**MAINE SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

**DOCKET NO. PUC-24-310**

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

**v.**

**PUBLIC UTILITIES COMMISSION**

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# BRIEF OF APPELLANT

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

Cases

Rules and Statutes

Constitutional Provisions



Other Authorities

## INTRODUCTION

This is an appeal pursuant to 35-A M.R.S. § 1320 from a June 13, 2024 final order (the "Order") of the Maine Public Utilities Commission (the "Commission"). The Order determined that under 35-A M.R.S. § 2524(2) ("Section 2424(2)") and the Commission's implementing regulations, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE ("Consolidated" or the "Company") is required to pay make-ready costs that the Town of Somerville (the "Town") will cause Consolidated to incur to make room for the Town to attach its new broadband network facilities (the "Project") to Consolidated-owned utility poles. In determining that Section 2424(2) applied, the Commission declined to determine any of the constitutional challenges Consolidated raised with respect to Section 2424(2) and Rule 6(A)(1)(b)[1] of the Commission's Chapter 880 Rules[2] (collectively, the "Municipal Exemption").

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

### I. Procedural Background

On February 14, 2023, the Town filed a complaint with the Commission requesting the Rapid Response Process Team ("RRPT") to find that the Company

[1] During the pendency of the proceedings below, the Commission entered an Order on September 12, 2023 in a separate rulemaking docket (Docket No. 2023-00058). The Order in Docket 2023-00058 amended the Rule relevant to the above-styled appeal by renumbering it from 5(A)(1)(b) to 6(A)(1)(b).

[2] 65-407 C.M.R. ch. 880, Attachment to Joint-Use Utility Poles; Determinations and Allocation of Costs; Procedure ("Chapter 880").

had unreasonably refused to comply with the Municipal Exemption by refusing to bear the costs of make-ready work necessary to complete the Project. (Appendix ("App.") at 37-38.)

After the Maine Connectivity Authority provided the RRPT with a Memorandum stating that the Town is an "unserved" area as that term is defined by the ConnectMaine Authority and as used in Section 2524(2) and Rule 6(A)(1)(b), the RRPT issued its Decision in favor of the Town on March 2, 2023. (App. at 31-36.)

Consolidated appealed the RRPT Decision to the Commission. Consolidated's appeal provided the factual and procedural background related to the RRPT process, provided several legal bases upon which the RRPT Decision should be rejected by the Commission, requested an opportunity to further develop the record through adjudicatory processes, and requested a stay of the RRPT Decision. (Consolidated's Appeal of RRPT Decision and Request for Stay.)

On March 21, 2023, the Commission issued a Notice of Investigation, opening a formal investigation to allow the Commission to develop a factual record upon which to base a final decision on the issues raised by the RRPT Decision and Consolidated's appeal. (App. at 39-45.)

The Town and Consolidated filed direct testimony and responded to data requests, and the Hearing Examiners held technical conferences. (App. at 3-5.)

After discovery concluded and the parties filed briefs, an Examiner's Report was issued finding that the Town satisfied the statutory criteria for application of the Municipal Exemption. The Examiners' Report declined to undertake any analyses and determinations of the constitutional challenges Consolidated raised concerning the Municipal Exemption.

Consolidated timely filed Exceptions to the Hearing Examiner's Report, including on the grounds that the Commission was required to make certain factual findings relating to Consolidated's constitutional challenges, even if those challenges would not be determined in the Commission proceeding. (App. at 46-55.) Consolidated's Exceptions identified each factual finding that was necessary to establish an adequate record. (*Id*. at 50-54.)

On June 13, 2024, the Commission issued an Order adopting the Examiners' Report and directed Consolidated to reimburse the Town for the make-ready costs the Town had paid to Consolidated. (App. at 7-30.)

## II. Factual Background

### A. Attachments to Consolidated's Property.

The predominant owners of the utility poles in Maine are the electric transmission and distribution ("T&D") utilities[3] and Consolidated. (App. at 62

[3] The largest T&D utilities in Maine are Central Maine Power Company ("CMP") and Versant Power. (Davis Test'y at 5, n.2.)

(5:15-16).) Consolidated owns in excess of 440,000 poles in Maine, either wholly or jointly with a T&D utility. (*Id*. at 62 (5:16-19).) Moreover, unlike the T&D utilities that own poles only within their service territories, Consolidated owns poles throughout the State due to its predecessors' provision of regulated telephone service throughout much of Maine. (*Id.* at 62-63 (5:19 – 6:2).) In Maine, Consolidated and the T&D utilities have defined maintenance areas in their overlapping service territories. (*Id.* at 63 (6:2-4).) For example, if a pole in CMP's maintenance territory needs to be replaced due to an auto accident, then CMP is responsible for setting a new pole. (*Id.* at 6:4-6.) Consolidated has similar responsibilities for poles in its maintenance territory. (*Id.* at 6:6.)

Third-party attachers, such as the Town here, gain pole access by entering into pole attachment agreements with the owners of the poles to which they seek to attach. (App. at 63 (6:8-9).) The process for a third party to attach to poles includes the submission of an application by the proposed attacher for an attachment license, a pole-by-pole field inspection by the pole owner(s) to determine whether make-ready work is required for the requested attachments, the performance of make-ready work by the pole owner(s) to accommodate the requested attachments, and the issuance of a license to attach after the make-ready work is complete. (*Id.* at 6:12-16.)

The make-ready work, as defined in the Municipal Exemption, refers to the

rearrangement or transfer of existing facilities, replacement and removal of poles and any other changes required to make space available for a third-party attacher to attach to a joint use pole. (Section 2524(1)(A); App. at 64 (7:2-3).) For example, existing attachments on the pole may need to be moved to make room for the new attachments. (*Id.* at 7:3-4.) If the existing pole does not have sufficient room for the new attachments, then the existing pole must be removed, a new taller pole is installed, and the existing attachments transferred from the old pole to the new pole in a manner that makes room for the proposed new attachments. (*Id.* at 7:4-8.) The make-ready work is necessary to allow the third-party attacher to physically access the utility pole and the make-ready work would not be performed but for the third-party attacher's request to physically occupy space on the pole. (*Id.* at 7:8-10.)

With regard to the Project, the Town seeks to attach messenger wire and fiber optic cable to Consolidated's poles. (App. at 69 (12:7-8).) The attachments will be physically connected to the poles using industry-standard hardware and will physically occupy space on Consolidated's poles. (*Id.* at 12:8-10.) A hole must be drilled through each pole for the hardware to be attached to the pole. (Oct. 12, 2023 Tech. Conf. Tr. at 62:8-16.)

### B. Grant Funding Fully Covers the Town's Budget for the Project, Including Make-Ready Costs.

On July 6, 2021, the Town submitted a request for grant funding in support of a ConnectMaine statewide application for National Telecommunications and

Information Administration ("NTIA") Broadband Grant funding. (Johnson Test'y at 7:12-13.) Per the Town's Grant Budget, the total cost of the Project is $1,661,901. (Oulette Test'y, Exh. C, line 16.)

On February 24, 2023, the Town was notified that its NTIA grant application was successful and the NTIA grant would fund 90 percent of the Project, with ConnectMaine funding the remaining 10 percent. (Johnson Test'y at 7:20-23.) Thus, the Grant Budget for the Town's Project was fully funded.[4]

The NTIA grant awarded to the Town included a line item for make-ready work in the amount of $278,620.[5] (Oulette Test'y at 5:14-16 & Exh. C.)

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[4] Consolidated had three projects that were also included in the same NTIA grant funding opportunity. (App. at 66 (9:1-2 & n.5).) As Ms. Davis explained:

> Consolidated's grant is different from the Town's grant. Consolidated is building a fiber to the premise network serving all residents and small businesses in eight of Consolidated's exchanges: the Farmington, ME exchange; the Rangeley, ME exchange; and six exchanges on the Blue Hill Peninsula (Castine, Penobscot, Blue Hill, Sedgwick, Stonington, and Deer Isle). As discussed in my testimony above, under the Town/Axiom grant, the ConnectME Authority offered to fund the Town/Axiom 10% match portion of the grant. The ConnectME Authority did not offer to fund Consolidated's match, and Consolidated had to match 22.8%, 13.3% and 31% of the grant dollars in Farmington, Blue Hill and Rangeley, respectively. This totaled more than $4.5 million in private matching grant funds.

(*Id.* (9 n.5).)

[5] The Town's consultant estimated the make-ready cost as follows:

> We determined that there are approximately 745 poles in Somerville that will require make-ready work. Such work was estimated at $225 per pole (745 x $225 = $167,625). We also estimated that about 10% of those poles would need to be replaced at a cost of about $1500 per pole (74 x $1500 = $111,000). This resulted in a total make-ready estimate of $278,620.

(Ouellette Test'y at 6:14-18.)

### C. The Make-Ready Costs Associated With The Town's Project.

Consolidated's make-ready costs for the Town's Project total $97,624.60. (Oct. 12, 2023 Tech. Conf. Tr. at 22:21-24.) Of that amount, $7,379.60 is related to poles physically located in the towns of Jefferson and Washington. (Davis Test'y at 13:3-5.)

Consolidated's make-ready costs were determined through a joint pole survey conducted by Consolidated and CMP, in which the Town was invited to participate. (Davis Test'y at 13:7-8.) During the survey, representatives from Consolidated and CMP met in the field and reviewed each of the more than 600 poles to which the Town requested attachment. (*Id.* at 13:8-10.) The representatives reviewed the space available on each pole and determined where the Somerville attachment could be placed and what make-ready work will be required on each pole to accommodate the Town's physical attachment while maintaining all separations and clearances required by the National Electric Safety Code and Telcordia Blue Book. (*Id.* at 13:10-14.)

To perform the make-ready work for the Project, Consolidated will need to prepare and issue an engineering job to accommodate the Town's attachments to Consolidated's poles. (App. at 70 (14:2-3).) After that job is issued, Consolidated will deploy construction crews to perform the necessary make-ready work. (*Id.* (14:3-4).) Since the Town is in CMP's maintenance area, CMP will need to set the

few new poles that are required to be set. (*Id.* (14:4-6).) Consolidated will be required to dispatch a crew to move its attachments from the old poles to the new poles. (*Id.* (14:6-7).)

**D. Recovery of the Make-Ready Costs.**

Prior to the introduction of competition in the telecommunications industry in the 1970's, telephone service was principally provided by public utilities as natural monopolies in defined geographic service territories and, in return, the telephone utilities were subject to regulation under both federal and state law. (App. at 61 (4:3-6).) Because both telephone utilities and T&D utilities historically provided a wires-based service, the utilities coordinated the ownership and maintenance of utility poles to which they attach their wires and other equipment necessary to provide service to their respective customers. (*Id.* (4:6-9).)

Since the 1970's, telephone utilities have been exposed to increased competition due to federal policies adopted pursuant to the federal Telecommunications Act that opened local telecommunications markets to competition. (App. at 61 (4:10-12).) As a result, pole owners became obligated to allow third parties access to the poles that were historically used only by the T&D and telephone utilities. (*Id.* (4:12-14).)

Today, Maine's T&D utilities remain free from competition in their service territories and are subject to comprehensive regulation by the Commission,

including traditional cost of service regulation where the T&D utilities' rates charged to customers are designed to recover the company's cost of providing service. (App. at 62 (5:4-7).) Consolidated, however, is only regulated by the Commission with regard to a backstop voice service known as Provider of Last Resort or "POLR" service. (*Id.* (5:7-9).) Importantly, unlike the T&D utilities, the Commission does not regulate Consolidated's rates using cost of service principles. (*Id.* (5:9-10).) Instead, Consolidated's rates for POLR service are capped by statute. (*Id.* (5:11).) The non-regulated communications services offered by Consolidated, including broadband service, non-POLR traditional voice service, VOIP, hosted PBX (private branch exchange) and others are subject to competitive pricing principles. (*Id.* at 61-62 (4:16 – 5:2, 5:7-13).)

Thus, when CMP incurs make-ready costs that it is unable to recover from the third-party attacher under the Municipal Exemption, it recovers those costs from its ratepayers through its distribution rates approved by the Commission. (App. at 77.) Unlike CMP, Consolidated has no opportunity to recover make-ready costs from its customers due to the competitive markets in which it offers services. (Davis Test'y at 17:11-12.)

## III. Background on Pole Attachment Regulation and Compensation.

### A. The Pole Attachment Act of 1978.

The Pole Attachment Act of 1978, 47 U.S.C. § 224 ("Section 224"), established jurisdiction within the Federal Communications Commission (the "FCC") and, according to S. Rep. 95-580 at 109 (1978) ("Senate Report"), Section 224 was intended to "to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities."[6] Section 224 defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

The Senate Report for Section 224 articulated the contemplated "Federal involvement in pole attachment arrangements" as serving two purposes: "[t]o establish a mechanism whereby unfair pole attachment may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." Senate Report at 122. The "underlying concept" of Section 224 was to "assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies . . . be made available at just and reasonable rates, and under just and reasonable terms and conditions . . .

[6] S. Rep. 95-580 at 109 (1978) ("Senate Report").

." *Id.* at 123. Thus, the legislative intent underlying Section 224 was to address the relative lack of state regulation of pole attachments at the time of enactment, particularly given the concurrent proliferation of cable television providers seeking to attach to utility poles and bring their services to new customers.

By Section 224, Congress required the FCC to "fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis." *Id.* at 125. The FCC must ensure that the pole owner receives just and reasonable compensation for the cost of pole attachments, particularly an amount:

> [N]ot less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1).

**B. The Telecommunications Act of 1996.**

Congress has amended Section 224 several times since its enactment in 1978. Section 224(f)(1), added as part of the Telecommunications Act of 1996, requires that a pole owner "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). The Section 224 requirement of nondiscriminatory access to poles being subject to just and reasonable rates also

informs 47 U.S.C. § 251(b)(4) ("Section 251(b)(4)"), which requires each incumbent local exchange carrier[7] to provide access to rights-of-way to competing providers of telecommunications services "on rates, terms, and conditions that are consistent with section 224." *Id.* § 251.

### C. Maine's Regulation of Pole Attachment Rates Separates Non-Recurring Make-Ready Charges From Recurring Costs Recovered Through Attachment Rates.

The Commission's Chapter 880 Rules address the calculation of attachment rates for joint use poles. Section 4 of the Rule states, in part:

> In determining a just and reasonable rate for attachments to joint-use utility poles, the Commission will employ the FCC Cable Rate Formula, presuming an average joint-use utility pole with a space factor of 7.4% per foot used by an attachment. Pole top attachments are presumed to occupy one foot of usable space for the purposes of Cable Rate calculations. The use of an average joint-use utility pole, and the one-foot space for pole-top attachments are rebuttable presumptions.

Ch. 880, Section 4.

In addition to specifying the use of the FCC's Cable Rate Formula for attachment rates, Chapter 880 also requires pole owners to separately charge attachers for other expenses and investments related to the third-party attacher's request to attach. Ch. 880, Section 6. These separate charges include make-ready work as well as the cost associated with a new pole when installation of a taller pole is necessary to accommodate the attacher's new facilities. *Id.*

[7] Consolidated is an incumbent local exchange carrier, or "ILEC."

Chapter 880's separate treatment of the pole owner's non-recurring make-ready costs and its recurring costs that are recoverable through the FCC's Cable Rate Formula is consistent with the FCC's separate treatment of those costs pursuant to federal law. *See, e.g., In the Matter of Alabama Cable Telecommunications Assoc., v. Alabama Power Company*, 16 FCC Rcd 12209, ¶ 48 (May 23, 2001) (distinguishing between make-ready charges and attachment rates established pursuant to the pole attachment rate formula for cable attachers); *In the Matter of Implementation of Section 224 of the Act*, WD Docket No. 07-245, Order and Further Notice of Proposed Rulemaking at ¶ 110 (May 20, 2010) (same); *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 at ¶ 28 (March 29, 2000) (same).

## ISSUES PRESENTED FOR REVIEW

I. Whether the Municipal Exemption violates the Takings Clauses of the United States and Maine Constitutions, where federal and state law require Consolidated to permit the Town to permanently physically occupy space on property owned by Consolidated for public use, make-ready work is necessary to comply with such laws, and Consolidated receives no just compensation for the costs of the Town's make-ready work due to the Municipal Exemption?

II. Whether the Municipal Exemption violates the Equal Protection Clauses of the United States and Maine Constitutions by treating telecommunications carriers differently than other pole owning public utilities, by failing to narrowly tailor the Municipal Exemption to meet any compelling state interest, and by having no rational basis to treat telecommunications carriers differently?

III. Whether Federal Law governing pole attachment compensation, including make-ready costs, preempts the Municipal Exemption under the Supremacy Clause of the United States Constitution by prohibiting Consolidated from recovering such costs from the Town?

IV. Whether the Municipal Exemption is void for vagueness or an excessive delegation of legislative authority because it provides insufficient guidance on what constitutes an unserved or underserved area?

V. Whether application of the Municipal Exemption here leads to absurd results and is contrary to the public interest, where the Town can receive a double recovery by retaining the grant funds designated for make-ready costs and obtaining a refund for those same costs from Consolidated?

## ARGUMENT

### I. THE MUNICIPAL EXEMPTION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF CONSOLIDATED'S PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSES OF THE UNITED STATES AND MAINE CONSTITUTIONS.

The Takings Clause of the Fifth Amendment to the United States Constitution, applicable to the states under the 14th Amendment,[8] requires that "private property [shall not] be taken for public use, without just compensation."

#### A. The Municipal Exemption is a Facially Unconstitutional Taking Because There is No Set of Circumstances Under Which Requiring Pole Owners to Absorb Make-Ready Costs Caused By a Municipality, Without Providing Just Compensation, is Constitutional Under the Takings Clauses.

The United States Supreme Court has determined that a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that statute requiring landlords to permit cable television company to install its facilities on the landlords' property constituted a physical taking). When a statute authorizes such a physical occupation, it constitutes a *per se* taking of property. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1329 (11th Cir. 1999) (relying on *Loretto* to hold that the Telecommunications Act of 1996 ("Telecom Act"), requiring utilities to provide cable and

[8] *E.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

telecommunications carriers access to the utilities' property constituted a *per se* taking).

In such physical takings cases, the property owner "entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Gulf Power*, 187 F.3d at 441. Regardless of the public interest the legislation may serve or how minimal the economic impact to the owner such legislation is, the government's permanent physical occupation of property constitutes a taking. *Loretto*, 458 U.S. at 434.

In addition, the Takings Clause of the Maine Constitution requires that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. Art. 1, § 21. This Court has made clear that "[t]he modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover." *Bell v. Town of Wells,* 557 A.2d 168, 178 (Me. 1989) (emphasis added).

The Municipal Exemption patently violates these constitutional principles.

Section 2524(2)[9] provides:

> **2. Access to poles; make-ready requirements.** Notwithstanding any provision of law to the contrary, for the purpose of safeguarding access to 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[10] to accommodate a municipality's attaching its facilities to that shared-use pole:
>
> A. For a governmental purpose consistent with the police power of the municipality; or

[9] Likewise, Rule 6(A)(1), states:

1. Municipal Exemption

a. Definitions. The following definitions are applicable to Section 5(A)(1) of this Chapter:

i. Make Ready Work. "Make-ready work" means the rearrangement or transfer of existing facilities, replacement of a pole, complete removal of any pole replaced or any other changes required to make space available for an additional attachment to a shared-use pole.

ii. Municipality. "Municipality" means a town, city, plantation, county, regional council of governments, quasi-municipal corporation or district as defined in 30-A M.R.S. §2351, regional municipal utility district established according to 30-A M.R.S. §2203(9) or a corporation wholly or partially owned by an entity specified in this Subsection.

iii. Unserved or Underserved Area. "Unserved or underserved area" has the same meaning as in 35-A M.R.S § 9202(5).

b. Exemption. Notwithstanding any provision of law to the contrary, for the purpose of safeguarding access to infrastructure essential to public health, safety and welfare, an owner of a joint-use utility pole and each attaching entity 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 joint-use utility pole:

i. For a governmental purpose consistent with the police power of the municipality; or

ii. For the purpose of providing broadband service to an unserved or underserved area.

[10] Section 2524(1)(A) defines make-ready work as "the rearrangement or transfer of existing facilities, replacement of a pole, complete removal of any pole replaced or any other changes required to make space available for an additional attachment to a shared-use pole."

> B. For the purpose of providing broadband service to an unserved or underserved area.[11]

The plain language of Section 2524(2) *entitles* a municipality to permanently physically occupy Consolidated's private property for public use. First, the title of the statute expressly states that Section 2524(2) authorizes "[a]ccess to poles." *See State v. Fleming*, 2020 ME 120, ¶ 40, 239 A.3d 648, 661 (rejecting the State's interpretation of a statute because its "interpretation far exceeds the purpose and intent of the statute as expressed in the title . . . "). Second, the statute expressly requires Consolidated and other pole owners to "accommodate a municipality's attaching its facilities to [the] shared use pole." The permanent physical "access" and "accommodat[ing] a municipality's attaching [of] its facilities" results in a taking. The Town intends to drill holes in and permanently occupy physical space on Consolidated's private property for the purpose of providing broadband services to consumers in the Town. The Town will, therefore, occupy the space for public use.

It is impossible to accommodate the Town's request to attach to poles owned by Consolidated without the requisite make-ready work to ensure compliance with pole facility separations and clearances required by the National Electric Safety Code and Telcordia Blue Book. (Davis Direct Test'y at 13:10-14.) Consequently,

[11] The term "unserved or underserved area" is given the same meaning as that term is defined by the ConnectMaine Authority pursuant to 35-A M.R.S. § 9202(5). *Id.* § 2524(1)(C).

the make-ready work is part and parcel of the "physical taking" of Consolidated's property for public use. Yet, the Municipal Exemption provisions require Consolidated to bear the cost of the make-ready work it incurs solely for the Town's benefit, with no means for just compensation.

Although Consolidated will receive periodic attachment fees from the Town pursuant to the Company's standard pole attachment agreement,[12] those attachment fees are not designed to compensate the Company for its make-ready work. The FCC has confirmed, in numerous orders, that attachment rates determined by the FCC's pole attachment formula are completely separate from the non-recurring make-ready charges that an attacher pays to the pole owner to ready the pole (or change-out the pole if there is insufficient room for the new attachment). For example, the FCC has stated:

> In [*FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)], the Supreme Court appropriately applied this standard of review to the Commission's pole attachment rate formula and found that the formula did not effect a taking of property without just compensation. **The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator. *In addition to these charges,* the attacher pays a proportionate share of pole capital costs and operating expenses**

[12] Consolidated estimates that the total pole attachment fees due from the Town will be approximately $1,115.15 per year. (Davis Test'y at 19:14-21.)

> **based on the amount of space occupied by the attachments. The Commission's pole attachment rate formula for cable attachers allocates the cost of the entire pole by the percentage of total usable space used. The formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The Supreme Court determined that this formula results in a rate that is not confiscatory.**

*In the Matter of Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 48 (May 23, 2001) (emphasis added; footnote omitted). *See also In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.*, 16 FCC Rcd. 12,209, ¶ 69 n. 154 (2001) ("The known fact is that the Cable Rate requires the attaching cable company to pay for any 'make-ready' costs and all other marginal costs . . . , in addition to some portion of the fully embedded cost."); *In the Matter of Implementation of Section 224 of the Act*, WD Docket No. 07-245, Order and Further Notice of Proposed Rulemaking at ¶ 110 (May 20, 2010) ("Telecommunications carriers and cable operators generally pay for access to utility poles in two separate ways. First, as noted above, attachers pay nonrecurring charges to cover the costs of 'make-ready' work—that is, rearranging existing pole attachments or installing new poles as needed to enable the provider to attach to the pole. Second, attachers generally also pay an annual pole rental fee, which currently is designed to recover a portion of the utility's operating and capital costs attributable to the pole."); *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 at ¶ 28 (March 29, 2000) ("Make-ready costs are

non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.") (citing *Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order* 72 FCC 2d 59, at ¶ 27 (1979) (the "*Second Report and Order")*.

In fact, the FCC prohibits the inclusion of make-ready costs in the FCC's formula rate "to avoid a double recovery" by the pole owner. *In the Matter of Alabama Cable Telecommunications Assoc.,* 16 FCC Rcd 12209, ¶ 69 n.154 (citing *Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 28 (2000)).[13]

Thus, the Municipal Exemption forces Consolidated to bear a burden that, in all fairness and justice, should fall on the Town as the cost-causer. *See Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537 (2005) (reiterating that the Court's takings jurisprudence "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole") (internal quotations and citations omitted). Nothing in Section 2524(2) or Rule 6(A)(1)(b) provides a mechanism for Consolidated to recover the make-ready costs that the municipality causes. Because just compensation is not afforded for the *per*

[13] Section 6(A) of the Commission's Chapter 880 Rules, requiring that "[p]ole owners must charge attaching entities separately for" "reasonable expenses incurred in surveying existing joint-use utility poles or in the performing of make ready work," is consistent with the FCC orders. (Emphasis added.)

*se* taking, the statute and implementing regulation violate the United States and Maine Constitutions.

Moreover, the municipal exemption is facially unconstitutional because there is no set of circumstances under which the exemption would be valid. *E.g.*, *Gulf Power*, 187 F.3d at 1328 (noting that "because the plaintiffs are bringing a facial challenge to the [statute], they must 'establish that *no set of circumstances exists under which the [statute] would be valid*.'" (emphasis in original; citations omitted). The Municipal Exemption permits any municipality to impose the burden of make-ready costs onto the entity that owns the poles, whenever and wherever the municipality seeks to provide broadband service to an unserved or underserved area.[14] There are no exceptions to the Municipal Exemption and, unlike the Telecom Act at issue in *Gulf Power*, Section 2524(2) and Rule 6(A)(1)(b) do not otherwise provide an opportunity for recovery of the make-ready costs. Accordingly, the Municipal Exemption is unconstitutional on its face.

In the Commission proceedings below, the Town and the Office of the Attorney General (the "OAG") argued that the government's exercise of police powers authorizes the permanent physical occupation of Consolidated's property for

[14] Nothing in the Municipal Exemption prevents a municipality from seeking to claim the exemption for a broadband project that exceeds the municipality's borders. Thus, a municipality could seek to develop a project in a completely different town that is underserved and invoke the Municipal Exemption to avoid responsibility for make-ready charges. Here, the Town seeks to attach to poles in the Towns of Jefferson and Washington. (Davis Test'y at 13:1-5.)

public use without just compensation. They claim that the Municipal Exemption is a valid limitation on Consolidated's license to occupy the right of way with its utility poles. Their argument is without merit. The state's exercise of its police powers to permanently physically occupy private property without just compensation is contrary to the Takings Clauses. There is no dispute that: (1) Consolidated owns (wholly or jointly) the poles to which the Town intends to attach to build the Project; (2) Maine law, including 35-A M.R.S. § 711, 35-A M.R.S. § 2524(2) and the Commission's Chapter 880 Rules, require Consolidated to permit the Town to attach its facilities to Consolidated's private property; and (3) such attachments will require physical occupation of Consolidated's private property, as well as the alteration of that property by drilling holes, installing brackets and mounts, and securing attachments. Where such a *per se* physical occupation is concerned, just compensation is required regardless of the purported public interest involved. *Loretto*, 458 U.S. at 434.

### B. The Municipal Exemption Is Unconstitutional as Applied to the Specific Circumstances of this Case, Where Consolidated has No Ability to Recover its Make-Ready Costs.

Assuming, *arguendo*, that the Municipal Exemption is constitutional on its face (which it is not for the reasons stated above), it is unconstitutional as applied to the circumstances presented here. POLR is the only Commission-regulated service provided by Consolidated, the rates for which are statutorily capped and not

established by cost of service regulation. (App. at 62 (5:9-10).) Thus, unlike the State's T&D utilities, Consolidated does not have a means to recover through Commission-regulated rates the make-ready costs that Consolidated will incur at the Town's demand. Worse yet, after Consolidated's shareholders have been required to absorb the Town's make-ready costs under the Municipal Exemption, the Town will attach its facilities to Consolidated's private property and be in direct competition with Consolidated for customers.

Additionally, as explained above, the Town received grant funding, which included an amount dedicated to make-ready costs. Even in the absence of grant funding, the Town has not explained why it could not have availed itself of the options generally available to similarly situated entrants to the competitive market, such as passing the make-ready costs on to the broadband subscribers who will benefit from the Town's new service.[15] Consolidated has no ability to socialize the make-ready costs it will incur among a significant pool of public utility ratepayers to accommodate the Town's attachments, and the Municipal Exemption forces Consolidated's shareholders to cover the cost of the make-ready work for a

[15] Moreover, although Consolidated was a recipient of NTIA grant funding for its broadband projects in Farmington, Rangeley and the Blue Hill Peninsula, the ConnectME Authority did not offer to fund Consolidated's 10% match portion of the grant. Thus, it was necessary for Consolidated's shareholders to privately fund the match, in an amount greater than $4.5 million. (App.at 66 (9 n.5).) Thus, Consolidated's shareholders are not only privately funding the 10% match portion of the Company's grant, but they are also being required to privately fund the construction of a competitor's network through the Municipal Exemption (notwithstanding that the Town has more than sufficient grant funds available to it that are specifically dedicated to covering make-ready costs).

municipal competitor to enter the market. Such a result is constitutionally impermissible. For these reasons, the Municipal Exemption is unconstitutional as applied to the circumstances of this case.

## II. THE MUNICIPAL EXEMPTION VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT TREATS TELECOMMUNICATIONS CARRIERS DIFFERENTLY FROM OTHER PUBLIC UTILITIES THAT OWN POLES.

The Equal Protection Clause of the United States Constitution[16] prohibits the states from "deny[ing] any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Equal Protection Clause, interference with a fundamental right warrants the application of strict scrutiny. *E.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (stating that strict scrutiny "is reserved for cases involving laws that operate to the disadvantage of a suspect class or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution"). Strict scrutiny requires that the challenged law be narrowly tailored to meet a compelling state interest. *E.g., Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The Municipal Exemption fails to meet such heightened scrutiny.

[16] The equal protection clause of the Maine Constitution provides that "[n]o person shall . . . be denied the equal protection of the laws . . . ." Me. Const. art. 1, § 6-A. The United States and Maine constitutions provide co-extensive protection. *Town of Frye Island v. State*, 2008 ME 27, ¶ 14, 940 A.2d 1065, 1069.

### A. The Municipal Exemption is Not Narrowly Tailored to Achieve a Compelling State Interest Because it Fails to Exclude Pole Owners That Have No Ability to Recover Make-Ready Costs Through Public Utility Ratemaking or to Otherwise Provide a Means of Recovery.

The right to be free from a governmental taking of one's property without just compensation is a bedrock constitutional principle. Therefore, it is a fundamental right for Equal Protection purposes. *See Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) (the constitutional right to free speech and freedom of religion are fundamental rights for equal protection purposes, and laws impinging such rights are subject to strict scrutiny); *see also Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that the right to marry is a fundamental right for equal protection purposes); *Fox v. Makin*, 2023 U.S. Dist. LEXIS 142983, * 31 (U.S. Dist. Me. Aug. 16, 2023) (freedom of religion is a fundamental right for purposes of the Equal Protection Clause).

The Equal Protection Clause mandates that government entities treat similarly situated people alike. *E.g., Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). The test for whether individuals are similarly situated for equal protection purposes is whether:

> a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact

> correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

*Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989) (overruled on other grounds by *Ecuadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61 (1st Cir. 2004)). The entities or individuals need not be identical in every way before an Equal Protection Clause violation occurs, however. *Id*. They simply must be similarly situated "*in all relevant respects*." *Id.*

Here, the utility poles in Maine are owned principally by T&D utilities and Consolidated. These utilities are similarly situated in all relevant respects, as follows: (1) they all own poles, jointly or individually, to provide wires-based services to their customers; (2) they are required by law to provide third parties with pole access so the third parties can provide their services to the public;[17] and (3) the third-party attacher is required to pay the pole owner for make-ready work when the Municipal Exemption does not apply. Ch. 880, § 6(A) ("Pole owners must charge attaching entities separately for the following expenses and investments: A. Make-Ready Work. . . ."). Based on the above facts, the entities are similarly situated in all relevant respects. Thus, they are similarly situated for Equal Protection purposes and must be treated alike.

[17] *See, e.g.,* Ch. 880, § 2(A)(1) ("A pole owner must provide a requesting party with nondiscriminatory access to any joint-use utility pole owned or controlled by it for the attachment of conductors, circuitry, antennas, or other facilities.").

Despite that they are similarly situated, the application of the Municipal Exemption to telecommunications carriers like Consolidated result in different treatment between similarly situated pole-owning public utilities. As described above, the rates of the T&D utilities are regulated by the Commission under cost of service ratemaking principles, and the T&D utilities are able to recover from their body of captive customers (*i.e.*, socialize) any make-ready costs not recovered from a municipality due to the Municipal Exemption. Consolidated, by contrast, only provides a single regulated backstop service (POLR), and the rate it is allowed to charge customers for that service is both capped by statute and subject to competitive pressures. *See* 35-A M.R.S. § 7222-A (initially establishing and capping POLR rates for price-cap incumbent local exchange carriers). Therefore, although the T&D utilities can recover make-ready costs by socializing those costs among their ratepayers through the ratemaking process governed by the Public Utility Code,[18] that same Public Utility Code provides Consolidated no similar opportunity to socialize make-ready costs incurred among a captive group of customers.[19]

[18] CMP confirmed that it socializes these costs among its customers. (App. at 77.)

[19] This disparity is exacerbated by the fact that the communications services provided by Consolidated are subject to intense competition, including wireless providers, cable providers and now municipal broadband providers, whereas the T&D utilities operate electric transmission and distribution networks that are not subject to competition. Thus, when a T&D utility raises its rates, its customers have no ability to "shop around" and obtain a comparable T&D service offered by a different service provider at a lower price in a competitive market.

Strict scrutiny requires the government to demonstrate that its "compelling interest [was] incapable of being served by less intrusive means." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003). Even assuming, without conceding, that the State's interest here is "compelling," the Municipal Exemption is not narrowly tailored to achieve this goal; the State has other less intrusive means available to achieve its goal. For example, rather than prohibiting pole owners from recovering make-ready costs from municipalities, the State could pay the make-ready costs to the pole owners on behalf of municipalities that seek to provide broadband in underserved areas (just as the NTIA grant funding is covering the Town's make-ready costs here). Instead, the Municipal Exemption treats pole owners differently due to their differing abilities to recover make-ready costs through the public utility ratemaking process. Consolidated's rates are capped and it cannot recover the costs through cost of service ratemaking.[20] If the Municipal Exemption had simply excluded telephone utilities, or provided some other mechanism for them to recover the make-ready costs they incur, the Equal Protection Clause would not be implicated.

[20] In fact, Consolidated pays twice for the Town's exercise of the Municipal Exemption. First, the Municipal Exemption prevents Consolidated from recovering its make-ready costs from the Town. Second, as a customer of CMP, Consolidated pays a portion of CMP's make-ready costs that are socialized among all CMP customers. As a CMP customer, Consolidated paid CMP more than $1.8 million for T&D service during 2022. (Davis Test'y at 16:5-8.)

### B. The Municipal Exemption Also Fails to Meet The Rational Review Standard Under The Equal Protection Clause Because it Arbitrarily Requires Consolidated to Bear the Make-Ready Costs with No Ability to Recover Them, While T&D Utilities Can Recoup Such Costs Through Cost of Service Regulation.

For equal protection purposes, when a law does not infringe upon a fundamental right or create suspect classifications, the law is subject to a rational review standard. *E.g., Vacco v. Quill*, 521 U.S. 793, 799 (1997). Even assuming, *arguendo*, the Municipal Exemption does not implicate a fundamental right, it nevertheless fails under the rational basis test.

Under rational basis review, a law does not violate the Equal Protection Clause if it is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Assuming the State has a legitimate interest in promoting broadband service to unserved and underserved regions in Maine, there is no rational basis for enacting a Municipal Exemption in the context of a public utility framework that allows some pole owners to recover those costs through cost of service rates while Consolidated has no corresponding mechanism within that regulatory framework to do so. There is no rational basis for treating Consolidated differently from the T&D utilities. Forcing Consolidated's shareholders to bear the burden of make-ready costs for municipal broadband, while providing T&D utilities a mechanism to recover such costs from its captive ratepayers, is not rationally related to the state's interest in providing broadband to

unserved or underserved areas. Instead, the disparate treatment is arbitrary, illogical, and unconstitutional.

## III. APPLICATION OF THE MUNICIPAL EXEMPTION TO REQUIRE POLE FACILITIES REARRANGEMENTS AND POLE REPLACEMENTS WITHOUT COMPENSATION IS PREEMPTED BY FEDERAL LAW

The Supremacy Clause of the U.S. Constitution states that the laws of the United States are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State contrary notwithstanding." U.S. Const., Art. VI, cl. 2. "Put simply, federal law preempts contrary state law." *Hughes v. Talen Energy Mktg. LLC,* 578 U.S. 150, 162 (2016). Conflict preemption of state law lies when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 163 (internal quotation marks and citation omitted).

As discussed above, through the Pole Attachment Act of 1978, Congress vested the FCC with jurisdiction over pole attachment arrangements to serve two purposes: "[t]o establish a mechanism whereby unfair pole attachment may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." Senate Report at 122. *See also id.* at 123 (the "underlying concept" of Section 224 was to "assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone

companies . . . be made available at just and reasonable rates and under just and reasonable terms and conditions . . . .").

The FCC must ensure that the pole owner receives just and reasonable compensation for the cost of pole attachments, particularly an amount:

> **[N]ot less than the additional costs of providing pole attachments**, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1) (emphasis added).

Although Section 224(c) allows states to determine pole attachment rates upon filing a written certification with the FCC that the state regulates pole attachment rates, Maine currently relies upon the FCC's cable rates for pole attachment charges. Ch. 880, § 4 ("In determining a just and reasonable rate for attachments to joint-use utility poles, the Commission will employ the FCC Cable Rate Formula . . . ."). In addition to adopting the FCC's Cable Rate Formula for attachment rates, Chapter 880 also requires pole owners to separately charge attachers for other expenses and investments related to the third-party attacher's request to attach, including make-ready work:

> 6. SEPARATE CHARGES
>
> Pole owners **must charge attaching entities separately** for the following expenses and investments:

> A. Make-Ready Work. An additional attaching entity or an existing attaching entity placing an additional attachment **must be charged reasonable expenses incurred in surveying existing joint-use utility poles or in performing make-ready work.** The attaching entity requiring additional space on an existing joint-use utility pole is presumed to be the attaching entity which must incur or be charged for the cost of all make-ready work, unless the other attaching entities otherwise agree.

Ch. 880, § 6(A) (emphasis added).

Chapter 880's separate treatment by a pole owner of its non-recurring make-ready costs and its recurring costs that are recoverable through the FCC's Cable Rate Formula is consistent with the requirement of 47 U.S.C. § 224(d)(1) that pole owners recover "not less than the additional costs of providing pole attachments." Make-ready costs—which would not be incurred by the pole owner but for the third party attacher's request to attach—are the quintessential "additional cost" to the pole owner of providing access to the pole for a new attachment. Yet the Municipal Exemption prevents Consolidated from recovering this additional cost that Section 224(d)(1) plainly requires third-party attachers to pay.

Moreover, as discussed above, numerous FCC decisions confirm that the non-recurring make-ready costs are recovered separately from the recurring costs included in the FCC formula. *E.g., In the Matter of Alabama Cable Telecommunications Assoc.*, 16 FCC Rcd 12209, ¶ 48 (distinguishing between make-ready charges and attachment rates established pursuant to the pole

attachment rate formula for cable attachers); *In the Matter of Implementation of Section 224 of the Act*, WD Docket No. 07-245, Order and Further Notice of Proposed Rulemaking at ¶ 110 (May 20, 2010) (same); *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 at ¶ 28 (March 29, 2000) (same); *Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order* 72 FCC 2d 59, at ¶ 27 (1979) (same). In fact, make-ready costs cannot be included in the FCC formula for attachment rates to ensure there is no double-recovery by the pole owner. *In the Matter of Alabama Cable Telecommunications Assoc.,* 16 FCC Rcd 12209, ¶ 48.

Here, applying the Municipal Exemption to prevent Consolidated from charging the Town for its make-ready work conflicts directly with Section 224(d)(1) and FCC decisions acknowledging that pole owners must be allowed to collect both their make-ready costs and the attachment rates determined by the FCC's formula. Consolidated's make-ready charges for the Somerville Project total $97,624.60, and the attachment fees that the Town will pay Consolidated to attach to approximately 600 poles are expected to total $1,115.15 per year. By prohibiting Consolidated from charging the Town for the significant make-ready costs, which are clearly not recovered through the annual attachment fees determined by the FCC formula, the Municipal Exemption contravenes federal law and cannot be enforced.

## IV. THE MUNICIPAL EXEMPTION IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AN EXCESSIVE DELEGATION OF LEGISLATIVE AUTHORITY BECAUSE THE DEFINITION OF "UNDERSERVED" IS LEFT TO THE WHIM OF THE MAINE CONNECTIVITY AUTHORITY.

A statute is unconstitutionally vague on its face when "its language forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning", *City of Portland v. Jacobsky*, 496 A.2d 646, 649 (Me. 1985), or if it authorizes arbitrary and discriminatory enforcement, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In advancing the argument that a statute is unconstitutionally vague on its face, the statute need not be vague in all its applications. *E.g., Johnson v. United States,* 576 U.S. 591, 602-603 (2015).

Here, the Municipal Exemption attempts to define the term "underserved area" to mean whatever the Maine Connectivity Authority ("MCA") decides it to mean pursuant to its rulemaking authority. The MCA's rules on what constitute an "underserved area" are not static. Currently, it is defined as "areas that have service available at greater than 50mbps download and 10mbps upload, but less than 100mbps download and 100mbps upload[.]" 99-639 C.M.R. ch. 101, § 5(C). This definition has changed[21] and will continue to change with demand, technological advances, and other factors. The changes will be left to MCA with no legislative oversight, other than the overly broad directive that the:

[21] *See* 99-639 C.M.R. ch. 101 (History of rule).

> Criteria established by the authority to define unserved and underserved areas must include the percentage of households within a municipality or other appropriate geographic area. The authority shall use these criteria to determine those areas of the State that are unserved or underserved.

A changing definition of "underserved" could lead to discriminatory treatment of existing communications providers because it allows the MCA to, in essence, select which pole owners will absorb the cost of make-ready work. The term "underserved" is indefinite in that its definition depends on how it is defined at any given time by the MCA. For these reasons, it is unconstitutionally vague and an excessive delegation of legislative authority.

## V. THE COMMISSION'S INTERPRETATION OF THE MUNICIPAL EXEMPTION TO REQUIRE CONSOLIDATED TO ABSORB THE TOWN'S MAKE-READY COSTS IS CONTRARY TO THE PUBLIC INTEREST AND LEADS TO AN ABSURD RESULT, WHERE THE TOWN WAS AWARDED GRANT FUNDING TO COVER CONSOLIDATED'S MAKE-READY COSTS.

The stated purpose of the Municipal Exemption is to "safeguard[] access to infrastructure essential to public health, safety and welfare." 35-A M.R.S. § 2524(2). The means of achieving that stated purpose is to require pole owners to be "responsible for that owner's . . . own expenses for make-ready work." *Id.* Apparently, 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.

Here, make-ready costs are not a barrier to the Town's access to joint use poles. It is undisputed that the cost of the Town's broadband project is covered completely by grant funds: 90% through the NTIA grant and 10% through ConnectMaine funding. (Johnson Test'y at 7:20-23.). In fact, the NTIA grant includes a line item of $278,620 dedicated solely to make-ready costs, which is nearly three times Consolidated's make-ready charges of $97,624.60 under its Pole Attachment Agreement with the Town. (Oulette Test'y at 5:14-16 & Exh. C; Oct. 12, 2023 Tech. Conf. Tr. at 22:21-24.) Indeed, the Town decided to pay Consolidated's make-ready costs "under protest" while this proceeding is conducted. (CONL-001-001-SMBB 2023-04-10 minutes.pdf at 1.)

Thus, application of the Municipal Exemption is not required in these circumstances to achieve the legislative objective (*i.e.*, safeguarding access to infrastructure). The Town has more than sufficient grant funding, designated exclusively for make-ready costs, to cover Consolidated's make-ready charges of $97,624.60. Indeed, application of the Municipal exemption here would lead to absurd results and would be contrary to the public interest to require Consolidated's shareholders to absorb its make-ready costs caused solely by the Town's Project when the Town has more than adequate grant funding available to cover those costs and the Town will be providing a service in direct competition with Consolidated. This Court has observed that:

> In construing a statute, we may properly consider its "practical operation and potential consequences." *Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 738 (Me. 1976). When one construction would lead to a result that is inimical to the public interest, and a different construction would avoid that result, the latter construction is to be favored unless the terms of the statute absolutely forbid it. *Id.* Moreover, "[w]e have the power and duty . . . to interpret statutes so as to avoid absurd results." *State v. Hopkins*, 526 A.2d 945, 950 (Me. 1987). "A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective." *[State v. Niles*, 585, A.2d 181 (Me. 1990], an approach "is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression." *State v. Day*, 132 Me. 38, 41, 165 A. 163 (1933).

*Doe v. Reg'l Sch. Unit 26*, 2014 ME 11, ¶ 15, 86 A.3d 600, 604-05.

Requiring Consolidated to absorb its make-ready costs when the Town has more than sufficient grant funds available to pay those costs is contrary to the public interest and leads to an absurd and illogical result. This Court will only apply the plain meaning of a statute "so long as it does not lead to an absurd, illogical, or inconsistent result." *NextEra Energy Res., LLC v. Pub. Utils. Comm'n*, 2020 ME 24, ¶ 17, 227 A.3d 1117 (citing *Trask v. Pub. Utils. Comm'n,* 1999 ME 93, ¶ 7, 731 A.2d 430). The Municipal Exemption assumes that municipalities would otherwise have to self-fund make-ready costs,[22] and the statute is designed to remove that barrier. Under the facts specific to the Town's Project, however, there is no make-

[22] In the past, the Town's residents have been willing to fund a portion of their broadband project by borrowing through municipal bonds amounts ranging from $210,000 to $632,250. (Johnson Test'y at 6:7-7:9.)

ready cost barrier for the Municipal Exemption to remove. The Legislature could not have intended for the Municipal Exemption to provide a windfall to municipalities and allow them to double-dip by both being exempt from make-ready costs and also being fully compensated for those costs through grant funds. This is particularly so when the Municipal Exemption requires the pole owner to absorb the cost of make-ready work caused solely by a competitor.[23] Under these circumstances, preventing Consolidated from recovering its make-ready costs, which the Town is funding from grant monies, is both contrary to the public interest and an absurd result.

There is no record evidence that the grant funding paid to the Town for make-ready would revert to NTIA to make the funds available to a different grant recipient, despite the Town's claim to the contrary in its brief filed in the Commission proceedings below. (Somerville Br. at 8). In fact, the record reveals that the Town intends to use grant funds awarded for make-ready costs for "self insurance of catastrophic loss." (App. at 71.) Moreover, the Town's broadband consultant, Axiom, recommends "claiming the [municipal] exemption and saving some or all of the M[ake] R[eady] we budgeted for." (*Id.* at 76.) It is against the public interest to

[23] As stated in Consolidated's testimony, "the Town's introduction of a competitive service will lead to a reduction in Consolidated's customers and decrease the revenue that Consolidated receives for services it offers in the Town. To make matters worse, Consolidated is required by Maine law to provide POLR service throughout Somerville, even when the cost to maintain its facilities within Somerville exceeds its revenue derived from the Somerville market." (App. at 66 (9:10-14).)

allow the Town to reap the benefits of taxpayer's money, in the form of a government grant, for make-ready costs it did not incur and which, instead, Consolidated's shareholders have been required to absorb under the Municipal Exemption and the Commission's Order.

## CONCLUSION

For all of the reasons stated herein, Consolidated respectfully requests that the Court: (a) declare the Municipal Exemption to be unconstitutional and unenforceable; (b) vacate the Commission's Order; and (c) grant such other and further relief as the Court deems just and equitable in the circumstances.

Respectfully submitted this 13th day of November, 2024.

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I hereby certify that two copies of the foregoing Brief and one copy of the Appendix have been served on the following parties this 13th day of November, 2024 via e-mail and U.S. Mail:

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