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 PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLEES SPECTRUM GULF COAST, LLC AND COMCAST OF MAINE/NEW HAMPSHIRE, INC.

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INTRODUCTION

This appeal of a final order ("Order") of the Public Utilities Commission ("PUC" or "Commission") concerns the validity of a statute that facially and unconstitutionally forces pole owners and communications providers, such as Spectrum Northeast, LLC ("Charter") and Comcast of Maine/New Hampshire, Inc. ("Comcast"), to subsidize the construction costs of their municipal broadband competitors. In addition to the unconstitutional physical taking that the law – 35-A M.R.S. § 2524(2) ("Section 2524(2)") and Rule 6(A)(1)(b) of the Commission's Chapter 880 rules[1] (collectively, the "Municipal Exemption") – inflicts on Appellant Consolidated Communications of Northern New England Company, LLC ("Consolidated"), the law also imposes unconstitutional, discriminatory, and anti-competitive harm on Charter and Comcast.

The Municipal Exemption requires that in geographic areas of the State that are vaguely classified as "underserved," existing communications providers, including Charter and Comcast, must bear the costs of relocating their utility pole attachments to make room for the benefit of otherwise similarly situated, municipal broadband providers. In determining that Section 2524(2) applied to the Town of Somerville, the Commission avoided all of the constitutional challenges to the Municipal Exemption raised by Charter and Comcast. But this Court should not.

[1] 65-407 C.M.R. ch. 880 (2023).

The Municipal Exemption conflicts with both bedrock cost-causation and non-discrimination rules for pole attachments, and also suffers from several facial constitutional defects. The law's application to "underserved" areas – a shifting definition left to the discretion of the quasi-governmental Maine Connectivity Authority ("MCA") – is an unconstitutionally vague and unlawful delegation of authority, especially given that the MCA itself is building its own competitive broadband network. Forcing cable operators to pay their municipal competitors' costs also violates cable operators' fundamental free speech and equal protection rights and constitutes a regulatory taking of their network investments without compensation or a legitimate government interest.

The Court therefore should declare that the Municipal Exemption is unconstitutional and vacate the Commission's Order.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Factual and Regulatory Background

1. Charter and Comcast rely on poles to provide broadband communications service in Maine.

Charter and Comcast (collectively, the "cable operators") are the two largest cable operators in Maine. For decades, they have provided a host of communications services, including video, mobile, broadband internet access, and digital voice, to residents and businesses across the State. (Apr. 5, 2023 Charter/Comcast PUC Pet. to Intervene, Dkt. 2023-00052.) The cable operators

have made substantial investments to build, operate, and expand their networks in reliance on reasonable, competitively neutral, and non-discriminatory access to poles. (*Id*. at 2; Dec. 15, 2023 Charter/Comcast PUC Intervenor Br. at 1 n.1, Dkt. 2023-00052.).[2]

2. Non-Discriminatory pole access is essential for communications providers.

Utility poles – owned by electric power companies or telephone companies, or jointly – are essential for advanced communications services such as those the cable operators provide throughout Maine. The United States Supreme Court has found that "[c]able television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable," but because installing cables underground is often impracticable, if not impossible, "[u]tility company poles provide, under such circumstances, virtually the only practical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).[3]

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[2] *See also* Maine Connectivity Authority, *Spectrum invests $82M in Maine to expand broadband internet* (Mar. 23, 2023), https://www.maineconnectivity.org/news/spectrum-invests-%2482m-in-maine-to-expand-broadband-internet; Comcast, *Comcast Expanding High-Speed Network to 11,200 Homes and Businesses in Sanford, Maine* (Jan. 20, 2023), https://newengland.comcast.com/2023/01/20/comcast-expanding-high-speed-network-to-11200-homes-and-businesses-in-sanford-maine/.

[3] *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (Cable operators "have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles."); *Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1036 (11th Cir. 2003) (noting "lack of alternatives to these existing poles"); *So. Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) ("As a practical matter, cable companies have had little choice but to" attach "their distribution cables to utility poles owned and maintained by power and telephone companies" because the cost of

(*continued on next page*)

Recognizing the importance of poles to the deployment of communications networks, federal and state legislative bodies, administrative agencies, and courts have determined that providers *must* be afforded access to utility poles on reasonable and non-discriminatory rates, terms, and conditions. *See, e.g.*, 47 U.S.C. § 224(f)(1) ("A utility *shall* 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." (emphasis added)); *So. Co.*, 293 F.3d at 1342.

A key component of non-discriminatory pole access is the just and equitable allocation of cost responsibility for make-ready work, *i.e.*, work that must be performed on a pole for the sole purpose of accommodating new or additional attachments, including rearranging or transferring existing attachments, replacing and removing poles, and any other work required to make space available for a new third-party attachment. 47 C.F.R. § 1.1402(o) (defining "make-ready"); 35-A M.R.S. § 2524(1)(A); 65-407 C.M.R. ch. 880, § 1(R) (2023). The well-established practice is that the party for whom this make-ready work is required, and not the existing attachers, bears those costs (unless the work was already necessary, such as replacing a pole or correcting a preexisting safety violation). For example, the

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constructing a new system is "insurmountable"); *So. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 576-77 (D.C. Cir. 2002) ("Since building new poles was prohibitively expensive, cable operators instead leased existing space from utilities . . .").

Federal Communications Commission's ("FCC's") pole attachment rules – with which the Maine PUC's Chapter 880 rules generally are aligned – provide that "a party with a preexisting attachment to a pole . . . shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party." 47 C.F.R. § 1.1408(b).[4]

These same principles also are enshrined in Maine, whose core pole-attachment policy is to "secure, reliable, competitive and sustainable" infrastructure and to "[m]aximize sustainable investment in broadband infrastructure." 35-A M.R.S. §§ 9202-A(1)(B) & (2)(A). Toward that end, "nondiscriminatory and reasonable access to pole space is essential to competitive

[4] *See also* 47 U.S.C. § 224(i) (providing that any existing pole attacher "shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity"); *Accelerating Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 36 FCC Rcd. 776, 777, ¶ 4 (2021) (Section 224(i) generally "protects pole attachers from costs associated with rearranging or replacing their preexisting attachments due to circumstances that they did not cause."); *Implementation of the Loc. Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd. 15499, 16053, ¶ 1211 (1996) ("If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party."). Costs for pole replacements also generally are allocated based on whether they were "necessitated solely" by a new attachment request or whether the pole already needed to be replaced (*e.g.*, because the pole already failed safety or engineering standards). *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Fourth Report & Order, Declaratory Ruling, & Third Further Notice of Proposed Rulemaking, 38 FCC Rcd. 12379, 12402-10 ¶¶ 39-48 (2023).

telecommunications providers and to the development of facilities-based competition." *Oxford Networks*, Order, Dkt. 2005-486 (Me. PUC Oct. 26, 2006).

To advance those goals, the Legislature empowered the Commission to "prescribe reasonable compensation and reasonable terms and conditions for the joint use" of poles and required the Commission to adopt pole attachment rules that "promote competition, further the state broadband policy . . . and ensure safe, nondiscriminatory [pole] access on just and reasonable terms." 35-A M.R.S §§ 711(1) & (4). The Commission's Chapter 880 rules for pole attachments mandate that "[t]he 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." 65-407 C.M.R. ch. 880, § 6(A) (2023).[5]

For example, in 2018, the Commission found that exempting municipal broadband providers from all make-ready costs would be anti-competitive and would afford municipalities with "a significant advantage over other entities providing identical services." *Amendments to Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure*, Order Amending Rule & Factual & Policy Basis, Dkt. 2017-00247, at 12-13 (Me. PUC

[5] Until 2023, the cost-causation requirement in Section 6(A) of the Chapter 880 rules was found in Section 5(A), and before that, in Section 7(A).

Jan. 12, 2018) ("*2018 PUC Order*"). The Commission therefore "decline[d] to provide municipalities with unfettered, free-of-charge access to joint-use utility poles for any competitive services such as the provision of Internet service or Internet infrastructure." *Id*. In doing so, the Commission correctly differentiated between traditional municipal "police power" functions and discretionary, commercial functions, such as "the provision of Internet service or Internet infrastructure." *Id*. at 12. As the Commission explained:

> Back in 1993, . . . there was not much concern that municipalities would seek to engage in activities that would compete with the entities that used joint-use utility poles; the primary consideration at the time was to allow . . . "municipal uses." Municipal uses at the time were understood to mean, for example, connections for traffic signals, connections between municipal offices, and connections for emergency communications for police and fire and rescue; municipal activities related to the health, safety, and welfare of its residents. In other words, "police power" activities.
>
> Today, however, more and more municipalities are seeking to either fill gaps left by the lack of options in their communities for modern telecommunications, such as high-speed broadband, or to provide additional, affordable options for those services. These are laudable goals, and . . . goals that [the] Maine Legislature has expressed in statute. 35-A M.R.S. § 9202-A.
>
> ***The fact that the State and the Commission agree that increased access to broadband in Maine is an unequivocal good does not, however, mean that, in a competitive marketplace, municipalities should somehow have an advantage over other market entrants. The Commission agrees . . that both the direct provision of Internet service, and the provision of "middle mile" access are in direct competition with other commercial entities that provide these services***. . . .

Id. (emphasis added).

The Commission therefore amended its Chapter 880 rules to clarify that a municipality could attach to utility poles free of make-ready charges *only* if it was doing so "for non-commercial, non-competitive use consistent with the police power of the municipality." *Amendments to Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure*, Chapter 880 (Legislative Edit), Dkt. 2017-00247 at § 7(A) (Me. PUC Jan. 12, 2018).[6]

3. The Municipal Exemption.

In 2019, LD 1192 (S.P. 366), "An Act To Establish Municipal Access to Utility Poles Located in Municipal Rights-of-way" was introduced in the Maine Legislature. 2019 Me. Laws 129th Leg. The bill originally proposed that pole owners and existing attachers would have to pay make-ready costs required to accommodate a municipality's pole attachments "for any purpose." 2019 Me. S.P. 366, 129th Leg.[7]

The Commission, however, testified to the Legislature its concerns that LD 1192 would "substantially expand the breadth and scope of the 'municipal exemption' as it [was] currently addressed in Chapter 880 . . . beyond non-commercial police power use to *any* use," allowing "a municipality to, for

[6] The Commission strictly defined "police power" as " [t]he inherent and plenary power of the sovereign to make all laws necessary to preserve the public security, order, health, morality, and justice,' and the right of a state to 'establish and enforce laws protecting the public's health, safety, and general welfare.' " *2018 PUC Order* at 12 n.14.

[7] *Available at* https://www.mainelegislature.org/legis/bills/bills_129th/billtexts/SP036601.asp.

example, invoke the exemption to install a commercial, retail broadband network without paying make ready costs." PUC Test., LD 1192, 129th Leg. (Mar. 27, 2019).[8] According to the Commission, "***[t]his result raises issues of fair competition in that competitors pay for the make ready costs of that installation, including the costs necessary to replace any poles without sufficient space for additional attachments***." *Id*. (emphasis added).

After an amendment, LD 1192 was passed in May 2019, codifying the Municipal Exemption at Section 2524(2), which reads as follows:

> 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[9] 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
>
> B. For the purpose of providing broadband service to an unserved or underserved area.

LD 1192, 129th Leg., Pub. Law, ch. 127 (2019); 35-A M.R.S. § 2524(2).

The Commission subsequently incorporated the Municipal Exemption nearly verbatim into the Chapter 880 rules. 65-407 C.M.R. ch. 880, § 6(A)(1)(b) (2023);

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[8] *Available at* https://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=113014.

[9] "Make-ready work" is defined 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." 35-A M.R.S. § 2524(1)(A).

Amendments to Chapter 880 – Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure, Order Amending Rule & Statement of Factual & Policy Basis, Dkt. 2019-00028, at 9 (Me. PUC Nov. 11, 2019).

As the Commission later observed, Section 2524(2) "relies on a serpentine definitional construct" of "underserved area." (Appendix ("App.") at 22.). Section 2524(1)(C) defines "underserved area" as having the same meaning as in 35-A M.R.S. § 9202(5).[10] Section 9202(5) in turn states that "underserved" area "means an area that the [ConnectMaine Authority] . . . determines to meet criteria established by the authority by rule . . . ." 35-A M.R.S. § 9202(5); *see also id.* § 9204-A(1).

But added to this "complicated definitional odyssey" is the fact that the operations and duties of the ConnectMaine Authority have been assumed by the quasi-governmental MCA. (App. at 23 (citing 2021 Me. Legis. Serv. Ch. 364, § 4 (West).)[11] The MCA not only determines which municipalities and

[10] The Chapter 880 rules also provide that " 'underserved' area has the same meaning as in 35-A M.R.S. § 9202(5)." 65-407 C.M.R. ch. 880, § 6(A)(1)(a)(iii) (2023).

[11] Established in 2021, the MCA "is a quasi-governmental agency charged with achieving universal access to reliable, affordable high-speed internet service statewide." MCA, *About the MCA*, https://www.maineconnectivity.org/about; *see also* 35-A M.R.S. §§ 9401, *et seq*.

communications providers receive direct broadband grants,[12] but it also is itself a broadband pole attacher and is currently constructing its own middle mile broadband network throughout Maine.[13]

The MCA's Chapter 101 rules define "underserved area" as "any geographic area where broadband service exists, ***but where the [MCA] has determined that the service is inadequate*** pursuant to criteria set forth in section 5(C)" of Chapter 101 of the MCA rules. 99-639 C.M.R. ch. 101, § 2(M) (2022) (emphasis added). Section 5(C) then currently describes "underserved area" as follows:

> Underserved Areas. In determining an underserved designation, the Authority shall consider data collected pursuant to §3 of this Chapter, the percentage of households with access to broadband service within a municipality or other appropriate geographic area, as well as other data sources that the Authority deems credible and appropriate to help make this determination. ***The Authority shall designate any geographic area as an underserved area*** and, therefore, eligible for a grant.
>
> 1. ***Underserved areas of the state are 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) (2022) (emphasis added).

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[12] 35-A M.R.S. §§ 9405(9) & (11) (empowering the MCA to provide financing and to make direct equity investments, loans, grants or any other contractual arrangement with private entities for broadband projects); 99-639 C.M.R. ch. 101, § 1(7) (2021).

[13] In May 2024, MCA successfully applied to the Commission to be a licensed pole attacher to construct its own middle mile broadband network, "MOOSE Net," in Maine. *Maine Connectivity Auth. Request for Approval of Pole Attachment License*, Order, Dkt. 2024-00110 (Me. PUC June 27, 2024). When asked by Commission staff whether MCA itself could invoke the Municipal Exemption for make-ready work, MCA only said it "did not intend to explore" that option and had not sought any legal option as to whether it would qualify. *Id.* at 2; *see* MCA, *Middle Mile & MOOSE Net*, https://www.maineconnectivity.org/middle-mile.

But this internet speed definition for "underserved" area already has changed in recent years,[14] and it almost certainly will again as technologies improve and demands for even greater speeds increase.[15] Moreover, the definition of what an "underserved" area is for the purpose of determining whether the Municipal Exemption applies in a given area is being made by the MCA—a competitive entity that also determines what and where broadband grants are made in the State.

B. Procedural History

The cable operators add the following to Consolidated's statement of the procedural background of this appeal, with which they otherwise agree:

On April 5, 2023, the cable operators timely petitioned to intervene in the Commission's Investigation. The Commission granted it on April 7, 2023. (App. at 2, 10.) On December 15, 2023, the cable operators filed their initial brief, arguing that along with effecting an unconstitutional taking, the Municipal Exemption unlawfully violates their free speech and equal protection rights and

[14] Until 2022, Section 5(C) of the MCA's Chapter 101 rules defined "underserved areas" as those where "[c]redible evidence has been presented that less than 20% of the households within a geographic area have access to broadband service." 99-639 C.M.R. ch. 101 § 5(C) (2021).

[15] For example, while in 2015, the FCC defined "underserved" as areas with only 25/3 Mbps service speed, the federal government later updated the definition to an area without broadband service offering speeds of 100/20 Mbps. NTIA, Internet For All, *Frequently Asked Questions and Answers Version 5.0*, at 5 (2023), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_5.0.pdf; FCC, *2015 Broadband Progress Report* (2015), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report. Different states, including Vermont, also have defined "underserved area" in various ways. *See, e.g.*, 30 V.S.A. § 7515b(a) (defining "underserved areas" as those with speeds between 4/1 Mbps and 25/ 3 Mbps); Jake Varn, Pew Charitable Trust, *What Makes a Community 'Unserved' or 'Underserved by Broadband?* (2023), https://www.pewtrusts.org/-/media/assets/2023/06/un--and-underserved-definitions-ta-memo-pdf.pdf.

was an unconstitutionally vague and excessive delegation of legislative authority. (Dec. 15, 2023 Charter/Comcast PUC Intervenor Br. at 2-6, Dkt. 2023-00052.)

The May 13, 2024, Examiners' Report, however, did not substantively address the constitutional issues raised by the cable operators. (May 13, 2024 PUC Examiner's Rep. at 2, 40-41, Dkt. 2023-00052.) The cable operators timely filed exceptions to the Examiner's Report. (App. at 78-81.) On June 13, 2024, the Commission issued its final Order, again avoiding ruling on the constitutional arguments the cable operators made about the Municipal Exemption. (*Id*. at 7-30.)

ISSUES PRESENTED FOR REVIEW

1. Is the Municipal Exemption unconstitutionally vague and an unlawful delegation of legislative authority where its application turns on the definition of "underserved" areas—a perpetually mutable term defined entirely by the quasi-governmental Maine Connectivity Authority?

2. Does the Municipal Exemption violate the cable operators' free speech rights by forcing them to subsidize costs of their municipal broadband competitors?

3. Does the Municipal Exemption violate the cable operators' equal protection rights by arbitrarily discriminating against cable operators in favor of their similarly situated, municipal broadband competitors?

4. Does the Municipal Exemption constitute an unconstitutional regulatory taking by forcing cable operators to pay the make-ready costs of municipal broadband providers and by having an adverse, economic impact on the value of the cable operators' network investments?

ARGUMENT

I. The Municipal Exemption Is Unconstitutionally Vague And An Unlawful Delegation Of Legislative Authority Because "Underserved" Area Is A Shifting And Arbitrary Term Defined By The Maine Connectivity Authority.

The cable operators agree with Consolidated that the Municipal Exemption is unconstitutionally vague on its face and an excessive delegation of legislative authority because the triggering term, "underserved" areas, is loosely-defined and subject entirely to the discretion of the MCA.

A statute is unconstitutionally vague "when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning, or if it authorizes or encourages arbitrary and discriminatory enforcement." *Uliano v. Bd. of Envtl. Prot*., 2009 ME 89, ¶ 15, 977 A.2d 400. "Similarly, legislation delegating discretionary authority to an administrative agency is unconstitutional if it fails to contain standards sufficient to guide administrative action." *Id*. (quotations omitted). Because "vagueness and unlawful delegation challenges are concerned with the issue of definiteness," both are "properly treated as a single inquiry." *Id*. In other words, when regulated businesses "cannot determine, in advance, how to conduct themselves to comply with the rule, such a subjective and unpredictable exercise of authority is violative of due process principles and an improper delegation of legislative authority to the executive." *State v. McCurdy*, 2010 ME 137, ¶ 16, 10 A.3d 686, 690.

For example, in *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 576-77 (Me. 1987), the Court struck down a zoning ordinance that vested the Board of Zoning Appeals with the discretion to deny exception applications when the proposed land use was not "compatible with the existing uses in the neighborhood, with respect to . . . intensity of use . . . and density of development." The Court held that without clear, objective criteria, the board could "roam at large in policy-making" and would be "free to express a legislative-type opinion about what is appropriate for the community," which "opens the door wide to favoritism and discrimination." *Id*. at 577. Similarly, in *McCurdy*, the Court held that a regulation prohibiting possession of "shucked scallops which measure more than 35 meats per 16 oz. certified measure" was unconstitutionally vague because it "forced fisherman to guess at how the regulation would be applied, failed to give them adequate notice as to what fishing practices would comply with the law, [and] promoted practices harmful to the conservation purpose of the law. . . ." *McCurdy*, 2010 ME 127, ¶¶ 19-21, 10 A.3d at 691-92.[16]

[16] *See also, e.g.*, *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968) (holding absence of specific standards can become "a ready tool for the suppression of competition through the granting of authority to one and the withholding from another," and zoning ordinances "cannot permit administrative officers or boards to pick and choose the recipients of the[i]r favors."); *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶¶ 15-17, 752 A.2d 183, 187 (striking down ordinance requiring development projects be designed to "conserve natural beauty"); *Cope v. Inhabitants of Brunswick*, 464 A.2d 223, 227 (Me. 1983) (holding ordinance requiring that construction not "adversely affect the "health, safety and welfare of the public and the essential character of the area" was insufficiently specific).

The Municipal Exemption suffers from these same defects through its vague application to "underserved" areas—a malleable, "serpentine definitional construct" that is left entirely to the discretion of the quasi-governmental MCA. (App. at 22-23.) Effectively, "underserved area" means anywhere "where the [MCA] has determined that the [internet] service is inadequate." 99-639 C.M.R. ch. 101, § 2(M) (2022); *see also* 35-A M.R.S. §§ 2524(1)(C) & 9202(5). Although MCA *currently* classifies underserved areas as those with broadband speeds between 50/10 Mbps and 100/100 Mbps, 99-639 C.M.R. ch. 101, § 5(C) (2022), the Legislature retains no oversight over changes MCA may make to that classification, *see* 35-A M.R.S. §§ 9208 & 9409. MCA's governing statute, 35-A M.R.S. § 9204-A, merely provides that "[c]riteria established by the authority to define unserved and underserved areas must include the percentage of households with access to broadband service within a municipality or other appropriate geographic area," and that the MCA "shall use these criteria to determine those areas of the State that are unserved or underserved." *Id*. § 9204-A(1).

Because "underserved" is open to shifting definitions and interpretations, communications pole attachers, like the cable operators, cannot reasonably know when and where in Maine they will have to subsidize municipal make-ready work. Indeed, while certain areas in Maine where the cable operators are attached to poles *today* may be considered "served" (*i.e*., have broadband speeds greater than

100/100 Mbps), there is nothing preventing the MCA from raising that benchmark tomorrow, immediately rendering those areas "underserved" and requiring existing attachers to subsidize their municipal competitors. *See Stucki v. Plavin*, 291 A.2d 508, 510 (Me. 1972) ("[T]he legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator."). That is not a remote possibility either, given MCA's definition for "underserved area" already has changed, and likely will need to again as consumer demands for faster broadband speed increase. *See supra* notes 14 & 15.

Affording the MCA broad discretion to define "underserved" area also authorizes or encourages arbitrary and discriminatory enforcement because the MCA can designate the communications providers that have to incur the make-ready costs of those providers' municipal competitors. That the MCA also (i) determines which municipalities and communications providers receive broadband grants, (ii) is itself a competing, broadband pole attacher, and (iii) may even have assisted Somerville's preparation of its complaint against Consolidated at the Commission (App. at 71-74)[17] exacerbates this basic problem.

[17] *See also* Town's Attachments to Resp. to Consolidated Data Request 001-017, Dkt. 2023-00052 (June 21, 2023), https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/CaseMaster.aspx?CaseNumber=2023-00052 (click on "Data Requests" tab, then "View Questions" next to "CONL-001").

The Municipal Exemption's current ambiguity and inherent, perpetual uncertainty render it unconstitutionally vague and an unlawful delegation of legislative authority. *See Waterville*, 241 A.2d at 53 (holding a regulation "must be in accordance with a proper rule or standard which must be applied alike to all persons similarly situated"); *Town of Windham v. LaPointe*, 308 A.2d 286, 293 (Me. 1973) ("When no standards are provided to guide the discretion of the enforcement authority, the fact that the law might be applied in a discriminatory manner settles its constitutionality.").

II. The Municipal Exemption Violates The Cable Operators' Free Speech And Equal Protection Rights By Imposing Disparate And Disproportionate Burdens On Them Compared To Their Competitors.

By compelling cable operators to absorb the make-ready costs of municipal broadband providers, the Municipal Exemption infringes on cable operators' free speech and equal protection rights, subjecting them to discriminatory burdens vis-à-vis their similarly situated, municipal competitors. *See* U.S. Const. amends. I & XIV; Maine Const. Art. I, §§ 4 & 6-A.[18]

A. The Municipal Exemption Violates The Cable Operators' Free Speech Rights.

The U.S. Supreme Court has long recognized that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press

[18] The United States and Maine Constitutions offer coextensive free speech and equal protection protections. *City of Bangor v. Diva's, Inc.*, 2003 ME 51, ¶ 11, 830 A.2d 898, 902 (Me. 2003); *Green v. Comm'r of Mental Health & Mental Retardation*, 2000 ME 92, ¶ 21 n.4, 750 A.2d 1265, 1273.

provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)). "[L]aws that single out the press, or certain elements thereof for special treatment," which "pose a particular danger of abuse by the State . . . and so are *always* subject to at least *some degree* of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41 (emphasis added) (applying heightened scrutiny to law that "impose[d] special obligations" and "special burdens" on cable operators).

Heightened First Amendment scrutiny can apply to "statutes which, although directed at activity with no expressive component, impose a *disproportionate burden* upon those engaged in protected First Amendment activities or have *the inevitable effect* of singling out those engaged in expressive activity." *Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607, 616 (1st Cir. 2021) (emphasis added). "[A] law may target a small number of speakers without expressly identifying those singled out. Rather, legislation 'targets a small group' by structuring its burdens in a way that apply to the few." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 640 n.13 (5th Cir. 2012) (holding law failed strict scrutiny by locking incumbent cable operators into municipal franchises while allowing other communications providers to obtain statewide franchises).

In *Comcast of Maine/New Hampshire*, for example, the First Circuit held that a Maine law requiring cable operators to allow *á la carte* channel subscription

purchasing triggered heightened First Amendment scrutiny because the law "treat[ed] cable operators differently from some of their direct competitors" and meant that "[c]able operators alone must adopt an á la carte system, while their competitors remain[ed] free to offer content in traditional tiers and packages." 988 F.3d at 614-17. In other words, the law "singl[ed] out cable from similarly situated rivals," and such "unique treatment . . . triggers heightened scrutiny." *Id*. at 616.[19]

Here too the Municipal Exemption would be subject to heightened scrutiny because it inevitably imposes a disparate and disproportionate burden (make-ready costs) on cable operators compared to their direct municipal competitors. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 591-92 (1983) (holding state tax exemption failed strict scrutiny when practical effect "resemble[d] more a penalty for a few of the largest newspapers"); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-29 (1987) (holding sales tax failed strict scrutiny where effect was "that only a few Arkansas magazines pa[id] any sales tax").

But the Municipal Exemption does not withstand strict scrutiny because the State has not shown its impact on cable operators is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id*. at 231.

[19] Notably, the First Circuit rejected the State's argument that the Maine law was insulated from heightened scrutiny as a "consumer protection" measure, because even "a beneficent consumer protection purpose does not insulate a law from the possible application of the First Amendment." *Comcast of Maine/New Hampshire*, 988 F.3d at 615 (citing *Turner*, 512 U.S. at 646).

Nor does the statute pass intermediate scrutiny, which requires the State to establish that the law "furthers an important or substantial governmental interest," is "unrelated to the suppression of free expression," and imposes restrictions on First Amendment rights that are "no greater than is essential to the furtherance of that interest." *Turner*, 512 U.S. at 662.

There is no evidence that burdening the speech of only some communications providers with added make-ready costs advances any compelling or substantial government interest, or does so in a narrowly tailored fashion. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding government must demonstrate "that the harms [the state] recites are real and that its restriction will in fact alleviate them to a material degree," and that they are not the product of "speculation and conjecture"); *Asociación de Educación Privada de P.R., Inc. v. García-Padilla*, 490 F.3d 1, 17-18 (1st Cir. 2007) (holding regulation failed intermediate scrutiny where it "was promulgated without any investigation, hearings, consultation with . . . experts, evidence, findings, or any other foundation which demonstrated" the claimed harms to be remedied).

To the contrary, if the Legislature thought that make-ready costs were such an impediment to broadband deployment in unserved or underserved areas that exempting municipalities from those costs would *encourage* deployment, then the opposite must be true too: that forcing *cable operators* to pay *extra* make-ready

costs would *discourage <u>their</u>* broadband deployment in those areas, contravening the State's broadband policy of maximizing "private resources to support the deployment of broadband infrastructure in unserved and underserved areas of the State." 35-A M.R.S. § 9202-A(2)(B); *see El Día, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 115-18 (1st Cir. 2005) (holding regulation failed intermediate scrutiny where no evidence of the asserted harms the regulation was intended to remedy or of the regulation having a material effect on the problem).

Even if the State's interest was legitimate, there are far more surgical ways to cover municipal make-ready costs that do not unduly burden cable operators, such as appropriating state grant funding to cover make-ready costs of *any* broadband provider seeking to build in unserved or underserved areas. Indeed, Somerville obtained similar subsidies from the federal government. (App. at 14, 25, 85-86.) The State also could reimburse existing attachers for make-ready costs incurred on behalf of municipalities, or municipalities could recover their costs through user charges and fees. Whatever the avenue, "that increased access to broadband in Maine is an unequivocal good does not, however, mean that, in a competitive marketplace, municipalities should somehow have an advantage over other market entrants." *2018 PUC Order* at 12. The Municipal Exemption therefore does not pass First Amendment muster.

B. The Municipal Exemption Violates The Cable Operators' Equal Protection Rights.

Because the Municipal Exemption violates cable operators' fundamental free speech rights, it also violates their equal protection rights by discriminating against them in favor of their similarly situated, municipal broadband competitors. Classifications between similarly situated entities "that impinge on 'fundamental rights,' including free speech rights, are subject to strict scrutiny and will only be upheld if precisely tailored to serve a compelling governmental interest." *Rocket Learning, Inc. v. Rivera-Sanchez*, 715 F.3d 1, 9 n.6 (1st Cir. 2013); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

Cable operators and municipal broadband providers unquestionably are "similarly situated" because any "prudent person, looking objectively at the incidents, would think them roughly equivalent." *See SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 34 (1st Cir. 2008) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners."). Both cable and municipal broadband providers attach to poles owned by electric utilities or telephone companies, and both provide broadband services to residential and business subscribers. (Johnson Test. at 4:4-6:2 (May 31, 2023); App. at 13.) Indeed the Commission has found "that both the direct provision of Internet service, and the provision of 'middle mile' access [by municipalities] are in direct competition with other commercial entities that provide these service." *2018 PUC Order* at 12.

But on its face, the Municipal Exemption fails strict scrutiny because there is no evidence that affording only municipal broadband providers free make-ready costs – and at the expense of their cable operator competitors – serves any compelling state interest or is narrowly tailored to achieve it. Rather, by pushing the municipal competitors' construction costs directly onto cable operators and their customers, the law discriminates in favor of municipalities by gifting to them lower cost market entry and a competitive advantage over existing broadband market participants (primarily cable operators). As a result, cable operators that already are attached to poles must not only pay for their *own* make-ready and other ongoing pole-related costs (such as maintenance), but also pick up the check for their municipal broadband competitors.

There is no rational, let alone compelling, basis for that disparate treatment other than an impermissible one that runs headlong into bedrock non-discrimination and cost-causation principles for pole attachments. *See* 35-A M.R.S. § 711(4) (requiring the Commission promulgate rules that "ensure . . . non-discriminatory [pole] access on just and reasonable terms"); 65-407 C.M.R. ch. 880, § 6(A) (2023) ("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. . . ."); *id*. § 6(C); 47 U.S.C. § 224(i); 47 C.F.R. § 1.1408(b). Absent evidence that requiring cable operators to subsidize

municipal competitors' pole costs will actually facilitate broadband deployment, it is no surprise the Commission concluded previously that exempting municipalities from make-ready costs confers on them a "significant advantage over other entities providing identical services," and raises serious "issues of fair competition." *2018 PUC Order* at 12-13; PUC Test., LD 1192, 129th Leg. (Mar. 27, 2019).

The Municipal Exemption therefore fails equal protection scrutiny.

III. The Municipal Exemption Is An Unconstitutional Regulatory Taking By Forcing Cable Operators To Pay Municipal Make-Ready Costs.

The Takings Clause of the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amends. V & XIV. In Maine too, "[w]here property is taken for public use, an owner is entitled to receive just compensation." *McTeague v. Dep't of Transp.*, 2000 ME 183, ¶ 7, 760 A.2d 619, 621 (citing Me. Const. Art. I, § 21).

Whereas a physical taking focuses on physical appropriation of property, "a regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given." *Phillip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002). Courts apply a "three-part 'ad hoc, factual inquiry' to evaluate whether a regulatory taking has occurred: (1) what is the economic impact of the regulation;

(2) whether the government action interferes with reasonable investment-backed expectations; and (3) what is the character of the government action." *Id*.

Here, the Municipal Exemption exacts a regulatory taking on the cable operators because forcing them to modify their networks (cables, wires, and other pole facilities), without reimbursement, for municipal broadband providers has a significant and adverse, economic impact on the cable operators' reasonable, investment-backed expectations in their own networks.

"While it is impossible to predict the exact impact that the [Municipal Exemption] will have" on the cable operators, "it is potentially tremendous." *See Reilly*, 312 F.3d at 41. The cable operators have invested millions of dollars in constructing, maintaining, and expanding their communications networks in reliance on reasonable, nondiscriminatory access to existing utility infrastructure. (Apr. 5, 2023 Charter/Comcast PUC Pet. to Intervene at 2, Dkt. 2023-00052; Dec. 15, 2023 Charter/Comcast PUC Intervenor Br. at 1 n.1, Dkt. 2023-00052; *supra* note 2.) The Municipal Exemption, however, impairs the value and benefits of those investments by disproportionately burdening cable operators with the added make-ready costs of their direct municipal competitors who cause them. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1338-39 (Fed. Cir. 2003) (holding statute that placed expenses "disproportionately on a few private property

owners . . . is the kind of expense-shifting to a few persons that amounts to a taking").

Make-ready costs in just a single town, such as Somerville, can be several hundred thousand dollars (App. at 10, 75). But given the cable operators are attached to poles in communities across Maine, the aggregate economic impact of the Municipal Exemption would be orders of magnitude greater. (App. at 71 (referencing "dozens or more towns" that could seek free make-ready costs). The scale of the Municipal Exemption's burden on the cable operators could discourage them from expanding and improving their broadband networks, which runs counter to Maine's policy goals. *See Implementation of Section 224 of the Act*, 25 FCC Rcd. 11864, 11909, ¶ 110 (2010) (explaining that pole costs "can impact communications service providers investment decisions"). Without just compensation, the Municipal Exemption therefore is an unconstitutional taking.

CONCLUSION

The Court should (1) declare that the Municipal Exemption is unconstitutional and unenforceable; (2) vacate the Commission's Order as contrary to law; and (3) grant such other and further relief as just and equitable.

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Respectfully Submitted,

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