somerville, where the Town has received a grant to pay for make-ready "[i]s not required . . . to achieve the legislative objective." (Blue Br. 37.)

"The first task of a court when interpreting a statute is to ascertain the real purpose of the legislation." *State v. Niles*, 585 A.2d 181, 182 (Me. 1990). In the matter on appeal, Appellant's view of Section 2524 and the Commission's view of Section 2524 are not necessarily in conflict. The Commission agrees that one effect of Section 2524 is to remove a cost barrier for municipalities when attaching to poles. The Commission also agrees that another effect of Section 2524 is to safeguard access to poles. Those effects, however, are not, in the Commission's view, the *reason* that the Legislature enacted Section 2524. That is to say, the purpose of Section 2524 is not simply to save municipalities money or ensure pole access. Those two laudable effects serve the overall purpose of the statute, which the Commission concluded is to "encourage and expedite the proliferation of municipal broadband projects." (A. 28.)

"Once [the legislative] purpose is found, a court should give effect to it, avoiding results that are absurd, inconsistent, unreasonable or illogical, if the language of the statute is fairly susceptible to such a construction." *State v. Niles*, 585 A.2d at 192. Given that the purpose of the statute is municipal broadband expansion, it is not unreasonable or illogical to conclude, as the Commission did, that

> [t]he fact that a municipality may receive grant funding, and that a portion of that grant funding could be used to pay for make-ready work in the absence of Section 2524(2) does not frustrate, circumvent, or defeat the Legislature's purpose of encouraging municipal

> broadband projects. Indeed, it is easy to envision how the receipt of grant funding for make ready could harmonize with the Legislature's intent by reducing the amount of grant funding for which municipalities must apply and, thus, increasing the chances of the award of such funding. Put another way, it is not clear to the Commission that the "obvious Legislative purpose" of Section 2524(2) is to have the statute apply only in absence of grant funding. *Reed*, 2020 ME 57, ¶ 17.

(A. 28.) This analysis is correct as a matter of law and is entitled to deference.

II. THE COMMISSION DID NOT ADDRESS THE CONSTITUTIONALITY OF SECTION 2524

Given Appellant's timely raising of the issue, the Commission provided the parties with an ample and full opportunity to develop an evidentiary record upon which the parties could argue the constitutionality of Section 2524. In its order, the Commission described in some detail the arguments of the parties regarding whether Section 2524 is consistent with the Fifth and Fourteenth Amendments to the U.S. Constitution. (A. 15-21.) Notwithstanding the above, however, the Commission declined to make conclusions of law regarding the constitutionality of Section 2524 and declined to strike down Section 2524 as unconstitutional. (A. 21.) The Commission, as is proper for a legislatively created Executive Branch administrative agency, assumed the constitutionality of Section 2524 and then proceeded to apply the plain language of the statute to the evidentiary record before it. *Dickinson v. Maine Pub. Serv. Co.*, 223 A.2d, 435, 436 (Me. 1966)

("The Commission as a quasi judicial tribunal very properly assumed the constitutionality of the new legislation").

This restraint and agency presumption of the constitutionality of statues is grounded in principles of separation of powers. *Wilson Cnty. Bd. Of Educ. v. Retirement Sys. Div.*, 891 S.E.2d 626, 633 (N.C. Ct. App. 2023) (it is "well-settled law that the judiciary may determine the constitutionality of a statute, but an administrative board may not"); *see also Clark v. Arkansas St. Bd. Of Health*, 699 S.W.3d 732, 736 (Ark. Ct. App. 2024) ("An administrative agency lacks the authority to decide the issue of the unconstitutionality of a statute"), *and Haaayy, LLC v. Department of Fin. and Prof. Regul.*, --- N.E.3d ---, ¶ 50, 2024 WL 4294026, *10 (Ill. App. Ct. 2024) ("Although parties are encouraged to raise constitutional issues before an administrative agency in order to preserve them for judicial review, it is well-settled that agencies lack the authority to decide constitutional issues").

CONCLUSION

For the foregoing reasons, the Commission respectfully requests this honorable Court affirm the findings of fact and conclusions of law in the Commission's June 13, 2024, Order in Docket No. 2023-00052.

December 31, 2024

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CERTIFICATE OF SERVICE

I, Jordan McColman, hereby certify that I have served two copies of the above Brief of Appellee Maine Public Utilities Commission upon the following parties in the above described matter electronically as prescribed by M.R. App. P. 1D(e).

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