MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. PUC-24-310

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC D/B/A/ CONSOLIDATED COMMUNICATIONS – NNE

v.

PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLEE TOWN OF SOMERVILLE

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INTRODUCTION

Appellee Town of Somerville ("Town" or "Appellee") respectfully submits this brief in opposition to Appellant Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE's ("Consolidated" or "Appellant") appeal of the Maine Public Utilities Commission's (the "Commission") final Order ("Order") of June 13, 2024. In its Order, the Commission held that the municipal exemption contained in 35-A M.R.S. § 2524(2) (herein "Section 2524") and Section 5(A)(1)(b)[1] of the Commission's Chapter 880 Rules (herein "Section 5(A)(1)(b)") was applicable to the Town's efforts to build a home-owned fiber to the premises broadband network (herein the Town's "broadband network") as a community unserved by broadband. As the Commission recognized, pursuant to the municipal exemption, Consolidated, as a pole owner (or, in most instances, co-owner[2]), is responsible for any "make-ready costs" associated with the Town's attachment of wires to Consolidated poles in order to facilitate building of the Town's broadband network. Consolidated's make-ready costs total $97,624.60 and are incurred by Consolidated moving its own equipment on poles it

[1] During the course of this proceeding, the Commission renumbered this section of the Rule from 5(A)(1)(b) to 6(A)(1)(b). See Order of the Commission, dated September 12, 2023 (PUC Docket No. 2023-00058).

[2] Central Maine Power ("CMP"), a utility also subject to Section 2524 and co-owner of most of the poles impacted here, will incur make-ready costs associated with the Town's project. Notably, however, CMP has challenged neither the applicability or constitutionality of Section 2524 and has made no attempt to charge the Town for make-ready costs.

either owns or co-owns to create space for the Town to place its wires.[3] The Commission declined to decide the constitutional questions raised by Consolidated below.

This Court should uphold the Commission's Order allocating responsibility for make-ready costs to Consolidated, as required by the plain language of Section 2524, for the following reasons: (1) Section 2524, as a statute duly enacted by the Maine legislature, enjoys a presumption of constitutionality and the result of the Commission's Order (the pole owner absorbing make-ready costs) is precisely what the legislature intended; (2) allocation of make-ready costs to Consolidated does not create an unconstitutional taking, as: (a) Section 2524 does not address physical occupation of the poles, only allocation of cost, and Consolidated, by its admission, will receive "rent" from the Town for the physical occupation of the poles; (b) pursuant to long-standing precedent in Maine, any utility's license to install equipment in the public right of way is subject to conditions and the allocation of make-ready costs to Consolidated is just such a permissible condition; and (c) the precedent relied upon by Consolidated is easily distinguishable from the instant case; (3) there is no Equal Protection violation here and Consolidated's argument in this regard belies a fundamental misunderstanding of the relevant standard; (4)

[3] See Transcript of October 12, 2023, Technical Conference, Testimony of Consolidated's Sarah Davis (herein "10/12/23 Tech. Conf. (Davis Test.)") at 22:21-24; 23:19-25.

Consolidated's Federal Pre-emption argument fails, as Maine is a certifying state and, therefore, not subject to the jurisdiction of the FCC with respect to pole attachment issues; (5) the relevant statute is neither unconstitutionally vague nor an excessive delegation of legislative authority; (6) Consolidated's payment of make-ready costs (i.e., the costs associated with Consolidated moving its own equipment on its own poles) is not anathema to the public interest, as Consolidated claims, but rather serves it; and (7) the Town's theoretical payment of make-ready costs would violate the Public Purpose Doctrine.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Factual Background

The Town is a Maine municipality that, according to the Maine Connectivity Authority[4], is unserved by broadband. Consolidated offers DSL service to many (though notably, not all) of the citizens of the Town, but this service is "either non-existent, slow, unreliable, very expensive, or a frustrating combination of those attributes." Appendix at 84. The impacts of this lack of internet service were felt particularly acutely during the pandemic, when citizens' options to work and learn from home were severely limited. Appendix at 84-85.

[4] See Prefiled Testimony of Somerville's Chris Johnson (herein "Johnson Test.") at Exhibit A (Letter from Maine Connectivity Authority indicating that the Town is unserved by broadband).

The existing service offered to individual consumers in the Town by Consolidated is "fiber to the node", meaning that the wires running to individual premises are copper. 10/12/23 Tech. Conf. (Davis Test.) at 51:1-10. The average maximum internet service speeds available to individual consumers in the Town[5] through Consolidated is 18.19Mbps download/3.15Mbps upload[6], significantly below the Maine Connectivity Authority's definition of broadband: 100 Mbps download/100 Mbps upload. See Footnote 4, *supra*.

Spearheaded by leadership from its Select Board and its Broadband Committee, and particularly by First Selectperson Chris Johnson, the Town has worked for a number of years to design and fund a home-owned fiber to the premises broadband network with the goal of providing its citizens with a high-speed broadband network that is affordable, available to all who want service, and can serve the community now and well into the future. Johnson Test. at 4:11-13; 5: 18 - 6:2. The Town retained Axiom Technologies, LLC to serve as its facilitator, primary construction partner and long-term operator on the project. Prefiled Testimony of Axiom's Mark Ouellette (herein "Ouellette Test.") at 2:5-9. The Town procured

[5] Not all citizens of Somerville have access to the DSL service offered by Consolidated, as DSL is a distance-sensitive technology (i.e., the further one is from the remote terminal providing signal, the slower the speed) and topography and distance limit the coverage. Appendix at 84; 10/12/23 Tech. Conf. (Davis Test.) at 50:1-18; Consolidated's Response to Town ODR-002-009.

[6] See Consolidated's response to TOSOM-001-001(f).

grant funding that will cover costs of constructing the network. Ouellette Test. at Exhibit C – Grant Budget.

Included in this funding is a line item labeled "Site Work" in the amount of $278,620, which will cover costs of licensing application fees, make-ready costs and pole attachments. Johnson Test. at 7-10. The total amount may be used for these three purposes ("make-ready", "licensing application fees", and "pole replacement") only, in whatever percentages the Town and Axiom deem most beneficial. Ouellette Test. at 6:6-9. The amount requested and ultimately procured for "site work" derived from an estimate calculated by Axiom based on its experience in the industry and specific knowledge of the number and condition of the poles in Somerville. Ouellette Test. at 6:12-18.

Funding for the cost of make-ready work was requested by the Town (with Axiom's guidance) in its July 6, 2021 RFI response in support of a ConnectMaine statewide application for NTIA Broadband Grant funding. Appendix at 86. The very language the Town used in its RFI illustrates its concern that Consolidated would refuse to comply with the law (Section 2524(2)). In requesting funding for make-ready costs, Somerville's RFI included the following language:

> Make-ready cost is included in this budget in spite of our intention to invoke 35-A MRSA § 2524 to reduce project cost. Including the cost ensures we have the funds to pay provisionally if necessary to keep the project on schedule in the event it is challenged in court, and recover them to refund to NTIA once the matter is settled. (emphasis added) Appendix at 86.

This language was included as a prudent hedge against the possibility that Consolidated would refuse to comply with the law and absorb make-ready costs as pole owner. Appendix at 86. The Town made this request for grant funding for make-ready costs to leave open the opportunity to proceed with the project, paying make-ready costs under protest, in the event Consolidated refused to comply with the law, which it now has. Johnson Test. at 11:1-2. Any excess funds that cannot be used for one of the three delineated purposes or that are recovered at the end of this process, will be returned to NTIA. Appendix at 86 and Ouellette Test. at 6:6-9.

After it received grant funding, the Town reached out to pole owners CMP and Consolidated to negotiate pole attachment agreements under which the Town could attach necessary hardware to poles to construct its broadband network. Johnson Testimony at 11:14-16. Consolidated indicated clearly that it would not agree to comply with the requirements of Section 2524(2) and absorb make-ready costs. Johnson Testimony at 11:19-21. Notably, CMP has not objected to the applicability of Section 2524. During the course of this proceeding, and once it received Consolidated's make-ready estimate of $97,624,60, the Town paid the full amount of the estimate to Consolidated under protest, pending the outcome of the PUC case and any subsequent appeal.

Once the Town's attachments are complete, Consolidated will charge it annual rental fees for its occupation of the poles that are separate and apart from

make-ready costs. Pre-filed Direct Testimony of Sarah Davis (herein "Davis Test."), dated September 1, 2023 at 7:13-15 (Appendix at 64).

As to the location of Consolidated's poles within the Town of Somerville, the overwhelming majority of those poles are located in the public easement and are co-owned with CMP. Appendix at 89, 94. Consolidated pays no fee or rental for locating its poles in the public right of way (taxes were the only "fee" Consolidated's representative could identify). Appendix at 89-90. Additionally, Consolidated will make no pole replacements associated with this project, so the exclusive make-ready costs are the movement of Consolidated's own services on poles that are owned or co-owned by Consolidated. Appendix at 88.

II. Procedural History

In response to Consolidated's initial refusal to comply with the law, First Select Person Johnson wrote a letter to the Commission on February 14, 2023, explaining the situation and the Town's position.[7] Appendix at 37-38. This letter became the basis of the Town's Rapid Response Complaint, which was ultimately resolved in the Town's favor via the RRPT Decision dated March 2, 2023. Johnson Test. at 12:8-12. The RRPT noted that "Consolidated is unreasonably refusing to honor the

[7] This occurred prior to Consolidated providing the Town with its estimate for make-ready costs and the Town subsequently deciding to pay make-ready costs to Consolidated under protest pending the outcome of this matter.

municipal exemption with respect to the Town's broadband project." Appendix at 34. Consolidated appealed the RRPT Decision to the full Commission and on March 21, 2023, the Commission opened a formal investigation. Appendix 39-45. The parties engaged in discovery, technical conferences were held by the Commission, and briefs were filed by both parties and Maine's Attorney General. The Commission issued its final Order on June 13, 2024, directing Consolidated to reimburse the Town for the make-ready costs it had paid (under protest) out of its grant funding to Consolidated. Appendix at 7-30. Consolidated now appeals the Commission's final Order to this Court.

ISSUES PRESENTED FOR REVIEW

I. Whether the Municipal Exemption violates the Takings Clauses of the United States and Maine Constitution where (1) a utility's license to exist in the public way is subject to conditions; (2) Section 2524 does not address physical occupation of the poles for which Consolidated will receive rent from the Town; and (3) and the precedent relied upon by Consolidated is irrelevant to the subject case.

II. Whether the Municipal Exemption violates the Equal Protection Clauses of the United States and Maine Constitutions where Consolidated does not allege disparate treatment of similarly situated parties and where the state's action in fact results in similar treatment of differently situated parties, an inversion of the required analysis.

III. Whether Maine, as a certifying state, is subject to the jurisdiction of the Federal Communications Commission with respect to pole attachment issues.

IV. Whether the Municipal Exemption is unconstitutionally vague and the Maine legislature's delegation of the determination of whether a community is "underserved" or "unserved" by broadband service is an impermissible delegation of legislative authority where such delegation was made to the Maine Connectivity Authority (a statutorily created instrumentality of the State) with a specific directive from the legislature.

V. Whether application of the Municipal Exemption leads to absurd results and is contrary to the public interest where, by the terms of its grant and per its explicit intention, the Town must and will return any grant funding expended to fund make-ready to its grantmaker once Consolidated reimburses the Town for make-ready costs in accordance with the Commission's final Order.

VI. Whether the Town's theoretical payment of make-ready costs violates the Public Purpose Doctrine where the Town would be paying to cover Consolidated's own costs to move its own equipment or upgrade its own infrastructure, and there is no rational basis for a municipality to pay to cover these preventable private costs, particularly when the municipality

will subsequently pay to actually occupy the poles, located on Town property, on an ongoing basis in the form of rent.

ARGUMENT

"The party challenging the constitutionality of a statute has "the heavy burden of overcoming the presumption that the statute is constitutionally valid." *Wood v. Dep't Fisheries and Wildlife*, 2023 ME 61; 302 A.3d 18, 19, quoting *Ford Motor Co. v. Darling's*, 2014 ME 7, ¶ 33, 86 A.3d 35 (quotation marks omitted). "It is presumed that a legislature has acted within its constitutional powers, [and, thus] a statute, or a regularly enacted legislative act, is presumed to be valid and constitutional" See 16 C.J.S. Constitutional Law § 249 (2005).

(1) Allocation of make-ready costs to Consolidated does not create an unconstitutional taking as a utility's license to exist in the public way is subject to conditions, Section 2524 does not address physical occupation of the pole for which Consolidated receives rent, and the precedent relied upon by Consolidated is irrelevant to the subject case.

State law gives rise to Consolidated's right to occupy the public right-of-way with its poles. 35-A M.R.S. § 2301, 2503; See also, Consolidated's Response to TOSOM-001-005 (acknowledging creation of right by statute). Such placement is made pursuant to a license granted by the state or municipality. See *Bangor-Hydro Elec. Co. v. Johnson*, 226 A.2d 371, 377-378 (Me. 1967). Title 35-A also imposes a number of limitations and restrictions on this right, including Section 2524[8]. See e.g., 35-A M.RS. §§ 2507-08, 2510, 2514, 2516. This concept of the right to install

[8] Examples of restrictions include, but are not limited to, limitations on road use and interference with trees, provisions for streetlights, revocation of license, etc.

poles in the public right-of-way being burdened by conditions is acknowledged by Consolidated: "…under common law, to the extent of municipality asks us to -- you know, they want to install a sidewalk in the right-of-way where our poles are placed, we are required, at our cost, to move those poles out of the way for you to produce a sidewalk. That's -- it's not a fee, if you will, but that is the rights and burdens that come with being in the municipal right-of-way." Appendix at 91 (emphasis added).

"Municipalities have, historically been able to attach to poles, sans make-ready charges or attachment fees, for the purpose of exercising their responsibilities to protect the public health, safety, and welfare." See Maine Public Utilities Commission, *Amendment to Chapter 880 - Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure*, Docket No. 2017-00247, Order Amending Rule and Factual Policy Basis (Jan. 12, 2018) at 10-11. CMP has explicitly acknowledged that "…municipalities typically do not pay for space that they use on poles and that this space should be considered common space.…[and that] this nonpayment by the municipalities… [is] part of a bargain under which pole owners and users do not pay for use of the public rights of way." Maine Public Utilities Commission, *Proposed Amendment to Chapter 88, Attachments to Joint-Use Utilities Poles; Determination and Allocation of Costs; Procedure (Chapter 88)*, Docket No. 93-087, Order Adopting Rule Policy Basis and Statement (October 18, 1993) at 18.

(a) Pursuant to long-standing precedent in Maine, a utility's license to install equipment in the public right of way is subject to conditions and the allocation of make-ready costs to Consolidated is just such a permissible condition.

Maine Courts have long held that it is constitutional for a utility to have to bear its own costs of relocation of equipment in the public way when such relocation is necessitated by a valid exercise of the State's police power.[9] Such power is "not confined to saving life and limb" but extends to "enforcing facilities for the public." *Boston & M.R. Co. v. City Cmm-rs of York City*, 79 Me. 386, 395. Just as it has for water and sewer systems, airports, parking facilities, etc., the legislature has deemed broadband systems a "public necessity", along with laws to bring such systems about.[10] See 30-A M.R.S. § 5402. Section 2524 clearly contemplates the use of the police power to effectuate a public necessity such as broadband as it explicitly provides for a pole-owner's absorption of make-ready costs "for the purpose of safeguarding access to infrastructure essential to public health, safety and welfare." See Section 2524.

[9] See *Boston & M.R. Co v. City Cmm-rs of York City*, 79 Me. 386; *First National Bank of Boston v. Maine Turnpike Authority*, 153 Me. 131; *Brunswick & Topsham Water Dist. V.W.H. Hinman Co.*, 153 Me. 173; and *Central Me. Power v. Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971).

[10] 30-A M.R.S. § 5402(1-A) provides: "**Need for broadband systems.** Access to affordable, reliable, high-speed broadband Internet is necessary to the general welfare of the public, and the people of the State and its economy require connection to existing publicly built infrastructure as a means of cultivating entrepreneurial activity, attracting business, improving access to modernized methods of education and health care and encouraging people to move to this State." 30-A M.R.S. § 5402(5) provides: "**Public necessity.** The enactment of laws to carry out the intent and purpose of this section is therefore a public necessity."

Well over one hundred years ago, Maine's Supreme Judicial Court in *Boston & M.R. Co.. supra*, this Court held that it was a constitutional exercise of the State's police power to require a Railroad to construct and maintain a crossing, at its own expense, where its tracks intersected with a contemplated public way. Notably, the Court stated that the State's exercise of the police power "must become wider, more varied and frequent with the progress of society" and that the power extended to "lives, limbs, health, comfort and quiet…" of all property within the State. *Id.* at 393-394. The police power is "more extensive and frequent" when the "property affected, though private in character, yet has a public relation". *Id*. at 394.

In 1957, in the face of a planned turnpike extension, the Court considered whether the Maine Turnpike Authority could properly require various utilities to relocate their pipes, wires, etc. to accommodate the extension project. See *First National Bank of Boston v. Maine Turnpike Authority*, 153 Me. 131. The Court found that the Authority's actions in insisting the utilities move their equipment at their own expense was a constitutional exercise of the State's police power. In its discussion, the Court cited a variety of supporting cases[11], including those that specifically address pole owners noting "[t]he telephone company then has no interest in the soil which supports its posts and lines except a right to occupy it by

[11] See *New Orleans Gas Light Company v. Drainage Commission of New Orleans*, 197 U.S. 453 (installation of gas pipes under city streets did not confer unfettered property rights to gas company, but "whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare.")

the permission of the municipal officers, a mere license revocable at will." (emphasis added) See *Id.* at 137, citing *Readfield Telephone and Telegraph Company* v. Cyr, 95 Me. 287 at 290.

That same year, the Court decided a similar case in which a quasi-municipal water utility claimed that its installation of pipes and aqueducts under a public way conferred real estate to it and, therefore, the State had to justly compensate the utility when it required the utility to move its equipment to accommodate street reconstruction. See *Brunswick & Topsham Water Dist. v. W.H. Hinman Co.*, 152 Me. 173. As it did in *First National, supra,* the Court, citing to *New Orleans Gas Light*, found that a utility's right to use the public way was subject to the police power and that any cost incurred by the utility in moving its equipment was "damnum absque injuria", or loss without injury. *Id.* at 178. Once again, the Court held that the utility having to move its own equipment in the public way at its own expense did not result in a taking without just compensation.

More recently, the Court addressed this issue in *Central Maine Power v. Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971), finding that the municipality's requirement that a utility pay for "excess costs" of placing the utility's equipment (previously installed above ground within the public easement) underground in the context of an urban renewal project, did not result in an unconstitutional taking. *Id.* The Court noted that "there was no taking or invasion

of a legal right" by virtue of the municipality requiring that the utility relocate its equipment underground at the utility's own expense. *Id.* at 239.

It is clearly constitutional for the State to require a utility to relocate its equipment at the utility's expense if such relocation is made pursuant to the police power. Broadband is a public necessity pursuant to 30-A M.R.S. § 5402, and allocation of make-ready costs to the pole owner in order to promote the creation of broadband networks is essential to the "purpose of safeguarding infrastructure essential to public health, safety and welfare", which is the essence of the police power. 35-A M.R.S. § 2524.

(b) Section 2524 does not address physical occupation of the poles, only allocation of cost and Consolidated, by its admission, will receive "rent" from the Town for the physical occupation of the poles, in addition to continuation of the privilege of free occupation of the public right-of-way.

The plain language of Section 2524 does not address physical occupation of the poles by a third party, but only the allocation of costs associated with make-ready work performed in anticipation of such occupation. In this sense, the statute cannot give rise to an unconstitutional taking as it does not mandate the taking of private property for a public use. Notably, Consolidated does not contest the constitutionality of the portions of Title 35-A that permit third party occupation.

Consolidated concedes that once the Town attaches to it poles, Consolidated will charge rent for such occupation. Appendix at 64. The poles at issue are almost exclusively located within the public easement in the Town. Appendix at 89.

Consolidated pays no rent or fee associated with its use of the public easement, and yet the Town, once it attaches, will be expected to pay rent to Consolidated for the privilege of hanging wires on poles which stand on Town property for free. To require that the Town pay make-ready costs, in other words pay Consolidated to move Consolidated's own wires on the poles, is unjust.

(c) The precedent relied upon by Consolidated is easily distinguishable from the instant case.

Consolidated relies principally on two federal cases, *Gulf Power*[12] and *Loretto*[13], both of which are distinguishable from the facts here and neither of which impact the analysis contained herein. *Loretto* involves a private property owner and landlord complaining that he was required to allow a private cable company to install equipment on his property. *Loretto* did not involve that state's exercise of its police power, property located within a public easement, nor parties subject to a complex regulatory scheme. Additionally, *Loretto* involved the actual physical occupation of private property by a third party, while here Section 2524 does not address or permit physical occupation, but merely allocates make-ready costs in certain circumstances. Therefore, the Court's guidance is not relevant to the case at bar.

Gulf Power, regardless of whether its precedent would otherwise be instructive, is an 11th circuit case and, therefore, is not controlling in Maine. Even

[12] *Gulf Power v. United States*, 187 F.3d 1324 (11th Circ.).
[13] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

if it were, however, in *Gulf Power* the 11th Circuit considers the constitutionality of a federal statute that requires pole owners to give non-discriminatory access to third parties. The statute in *Gulf Power*, unlike Section 2524 which is subject to challenge here, authorized the taking of personal property. As discussed herein, Section 2524 is silent with respect to the occupation of Consolidated's poles by third parties or with respect to the taking of any other personal property in any manner. The only issue addressed by Section 2524 relevant to this case is the allocation of make-ready costs in certain instances. Make-ready work, in this matter, amounts to Consolidated moving its own facilities on its poles. The statute in *Gulf Power* also extended beyond property located in the public way, distinguishing it from the situation here.

(2) There is no Equal Protection violation here and Consolidated's argument in this regard belies a fundamental misunderstanding of the relevant standard.

At the risk of oversimplification, Equal Protection claims turn on whether similar parties are being treated or impacted differently. The Equal Protection clause of the Fourteenth Amendment is "implicated only when action by the state results in treatment of that person different than that given similarly situated individuals." *Wellman v. Dep't of Human Servs.*, 574 A.2d 879, 883 (Me. 1990). This type of selective treatment is the foundation of all Equal Protection claims. However, Consolidated does not claim that the state's action results in treatment of it that is different from those who are similarly situated. Instead, in an inversion of the required analysis, Consolidated argues that there is an Equal Protection violation

because the state's action results in similar treatment of differently situated parties (namely Consolidated and CMP). Moreover, Consolidated unnecessarily limits the scope of its claim to a comparison with one of Maine's Transmission and Distribution Utilities, when it is clear that the municipal exemption applies not only to electric utilities but also all other telecommunications facilities throughout the State. Consolidated's Equal Protection claim must fail, as it has not alleged the threshold requirement (i.e., disparate impact or treatment of similar parties) for any such claim.[14]

(3) Consolidated's Federal Preemption argument fails, as Maine is a certifying state and, therefore, not subject to the jurisdiction of the FCC with respect to pole attachment issues.

The federal government, by and through the Federal Communications Commission, promulgates rules and regulations regarding pole attachments. However, pursuant to 47 CFR §§ 224(c), 1.1405(c), in the event a state certifies to the FCC that it has issued and made effective rules and regulations implementing the state's regulatory authority, including a specific methodology for such regulation that has been made publicly available in the state, such certification "preempts the FCC from accepting pole attachment complaints." In other words, if a state chooses to regulate and adjudicate pole attachments in accordance with its own state-specific

[14] See *Estate of Buchanan v. Maine*, 417 F. Supp. 2d 24 (D. Me. 2006) and *McDonald v. Village of Winnetka*, 371 F.3d 992 (7th Circ. 2004)(failure to identify a similarly situated person treated differently sufficient grounds for grant of summary judgment).

regulations, it may do so, subject to certification and approval by the FCC. See *Id.* and FCC Public Notice DA 22-630, States that Have Certified that they Regulate Pole Attachments. Maine is a certifying state (see Maine on list of certifying states in FCC's Public Notice referenced above) and is, therefore, exempt from FCC regulation with respect to pole attachment disputes.

(4) The Municipal Exemption is neither unconstitutionally vague nor does it constitute an unlawful delegation of legislative authority.

Consolidated claims that the Municipal Exemption is unconstitutionally vague and represents an unlawful delegation of legislative authority because it directs the Maine Connectivity Authority (MCA) to provide technical definitions (the MCA uses upload and download speeds) for a community to be considered "unserved or underserved" by broadband. The MCA is "a body corporate and politic and a public instrumentality of the State" and is required by statute to adopt bylaws and technical rules as defined by the Maine Administrative Procedure Act. See 35-A M.R.S. §§ 9404 - 9409; 5 M.R.S. §§ 8071-8073. The MCA's membership consists of seven voting members appointed by the Governor and confirmed by the Legislature and four ex officio members and it is required to report annually to the Legislature. See 35-A M.R.S. §§ 9404 – 9409.

"To a significant degree, both vagueness and unlawful delegation challenges are concerned with the issue of definiteness." *Uliano v. Bd. of Envtl. Prot.*, 977 A.2d

400, 408 (Me. 2009). "[V]agueness and unlawful delegation are often raised simultaneously and properly treated as a single inquiry." *Id.* at 408, citing *Secure Environments, Inc. v. Norridgewock,* 544 A.2d 319, 321-24 (Me. 1988). "A person challenging the constitutionality of a legislative enactment bears a heavy burden of proving unconstitutionality[,] since all acts of the Legislature are presumed constitutional[.]" *Jones v. Sec'y of State*, 2020 ME 113, ¶ 18, 238 A.3d 982 (quoting *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341). "In a void-for-vagueness challenge, the challenging party 'must demonstrate that the statute has no valid application or logical construction.'" *Ouellette v. Saco River Corridor Comm'n*, 278 A.3d 1183, 1189 (Me. 2022) (quoting *Stewart Title Guar. Co. v. State Tax Assessor*, 2009 ME 8, ¶ 40, 963 A.2d 169). Consolidated has not and cannot meet this high burden.

The Municipal Exemption provides that "for the purpose of safeguarding infrastructure essential to public health, safety and welfare, 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….[f]or the purpose of providing broadband service to an unserved or underserved area." See 35-A M.R.S. § 2524(2)(B). Criteria to define "unserved or underserved area" is to be established by the MCA and "must include the percentage of households with access to

broadband service within a municipality or other appropriate geographic area." See 35-A M.R.S. § 9204-A(1). "In delegating decision-making authority to an executive agency, a statute need not provide determinate criteria as long as it offers an intelligible principle to which the person or body authorized to act is directed to conform." *Uliano v. Bd. Of Envtl. Prot*, 977 A.2d 400, 413 (Me. 2009) (internal quotations omitted). In delegating authority to the MCA to determine whether a community is "unserved or underserved" by broadband, the legislature has exceeded this low bar of articulation of an intelligible principle.

"[I]n such cases in which the statutory enactment of detailed specific standards is impossible, the presence of adequate procedural safeguards to protect against an abuse of discretion by the administrators of the law compensates substantially for the want of precise legislative guidelines and may be taken into consideration in resolving the constitutionality of the delegation of power." *Finks v. Me. State Highway Comm'n,* 328 A.2d 791, 796 (Me. 1974). As the Appellant seems to concede in its description of MCA's definitional change over time, the definition of broadband is an evolving one as technology progresses and speeds increase. Delegation of such a technical and changing concept to the MCA is appropriate and constitutionally sound, particularly as the MCA is statutorily created, consists of voting members who are nominated by the governor and approved by the legislature, must annually report to the legislature and is statutorily obligated to create technical

rules as defined in the Maine Administrative Procedure Act. These safeguards "protect against an abuse of discretion when, like here, the statutory enactment of detailed specific standards" is beyond the scope of the legislature's expertise and is better left to an agency with technical knowledge and the ability to adapt to rapidly evolving changes in technology. *Ouellette v. Saco River Comm'n*, 278 A.3d 1183, 1190 (Me. 2022); See also, *Uliano v. Bd. Of Envtl. Prot*, 977 A.2d 400 (Me. 2009).

(5) Application of the Municipal Exemption to this situation neither leads to absurd results, nor is it contrary to the public interest where, by the terms of its grant and per its explicit intention, the Town must and will return any grant funding expended to fund make-ready to its grantmaker once Consolidated reimburses the Town for make-ready costs in accordance with the Commission's final Order.

Consolidated argues that because the Town procured grant funding that contains a line item for make-ready costs sufficient to cover Consolidated's make-ready costs in their entirety, application of the statute clearly requiring Consolidated (as pole owner) to pay for the make- ready costs is "absurd", "contrary to the public interest", and would create a "windfall" for the Town and permit it to "double-dip" *Consolidated's Initial Brief submitted to PUC (Docket No. 47)* at 16-17. These allegations are not supported by the terms of the grant.

To the contrary, as both the plain language and the legislative history of Section 2524 clearly reflect, the law is intended to promote provision of broadband only to

the unserved and underserved, a purpose that serves the public good.[15] Broadband is a "public necessity", as "access to affordable, high speed broadband Internet is necessary to the general welfare of the public, and the people of the State and its economy require connection to existing publicly built infrastructure as a means of cultivating entrepreneurial activity, attracting business, improving access to modernized methods of education and health care and encouraging people to move to this State." 30-A M.R.S. § 5402.

Consolidated seems to suggest that the Town will somehow be permitted to retain the grant funds it expended (under protest) on make-ready costs in the event Consolidated is directed to comply with Section 2524(2) and absorb the make-ready costs itself.[16] This is simply untrue. In the event the Town is reimbursed for the make-ready costs it has paid under protest it will, in accordance with the representation it made in its grant application, return funds to the NTIA. By the terms of the grant, the Town could not use the funds for any purpose other than those delineated in the line item ("make-ready", "licensing application fees", and "pole replacement") regardless. Reversion of this $97,624.60 to NTIA would make the

[15] See LD 1192, SP 366, Text and Status, 129th Legislature, First Regular Session (mainelegislature.org), for legislative history, including testimony acknowledging the purpose of the municipal exemption, of *An Act to Establish Municipal Access to Utility Poles Located in the Municipal Rights-of-Way* (ultimately enacted as Section 2524).

[16] This would necessitate reimbursement from Consolidated to the Town of make-ready costs paid under protest by the Town.

funds available to another grant recipient, again serving the public interest. It is, therefore, difficult to fathom the basis for Consolidated's argument that its absorption of make-ready costs in this instance is contrary to the public's interest.

Consolidated fails to consider the "double-dipping" scenario that its rejection of the cost shifting mechanism contained in Section 2524 creates for itself. If the Town is forced to pay for the costs of Consolidated's make-ready, Consolidated will be compensated both by ratepayers through profits and the Town through make-ready charges (all in addition to annual rent from the Town). This additional revenue will be created all while Consolidated occupies public property for free and continues to fail to provide a public necessity (broadband) to the Town. Notably, the need for Consolidated to move its attachments on the poles results from its own actions in failing to leave room for future municipal attachments when it originally installed its equipment on the poles. In other words, Consolidated stands to benefit financially from a problem that Consolidated itself created.

Consolidated claims to be doubly aggrieved because it alleges that the Town is seeking to compete with it for customers by virtue of its broadband project. While Consolidated's purported outrage is not directly relevant to any legal challenge, it is worth noting that the Town could only compete with Consolidated if Consolidated was willing to offer the same product that the Town seeks to offer. The Town seeks to offer fiber to the premises broadband service to its residents, a product that

Consolidated does not and cannot currently offer.[17] If Consolidated did offer such a fiber to the premises broadband service, or any individual consumer level broadband service, in Somerville, the Town would not be an unserved community as required by Section 2524(2). The entire reason Somerville is unserved is because Consolidated does not offer the broadband service the Town seeks to offer. Thus, the Town cannot fairly be considered a competitor to Consolidated.

(6) The Town's theoretical payment of make-ready costs (i.e., the costs associated with Consolidated moving its own equipment on the poles) would violate the Public Purpose Doctrine.

This Court has long interpreted the Maine Constitution to require that taxation and spending at either the state or local level have a public purpose to be constitutionally valid. See Maine Const., Art. IV, Pt. 3rd, § 1; *Delogu v. State*, 1998 ME 246, 720 A.2d 1153, *Common Cause v. State*, 455. A.2d 1 (Me. 1983), *Maine State Housing Authority v. Depositors Trust Co.*, 278 A.2d 699 (Me. 1971), *Opinion of the Justice*s, 560 A.2d 552 (Me. 1989). State law includes a non-exclusive list of public purposes, including fire and police protection, sewer/water/power services, public works, schools and libraries, health and welfare, and economic development (see 30-A M.R.S. §§ 5722 to 5727). However, the unique facts surrounding any expenditure, even for a purpose included on the statutory list, must be examined by

[17] "Consolidated does not offer mass market fiber to the premises broadband service in Somerville." Consolidated's Response to Data Request TOSOM-001-001(b).

the municipality (and ultimately a court) to confirm that the expenditure "is for the benefit of the people," *Common Cause v. State*, 455 A.2d 1, 23 (Me. 1983), or "will confer a general benefit upon the public at large." *Maine State Hous. Auth. v. Depositors Tr. Co.*, 278 A.2d 699, 705 (Me. 1971).

While an expenditure by a municipality need not be for the direct benefit of every resident in the municipality to be constitutional, courts have established that a legislative body's purpose for a public expenditure must be supported by a rational basis. *Common Cause v. State*, 455 A.2d 1, 25 (Me. 1983). Specifically, when public funds are provided directly to a limited number of individuals or entities, the analysis centers on whether the indirect public benefit is supported by a clear and rational basis.

The statute Consolidated contests in the instant matter allocates the cost of make-ready to the pole owner when a community that seeks to attach is unserved by broadband. See Section 2524. These make-ready costs are costs associated with the pole-owner's movement of its own equipment on the pole to make space for the attaching community's wires. Note that nothing prevents a utility from reserving a space for municipal attachments on its poles, a practice which could minimize and possibly negate the need for utilities' make-ready work in this context. It is also notable that the statute is silent as to costs of actual occupation of the pole and, in

this case, that cost is covered by annual "rents" paid by the Town to Consolidated. See Appendix at 64.

The Town paying to cover Consolidated's own costs to move its own equipment or upgrade its own infrastructure would be an unconstitutional expenditure under the public purpose doctrine, as there is no rational basis for a municipality to pay to cover these preventable private costs, particularly when the municipality is paying to actually occupy the pole, located on its own municipal property, on an ongoing basis. In fact, it may be more appropriate to question the public purpose of allowing utilities to freely occupy the public right-of-way with numerous immovable structures that unquestionably constitute potential hazards to vehicular traffic, with the public regularly bearing the costs of emergency responses to collisions with utility poles.

CONCLUSION

For all the reasons stated herein, the Town of Somerville respectfully requests that this Court: (a) declare the Municipal Exemption to be constitutional and enforceable; (b) uphold the Commission's Order; and (c) grant such further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served on the following parties this 2nd day of January 2025 via email:

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