STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PUC-24-310

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

v.

PUBLIC UTILITIES COMMISSION
Appellee

On Appeal from the Maine Public Utilities Commission

Brief of *Amicus Curiae* Maine Municipal Association,
in support of Appellee

Breana N. Gersen, Esq.
Bar No. 5031
L. Adelia Weber, Esq.
Bar No. 11142
Attorneys for Amicus Curiae
Maine Municipal Association
60 Community Drive
Augusta, ME 04330
(207) 623-8428
bgersen@memun.org
aweber@memun.org

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INTRODUCTION
STATEMENT OF INTEREST

The Maine Municipal Association ("MMA") is a nonprofit advisory organization which the Legislature has declared to be an instrumentality of its member municipalities. 30-A M.R.S. § 5722 (9) (2024). Currently, 480 of Maine's 484 municipalities, including the Town of Somerville ("Town"), are members of MMA.

MMA provides legal advice, training, and technical assistance to its members on a wide array of municipal legal issues, including municipal broadband projects, ownership, maintenance, and control of municipal roads, and the permitting of utility facilities within the public right-of-way. MMA participates as *amicus curiae* in the present appeal to represent the interests of its municipal members and to communicate the foreseeable impacts of the Law Court's decision on municipalities throughout the State.

MMA urges this Court to uphold the decision of the Maine Public Utility Commission's order requiring the Appellant to pay "make-ready"[1] costs incurred due to the Town's municipal broadband project under 35-A M.R.S. § 2524(2) (2024) and 65-407 C.M.R. ch. 880, § 6(A)(1)(b) (2023) (collectively and

[1] "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).

hereinafter the "Municipal Exemption") and to reject the Appellant's argument that the Municipal Exemption is an unconstitutional taking of private property.

SUMMARY OF ARGUMENT

This brief is submitted in support of the PUC (hereinafter "PUC") and the Town.

The Appellant's challenge to the constitutionality of the Municipal Exemption must fail because a utility company does not have an unfettered right to construct utility poles in the public right-of-way. A utility's rights are, and must, be balanced with the property rights of the municipality, including to use the public right-of-way for a municipality's own services and government functions, and a municipality's obligation to safeguard the public health, safety, and welfare by, among other things, regulating use of the public right-of-way for safe travel.

Maine municipalities have long-standing authority to approve location permits, which are required to construct utility poles in the public right-of-way, including with the condition that the applicant allow the municipality to access the pole for municipal attachments that serve the public health, safety, and welfare. This condition on location permits is a valid exercise of a municipality's police power, because municipal regulation of obstructions in the public right-of-way promotes the public health, safety, and welfare of residents.

The Municipal Exemption confirms long-standing authority and practice for municipalities to access utility poles in the public right-of-way, and ensures this municipal authority is applied consistently across the State. When municipalities are required to pay the make-ready costs incurred by private companies to move or upgrade their equipment to make space for a municipal attachment on utility poles, municipal broadband projects can become cost prohibitive and municipalities lose the ability to access utility poles located in the public right-of-way, thereby hindering a municipality's ability to provide essential government services and perform necessary government functions.

The Appellant's argument that the Municipal Exemption puts municipalities in direct competition with for-profit, private service providers is absurd. The Legislature clearly intended for the exemption to only apply when municipalities provide broadband services to unserved or underserved areas; thereby encouraging municipal broadband projects to fill in the gaps when private service providers fail to establish services in rural or remote communities.

If municipalities are required to use taxpayer funds to cover a private entity's costs to upgrade privately owned infrastructure, the expenditure could be challenged as a violation of the public purpose doctrine, which prohibits municipalities from using taxpayer funds for a private purpose. The Municipal Exemption ensures that municipal broadband projects will not be barred simply

because municipal expenditures for "make-ready" costs could be challenged under a competing constitutional requirement imposed on municipalities.

ARGUMENT

I. THE MUNICIPAL EXEMPTION IS BASED ON LONG-STANDING MUNICIPAL AUTHORITY AND PRACTICE.

MMA writes here to provide further explanation and support for municipal authority to regulate utility poles within the public right-of-way, including the authority to attach conditions to location permits and be exempt from "make-ready" costs.

A. Municipalities have long-standing authority to require utility pole owners to allow access for municipal attachments to utility poles located in the public right-of-way.

The right to construct utility poles in the public right-of-way has never been an absolute or unlimited right.[2] Municipalities, historically, have had the power to control the location and construction of utility poles in the public right-of-way under the State regulatory scheme governing utilities in the public right-of-way, including by attaching conditions to location permits to promote the public health, safety, and welfare.

[2] The authority to construct, maintain, and operate lines upon and along any roads and streets is "subject to the conditions under the restrictions provided in this chapter and chapter 25." 35-A M.R.S. § 2301 (2024).

State law requires any person seeking to construct facilities upon and along highways and public roads, including every telecommunication and information service provider, to obtain a location permit from the applicable licensing authority. 35-A M.R.S. §§ 2501(2), 2503 (2024). The "applicable licensing authority" for this purpose is "the municipal officers or their designees, when the public way is a city street or town way or a state or state-aid highway in the compact area of urban compact municipalities as defined in Title 23, section 754." 35-A M.R.S. § 2502(1)(B) (2024).

Municipalities have been authorized to issue location permits to construct utility poles in the public right-of-way since at least 1944. *See* 35-A M.R.S. § 2503 (2024); 35 M.R.S. § 2482 (1964); R.S. ch. 50, § 37 (1954); R.S. ch. 46, § 31 (1944). Although the requirements for issuing these permits have changed, municipalities have consistently been authorized to attach conditions to location permits.

State law currently provides that the municipal officers "may specify in the permit other requirements determined necessary in the best interests of the public safety and use of the right-of-way so as not to obstruct use for public travel." 35-A M.R.S. § 2503(5) (2024). Similarly, a previous version of the location permit law authorized the municipal officers to "specify in the permit other requirements

deemed necessary in the best interests of the public safety and use of the right-of-way so as not to incommode use for public travel." 35 M.R.S. § 2483(6) (1967).

Requiring utilities to allow municipalities to access utility poles in the public right-of-way is clearly in the best interest of public safety and establishes an important balance between public and private interest.[3] Like private broadband utilities, municipalities provide essential services, some of which require placement of poles in the public right-of-way. When private utilities place poles in public right-of-way, the utilities are occupying public space that would otherwise be available to municipalities to provide services to their communities. By ensuring municipal access to existing utility poles in the public right-of-way, municipalities can allow private pole placement while avoiding the need to construct its own utility poles to provide essential government services and perform essential government functions; thereby avoiding duplicative utility poles within the public right-of-way and the inevitable impacts on traffic safety that accompany multiple obstructions in the public right-of-way. Duplicative utility poles in the public right-of-way will also necessarily impact a municipality's ability to conduct road maintenance, such as ditching and draining required to maintain the road and ensure the safe passage of vehicles.

[3] Any requirement to this effect should be presumed to be reasonable and constitutional. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937). If the requirement has a rational basis, it should not be stricken down merely because this Court would, if acting in the role of the voters or Legislators, deem it unwise. *Common Cause v. State*, 455 A.2d 1, 17 (Me. 1983)

Requiring utilities to allow municipalities to access existing utility poles in the public right-of-way serves other police power interests appropriately excised by municipalities under their home rule authority, including reducing the aesthetic impact of utility poles in the public right-of-way, and reduces the time it takes municipalities to provide essential services to residents.

Municipal access to utility poles in the public right-of-way is also mandated by state law for the installation of streetlights. 35-A M.R.S. § 2523 (2024). Although the PUC may determine what, if any, pole attachment fees may be assessed to municipalities for the installation of streetlights on utility poles in the public right-of-way, in making this determination the PUC "shall weigh, among other factors, the municipal interest to serve the general public and the location of the poles in municipal rights-of-way." 35-A M.R.S. § 2523(3).

B. Municipalities have historically been exempt from paying "make-ready" costs to attach to utility poles located in the public right-of-way.

The Municipal Exemption is a codification of long-standing practice by the PUC and utility pole owners to exempt municipalities from "make-ready" costs, even when not expressly required by law or as a condition of approval in a location permit.

Prior to the enactment of the Municipal Exemption in 2019, prior versions of Chapter 880 expressly exempted municipalities from paying "make-ready" costs. 65-407 C.M.R ch. 880, § 7(A) (2018); 65-407 C.M.R. ch. 880, § 7(A) (1993).

During the rulemaking process in 2018, the PUC expressly recognized that "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." *Me. Pub. Utils. Comm'n*, Amendment to Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure, No. 2017-00247, Order Amending Rule and Factual and Policy Basis at 10-11 (Me. P.U.C. Jan. 12, 2018).[4]

Consolidated Communications (then known as FairPoint) also submitted comments in that docket, confirming this historical position, which included the following passage:

> FairPoint has always allowed municipal attachment to FairPoint's utility poles at no cost for legitimate, public, protective purpose under its police power. FairPoint believes that municipalities should continue to enjoy this benefit and that this space should be treated as common space and allocated to all pole attachers as provided in Section 1 above.

Me. Pub. Utils. Comm'n, Amendment to Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure, No. 2017-00247, FairPoint Comments at 15 (Me. P.U.C. Dec. 18, 2017).

[4] Testimony and other filings related to this proceeding can be located in the PUC's Docket in the Commission's online Case Management System, which is available at https://www.maine.gov/mpuc/online-services.

Only recently has this historical practice been challenged. Most likely this is due to the increasing costs to accommodate municipal access to existing utility poles and the emergent need for municipalities to provide broadband service to residents. In addition, notably, municipalities have continued to allow utility companies to construct utility poles within the public right-of-way without compensating the municipality for their private use of public property.

In MMA's opinion, the long-standing practice of allowing utilities to construct utility poles in the public right-of-way, without charge, and allowing municipalities to attach to those poles, without charge, is a mutually beneficial arrangement that promotes expansion of essential services, such as a telephone, electricity, and internet, particularly in rural areas, by both the public and private sectors.

C. The Municipal Exemption is necessary to ensure municipalities can continue to attach to utility poles located in the public right-of-way to promote the public, health, safety, and welfare.

As utility poles become increasingly burdened with different services, municipalities' ability to access utility poles is eroded, if not eliminated, because of the increasing cost to rearrange facilities on the pole and upgrade infrastructure to facilitate municipal pole attachments. The purpose of the Municipal Exemption is to safeguard municipal access to utility poles located in the public right-of-way by exempting municipalities from the costs a private utility incurs to make space on

the pole for municipal attachments.[5] The Appellant incorrectly interprets the Legislature's reference to "access" here to mean a physical occupation by municipalities without compensation. (Blue Br. 36.) To the contrary, the Municipal Exemption only serves to shift the cost incurred by private utilities back to private utilities to ensure municipalities are not entirely precluded from placing its facilities on utility poles due to the utilities' own costs to rearrange and upgrade their equipment to support municipal attachments, when the attachment is necessary to promote public health, safety, and welfare.

"Make-ready" costs are commonly a significant part of municipal broadband projects. *See generally An Act to Establish Municipal Access to Utility Poles Located in Municipal Rights-of-way: Hearing on L.D. 1192 Before the Comm. on Energy, Utils., and Tech.*, 129th Legis. (2019) (testimony of Garrett Gorbin, Me. Mun. Ass'n, Legislative Policy Committee) ("'make-ready' fees have commonly added 20-30% to the overall project costs…"), (testimony of Steven R. Buck, Sanford City Manager) ("The City of Sanford will pay in excess of $500,000 of Make Ready Costs to construct its municipally-owned dark fiber network in the Common Space paid to Central Maine Power (electric), Consolidated Communications (telephone), and Atlantic Broad Band (cable tv).").[6] Moreover,

[5] In addition to the legislative history of the statute in Section II (A) below, notably the heading of 35-A M.R.S. § 2524 is "Municipal access to poles."

[6] Testimony and bill summaries related to P.L. 2019, ch. 127 can be located on the Maine State Legislature's website here: https://legislature.maine.gov/legis/bills/bills_129th/billtexts/SP036601.asp.

"make-ready" costs are entirely determined by the pole owner and other utilities attached to the pole. 65-407 C.M.R ch. 880, § 6(A) (2023). Without the exemption, municipalities are prevented exercising their long-standing authority to access utility poles constructed within the public right-of-way due to exorbitant "make-ready" cost alone.

State law expressly limits a municipalities authority to issue pole location permits for existing facilities located in the municipal right-of-way. *See* 35-A M.R.S. § 2503 (8-11) (2024) (providing that no location permit is required for the relocation of a utility pole or the replacement, additions, or improvements of utility poles that received a pole location permit, in certain circumstances). Therefore, the Municipal Exemption is necessary to preserve municipalities' access to utility poles in the public right-of-way that were approved when municipalities had no reason to believe that an express condition or ordinance would be required to preserve their access to utility poles in the future. Indeed, many services now attached to utility poles, such as broadband, cable, and other telecommunication services, did not even exist when many utility poles were first approved by municipalities.

The Municipal Exemption reflects long-standing municipal authority and practice of requiring municipal access to utility poles in the public right-of-way to promote the public health, safety, and welfare of its residents by addressing the

emergent need for municipalities to be exempt from "make-ready" costs that would otherwise prevent a municipality from exercising its police power authority. If private utilities do not wish to be subject to this condition that accompanies the right to construct utility poles in the public right-of-way, the utilities could locate their facilities outside of the public right-of-way or pay for an easement that enables them to use the land on which they are located without this condition.

II. MUNICIPAL BROADBAND PROJECTS ESTABLISHED UNDER THE MUNICIPAL EXEMPTION ARE NOT IN DIRECT COMPETITION WITH FOR-PROFIT COMPANIES.

The Appellant's argument that the Town's broadband project is in direct competition with their services and should not be eligible for an exemption from "make-ready" costs is absurd and a result that the Legislature clearly intended to avoid. The Legislature expressly limited the scope of the Municipal Exemption to broadband projects in unserved or underserved areas to avoid municipal competition with for-profit service providers. 35-A M.R.S. § 2524(2) (2024). Moreover, municipal broadband projects are a valid, and necessary, exercise of municipal police power when established to provide broadband service to unserved and underserved areas.

A. The Legislature purposefully limited the municipal exemption to unserved and underserved areas by narrowing the statute to avoid competition with for-profit broadband providers.

The original legislative summary provided that amending the utilities law would "provide access by municipalities to facilities located in the municipal right-of-way in the interest of public health, safety and welfare." L.D. 1192, Summary (129th Legis. 2019). Initially, the Energy, Utilities, and Technology Committee ("the Committee") also included in the summary that "the bill also establishes the preservation of space for municipal attachments to shared-use poles by exempting municipalities from expenses assessed by joint use entities when the attachment is made for any purpose." *Id.* (emphasis added).

Before submitting the bill to the legislature to be voted on, the Committee heard public testimony from fifteen parties. *An Act to Establish Municipal Access to Utility Poles Located in Municipal Rights-of-way: Hearing on L.D. 1192 Before the Comm. on Energy, Utils., & Tech.*, 129th Legis. (2019). The public testimony showed that the majority of interested parties supported the bill as written. *Id.* Three parties raised the anti-competitive concern that the Appellant raises in this action: the result of the municipal exemption in its original form raises issues of unfair competition when competitors are required to pay for "make-ready" costs. *Id.* (testimony of Jeff McCarthy, Me. Fiber Co.), (testimony of Paulina Collins, Me. Pub. Utils. Comm.), (testimony of Ben Sanborn, Telecomm. Ass'n. of Me.).

In response to the public hearing, the Senate amended the bill to restrict the applicability of the exemption to address these concerns. Comm. Amend. to L.D.

1192, Summary (129th Legis. 2019). The Committee Amendment limited the exemption to only projects that meet a governmental purpose consistent with municipal police power or for the purpose of providing broadband service to an unserved or underserved area. *Id.* The Amendment Summary specifically provided the following:

> The amendment changes the provision in the bill that exempts a municipality from expenses assessed for make-ready work to accommodate the municipality's attaching its facilities to a shared-used pole for any purpose. The amendment instead exempts a municipality from expenses assessed for make-ready work to accommodate the municipality's attaching its facilities for a governmental purpose consistent with the police power of the municipality or for the purpose of providing broadband service to an unserved or underserved area.

Id.

Clearly, the Legislature considered the direct competition argument that is raised by the Appellant and consequently narrowed the exemption to provide that municipal broadband projects are only exempt from "make-ready" costs when they are not in direct competition with existing services. The Legislature did not intend for 35-A M.R.S. § 2524(2) (2024) to apply, nor may it be applied, to every municipal broadband project.

The Municipal Exemption was part of the Legislature's attempt to fill a gap left by the private sector broadband model. *See generally* Corian Zacher, *Paving*

the Road to Fiber, 18 Colo. Tech. J. 261, 266-67 (2020). The ConnectMaine Broadband Action Plan correctly explains:

> the private sector broadband investment model does not work in rural Maine. The low population density and limited scale make it unprofitable for the private sector to expand their networks with private investment only. The persistent market failure is the driving force behind state, local, and federal investments in high-speed internet connectivity for rural areas.

CONNECTMAINE, STATE OF MAINE BROADBAND ACTION PLAN 3 (Jan. 2020).

Along with other bills in 2019,[7] 35-A M.R.S. § 2524 (2024) was drafted as a solution to the ever-growing problem of broadband accessibility, a problem exacerbated by the pandemic. *Id.* Given that the legislative history confirms the Legislature's intent and the meaning of the statute's plain language, it should be applied as written.

B. Municipal broadband projects that provide broadband service to unserved and underserved areas serve a clear public purpose.

The Legislature unequivocally finds that "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

[7] See P.L. 2019, ch. 108, entitled: "An Act To Support the Role of Municipalities in Expanding Broadband Infrastructure."

and encouraging people to move to this State." 30-A M.R.S. § 5402 (1-A) (2024). *See also,* 35-A M.R.S. § 2524(2) (2024) and 47 U.S.C.A. § 254(b)(6-7) (West). To support the role of municipalities in expanding broadband, the Legislature designated community broadband systems as revenue-producing municipal facilities. P.L. 2019, ch. 108.

Moreover, this Court held that when municipalities engage in the sale of commodities that are also sold by private entities, taxpayer funds spent for this purpose are expended for a public use "where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character and the difficulty, perhaps impossibility, of making provisions for them otherwise, is alike proper, useful, and needful for the government to provide." *Laughlin v. City of Portland*, 111 Me. 486, 90 A. 318, 323 (1914).

In *Laughlin*, a municipality began selling a commodity to residents that was also available for sale by private entities. *Id.* at 323. This Court held that the public purpose test was met because the commodity was "one of public necessity, convenience, or welfare," and that "the practical difficulty is caused by the existence of monopolistic combinations." *Id.* This Court noted, however, that it would be impossible to establish a bright-lined rule for determining public use because "Times change. The wants and necessities of people change. The

opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today." *Id.* at 320.

Here, the Legislature has clearly and unequivocally determined broadband services are a public necessity that promote the general welfare of the public.[8] Similar to *Laughlin*, municipalities have a clear interest in providing broadband services in unserved and underserved areas because difficulties in practical implementation by the private sector has left gaps in services. Without municipal intervention, residents would be without adequate access to a public necessity.

Furthermore, the Legislature determined that the Municipal Exemption is necessary to facilitate municipal broadband services in areas where the private sector does not offer adequate services to fulfill this public necessity. Therefore, the Municipal Exemption, which serves to facilitate municipal broadband projects

[8] Municipal broadband service in unserved and underserved areas aids the public health and welfare by promoting:

- digital healthcare tools— such as patient portals or telehealth appointments by providers, Brittney Crock Bauerly, *Broadband Access as a Public Health Issue: The Role of Law in Expanding Broadband Access and Connecting Underserved Communities for Better Health Outcomes*, 47 J.L. Med. & Ethics 39, 39 (2019);
- the operation of businesses and the local economy, *Broadband*, U.S. Dep't of Agriculture, https://www.usda.gov/broadband (last accessed on Dec. 26. 2024);
- retaining and attracting people to municipalities, particularly in rural parts of the state, *What is possible when high-speed broadband comes to rural towns*, Center on Rural Innovation (Jan. 12, 2024), https://ruralinnovation.us/blog/what-possible-high-speed-broadband-comes-rural-town/; and
- the ability of students to access educational materials and classes, Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 Admin. L. Rev. 1, 83 (2009).

by shifting "make-ready" to private utilities furthers the intent and purpose of Section 5402 and is a public necessity. 30-A M.R.S. § 5402(5).

III. THE MUNICIPAL EXEMPTION IS ESSENTIAL TO ENSURING MUNICPALITIES CAN COMPLETE MUNICIPAL BROADBAND PROJECTS WITHOUT VIOLATING THE PUBLIC PURPOSE DOCTRINE.

The Maine Constitution has long been interpreted by this Court to require that taxation and spending at either the state or local level have a public purpose to be constitutionally valid. Me. Const., art. IV, pt. 3, § 1; *Delogu v. State*, 1998 ME 246, ¶ 10, 720 A.2d 1153, 1155; *Common Cause v. State*, 455. A.2d 1, 15 (Me. 1983); *Me. State Hous. Auth. v. Depositors Tr. Co.*, 278 A.2d 699, 704 (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. 30-A M.R.S. §§ 5722-27.

Although municipal broadband projects are not expressly listed in statute, a municipality can generally show that a municipal broadband project will promote a valid public purpose under its police power, as discussed in Section II (B) above. However, a municipality's argument that such a project supports a public purpose could be subject to challenge if the municipality is required to pay to upgrade or replace equipment and infrastructure that is privately owned, such as by paying to

replace a utility pole that is owned by a private utility company. Under Chapter 880 the cost for pole replacement is generally borne entirely by the cost causer and is not prorated among the different attachers and pole owners. 65-407 C.M.R. ch. 880 § (6)(C) (2023). Meaning that, similar to the prohibition of using taxpayer funds to plow a private road, a municipality may be found to have violated the public purpose doctrine by using taxpayer funds to replace poles and other infrastructure that is owned and maintained by a private entity, particularly when the utilities will get the primary benefit of the upgrade.

Moreover, without the Municipal Exemption utility companies would be granted a windfall. Utility companies would be able to require municipalities to pay "make-ready" costs, including the cost to replace privately owned infrastructure, require municipalities to pay rental fees to use existing utility poles, and construct utility poles in the public right-of-way without compensating municipal taxpayers for using municipally owned property. Particularly under this scenario, a municipality could have difficulty arguing that the expenditure of taxpayer funds to upgrade privately owned infrastructure serves a broader public purpose.

Therefore, the Municipal Exemption is necessary to ensure that municipalities can complete municipal broadband projects to unserved and underserved areas under the current regulatory framework for joint-use pole

attachments without being found to have violated a competing constitutional requirement imposed on municipalities.

CONCLUSION

For the foregoing reasons, MMA respectfully requests that this Court uphold the decision of the PUC order requiring the Appellant to pay make-ready costs incurred due to the Town's municipal broadband project under 35-A M.R.S. § 2524(2) and to reject the Appellant's argument that the Municipal Exemption is an unconstitutional taking of private property.

Respectfully submitted, dated at Augusta, Maine this 2nd day of January, 2025.

/s/ Breana N. Gersen
Breana N. Gersen, Esq.
Bar No. 5031
L. Adelia Weber, Esq.
Bar No. 11142
Attorneys for Amicus Curiae
Maine Municipal Association
60 Community Drive
Augusta, ME 04330
(207) 623-8428
bgersen@memun.org
aweber@memun.org

CERTIFICATE OF SERVICE

I, Breana N. Gersen, hereby certify that two copies of this Brief of *Amicus Curiae* were served upon the following parties in the above described matter electronically as prescribed by M.R. App. P. 1D(e).

Andrea S. Hewitt, Esq.
William D. Hewitt, Esq.
Hewitt & Hewitt
ahewitt@HewittLegalAdvisors.com
whewitt@HewittLegalAdvisors.com

Jordan D. McColman, Esq.
Amy Mills, Esq.
Maine Public Utilities Commission
Jordan.D.McColman@maine.gov
Amy.Mills@maine.gov

Kimberly Patwardhan, Esq.
Office of the Maine Attorney General
kimberly.patwardhan@maine.gov

Jan M. Gould, Esq.
Mary A. Denison, Esq.
Lake & Denison, LLC
jgould@lakedenison.com
mdenison@lakedenison.com

Abraham J. Shanedling, Esq.
J. David Thomas, Esq.
Sheppard, Mullin, Richter, & Hampton LLP
ashanedling@sheppardmullin.com
dthomas@sheppardmullin.com

Johnathan I. Handler, Esq.
Day Pitney LLP
jihandler@daypitney.com

Kristina R. Winther, Esq.
Richard P. Hevey, Esq.
Office of the Maine Public Advocate
kristina.r.winther@maine.gov
richard.p.hevey@maine.gov

Dated: January 2, 2025

/s/ Breana N. Gersen
Breana N. Gersen, Bar No. 5031
MAINE MUNICIPAL ASSOCIATION
60 Community Drive
Augusta, ME 04330
(207) 623-8428
Bgersen@memun.org