PUBLIC SERVICE ELECTRIC AND GAS COMPANY,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiff-Respondent	**Appeal No. A-003602-22**
v.	**Civil Action**
TOWN OF WESTFIELD,	**On appeal from Law Division, Superior Court of New Jersey, Union County.**
Defendant-Appellant	**Docket No. Below: UNN-L 001092-22**
	Sat Below:
	Hon. Mark P. Ciarocco

BRIEF OF TOWN OF WESTFIELD

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PRELIMINARY STATEMENT

This lawsuit is a challenge by a utility to a municipal ordinance regulating the usage of the municipality's right-of-way with respect to what may be placed therein. The Town of Westfield's ("Town" or "Westfield") ordinance is the same as ones adopted by many municipalities in New Jersey. It does not prohibit utilities from placing facilities in the right-of-way; rather, it only regulates the manner in which utilities may use the municipality's right-of-way, requires the utility to submit an application for approval of the proposed use, and permits the municipality to grant certain exemptions from the ordinance's requirements.

Here, PSE&G wanted to construct a 69 kilovolt line (the "69kV Project) to link its Front Street substation in Scotch Plains to its Springfield Road substation in Union through high-powered 69kV electric lines. Although there were at least five feasible routes by which PSE&G could accomplish this connection, it wanted to route the line through Westfield. PSE&G specifically designed the 69kV Project in a manner that violated Westfield's ordinance. Rather than apply to Westfield for approval of the route and the design that did not conform to the ordinance, PSE&G chose to institute a suit challenging various provisions of the ordinance.

Since no proper application for the 69kV Project was made to Westfield or denied, the challenge by PSE&G was necessarily a challenge to the ordinance on its

face and not a challenge to the ordinance "as applied." However, this became the source of the trial court's first error. The court justified its striking of portions of the ordinance with respect to the 69kV Project on the basis that the project was essential to the provision of adequate utility service, which necessarily involved an application of the ordinance to this specific project. In other words, that court below used an "as applied" analysis even before there had been an application that was denied. As such, the matter was not ripe, and the ruling was premature because the ordinance had not yet been applied to the 69kV Project due to the lack of an application and the lack of a final determination by Westfield.

The trial court's second error was that it based its summary judgment ruling upon its making of a finding of fact. Specifically, the trial court based its decision on its determination that the route through Westfield was necessary to provide adequate utility service. The evidence before the court established that there were at least four other routes the 69kV Project could take that did not pass through Westfield. In ruling as it did, the trial court necessarily made findings on a disputed issue of fact, which is prohibited on a motion for summary judgment. This error is further compounded by the trial court's conflation of two separate issues. The first issue was whether a 69kV connection was necessary for adequate service; the second issue was whether it was essential that the 69kV connection be routed above ground through Westfield. That the court concluded that a 69kV *connection* was essential

does not determine that the *route* desired by PSE&G through Westfield was also essential so as to support the striking of portions of the ordinance. Indeed, any finding that the *route* through Westfield was essential is prohibited by the very fact that PSE&G had identified at least four other routes that could be used to make a 69kV connection between the two substations. PSE&G could go around Westfield, could go underground through Westfield, or could have used a design that would comply with the limitations allowed by the ordinance (*e.g.*, conformed to the pole height limits in the ordinance).

Finally, for multiple reasons, including a long-standing contractual agreement between PSE&G and Westfield, as well as the Legislature's ratification and validation of that agreement, the Legislature conferred and recognized the ability of municipalities to impose requirements and restrictions on the use of the rights of way of the municipalities.

Thus, the summary judgment entered by the court below was in error and must be reversed because (i) it applied the wrong standard of review to what was necessarily a facial challenge to the provisions of the ordinance, (ii) it made determinations of a factual dispute on a motion for summary judgment, and (iii) the court's ruling was wrong on the legal merits of a municipality's power to regulate the use of its own property.

PROCEDURAL HISTORY

This action was commenced on April 8, 2022, when PSE&G filed its Complaint seeking to invalidate Westfield's Ordinance No. 2022-04 ("the Ordinance"). Defendant's Appendix ("DA") at 12a. The Ordinance specifically provides a procedure and process for one seeking to place poles in the right-of-way to apply for a permit to do so (DA at 46a-47a), and it specifically exempts utilities from the permit requirement if they are replacing existing poles with poles that are substantially identical or smaller. DA at 38a-39a, 46a. The Ordinance also provides for an applicant to request an exception from any of the requirements of the Ordinance. DA at 49a. See also, DA at 51a. Grounds for the issuance of an exemption by the municipality include instances where the denial of a permit would violate federal or state law (DA at 51a) or would have the effect of prohibiting an entity form providing utility service to any prospective customer in the town (DA at 52a). The Ordinance also contains a provision for an appeal to the Town Council from the denial of a permit. DA at 51a. Although PSE&G alleged that the Ordinance is facially and as applied invalid (DA at 13a), PSE&G's Complaint did *not* allege that it applied for a permit nor allege that it requested in an application an exemption from any requirements of the Ordinance (DA at 12a *et seq.*), and in fact PSE&G admits that it did not file for any permit (DA at 252a).

On June 18, 2022, the Town filed its Answer and Separate Defenses in this action. DA at 77a. Among the Separate Defenses asserted were that the Complaint was not ripe for adjudication, that the Ordinance is entitled to a presumption of validity, that the Town complied with all applicable laws, regulations and rules, that the Town's policies and procedures have been reasonable and appropriate and have ensured the protection of all rights, privileges, and immunities of the public, and that the Complaint fails to state a claim.

After discovery, both the Town and PSE&G moved for summary judgment on February 24, 2023. DA at 88a, 508a. Both motions were duly opposed. DA at 474a *et seq.*, 881a *et seq*. On May 5, 2023, the trial court heard oral argument on the motions. On June 15, 2023, the trial court entered its order and issued a written opinion. DA at 1a *et seq*. On July 26, 2023, the Town of Westfield filed its Notice of Appeal. DA at 945a.

STATEMENT OF FACTS

The genesis of the relationship between Westfield and PSE&G has a long history that has repeated recognized, in contract and in the courts, the right of Westfield to impose restrictions on the use of its rights of way and the construction of poles and powerlines therein.

1. The 1892 Agreement between the Town and PSE&G

On February 6, 1892, the Suburban Electric Company ("Suburban Electric")—a predecessor to Plaintiff PSE&G—applied to the Town of Westfield[1] for permission to erect poles on then-existing streets and highways to sustain wires for the conduction of heat, light, and power. Defendant's Appendix ("DA") at 61a, 107a. On March 2, 1892, the Town's governing body adopted a resolution (the "1892 Agreement") granting Suburban Electric, its successors, and assigns, "the right and privilege of erecting and maintaining such and so many poles and other necessary supports and fixtures as may be necessary along, over or under the streets, lanes, avenues, or alleys in said township for the purpose of furnishing electric light, heat and power . . . ." Id.

The 1892 Agreement contained several conditions: (1) "Suburban Electric company, its successors or assigns shall be subject to such prudential rules and regulations as the said Township Committee may from time to time prescribe by ordinance or otherwise"; (2) Suburban Electric was required to obtain consent of property owners to erect poles in front of their property; (3) the poles had to be placed subject to the supervision of the governing body such that it could regulate

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[1]. At the time, Westfield operated under the township form of government. See P.L. 1798, c. 696. However, on March 4, 1903, it was reincorporated as the Town of Westfield. See P.L. 1903, c. 14. It has operated under a Special Charter from the Legislature since 1967. See P.L. 1967, c. 195.

how and where new lines are installed; and (4) each of these requirements **must** be fully accepted by Suburban Electric before the resolution goes into effect. Shortly after the resolution was adopted, Suburban Electric accepted the terms of the resolution and filed it with the Town Clerk.

2. The Town's Ordinance

Since 2016, the Town has had numerous internal discussions regarding the proliferation of small cell wireless facilities, commonly referred to as 5G cell towers, as well as the ability of the municipality to regulate their installation and maintenance. The Town began sporadically discussing the scope of the issue and how it could be addressed, if at all. DA at 99a.

On April 30, 2019, the Township of Cranford (a bordering town to Westfield) adopted Ordinance No. 2019-04, which seeks to regulate these small cell 5G wireless facilities (the "Cranford Ordinance"). DA at 108a. Among other things, the Cranford Ordinance requires that all poles installed in the municipal right-of-way be subject to certain siting standards, including specific height and location standards. Id. Moreover, it specifically applies to all poles "proposed to be placed within the municipal right-of-way by a utility regulated by the Board of Public Utilities, or any other entity lawfully within the municipal right-of-way," including all electrical utility poles. Id. While stylized as an ordinance addressing small cell facilities, the

Cranford Ordinance in fact regulates all facilities installed in the municipal right-of-way. Id.

The Town became aware of the Cranford Ordinance shortly after it was adopted in April 2019 and began to review other functionally identical ordinances passed by numerous other municipalities in the area, including but not limited to:

- Ordinance 2522-18, as adopted by the Township of Millburn on December 6, 2018
- Ordinance 19-06, as adopted by the Township of Warren on February 28, 2019
- Ordinance 19-07, as adopted by the Township of Clark on March 18, 2019
- Ordinance 2019-8, as adopted by the Borough of Princeton on March 25, 2019
- Ordinance 13-19, as adopted by the Township of Morris on April 17, 2019
- Ordinance 2019-28, as adopted by the Borough of Ho-Ho-Kus on November 26, 2019
- Ordinance B-289, as adopted by the City of Hoboken on October 21, 2020
- Ordinance 2021-01, as adopted by the Township of Leonia on April 5, 2021
- Ordinance 2146, as adopted by the Borough of Ridgefield on May 24, 2021
- Ordinance 1847, as adopted by the Borough of Glen Rock on May 26, 2021

DA at 100a, 116a – 248a. All such ordinances applied to all utilities operating in the municipal right-of-way, regardless of whether they are regulated by the Board of Public Utilities, and all involve identical siting standards. None has been challenged by PSE&G in any legal proceeding. DA at 252a – 258a.

In late October 2020, the Town was approached by SQF, LLC, a licensed telecommunications provider, which was seeking to enter into a small cell wireless right-of-way agreement with the Town. The Town elected not to proceed with an agreement with SQF, LLC, but continued to analyze whether such a small cell wireless facility ordinance was appropriate for its needs. DA at 99a.

In mid-March 2021, the governing body of the Town directed the Town Attorney to begin drafting an ordinance that substantively mirrored these previous ordinances. Ultimately, on February 8, 2022, the Town introduced General Ordinance No. 2022-04 ("Ordinance 2022-04"), the Ordinance at issue in this prerogative writ action, and adopted it on February 22, 2022. DA at 100a.

As stated in the Ordinance, it was intended both: (1) to adopt comprehensive standards and regulations for the installation of new "small wireless facilities" (that is, lower range, micro-cell facilities that add capacity to existing macro-cell sites such as traditional cell towers, thereby allowing the transition to 5G technology); and (2) to better manage access to and use of the Town's rights-of-way by traditional utility companies. DA at 35a. Simply put another way, the goal of the Ordinance is to provide standards and regulations for how the Town manages the use of its public rights-of-way by utility companies and telecommunications providers, using the same standards adopted elsewhere.

As to ***existing*** poles, the Ordinance further specifically does not subject such poles to any new requirements when they are being replaced. It states:

> The requirements of this section shall not apply in any circumstance in which a utility service provider that already has, as of the date of the adoption of this Ordinance, an existing utility pole, provided that the pole replacing the existing utility pole is identical, substantially identical, or smaller than the pole being replaced as to its height and diameter, and the material of the replacement pole is identical or substantially identical to the material of the existing pole.

DA at 46a. As to ***new*** poles, the Ordinance merely prevents PSE&G from placing them unilaterally, without any review by the Town, which it is entitled to do both under existing state law, *infra*, as well as under the 1892 Agreement. Id.

3. PSE&G's Proposed Projects

On June 9, 2017, PSE&G presented a plan to PJM Interconnection, LLC, an independent regional grid planner and system operator that serves, in part, to regulate PSE&G's operations. DA at 266a. PSE&G was seeking to provide a third source of power to its Springfield Road and Stanley Terrace substations in Union, New Jersey, for purposes of "adding reliability to [the] network" through redundancy. DA at 299a. This provision of another power source is considered a "baseline" project because failure to complete it will allegedly result in a violation of *PSE&G's* internal minimum criteria requirements needed for service to customers. DA at 316a – 317a.

PSE&G's proposed solution was to construct a new, higher voltage 69kV line connecting its Front Street substation with Springfield Road and Stanley Terrace. DA at 266a *et seq.* Ultimately, the construction of a line from those two substations was approved by PJM on October 18, 2017, and labeled as "b2933." DA at 323a *et seq*. According to PJM, b2933 was initially required to be completed by June 1, 2018. Id. Neither PJM nor any other regulatory authority such as the Board of Public Utilities must approve the route selected by PSE&G to satisfy the requirements of b2933 and neither did; all that needed approval was the construction of ***a*** connection for the two substations. DA at 301a. In fact, the approval of b2933 did not specify or give approval to any specific route for the connection. DA at 323a *et seq*. Indeed, at this point in time, the determination of the particular route by which the connection would be made had not been decided. DA at 285a.

On January 25, 2019, PSE&G returned to PJM to present another project, this time to replace its Clark substation, which is, according to PSE&G, old, near capacity, and suffering from performance problems. DA at 329a *et seq*. Unlike b2933, which was a baseline project, the Clark substation replacement was identified as a "supplemental" project. Id. According to PSE&G, the difference between a baseline and supplemental project is that a supplemental project goes beyond the criteria required for service to customers and is only meant to address a specific stated need of PSE&G. DA at 318a – 319a.

Replacement of the Clark substation was ultimately approved by PJM and that separate non-essential project labeled as "s1823." DA at 381a. There is absolutely no requirement that PSE&G complete s1823 in order to comply with the b2933 project, and *only b2933 is actually necessary for PSE&G to provide safe, adequate, and proper service*, as it is required by law to do. DA at 319a -320a.

For its own convenience and purposes, and not because any part of s1823 was essential to providing adequate service, PSE&G wanted to combine b2933 with the s1823 plan for replacing the Clark substation. DA at 329a *et seq*.

PSE&G initially mapped out five potential routes each of which could accomplish *both* b2933 and s1823. DA at 347a. All potential routes involve starting at the Front Street substation (in Scotch Plains) and initially going south, then either continuing south to bypass Westfield completely or turning east to go through Westfield, connecting at a Clark substation replacement, before turning north to connect to the Springfield Road substation. DA at 347a. PSE&G did not map or analyze any potential routes that would complete only b2933. Id. Also, PSE&G did not map or analyze any potential routes that would go north, for example, using State Highway Route 22 to connect Front Street to Springfield Road. DA at 309a – 310a. *Three of PSE&G's five potential routes either skip Westfield entirely or only go through a very small portion of the Town at its outskirts*. DA at 347a. Excluding PSE&G's initial proposed route that later became infeasible—as discussed *infra*—

PSE&G estimates that the four other routes would cost anywhere from $36.3 million to $40.8 million, which would ultimately be reimbursed by all of its ratepayers. DA at 348a *et seq*.

PSE&G's proposed 69kV Project for both b2933 and s1823 combined will require the replacement of hundreds of existing 26kV poles with poles that are significantly taller than the existing poles. DA at 348a *et seq*. This is apparently necessary to allow the new higher voltage 69kV lines to be placed on the same pole above the existing 26kV lines that are currently in place. Id. While PSE&G has previously publicly stated that the poles will be approximately 65 feet high (in contrast to the approximately 30 feet height they are now), at least 13 poles will in fact be 75 feet high. DA at 378a – 379a.

In 2019, PSE&G initially approached the Town about routing a 69kV line through the municipality and presented it as being *required* by their regulatory authority and necessary for continued electric service, when in fact only the creation of another connection and *not the route desired by PSE&G was required* by their regulatory authority. DA at 100a. PSE&G did not explain the difference between the baseline and supplemental projects or that the goal of b2933 was simply to add a third level of redundancy. DA at 100a.

Initially, PSE&G presented a route that involved going from the Front Street substation to a planned but unconstructed substation on Walnut Avenue in Cranford

before going to the Springfield Road substation. DA at 101a, 347a. The proposed route wound through largely residential streets within Westfield and is designated as the purple "original route." Id.

After discussion about the proposed route with Town officials, PSE&G conducted a public meeting in April 2019, at which point the plan met significant public resistance. DA at 101a. Westfield officials identified concerns with the proposed route and asked PSE&G to evaluate additional routes, including one that would involve using an existing 120-foot right-of-way that contains a 230kV transmission line. DA at 101a. This route would go south from the Front Street substation and then go along the Conrail railroad tracks, where PSE&G already has high voltage power lines, and it would not require going through any residential or commercial areas at all. DA at 321a – 322a. PSE&G complied with this request and ultimately determined that the route was feasible. DA at 388a *et seq*. PSE&G did not want to use this route because it would cost more money than the route they wanted through Westfield. Id. However, the fact that PSE&G determined that the Conrail route was feasible establishes that the route through Westfield is not essential to the provision of adequate service.

After the public meeting in April 2019 in which PSE&G presented its plan to Westfield residents, PSE&G placed its 69kV Project on an indefinite hold, because its plans to purchase the property that would contain the Walnut Avenue substation

fell through. DA at 101a. This is significant because the reason for putting the 69kV line through Westfield was to connect to the proposed Walnut Avenue substation (which was no longer planned). DA at 391a. Without a determination of the connection points for the route, PSE&G advised the Town that they did not, at that time, believe that they could continue to move forward with routing the 69kV line through Westfield until a new substation could be identified. DA at 101a. However, it is unclear why PSE&G did not at least continue with the b2933 project, which it was required to undertake, while it sought another location for a Clark substation replacement pursuant to the s1823 project. DA at 101a.

On February 4, 2022, PSE&G again approached the Town with a new route for their 69kV line that was similar to the one previously proposed, except that it would no longer wind through the tertiary residential roads, instead going along South Avenue before turning onto Central Ave (identified on the map as the light blue "proposed route"). DA at 101a, 347a. There had been no discussion in the intervening time between the Town and PSE&G about the status of the project. DA at 102a.

Since the Walnut Avenue property fell through, PSE&G has attempted to purchase property in Linden to replace the Clark substation, but it was unsuccessful. DA at 304a – 305a. PSE&G is currently attempting to purchase property in Roselle where a new substation can be constructed, but it has yet to do so. DA at 304a. Until

such a property is purchased, PSE&G does not know exactly how it will need to route the connections for the combined projects b2933 and s1823. Id.

On June 15, 2023, the trial court denied Westfield's motion for summary judgment and granted PSE&G's motion for summary judgment in a written decision. DA at 1a *et seq*. Central to that ruling was the court's mistaken finding that the route through Westfield was essential to the provision of a third connection to the substations. The Court stated:

> The Court finds that PSE&G's motion for summary judgement must be granted as a matter of law. New Jersey law requires that a public utility furnish safe, adequate and proper service. N.J.S.A. 48:2-23. Here, PSE&G seeks to install high capacity 69kV power lines to upgrade electric transmission and distribution lines throughout New Jersey to meet increasing electric demand and ensure a reliable energy infrastructure. Further, the need for taller poles for the power lines is mandated pursuant to the National Safety Code which was adopted by the New Jersey Board of Public Utilities through N.J.A.C. 14:5-2.1. Therefore, the Project is crucial for PSE&G to fulfill their statutory obligation to furnish safe and adequate utility services throughout New Jersey. The Project is also necessary, and PSE&G properly routed the Project through Westfield.

DA at 6a. The court then used this finding it made on disputed facts to justify its ruling that N.J.S.A. 48:2-23 required the route through Westfield because it was essential to the provision of adequate service. Even the court's reliance on that statute is improper at this stage of the dispute. That statute specifically empowers the ***Board of Public Utilities*** (not the court), to issue a written order requiring the provision of safe, adequate, and proper service and to maintain its property and

equipment in such condition as to enable it to do so "***after public hearing***." N.J.S.A. 48:2-23 (emphasis added). Here, the court just ignored the fact that the statute requires a written order (which, in turn, would need to be based upon findings) by the Board of Public Utilities after a public hearing; and here there is nothing in the record to show that the statutorily required written order was ever issued after a public hearing or that the BPU made any findings determining that the routing of the 69 kV line through Westfield was "require[d] [for] the provision of safe, adequate, and proper service."

In making the determination that the route through Westfield was essential, the court below lost sight of the undisputed fact that PJM only determined that the addition of a third connection was required to furnish safe and adequate utility service and that neither PJM nor the Federal Energy Regulatory Commission ("FERC") made any determinations or gave approval to any particular route for that connection, let alone a route that PSE&G later selected to run through Westfield. In short, the court conflated the need for a third connection with the route that the connection would take, and therein lies the court's error, referring to both as "the Project" throughout its decision. See, DA at 1a *et seq*.; T.4:7-17.[2]

[2] There is only one volume of the transcript. In keeping with Rule 2:6-8, "T.:x-y" shall refer to transcript at page "x" and lines "y."

Apparently concerned about the availability of alternate feasible routes, the trial court then proceeded to selectively and improperly apply a regulation of the Board of Public Utilities. Specifically, it asserted that N.J.A.C. 14:5-7.1 imposed an unconditional requirement for PSE&G to follow the existing route through Westfield, and that therefore the Ordinance requiring Westfield's approval was invalid. In actuality, the regulation the court relied upon provides in relevant part:

> (a) Whenever an EDC constructs an overhead transmission line, it shall:
>
> 1. Make use of available railroad or other rights-of-way whenever practicable, feasible and with safety, ***subject to agreement with the owners***;

N.J.A.C. § 14:5-7.1 (emphasis added). In concluding that this regulation barred the Town from having any say in the construction of the line, the court totally wrote out of existence the requirement that it be done with the agreement of the owner of the right-of-way.

The court also tortured another regulation of the Board of Public Utilities, N.J.A.C. 14:3-8.5(d) in an effort to shore up its flawed ruling in the event that the route was not essential. The court used regulation to make the route through Westfield legally required based on its costs. However, that regulation only addresses "extensions" as defined in N.J.A.C. 14:3-8.2. An extension "means the construction or installation of plant and/or facilities to convey new service from existing or new plant and/or facilities to a structure or property for which the

applicant has requested service." In turn, "applicant" for an extension is defined as "a person that has applied to the appropriate regulated entity, as defined at N.J.A.C. 14:3-1, for the construction of an extension as defined at N.J.A.C. 14:3-8.2." Thus, an "extension" under N.J.A.C. 14:3-8.5 requires that the connection be from facilities of one entity to a structure of another entity." The proposed 69kV line through Westfield would be a connection between facilities and structures of just a single entity (PSE&G) as such is not an "extension" under the regulation relied upon by the court.[3]

As a result of the trial court's improper ruling on the motions for summary judgment, Westfield filed this appeal on July 26, 2023. DA at 945a.

STANDARD OF REVIEW

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is *de novo*. See *In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); *State v. Courtney*, 243 N.J. 77, 85 (2020) (interpretation of sentencing provisions in the Criminal Code); *State v. G.E.P.*, 243 N.J. 362, 382 (2020) (retroactivity of statute); *State v. Hemenway*, 239 N.J. 111, 125 (2019) (constitutionality of a statute); *State v. Hyland*, 238 N.J. 135, 143 (2019),

[3] Common examples of extensions would be a line from a water main to a person's home, or a power line from an electric utility's distribution line to a business.

reconsideration denied, 238 N.J. 429 (2019) (appealability of a sentence); *Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3, 9 (2019) (statutory interpretation); *Green v. Monmouth Univ.*, 237 N.J. 516, 529 (2019) (applicability of charitable immunity); *State v. Fuqua*, 234 N.J. 583, 591 (2018) (statutory interpretation); *State v. Dickerson*, 232 N.J. 2, 17 (2018) (interpretation of court rules). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 552 (2019) (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)).

If a judge makes a discretionary decision, but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to the usual deference. *Summit Plaza Assocs. v. Kolta*, 462 N.J. Super. 401, 409 (App. Div. 2020), certif. denied, 244 N.J. 145 (2020); *Alves v. Rosenberg*, 400 N.J. Super. 553, 563 (App. Div. 2008).

While appellate courts apply a deferential standard in reviewing factual findings by a judge, *Balducci v. Cige*, 240 N.J. 574, 595 (2020), *State v. McNeil-Thomas*, 238 N.J. 256, 271 (2019), Rule 4:46-2 prohibits a trial court from deciding any disputed issues of fact on a motion for summary judgment. See *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). Accordingly, there cannot be any deference to any findings by the court below concerning any facts that were disputed.

SUMMARY OF THE ARGUMENT

1. The granting of summary judgment was improper and must be reversed because the Ordinance is not invalid "on its face" because it cannot be said that the Ordinance can never be valid under any circumstance. Rather, the court below needed to base its ruling on the particular circumstances related to the application of the Ordinance to particular line PSE&G sought to construct through Westfield. However, any such ruling would necessarily have to be based upon an "as applied" standard. An "as applied" determination cannot and could not be made because (i) PSE&G did not apply for a permit and (ii) PSE&G did not seek an exception from any of the requirements of the Ordinance as permitted by the Ordinance. Simply put, the determination could not be one "as applied" because PSE&G did not allow the Ordinance to be applied to its proposed construction of the 69kV line. Further, and related to the second point herein, the decision of the court below was based upon its conflation of the PJM approval limited to the provision of *a* third connection which the court concluded was essential with *the particular route sought* to have the line take ,which route was not approved by PJM, was not essential, and was just one of multiple, feasible routes for the connection. Again this necessarily amounted to an "as applied" analysis, which the court was not in a position to undertake due to the lack of a record of how the Ordinance was applied.

2. The granting of summary judgment was improper and must be reversed because the court below decided a genuine issue of material fact in entering a summary judgment. The court's entire analysis of why the Ordinance was invalid was that the proposed route through Westfield was essential to the provision of adequate electrical service by PSE&G. The record showed undisputedly that there were other feasible routes the line could take that would not be prohibited by the Ordinance. By basing its ruling upon its resolution of a genuinely disputed material fact, the lower court's ruling ran afoul of the requirements for and prohibitions on granting summary judgment, and must be reversed.

3. The court below erroneously concluded that there was no authority for Westfield to regulate in any manner the placement, size, and construction of power lines in its right-of-way. However, the record established that there is contractual authority for PSE&G being required to obtain Westfield's approval, that there are judicial determinations that are *res judicata* that require PSE&G to obtain Westfield's approval, and that there are multiple legislative enactments that establish that as a municipality and as the owner of the right-of-way in which the line would be placed has the power to impose reasonable requirements on the placement, size, and construction of 69kV line in question.

LEGAL ARGUMENT

POINT I

THE COURT BELOW APPLIED THE WRONG STANDARD OF LAW IN RULING THAT PORTIONS OF THE ORDINANCE ARE INVALID AS A MATTER OF LAW

(Raised below at DA 52a at ¶ 8; DA382a at Interrogatory No. 13; T.6:23-7:8; T.27:9 – 28:4)

Indispensable to the ruling by the court below is its conclusion that because the b2933 project was essential to providing adequate service to PSE&G's customers, portions of the Ordinance are facially invalid.

The undisputed facts show that PSE&G ***never*** applied for a permit from Westfield for the 69kV line it wanted to construct. Likewise, it never sought any exemption from any of the Ordinance's requirements as permitted under the Ordinance. As a result, neither the Administrative Review Team (provided for in the Ordinance) nor the Town Council were able to apply the Ordinance or its exemptions to PSE&G's proposed 69kV line. With PSE&G having prevented Westfield from determining how the Ordinance would be applied to this specific project, PSE&G's challenge to the Ordinance's validity was not, and could not, be a challenge to the Ordinance "as applied."

Consequently, this action was and could only be a challenge to Ordinance "on its face." Claims of facial invalidity are not favored and subject to a stringent standard. See, *In re Contest of November 8, 2011 Gen. Election of Office of N.J.*

Gen. Assembly, 210 N.J. 29, 64 (2012). That is because such claims often rest on speculation and "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" Id. (citation omitted). Another reason is that claims of "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." Id. (citation omitted).

Consequently, "when confronted with a facial challenge, [courts are obligated] to take care "not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases" under which constitutional problems might be present." Id. In other words, a statute may be declared invalid on its face only if facts in addition to the language of the statute are not required to be considered to create a basis for invalidating the statute.

As applied in the present matter, the court below necessarily went beyond the language of the statute and had to consider the disputed assertion that the route through Westfield was essential to the provision of adequate service and that there was no other route to make the connection. Not only did this involve the resolution of genuinely disputed material facts (*e.g.*, that the route through Westfield was essential to the connection and that no other route was feasible), but it also failed to apply the correct standard for facial challenges to the Ordinance. Further, it completely disregarded that under the statute there was a mechanism for PSE&G to

seek exemptions from various requirements of the Ordinance, which mechanism PSE&G chose not to avail. Instead, the court either speculated that an exemption would not be granted for this project, or that other feasible designs for the connection (*e.g.*, lesser pole heights, routes through other parts of Westfield, or even underground lines) were not capable of being approved under the Ordinance. As such, any declaration of invalidity of portions of the Ordinance was premature – any application for exemptions from certain requirements had not yet been made or denied, and hence one cannot say that the Ordinance could never be validly applied to power transmission lines.

In addition, the court's assumption that the Town would not apply the Ordinances provisions for an exemption ran afoul of yet another precept for denying facial challenges – it short circuited the democratic process by preventing the application of the will of the people that their municipal officials apply the Ordinance for the benefit of all in accordance Ordinance's provision that the public officials have the right, power, and ability to apply the exemption process contained in the Ordinance to the extent they determine that any exemption is be required by law. In short, the process used by the court below in this matter violated the requirement that PSE&G apply for a permit and exhaust its administrative remedies before the municipality prior to seeking a judicial declaration that the Ordinance was invalid on its face. Accord, *Main Union Assocs. v. Twp. of Little Falls Rent Leveling Bd.*,

306 N.J. Super. 404, 412 (App. Div. 1997), certif. denied, 153 N.J. 402 (1998) (facial challenge to rent ordinance would require a categorical exclusion of capital improvement costs from being included in rent increases; ability of the determining body to consider them prevented a successful facial challenge to the ordinance). Here, the court below engaged in the consideration of a hypothetical case based on the unestablished (and false) assumption that PSE&G could not be granted any relief under the provisions of the Ordinance.

The test for whether an enactment is invalid on its face has been described as follow:

> When examining a facial challenge to legislation, "the effects [of the statute] on particular participants in an industry are not dispositive; rather, the question is whether the 'mere enactment' of a statute offends constitutional rights." *State Farm*, *supra*, 124 N.J. at 46, 590 A.2d 191. Holding a statute facially unconstitutional is "exceedingly rare." *Id.* "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L. Ed. 1061, (1916); *see also*, *Rust v. Sullivan*, 500 U.S. 173, 191, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Thus, where a statute is capable of two constructions, one of which would render it unconstitutional and the other valid, that which will uphold its validity must be adopted by the reviewing court. *Ahto v. Weaver*, 39 N.J. 418, 428, 189 A.2d 27 (1963).

N.J. Ass'n of Health Plans v. Farmer, 342 N.J. Super. 536, 552-53 (Ch. Div. 2000).

In *State v. Hester*, 449 N.J. Super. 314, 325 (App. Div. 2017), affirmed, 233 N.J. 381 (2018), the court stated:

> "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *J.B., supra*, 433 N.J. Super. at 344, 79 A.3d 467 (quoting *Binkowski v. State*, 322 N.J. Super. 359, 375-76, 731 A.2d 64 (App. Div. 1999)). "[A] statute . . . is facially unconstitutional only if the constitution is necessarily violated every time the law is enforced."

In considering facial challenges to an enactment, courts should not strike them down in anticipation that particular applications may be invalid. *Ran-Dav's Cty. Kosher v. State*, 129 N.J. 141, 174 (1992), cert. denied, 507 U.S. 952, 113 S. Ct. 1366, 122 L.Ed.2d 744 (1993). "On a facial challenge, a statute should be deemed constitutional if it operates constitutionally in some instances." *Matter of M.U.'s Application for a Handgun Purchase Permit*, 475 N.J. Super. 148, 191 (App. Div. 2023). In other words, to declare an enactment invalid on its face, it must be such that *under no circumstances is it possible to apply the legislation in a valid manner*. Once it is capable of being applied validly in some circumstances, any challenge is no longer one to the enactment "on its face" and becomes a challenge "as applied."

In the present matter, PSE&G failed to establish that under no circumstances could the Ordinance ever be validly applied to any person. Rather, PSE&G was forced to assert that the Ordinance's provisions could not be applied to *it* with respect to *the particular route* it wanted to take for the 69kV line. Thus, as set forth in *N.J. Ass'n of Health Plans v. Farmer, supra*, PSE&G needed to assert and prove, and the court needed to find, that this particular route for the line was undisputedly essential

to the provision of adequate service in order to have the Ordinance declared invalid on it face. The undisputed fact that there were alternative routes precluded any such determination.

By asserting that the Ordinance was invalid because it might interfere with PSE&G's first choice for a route, PSE&G's challenge to the Ordinance became one challenging its validity "as applied." As such, PSE&G was first required to apply for a permit; and any challenge in court before a permit was denied was premature. Indeed, the Ordinance specifically contained provisions for PSE&G to seek exemptions from requirements of the Ordinance when a requirement of Ordinance "[w]ill prohibit, or have the effect of prohibiting, the ability of an entity to provide Utility Service to any prospective customer within the Town" (DA at 52a) or when a requirement of the Ordinance "would violate federal law, state law, or both; or . . . [a] provision of this Chapter, as applied to an applicant, would deprive the applicant of its rights under federal law, state law, or both" (DA at 51a). With those provisions as part of the Ordinance, PSE&G could not possibly establish that under all circumstances the Ordinance cannot be applied in a lawful and valid manner or that it prohibits PSE&G from providing and adequate service required by law unless and until it applies for a permit and exemption and is denied an exemption. To find an ordinance to be invalid "as applied," the plaintiff must first permit the provisions ordinance to actually be applied whenever the ordinance contains a mechanism

where the alleged invalid outcome may be avoided. The Ordinance contains just such a mechanism, *i.e.*, the exemption process set forth in it. Here, by jumping the gun and running straight to court, PSE&G prevented Westfield from applying the provisions pertaining to an exemption if the conditions for such an exemption existed. Simply stated, PSE&G cannot say the Ordinance is invalid as applied when PSE&G prevented the potentially ameliorative provisions of the Ordinance from being applied.

It is a basic principle that when an ordinance vests discretion in the local body to permit exceptions, a trial court should ordinarily decline to adjudicate an attack upon the ordinance as applied until after the plaintiff has first sought and been denied relief from the ordinance by the local body charged with making such decisions. See *Conlon v. Bd. of Pub. Works*, 11 N.J. 363, 370 (1953). See also, *Griepenburg v. Twp. of Ocean*, 220 N.J. 239, 263 (2015); *Brunetti v. New Milford*, 68 N.J. 576 (1975); *AMG Assocs. v. Springfield*, 65 N.J. 101, 109 n.3 (1974). As stated in *Harvard Enters., Inc. v. Bd. of Adjustment*, 56 N.J. 362, 368-69 (1970):

> An ordinance that may operate reasonably in some circumstances and unreasonably in others is not void *in toto*, but is enforceable except where in the particular circumstances its operation would be unreasonable and oppressive. *Isola v. Borough of Belmar*, 34 N.J. Super. 544, 552 (App. Div. 1955); *Independent, etc., Oil Co. v. Mayor, etc., of Gloucester*, 102 N.J.L. 502, 504 (Sup. Ct. 1926); 5 *McQuillin, Municipal Corporations* (3*d ed.* 1969), § 18.05, p. 344. The determination of such an issue depends upon an evaluation of the proven facts within the context of applicable legal principles. The total factual setting must be evaluated in

> each case, and if the issue be in doubt, the ordinance must be upheld.

Thus, in addition to the plaintiff being required to first seek and be denied relief that is available under the ordinance, a determination of whether the application of the ordinance is valid is also dependent upon the particular facts and circumstances. As set forth in the Statement of Facts and in Point II herein, the particular facts that the court below relied upon to invalidate the Ordinance (*i.e.,* that the routing of 69kV lines through Westfield was essential to assure adequate service) was hotly disputed and incapable of being decided on summary judgment (as the court below wrongly did).

Having failed to apply for a permit and an exemption from any of the requirements of the Ordinance which could allow the 69kV line or another route to succeed, PSE&G's facial challenge necessarily fails (because it cannot establish that in all circumstances it prohibits expansion that is essential to providing adequate service); and it has also failed to establish that when the Ordinance with its provision for exemptions is applied to the 69kV line through Westfield that it prevents PSE&G from providing adequate service to the public. Indeed, PSE&G's refusal to apply for either a permit or for an exemption precludes any ability to establish that the Ordinance is invalid "as applied." A plaintiff cannot be heard to assert, nor can a court find, that an Ordinance is invalid "as applied" when the challenger to the Ordinance has pursued a course of action that prevents the municipality from

applying the Ordinance's discretionary provisions that could make its application valid.

Finally, for all the reasons set forth in Point III below, the Ordinance is not facially invalid because of other legislative pronouncements. To the contrary, as set forth in that Point, the Legislature has ratified Westfield's right, power and ability to regulate that which is placed in its right-of-way.

POINT II

THE DECISION BELOW CANNOT BE SUSTAINED BECAUSE IT WAS ENTERED AS A RESULT OF A MOTION FOR SUMMARY JUDGMENT AND IMPROPERLY AND NECESSARILY RELIES ON A FINDING OF A MATERIAL FACT THAT WAS THE SUBJECT OF A GENUINE DISPUTE

(Raised Below at DA 93a – 96a;
DA 520a at ¶ 46 in conjunction with DA 934a at ¶ 46; T.25:13-24)

In its decision, the court below clearly conflated the provision of that third connection to PSE&G's substations, b2933, with the routing of the lines to do so through Westfield. DA at 2a (referring to "the Project" as b2933 which only requires an additional line and not any particular line or route, and also indicating that "the Project" will replace poles in Westfield). DA at 1a *et seq.* T. 4:7-17. Regardless of whether the provision of a third line was essential to providing adequate service, Westfield genuinely disputed any fact or assertion that routing the line along South

Avenue and Central Avenue in Westfield was in any way "essential."[4] Indeed, the record was replete with evidence that there were other feasible routes, and that PSE&G considered them to be feasible.

Nonetheless, the trial court decided this disputed fact when it found:

> the Project is crucial for PSE&G to fulfill their statutory obligation to furnish safe and adequate utility services throughout New Jersey. The Project is also necessary, and PSE&G properly routed the Project through Westfield. The Project is also necessary as it was approved by PJM under the delegated authority of FERC.

DA at 6a.

Central to the court's ruling was its mistaken finding that the *route* through Westfield was essential to the provision of a third connection to the substations, which it then used to invalidate the Ordinance. The Court stated:

> The Court finds that PSE&G's motion for summary judgement must be granted as a matter of law. New Jersey law requires that a public utility furnish safe, adequate and proper service. N.J.S.A. 48:2-23. Here, PSE&G seeks to install high capacity 69kV power lines to upgrade electric transmission and distribution lines throughout New Jersey to meet increasing electric demand and ensure a reliable energy infrastructure. Further, the need for taller poles for the power lines is mandated pursuant to the National Safety Code which was adopted by the New Jersey Board of Public Utilities through N.J.A.C. 14:5-2.1. Therefore, the Project is crucial for PSE&G to fulfill their statutory obligation to furnish safe and adequate utility services

[4] All of the evidence before the court established that the b2933 Project that was approved by PJM was limited to the requirement that a third connection be made to the substations and *did not* constitute approval of any particular route.

> throughout New Jersey. The Project is also necessary, and PSE&G properly routed the Project through Westfield.

DA at 6a. The court then used its finding on disputed facts to justify its ruling that, as a matter of law, N.J.S.A. 48:2-23 required the route through Westfield because it was essential to the provision of adequate service. Even the court's reliance on that statute was improper at this stage of the dispute. That statute specifically empowers the ***Board of Public Utilities*** (not the court), to require the provision of safe, adequate, and proper service and to maintain its property and equipment in such condition as to enable it to do so "***after public hearing***." N.J.S.A. 48:2-23 (emphasis added). Here, the court just ignored the fact that the statute requires a written order (which, in turn, would need to be based upon findings) by the Board of Public Utilities after a public hearing; and here there is nothing in the record to show that the statutorily required written order was ever issued after a public hearing, or that the BPU made any findings determining that the routing of the 69 kV line through Westfield was "require[d] [for] the provision of safe, adequate, and proper service."

In making the determination that the route through Westfield was essential, the court below lost sight of the undisputed fact that PJM only determined that the addition of a third connection was required to furnish safe and adequate utility service and that neither PJM nor FERC made any determinations or gave approval to any particular route for that connection, let alone a route that PSE&G later selected

to run through Westfield. In short, the court conflated the need for a third connection with the route that the connection would take, and therein lies the court's error, referring to both as "the Project" throughout its decision.

It is a cardinal principle of motions for summary judgment that the court is prohibited from deciding any genuine issues of material fact. Rule 4:46-2 ("judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law"). In the leading case of *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 529 (1995), the Supreme Court stated:

> a court should deny a summary judgment motion . . . where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'

Similarly, in the seminal case of *Judson v. Peoples Bank and Trust of Westfield*, 17 N.J. 67 (1954), the Supreme Court held:

> The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.

Id. at 74. That is because summary judgment

> is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search

> of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

Id. See also, *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627, 641-42 (1995).

In the present matter, the record establishes a genuine and vigorous dispute over whether the routing of the 69kV line through Westfield is essential to providing adequate service. The record was replete with other feasible routes that could accomplish the third connection for PSE&G's substations. That the dispute was material to the court's decision is made clear by its reliance on N.J.S.A. 48:2-23 (relating to the provision of adequate service) as the grounds for invalidating the Ordinance.

Cases are legion regarding the consequences of a trial court deciding genuine issues. When a genuine issue of material fact is decided on a motion for summary judgment, the summary judgment must be reversed. See, *e.g.*, *Wilson v. Parisi*, 268 N.J. Super. 213 (App. Div. 1993); *Simonetti v. Selective Ins. Co.*, 372 N.J. Super. 421, 424 (App. Div. 2004); *Port Auth. of N.Y. & N.J. v. Honeywell Protective Servs., Honeywell, Inc.*, 222 N.J. Super. 11, 16 (App. Div. 1987); *Allstate Redevelopment Corp. v. Summit Assocs.*, 206 N.J. Super. 318 (App. Div. 1985); *CPC Intern., Inc. v. Hartford Accident & Indem. Co.*, 316 N.J. Super. 351, 379 (App. Div. 1998), certif. denied, 158 N.J. 73 (1999).

Accordingly, the summary judgment below must be reversed.

POINT III

THE SUMMARY JUDGMENT GRANTED TO PSE&G MUST BE REVERSED ON ITS MERITS

(Raised below at DA 1a *et seq*,. DA 90a *et seq*., DA 931a *et seq.*; T.19:1 – 29:23; Briefs below of the Town of Westfield)

This matter involves a challenge to a municipal ordinance adopted by the Town. Municipal actions enjoy a well-established presumption of validity. See *Fanelli v. City of Trenton*, 135 N.J. 582, 589 (1994); *Ballantyne House Assocs. v. City of Newark*, 269 N.J. Super. 322, 337 (App. Div. 1993). "Thus, a challenge to the validity of a municipal ordinance . . . must overcome the presumption of validity—a heavy burden." *Witt v. Borough of Maywood*, 328 N.J. Super. 432, 442 (Law Div. 1998), affirmed, 328 N.J. Super. 343 (App. Div. 2000) (quoting *515 Assocs. v. City of Newark*, 132 N.J. 180, 185 (1993)).

That presumption of validity is deeply rooted in the Constitution of New Jersey:

> [A]ny law concerning municipal corporations formed for local governments . . . shall be liberally construed in their favor. The powers of . . . such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto . . . .

N.J. Const., Art. IV, § VII, ¶ 11.

In fact, the presumption is so strong it may only be overturned by a court if it is arbitrary, capricious, or unreasonable. See *Charlie Brown of Chatham v. Board of Adj. of Chatham*, 202 N.J. Super. 312, 321 (App. Div. 1985); *Drake v. Human Servs. Dept.*, 186 N.J. Super. 532, 536 (App. Div. 1982); *In re App. of Holy Name Hosp.*, 301 N.J. Super. 282, 295 (App. Div. 1997).

A. The Ordinance is Further Supported by a 130-Year-Old Contract and State Law

PSE&G and the court below appeared to believe that the Town is basing its authority to adopt the Ordinance upon its general police powers. This is inaccurate and incomplete. For the reasons stated, the Ordinance is explicitly based on the Federal Telecommunications Act, which is valid federal law. See Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat.

Moreover, the Town is authorized to regulate how PSE&G places new poles based upon the 1892 Agreement, which obligates PSE&G, as a successor of Suburban Electric, to abide by "such prudential rules and regulations as the said [Town Council] may from time to time prescribe by ordinance or otherwise." DA at 65a. While it is unclear whether any other municipality has the same rights as does Westfield, it is a right that has been repeatedly confirmed by courts in New Jersey as well as by the State Legislature.

In 1898, the State Legislature passed a law that validated agreements such as the one between the Town and PSE&G. See P.L. 1898, c. 197, p. 458. That law stated:

> All proceedings heretofore had or taken by the several municipalities of this state, purporting to authorize the construction, reconstruction and extension of subways or pole-lines, to be used by electric light, heat and power companies for the purposes of their business, and under which subways and pole lines have been constructed, **and all contracts entered into by the several municipalities with electric light, heat and power companies, in the carrying out of which subways or pole-lines have been erected by such companies, shall be taken to be legal and binding** and to have authorized the construction of such subways and the erection of such pole-lines and to authorize their maintenance for public and commercial use and the electric light, heat and power companies which shall have so constructed subways or pole-lines, and placed therein or thereon cables or wires for the purpose of furnishing electric light, heat or power in the streets of any municipality shall be deemed to have and possess in such streets all legal authority necessary to be secured from such municipality in order in such streets to lawfully construct, reconstruct and maintain such subways, pole-lines . . . .

P.L. 1898, c. 197, p. 458 (emphasis added).

This 1898 Act was later saved from repeal when the Legislature adopted the Revised Statutes, due to the passage of N.J.S.A. 48:7-6, which states:

> L.1898, c. 197, p. 458 (C.S. p. 3153, 38), entitled "An act relating to the use of the public streets by electric light, heat and power companies," approved May eighteenth, one thousand eight hundred and ninety-eight, saved from repeal. [***This act validates the*** construction, reconstruction and extension of subways and polelines by electric light, heat and power companies, as well as ***contracts entered into between such companies and the several municipalities***.]

N.J.S.A. 48:7-6 (emphasis added).

As such, this validation act makes the 1892 Agreement still enforceable. "This act of 1898 was, on the face of it, a validating act, and the entire act must be considered for the purpose of applying it to the proceedings intended to be validated." *Public Service Corp. v. Westfield*, 80 N.J. Eq. 295, 303 (Ch. Div. 1912), affirmed, 82 N.J. Eq. 662 (E.&A. 1914). It is still plainly good law enshrined in the Revised Statutes, and it cannot be blithely disregarded as PSE&G and the court below did. PSE&G is therefore still bound to the 1892 Agreement's terms, and such terms expressly permit the Town to regulate new poles. The court below is likewise bound by that statute. Indeed, courts have repeatedly upheld the validity of the 1892 Agreement in the years since, despite intervening events, such as when the Town was reincorporated in 1903, and have made it clear that the Town is entitled to reasonably regulate the construction of new poles.

One such case is *Public Service Corp.*, *supra.* There, beginning in November 1908, PSE&G replaced several of the poles that had been erected in the Town and erected additional poles on other streets without authorization from the Town. Then, in December 1908, the Town notified Public Service that it must remove all poles that were erected without the Town's consent. PSE&G declined to remove any of the poles, claiming that consent of the Town was no longer necessary under several laws that had been passed by the Legislature subsequent to the 1892 Agreement. In March 1909, the Town's governing body held a meeting and adopted a resolution

pursuant to which the Town Clerk advised PSE&G that it had erected posts and poles on certain public streets in Westfield without first obtaining a designation of streets and the manner of placing them from the Town, and the Town Clerk was directed to notify PSE&G that it must remove the posts and poles by a date certain—and, if they failed to do so, the overseer of the roads for the Town would be directed to remove them.

Upon receiving this notice, PSE&G initiated a lawsuit against the Town by filing a Complaint in the Court of Chancery to enjoin the Town from removing the poles. Using the 1898 Act as its basis, the *Court of Chancery held that the 1892 Agreement allows the Town to dictate where new poles are installed on its streets and highways*, except for those poles and lines that existed prior to 1903 (when the Town was incorporated), *as well as what type of poles may be installed***.** Id. This was appealed to The Court of Errors and Appeals which affirmed the Chancery Court's decision.

Thus, the rule of law in Westfield can be summarized as follows: first, if a pole location existed prior to 1903, the Town may not prohibit the continued existence of a pole at that location. Second, if a pole did not exist prior to 1903, the Town can prohibit an electrical utility from placing a pole at a particular location. And third, whether or not the pole location existed before or after 1903, *the size, scope, and height of any replacement pole can be regulated by the Town, subject*

only to the requirement that the Town's regulation not eviscerate the essential purpose of the pole and therefore the property right of the utility. Public Service Corp., 82 N.J. Eq. at 662.

Shortly thereafter, Westfield's right to regulate the location and placement of poles within its borders was reaffirmed in federal court in the case of *Public Service Electric Company v. Westfield* (D.N.J., Sept. 5, 1918). DA at 461a *et seq*. There, PSE&G petitioned the Town in 1914 for permission to erect, maintain, and string electric lines on certain roads. The Town's governing body approved the request with the caveat that they must be placed underground, but the Town refused to permit PSE&G to run the lines on poles above ground. PSE&G again sued, this time in the United States District Court for the District of New Jersey, arguing among other things that Westfield had no legal authority to require that the wires be placed underground. Id. The District Court dismissed PSE&G's lawsuit, holding that the State's highest court had already previously ruled that *the Town did indeed have the power to reasonably regulate power lines in a manner that it deemed appropriate*, and that the federal court had no jurisdiction to overrule that decision. Id.[5]

In addition to the historical litigation between PSE&G and Westfield, which establishes Westfield's power to regulate power lines in its right-of-way and is *res*

[5] PSE&G later appealed to the Supreme Court of the United States, but the matter was settled by the parties before it was heard. See *Public Service Corp. v. Westfield*, 257 U.S. 669 (1922).

judicata, the State Legislature has created a statutory scheme of general application that requires municipal consent in numerous scenarios relevant to public utilities. For example:

- "***The consent of the municipality shall be obtained*** for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place." N.J.S.A. 48:3-19 (emphasis added).

- "No poles shall be erected in any street of an incorporated city or town ***without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed and the manner of placing the same***. Such use of the public streets shall be subject to such regulations as may be first imposed by the corporate authorities of the city or town." N.J.S.A. 48:7-1 (emphasis added).

- "No public streets shall be opened in any municipality for the purpose of laying any such pipes, conduits or wires ***without the permission of the municipality***." N.J.S.A. 48:7-2. (emphasis added).

- "Any telegraph or telephone company organized under the laws of this or any other State, or of the United States may erect, construct and maintain the necessary poles, wires, conduits, and other fixtures for its lines, in, upon, along, over or under any public street, road or highway, ***upon first obtaining the consent in writing of the owner of the soil to the erection of such poles*** . . . ." N.J.S.A. 48:17-8 (emphasis added).[6]

- "No pole, conduit, wire or other fixture, except such as are a part of a through line of any such telegraph or telephone company as distinguished from a local line, shall be constructed or erected in, upon, along, over or under any public road, street or highway of any municipality ***without first obtaining permission by ordinance or resolution from the governing body*** of the municipality, nor in, upon, along, over or under any public road, street or highway of any county without first obtaining permission by resolution from the board of freeholders of the county." N.J.S.A. 48:17-10 (emphasis added).

[6] Since the Ordinance was created primarily to regulate small wireless 5G facilities, the Town's authority under these statutes to regulate and provide consent for such actions are especially relevant.

- "The governing body of any municipality or the board of freeholders of any county on granting permission to use any street, road or highway for a local line, or on written application to it by any such telegraph or telephone company desiring to construct any through line, ***shall designate by ordinance or resolution the streets, roads or highways in, along, over or under which the poles, wires, conduits and other fixtures shall be erected or constructed*** and the manner of erecting or constructing the same and the particular location in any street, road or highway where the same shall be placed. . . .The use of all streets, roads or highways by the company ***shall be subject to such police and other regulations and restrictions as may be adopted by the governing body of the municipality*** or the board of freeholders." N.J.S.A. 48:17-11 (emphasis added).

- "Where application is made to the governing body of any municipality or county for permission to erect, construct and maintain poles, wires, conduits or other fixtures for any local line in the municipality or county, the governing body shall designate by ordinance or resolution a feasible route in the municipality or county for the local line under regulations and restrictions as aforesaid . . . ." N.J.S.A. 48:17-12.

All of these statutes bespeak of and confer authority upon a municipality to impose reasonable regulations upon the placement of poles and lines by utilities in its right-of-way. Given these powers and obligations, Westfield is necessarily authorized by the Legislature to create a process by which it can approve the installation of utility services as well as regulate, to a degree dictated by the type of utility at issue, the specific terms of said installation. Critically, the Ordinance provides a structure of review by municipal authorities, and as such, it must be permitted in its entirety.

Against this overwhelming weight of statutory authorization, the court below refused to apply the limitations set forth in the legislative and regulatory authorities it relied upon to invalidate the Ordinance. Although the Legislature required, in N.J.S.A. 48:2-23, Board of Public Utilities approval after a public hearing, the court

below used this statute to justify invalidating the Ordinance through the improper expediency of disregarding the fact that the statute is limited to circumstances where the Board of Public Utilities has determined, after public hearing, that the project is required for the provision of safe, adequate, and proper service by the utility and has issued a written order to that effect. Here, there was never a determination by the Board of Public Utilities that routing the 69kV line through Westfield was essential to the provision of adequate service. Further, there is nothing in the record showing that the Board of Public Utilities issued a written order specifically requiring that the line be routed through Westfield. Accordingly, that statute was inapplicable to the matter before the court. The court also attempted to use N.J.A.C. 14:5-7.1 as authority that superseded Westfield's power to regulate any 69kV line through its right-of-way. While that regulation does provide that an overhead transmission line shall "[m]ake use of available railroad or other rights-of-way whenever practicable, feasible and with safety, ***subject to agreement with the owners***," (emphasis added), the court completely ignored and wrote out of existence the requirement of agreement with the owner. The court also tortured another regulation of the Board of Public Utilities, N.J.A.C. 14:3-8.5(d) in an effort to shore up its flawed ruling in the event that the route was not essential. That regulation, concerning the cost, only applies to extensions as defined in N.J.A.C. 14:3-8.2. However, that definition requires the existence of an applicant other than the utility constructing the line, since

the definition of "applicant" for an extension is defined as "a person that has applied to the appropriate regulated entity . . . for the construction of an extension as defined at N.J.A.C. 14:3-8.2." Since an "extension" under N.J.A.C. 14:3-8.5 requires that the connection be from facilities of one entity to a structure of another entity, this purported authority relied upon by the court was inapplicable to the construction of a transmission line by the utility interconnecting two of the utility's own structures.

Thus, against all of the statutes cited by Westfield that empower its enactment of the Ordinance and the historical (and *res judicata*) litigation between PSE&G and Westfield recognizing that power of Westfield, the court below had no legal authority for invalidating the Ordinance which was applicable if all of the requirements and limitations of those authorities were applied.[7]

Lastly, the case law is clear that municipalities do retain some control over poles and electric lines even after permission is first granted to place said poles and lines. See *New Jersey Natural Gas Go. v. Borough of Red Bank*, 438 N.J. Super. 164 (App. Div. 2014); see also *Seals v. County of Morris*, 210 N.J. 157 (2012) (holding that utility companies are required to obtain street designations from a

[7] Although the court cited to N.J.S.A. 48:3-17.1, that statute is irrelevant. It only applies where municipality seeks the removal of a pole that has occupied a location for at least 10 years regardless of whether permission was actually given, and that no court can order the removal of said pole. It is inapposite to the present matter because ***nobody is questioning whether PSE&G has permission to keep its existing poles where they are currently situated, and nobody has filed a lawsuit to remove said poles.***

municipality as to where poles may be placed). Critically, our Supreme Court has further explicitly held that electric utility services are not automatically exempt from local regulations. See *State v. Jersey Central Power & Light Co.*, 55 N.J. 363 (1970) (holding that the State Legislature has evinced an intent to give municipalities some ability to regulate utilities within their boundaries). Contrary to the lower court's and PSE&G's interpretation of *In re Pub. Serv. Elec & Gas Co.*, 35 N.J. 358 (1961) as prohibiting any and all municipal regulation related to "high-capacity power lines," such was not the holding in that case. The facts of that case were that the Borough of Roselle was *outright banning all* high-powered lines from being placed above-ground, *regardless of where they would be located in the borough, regardless of height and regardless of need*. Under Roselle's ordinance, even if a 69kV line was unquestionably necessary to provide basic power to residents or others, it was still prohibited from being placed above ground. In addition, Roselle asserted that its ordinance was authorized by its general power to regulate land use; it was not based upon Roselle's ownership of the land or the placement of lines in the streets. Indeed, the Supreme Court noted that N.J.S.A. 48:7-1 could provide authority for regulation of such lines *if the ordinance were limited to the placement of lines in right-of-way of the borough's streets.* Id. at 372-373 ("While some reservation of municipal control over the installation of overhead power lines and underground cables may be found in *R.S.* 48:7-1 and 2, this control is limited to a requirement of

municipal consent where an electric company desires to use *public streets* for the construction of overhead or underground lines, obviously for service to local residents. Such is not the situation here.")

The Westfield Ordinance and facts are readily distinguishable from the Roselle case. First, Westfield does not base its authority on the Municipal Land Use Law or general police power; rather, its authority is contractual in nature, is the result of litigation that is *res judicata,* and it subject to an express statutory grant of authority by N.J.S.A. 48:7-1. Second, Westfield has not adopted a complete and total ban of above ground high power lines; rather it permits such lines to be placed above ground. Third, although Westfield's Ordinance provides siting standards that might potentially restrict some types of high-capacity power lines from being installed, the Ordinance provides an exemption to allow it when necessary. The Town does not, of course, seek to prohibit all power transmission and distribution within its borders, and the court should not have treated the Ordinance as an absolute ban on high capacity lines nor a ban of lines that are truly necessary for the provision of adequate service. Thus, the *Roselle* case did not prohibit Westfield's contractual, statutory, and adjudicated rights to maintain "such prudential rules and regulations as the said Township Committee may from time to time prescribe by ordinance or otherwise."[8]

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[8]. In *Public Service Electric Company v. Westfield* (D.N.J., Sept. 5, 1918), Judge Davis indicated that "if the effect of the decisions of the State Courts was to impair

Indeed, in *N.J. Nat. Gas Co. v. Borough of Red Bank*, *supra*, the court found that a statute pertaining to the laying of gas lines required consent by the municipality and that this provided authority for the municipality to impose reasonable regulations. Id. at 178. So too, with respect to the erection of electrical power lines on poles, N.J.S.A. 48:7-1 requires consent of the owner (here, the municipality) and this likewise provides legislative authority to the municipality to impose reasonable regulations. In addition, N.J.A.C. 14:5-7.1 requires that construction of transmission lines requires agreement with the owners of the property over which the line will pass. This too, provides authority for the municipality having the right-of-way to impose reasonable requirements.

CONCLUSION

For the foregoing reasons, this Court must vacate the summary judgment entered in favor of PSE&G by the court below. There is no basis to find that the Ordinance is arbitrary, capricious, or unreasonable. It is well-founded upon a 130-year-old contract, state law, and federal law, as well as other, identical local municipal ordinances. Nor does the Ordinance improperly infringe on PSE&G's rights to provide safe, adequate, and proper service, as PSE&G could use an alternative route or method of accomplishing its allegedly required goals. And if

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the obligations" of the 1892 Agreement, such action may violate the Contracts Clause of the United States Constitution. DA at 465a.

PSE&G truly did have to go through Westfield to complete its 69kV Project, the Ordinance has built-in safeguards that would allow such a project upon a proper showing of necessity by PSE&G. For these reasons, the Ordinance is valid on its face, the requirements for an "as applied" challenge have not been met, and this matter should be dismissed with prejudice.

Respectfully submitted,

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Attorneys for Defendant-Appellant,
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Dated: November 3, 2023

/s/ Thomas C. Jardim Esq. (011041994)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003602-22

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Plaintiff/Respondent, v. TOWN OF WESTFIELD, Defendant/Appellant.	CIVIL ACTION On Appeal from the Superior Court of New Jersey Law Division Union County: Docket No. UNN-L-1092-22 Sat Below: Hon. Mark P. Ciarocco

BRIEF OF PLAINTIFF/RESPONDENT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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PRELIMINARY STATEMENT

By way of this appeal, the Town of Westfield ("Westfield" or the "Town") – despite an unsuccessful attempt at the summary judgment stage and, later, in two separate motions to stay the trial court's decision – once again seeks to prevent Public Service Electric and Gas Company ("PSE&G") from proceeding with a multi-jurisdictional transmission project on the grounds that it is precluded by a local ordinance. Yet this precise issue has already been addressed by our Supreme Court in In re PSE&G, in which the Court ruled that municipal regulation of high capacity transmission lines is preempted by supervening state law. Finding In re PSE&G directly on point, the trial court properly held that Westfield's Ordinance No. 2022-04 ("Ordinance") was preempted as a matter of law. That decision should be upheld here.

PSE&G is a regulated utility of the State of New Jersey under Title 48 of the New Jersey Statutes. PSE&G has installed more than 575 miles of 69,000-volt ("69kV") power lines in almost 100 municipalities since 2007. PSE&G is subject to regulation at the state level by the New Jersey Board of Public Utilities ("BPU") and at the federal level by the Federal Energy Regulatory Commission ("FERC").

PSE&G has a statutory obligation to furnish "safe, adequate and proper service" pursuant to N.J.S.A. 48:2-23. The 69kV project specifically at issue in this matter also has support grounded in federal law as the project was approved in 2017

by PJM Interconnection, L.L.C.'s ("PJM") Board of Managers operating under its FERC-approved planning process. The 69kV project runs through nine municipalities in Union County serving approximately 25,000 customers, including customers in Westfield ("Union County Project" or "Project").

Despite PSE&G installing hundreds of miles of 69kV power lines throughout the State, Westfield vehemently opposed less than five miles of the Project proposed to run through the Town. To foreclose PSE&G from placing such power lines, Westfield adopted the Ordinance on February 22, 2022. By attempting to regulate the physical placement of utility poles — as well as the maximum allowed height of poles — within existing public rights of way, the Ordinance requirements prevent PSE&G from installing transmission lines that are required to provide safe, adequate, and proper service in New Jersey.

PSE&G filed a prerogative writ action and, ultimately, was granted summary judgment on the grounds that the Ordinance is preempted in accordance with the In re PSE&G decision. Now, on appeal, Westfield sets forth a host of arguments advocating for the reversal of the trial court's decision. Yet none of them has merit.

First, the trial court properly found that the Supreme Court's binding decision in In re PSE&G rendered the Ordinance void as to PSE&G. Westfield's efforts to distinguish In re PSE&G were rejected by the trial court, and should once again be rejected here.

Second, Westfield's contention that the trial court erred by applying a "facial" challenge analysis to the Ordinance rather than an "as applied" challenge analysis also fails. PSE&G did not challenge the Ordinance on the grounds that it was unconstitutional, as would have been required for the trial court to engage in either analysis. On summary judgment, PSE&G argued only that the Ordinance was preempted – and the trial court applied the proper legal standard in deferring to the Supreme Court's In re PSE&G decision. Its reasoning should not be disturbed.

Third, the trial court properly granted summary judgment as a matter of law when it found that there were no disputed issues of fact with respect to the necessity of the Union County Project. Westfield presents no cognizable arguments on appeal to make up for its failure to present record evidence creating such a dispute.

Fourth, Westfield's remaining hodge podge of statutory and legal arguments – many of which rely on outdated law created prior to the 1900s – lacks merit.

Fifth, Westfield raises new arguments on appeal for the first time. This Court should not permit Westfield to raise new arguments that were not asserted below. However, even if the Court considers Westfield's new arguments, they still lack any foundation in the law or facts. Therefore, the Court should reject these arguments and uphold the trial court's Opinion and Order granting summary judgment in favor of PSE&G.

PROCEDURAL HISTORY

PSE&G filed a Complaint in Lieu of Prerogative Writ on April 8, 2022, seeking declaratory and injunctive relief enjoining and restraining the enforcement of the Ordinance as to PSE&G. (Da012a). Westfield subsequently filed its Answer and Affirmative Defenses on June 18, 2022. (Da077a).

On February 24, 2023, the parties filed competing motions for summary judgment. (Da088a; Da508a). Oral argument was held by the trial court on May 5, 2023. The trial court issued its written opinion and order granting PSE&G's motion for summary judgment and denying Westfield's motion on June 15, 2023 ("Opinion and Order"). (Da001a).

Westfield filed its notice of appeal with the Appellate Division on June 26, 2023. Westfield then filed an Order to Show Cause seeking a stay of the trial court's final judgment on August 21, 2023. Westfield's application was denied on August 31, 2023. On September 6, 2023, Westfield filed a motion to stay the trial court's final judgment with the Appellate Division. That motion was also denied on September 11, 2023.

STATEMENT OF FACTS

A. Overview of PSE&G's 69kV Statewide Initiative

PSE&G is a regulated utility of the State of New Jersey under Title 48 of the New Jersey statutes. (Da525a, ¶13). PSE&G currently serves approximately 2.3

million electric customers in New Jersey. (Da523a, ¶4). Since 2007, PSE&G has installed more than 575 miles of 69kV power lines in almost 100 municipalities in New Jersey ("69kV Statewide Initiative"). (Da524a, ¶5). PSE&G's 69kV Statewide Initiative involves the upgrading of electric transmission and distribution lines throughout the State to meet increasing electric demand and to ensure the continued reliability of its energy infrastructure. (Da524a, ¶6). The Union County Project and, more specifically, the less than five miles of work necessary in Westfield, is just a small part of PSE&G's overall Statewide Initiative. (Da523a, ¶3; Da526a, ¶15).

B. Regulatory reviews and approvals in connection with the Union County Project

Pursuant to N.J.S.A. 48:2-23, PSE&G is obligated to "furnish safe, adequate and proper service." PSE&G's Statewide Initiative is part of PJM's Regional Transmission Expansion Plan ("RTEP"). (Da526a, ¶15). PJM is a Regional Transmission Organization ("RTO") approved and fully regulated by FERC. (Id.). PJM coordinates the transmission of electricity to over 65 million customers through all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. (Da526a, ¶16).

C. Planning and implementation of the Union County Project

The Union County Project was initiated to address certain issues with the 230kV transmission lines supplying the Springfield Road and Stanley Terrace substations in the PSEG transmission zone identified by PSE&G as part of PJM's RTEP transmission planning process. (Da528a, ¶22). In 2017, PJM confirmed PSE&G's finding that, were its systems not upgraded, the loss of a single transmission or generator component would result in a complete loss of electric supply for more than 24 hours at both substations. (Id.).

On October 18, 2017, the PJM Board of Managers approved the Union County Project, designating construction responsibility to PSE&G to: (1) construct a 230/69kV station at Springfield Road; (2) construct a 230/69kV station at Stanley Terrace; and (3) construct a 69kV network between Front Street, Springfield Road, and Stanley Terrace. (Da529a, ¶24). As part of the 69kV network, the Project will replace 136 poles on the existing pole line in the existing right of way on South Avenue and Central Avenue in Westfield. (Da531a, ¶33). The replacement poles will range between 65 and 75 feet in length (56 and 66 feet above ground) and will have the same spacing as the existing poles. (Da531a, ¶34). In connection with the 69kV Statewide Initiative discussed above, taller poles are mandated pursuant to National Electrical Safety Code ("NESC") requiring certain minimum spacing separating the lines. (Da531a, ¶35).

PSE&G undertook a comprehensive review of potential routes for the 69kV reliability project through Westfield. PSE&G concluded that the technically feasible route was the South Avenue right of way. (Da532a, ¶38).

D. The Westfield Ordinance

On February 22, 2022, Westfield adopted the Ordinance. (Da32a-60a; Da532a, ¶39). The Ordinance imposes numerous requirements on the physical placement of utility poles (as well as the maximum allowed height of poles) within existing public rights of way. (Da532a, ¶40). The Ordinance requirements prevent PSE&G from installing poles that are required to continue to provide safe, adequate, and proper service in New Jersey. See Ordinance Sections 17-3.1(a), (b), and (c). (Da038a-039a; Da532a-33a, ¶¶40-45). Section 17-3.1(b) states, in relevant part, that no poles shall be taller than 35 feet. However, as noted above, taller poles are mandated by the NESC Section 23, with which PSE&G is obligated to comply. (Da533a, ¶45).

E. The Litigation and Trial Court's Summary Judgment Order

PSE&G filed a Complaint in Lieu of Prerogative Writ on April 8, 2022, seeking declaratory and injunctive relief enjoining and restraining the enforcement of the Ordinance as to PSE&G.

The trial court ultimately granted PSE&G's motion for summary judgment on June 15, 2023, holding:

The Court finds that PSE&G's motion for summary judgement must be granted as a matter of law. New Jersey law requires that a public utility furnish safe, adequate and proper service. N.J.S.A. 48:2-23. Here, PSE&G seeks to install high capacity 69kV power lines to upgrade electric transmission and distribution lines throughout New Jersey to meet increasing electric demand and ensure a reliable energy infrastructure. Further, the need for taller poles for the power lines is mandated pursuant to the National Safety Code which was adopted by the New Jersey Board of Public Utilities through N.J.A.C. 14:5-2.1. Therefore, the Project is crucial for PSE&G to fulfill their statutory obligation to furnish safe and adequate utility services throughout New Jersey. The Project is also necessary, and PSE&G properly routed the Project through Westfield. The Project is also necessary as it was approved by PJM under the delegated authority of FERC. Further, the selection of the route for the Project follows PSE&G's existing power lines (existing right-of-way and land rights) in accordance with the New Jersey Board of Public Utilities regulations. See N.J.A.C. 14:5-7.1 (a public utility is required to select a route for its transmission facility that "[m]ake[s] use of available ... rights of way whenever practicable, feasible and with safety"); See also N.J.A.C. 14:3-8.5(d) (requiring a regulated entity "to facilitate construction of an extension at the lowest reasonable cost consistent with system reliability and safety"). Therefore, alternative routing around Westfield is not feasible under the administrative code and PSE&G is obligated to route the Project through Westfield as it poses the lowest reasonable cost.

Next, the Court must determine whether Westfield possess the requisite legal authority under New Jersey law to impose the Ordinance. The Ordinance effectively prevents PSE&G from completing the Project as it regulates utility pole installation by regulating the precise pole placement, pole height, pole diameter, and pole material. ***However, the Court finds that the Ordinance is preempted by the***

Supreme Court's decision in In re PSE&G as applied to high capacity transmission lines. See In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358 (1961). Generally, a municipality has broad power as delegated by the State. Id. at 370. However, that power is restricted in matters in need of uniform treatment. Id. at 371. The Supreme Court stated that "It is rather difficult to conceive of a subject which more requires uniform regulation at a high and broad level of authority than the method of transmission of electric power." Id. at 373. Further, the Court determined that N.J.S.A. 48:7-1—the sole potentially applicable statute granting limited consent power to municipalities—only requires "municipal consent where an electric company desires to use public streets for the construction of overhead ... lines, obviously for service to local residents." Id. at 373. Thus, the Court determined that the statute's municipal consent requirement does not apply to high-capacity transmission power lines which provide electricity to multiple jurisdictions. Here, it is undisputed that the Project is multi-jurisdictional. The Project will upgrade power lines through Westfield and eight other municipalities including Fanwood, Scotch Plains, Clark, Roselle, Roselle Park, Kenilworth, Union and Linden. Thus, because the Project is multijurisdictional, the municipal consent requirement pursuant to N.J.S.A. 48:7-1 does not apply. Accordingly, the Ordinance is preempted as Westfield does not have the authority to impose a comprehensive regulatory regime on the installation of electric utility poles. Therefore, PSE&G's motion for summary judgement must be granted, but the Court will not void the entire ordinance but only the sections (specified in the holding) as applicable to the installation of electric utility poles on any public right of way in Westfield.

[Da007a (emphasis added)].

LEGAL ARGUMENT

POINT I
THE TRIAL COURT CORRECTLY HELD THAT WESTFIELD'S ORDINANCE IS PREEMPTED UNDER STATE LAW (Da0006-0007)

A. The trial court properly held that the Supreme Court's decision In re PSE&G required a finding of preemption.

The legal issue presented by PSE&G's prerogative writ action was the validity of Westfield's Ordinance purporting to regulate the placement and height of electric utility poles on public rights of way. The threshold question raised by PSE&G in its motion for summary judgment was whether the Ordinance was rendered without force and effect by operation of the legal doctrine of preemption. In determining this question, the trial court's inquiry ends, as Westfield would not have the power to enact such an Ordinance. Under well-settled principles of New Jersey law, the doctrine of preemption precludes municipal regulation when supervening statutes and state regulations occupy the field and leave no room for municipal regulation.

Preemption "is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of Town of W. N.Y., 71 N.J. 451, 461 (1976). Applying this principle, a court will "declare an ordinance invalid if it . . . is preempted by superior legal authority[.]" Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven, 177 N.J. 338, 351 (2003). The trial court

properly determined this threshold question and granted summary judgment in favor of PSE&G, finding the Ordinance preempted by state law.

In granting PSE&G's motion for summary judgment, the trial court below principally relied on the Supreme Court's decision in In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358 (1961) (hereafter, "In re PSE&G") and that case's holding that municipal regulation of high capacity transmission lines is preempted by supervening state law. The trial court reasoned:

> The Ordinance effectively prevents PSE&G from completing the Project as it regulates utility pole installation by regulating the precise pole placement, pole height, pole diameter, and pole material. However, the Court finds that the Ordinance is preempted by the Supreme Court's decision in In re PSE&G as applied to high- capacity transmission lines. See In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358 (1961). Generally, a municipality has broad power as delegated by the State. Id. at 370. However, that power is restricted in matters in need of uniform treatment. Id. at 371. The Supreme Court stated that "It is rather difficult to conceive of a subject which more requires uniform regulation at a high and broad level of authority than the method of transmission of electric power." Id. at 373. Further, the Court determined that N.J.S.A. 48:7-1-the sole potentially applicable statute granting limited consent power to municipalities-only requires "municipal consent where an electric company desires to use public streets for the construction of overhead ... lines, obviously for service to local residents." Id. at 373. Thus, the Court determined that the statute's municipal consent requirement does not apply to high-capacity transmission power lines which

> provide electricity to multiple jurisdictions. Here, it is undisputed that the Project is multi-jurisdictional. The Project will upgrade power lines through Westfield and eight other municipalities including Fanwood, Scotch Plains, Clark, Roselle, Roselle Park, Kenilworth, Union and Linden. Thus, because the Project is multi-jurisdictional, the municipal consent requirement pursuant to N.J.S.A. 48:7-1 does not apply. Accordingly, the Ordinance is preempted as Westfield does not have the authority to impose a comprehensive regulatory regime on the installation of electric utility poles.
>
> [Da007a].

As held by the trial court, the seminal case of In re PSE&G is directly on point and applicable to this matter. As a matter of law, any limited authority a municipality might have pursuant to N.J.S.A. 48:7-1 does not apply to ***high-capacity lines, as in this case***. See In re PSE&G, 35 N.J. at 373.

In In re PSE&G, our Supreme Court considered the validity under the Public Utility Law of a municipal ordinance adopted by the Borough of Roselle that sought to require the public utility to install all new high-capacity electric power lines underground rather than to install those electric power lines on utility poles. Id. at 363. The Roselle ordinance "provided, in effect, that all electric power lines in Roselle carrying more than 33,000 volts must be installed underground." Id. Furthermore, the ordinance "specif[ied] standards for such installation as well as the requirement of filing plans and specifications and the obtaining of a municipal permit before any such line could be lawfully constructed or maintained." Id.

Following the adoption of the ordinance, "Public Service immediately instituted an action in lieu of prerogative writ in the Law Division attacking the validity of the ordinance." Id. at 363-64.

The New Jersey Supreme Court affirmed the trial court's grant of summary judgment in favor of PSE&G, wherein the court held the ordinance invalid by reason of preemption by operation of the Public Utility Law. Id. at 364. The New Jersey Supreme Court found that Title 48 legislatively recognizes the public interest in the proper regulation of public utilities, which transcends municipal or county lines in order to ensure uniformly safe, proper and adequate service by utilities throughout the State:

> [T]his State has delegated in most sweeping terms 'general supervision and regulation of and jurisdiction and control over all public utilities' and 'their property, property rights, equipment, facilities and franchises' to the Board. N.J.S.A. 48:2-13. More specifically, the Board is empowered to direct utilities to furnish safe, adequate and proper service,… and to that end it may fix just and reasonable standards and practices. N.J.S.A. 48:2-25. **We find in these statutes, and throughout Title 48 of the Revised Statutes (1937), a legislative recognition that the public interest in proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the State.**
>
> [Id. at 371 (emphasis added)].

The Court further emphasized that "[i]t is rather difficult to conceive of a subject which more requires uniform regulation at a high and broad level of authority than the method of transmission of electric power[.]" Id. at 373.

Moreover, the Court determined that N.J.S.A. 48:7-1 and -2 – the sole potentially applicable statute granting limited consent power to municipalities – only require "municipal consent where an electric company desires to use Public streets for the construction of overhead or underground lines, obviously for service to local residents." Id. at 372-73. Thus, the Court determined that the N.J.S.A. 48:7-1 municipal consent requirement does not apply to high-capacity transmission power lines, which provide electricity to multiple jurisdictions and are not strictly limited to local residents. Id. The Court thus invalidated Roselle's ordinance. Id. at 363. The Court concluded:

> Were each municipality through which a power line has to pass free to impose its own ideas of how the current should be transmitted through it, nothing but chaos would result, and neither the utility nor the state agency vested with control could be assured of ability to fulfill its obligations of furnishing safe, adequate and proper service to the public in all areas.
>
> [Id.].

The same result is warranted here, where it is undisputed that the Union County Project involves multi-jurisdictional high-capacity transmission lines. PSE&G's high-capacity power lines running through Westfield will provide power

not just to some residents of Westfield, but also to residents of other municipalities, including Scotch Plains, Fanwood, Clark, Cranford, and Mountainside. (Da763a-766a). The Union County Project and more specifically, the less than five miles of work necessary in Westfield, is just a small part of PSE&G's overall 69kV Statewide Initiative. (Da526a). PSE&G's statewide program is part of PJM's RTEP. (Id.). As a FERC-approved RTO, PJM ensures the reliability of the largest centrally dispatched electric grid in the world, coordinating the transmission electricity through all or parts of 13 states and the District of Columbia. (Da526a-Da527a). The trial court correctly concluded that Westfield is precluded from enacting an Ordinance regulating high-capacity 69kV transmission lines pursuant to In re PSE&G. (Da007a).

Westfield cannot rely on the authority of N.J.S.A. 48:7-1 as a basis to defend the validity of its Ordinance as applied to high-capacity power lines. Pursuant to In re PSE&G, the Ordinance provisions are invalid as a matter of law. The Westfield Ordinance provisions precisely implicate — and run afoul of – the statutory and public policy concerns identified by the Supreme Court. As with the Roselle ordinance, Westfield's Ordinance "specif[ies] standards for such installation as well as the requirement of filing plans and specifications and the obtaining of a municipal permit before any such line could be lawfully constructed or maintained." 35 N.J. at 363. As posited by the trial court, preemption of the Westfield Ordinance is required

because the consent authority conferred by N.J.S.A. 48:7-1 does not, as a matter of law, apply to high-capacity power lines. Hence, the Westfield Ordinance is preempted for this reason alone.

B. Westfield's efforts to distinguish In re PSE&G fail.

On appeal, Westfield once again attempts to distinguish In re PSE&G on the basis that Roselle required all power lines that carried more than 33kV of electricity to be installed underground, no matter what. (Db46). Westfield attempts to distinguish its Ordinance from Roselle's ordinance in that the Town permits the proposed lines above ground subject to siting standards. Westfield's efforts to limit the scope of In re PSE&G are unavailing. The trial court rejected this argument below, and it should be rejected again here. There is no municipal authority to regulate high-capacity transmission lines. *None whatsoever*. See In re PSE&G, 35 N.J. at 372-73. Westfield's Ordinance is preempted.

For the first time on appeal, Westfield argues that "Roselle asserted that its ordinance was authorized by its general power to regulate land use; it was not based on Roselle's ownership of the land or the placement of lines in the streets." (Db46). Westfield now asserts that this case is distinguishable from In re PSE&G because Westfield does not base its authority on the Municipal Land Use Law or general police power; rather it is contractual in nature and subject to the statutory grant of authority by N.J.S.A. 48:7-1. (Db47). Issues not raised below will ordinarily not be

considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. State v. Legette, 227 N.J. 460, n. 1 (2017); see Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2021). If an issue does not implicate the jurisdictional or public-interest standard, the appellate court should not itself recognize an unpleaded cause of action. Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 396-97 (2016). Moreover, Westfield does not indicate that these issues were not raised below, in violation of Rule 2:6-2(a)(6). The new arguments do not meet that standard. Consequently, this Court should not consider this argument here.

Should the Court choose to address this contention, however, it is contradicted by the summary judgment papers Westfield submitted to the trial court, in which Westfield stated explicitly that the Ordinance "is a valid exercise of its police power" (Pa015) and "legally permissible use of the Town's contractual and police power" (Pa003). Thus, it is not readily distinguishable from Roselle, and Westfield's efforts to change its position after-the-fact should be rejected. Further, the Supreme Court was clear that N.J.S.A. 48:7-1 only requires "municipal consent where an electric company desires to use public streets for the construction of overhead or underground lines, obviously for service to local residents." Id. The Court determined that the N.J.S.A. 48:7-1 municipal consent requirement **does not apply** to high-capacity transmission power lines, which provide electricity to multiple jurisdictions. Id.

For all of these reasons, the trial court properly applied the Supreme Court's decision in In re PSE&G, and its order granting summary judgment to PSE&G on preemption grounds should be affirmed.

C. The trial court properly granted summary judgment as a matter of law.

The trial court's determination that Westfield's Ordinance is preempted by state law ended the summary judgment inquiry and compelled the grant of summary judgment in favor of PSE&G on this basis alone. Accordingly, the trial court's Opinion and Order should not be overturned. Nevertheless, Westfield argues that the trial court's Opinion and Order must be reversed because there were disputed issues of fact regarding the route of the Union County Project through Westfield and whether the route was essential to providing adequate service. (Db35). The question of law before the trial court was whether Westfield possessed the requisite legal authority under New Jersey law to enact the Ordinance. As correctly held by the trial court, as a matter of law, the answer is clearly "no," because the Ordinance is preempted by state law. The trial court's legal determination on summary judgment concerning preemption is distinguishable and separate from the dicta[1] regarding the

[1] "New Jersey law requires that a public utility furnish safe, adequate and proper service. N.J.S.A. 48:2-23. Here, PSE&G seeks to install high capacity 69kV power lines to upgrade electric transmission and distribution lines throughout New Jersey to meet increasing electric demand and ensure a reliable energy infrastructure. Further, the need for taller poles for the power lines is mandated pursuant to the National Safety Code which was adopted by the New Jersey Board of Public Utilities

Union County Project. PSE&G moved for summary judgment on the First Count (invalidation of various sections of the Westfield Ordinance by operation of N.J.S.A. 48:7-1 and N.J.S.A. 48:3-17.1) and Second Count (invalidation of various sections of the Westfield Ordinance by operation of N.J.S.A. 48:2-23, N.J.A.C. 14:3-31, N.J.A.C. 14:5-2.1 and other provisions of Title 48 of the New Jersey Statutes) of its Complaint in Lieu of Prerogative Writ, which both entailed a determination of questions of law, not questions of fact. Contrary to Westfield's assertion, the question of the necessity of the route of the Union County Project through Westfield is not germane to reach a determination of preemption.

However, on appeal, Westfield continues its attempt to create an issue of fact where none exists by asserting that the route of the Union County Project through Westfield is unnecessary. The question of the route of the Union County Project is

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through N.J.A.C. 14:5-2.1 Therefore, the Project is crucial for PSE&G to fulfill their statutory obligation to furnish safe and adequate utility services throughout New Jersey. The Project is also necessary, and PSE&G properly routed the Project through Westfield. The Project is also necessary as it was approved by PJM under the delegated authority of FERC. Further, the selection of the route for the Project follow's PSE&G's existing power lines (existing right-of-way and land rights) in accordance with the New Jersey Board of Public Utilities regulations. See N.J.A.C. 14:5-7.1 (a public utility is required to select a route for its transmission facility that "[m]ake[s] use of available . . . rights of way whenever practicable, feasible and with safety"); See also N.J.A.C. 14:3-8.5(d) (requiring a regulated entity "to facilitate construction of an extension at the lowest reasonable cost consistent with system reliability and safety"). Therefore, alternative routing around Westfield is not feasible under the administrative code and PSE&G is obligated to route the Project through Westfield as it poses the lowest reasonable cost." (Da006a-007a).

not even relevant to the preemption analysis, as asserted above. The point is that Westfield lacks the delegated statutory authority under New Jersey law to enact the Ordinance as to PSE&G. Nevertheless, the necessity of the Union County Project and/or the proposed routes were completely unrebutted by Westfield before the trial court. (T16-10-25). There is not a shred of documentary or expert evidence in the record countering the necessity of the Union County Project. Thus, Westfield's argument should be rejected in its entirety.

D. New arguments raised by Westfield on appeal should be disregarded and are irrelevant to the trial court's determination that the Ordinance is preempted by state law.

Westfield raises new arguments on appeal that were not raised below, arguing that the trial court erred in its interpretation of N.J.S.A. 48:2-23, N.J.A.C. 14:5-7.1, and N.J.A.C. 14:3-8.5(d). None of these regulations and statute are applicable to the trial court's determination of whether the Ordinance is preempted by state law and were not relied upon by the trial court in its preemption analysis. Consequently, Westfield's arguments are irrelevant to the judgment of the case and should be disregarded by this Court.

Further, Westfield could have raised these arguments below, but did not. As set forth above, issues not raised below will ordinarily not be considered on appeal. State v. Legette, 227 N.J. 460, n. 1 (2017). The new arguments are not jurisdictional in nature and do not substantially implicate public interest. Consequently, this Court

should not consider new arguments raised by Westfield.

Nevertheless, should the Court consider these arguments, the trial court's Opinion and Order must still be affirmed. Westfield is misconstruing N.J.S.A. 48:2-23. Westfield argues that the trial court's reliance on N.J.S.A. 48:2-23 at this stage of the dispute was improper because the BPU must first determine, after a public hearing, that PSE&G's Union County Project is required for the provision of safe, adequate, and proper service, and must issue a written order to that effect. (Db33; Db43-44). Again, a BPU determination of whether the Union County Project provides safe, adequate, and proper service is irrelevant to the trial court's preemption analysis. Regardless, the BPU does not require a public hearing and issue an order for every single action a utility, such as PSE&G, may take as part of its activities and operations. Matter of Petition of New Jersey Nat. Gas Co. for Permission to Revise Rates for Appliance Serv., BPU Docket No. GR91010051 (93 N.J.A.R.2d (BRC) 19 (N.J. Adm.)), Final Agency Decision (June 4, 1992) (stating the BPU has "long recognized that regulated utilities may engage in any reasonable legitimate business endeavors that are not directly or indirectly prohibited by law."). Section 48:2-23 is an executive agency enforcement statute and is applied that way by the BPU. The BPU "may" conduct a public hearing "to require" the provision of safe, adequate, and proper service. The BPU ultimately has discretion in how to

exercise this authority.[2]

Moreover, the need for transmission development is subject to a comprehensive planning paradigm approved by FERC and implemented through PJM. As discussed above in the Factual Background, it is undisputed that PJM is a FERC-approved RTO. FERC specifies the minimum characteristics and functions necessary for an entity to be an RTO. RTOs do not own electric generating plants or transmission lines but have exclusive authority for planning regional transmission facilities to maintain the reliability of the bulk electric system for the designated region. PJM's functions include responsibility for planning and directing transmission expansions and upgrades that enable efficient, reliable, and non-discriminatory transmission service. In 2017, PJM approved the construction of a 230/69kV station at Springfield Road, the construction of a 230/69kV station at Stanley Terrace, and the construction of a 69kV network between Front Street, Springfield Road, and Stanley Terrace. (Da525a; Da528a; Da529a-Da530a;

[2] Indeed, it is well-settled in New Jersey that agencies such as the BPU have discretion in determining how to implement any governing statutes. See, e.g., In re Adoption of Unif. Housing Affordability Controls, 390 N.J. Super 89 (App. Div. 2007) (in rejecting arguments that the New Jersey Housing and Mortgage Finance Agency should have held broader proceedings to build a more detailed record as part of adopting certain regulations, the Court cited long held principle of administrative law that administrative agencies have wide discretion in selecting the means to fulfill their legislatively-delegated duties and courts normally defer to that choice so long as the selecting is responsive to the purpose and function of the agency).

Da742a-749a). All of the foregoing is undisputed by Westfield. Although PJM leaves route selection to utilities like PSE&G who understand the system topography, PJM's planning approval under federal law of the need for, and major elements and components of, the Union County Project leaves no room for the Ordinance's local regulatory regime purporting to regulate, among other things, the precise pole placement in the public right of way, pole height, pole diameter, and pole material.

Westfield also argues the trial court erred in its application of N.J.A.C. 14:5-7.1, which provides that whenever a public utility, like PSE&G, constructs an overhead transmission line, it shall "[m]ake use of available railroad or other rights-of-way whenever practicable, feasible and with safety, subject to agreement with the owners[.]" (Db44). Westfield claims the trial court ignored the language requiring "agreement with the owners." (Db44). The trial court found in line with the New Jersey Supreme Court in In re PSE&G that the municipal consent requirement to use public streets for the construction of overhead lines under N.J.S.A. 48:7-1 does not apply to high-capacity transmission power lines which provide electricity to multiple jurisdictions. See In re PSE&G, 35 N.J. at 373. Accordingly, Westfield's consent is not required.[3]

[3] Alternatively, Westfield consented to utility poles per its agreement with PSE&G's predecessor over a century ago in 1892. See N.J.S.A. 48:7-1. Likewise, pursuant to

Finally, Westfield claims that the trial court erred in its interpretation and application of N.J.A.C. 14:3-8.5(d). (Db44-45). Westfield posits that this regulation, concerning cost, only applies to extensions as defined in N.J.A.C. 14:3-8.2, and is inapplicable to this case. (Db44). Once again, this argument was not raised below by Westfield, but could have been asserted. Likewise, as set forth above, the question of concerning the cost of extensions is irrelevant to the determination of whether Westfield had the power to enact the Ordinance.

Accordingly, this Court should affirm the Opinion and Order.

POINT II
THE TRIAL COURT APPLIED THE CORRECT STANDARD OF LAW (Not Raised Below)

A. Westfield failed to raise the "facial" versus "as applied" issue below, so this Court need not consider it on appeal.

As a threshold matter, Point I of Westfield's brief – in which it contends that the trial court applied the wrong standard of law in its decision – is improper because Westfield failed to advocate for this legal standard below. For the first time, on

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N.J.S.A. 48:3-17.1, PSE&G has continuously used and occupied the public right of way in Westfield for its electric utility lines for a period far in excess of the statutory ten-year period, as it is undisputed that Westfield consented to the placement of PSE&G's utility poles as far back as 1892. See N.J.S.A. 48:3-17.1 (providing that when use and occupancy of a public right of way "has continued at substantially the same location or locations for a period of ten years . . . such occupancy shall be presumed to be with the consent in writing of the owner of the soil upon which such pole or poles have been placed[.]").

appeal, Westfield argues that the trial court should have assessed the Ordinance using the standard for an "as applied" challenge rather than a "facial" challenge. As set forth in Point II.B below, this argument lacks merit because PSE&G did not challenge the Ordinance on constitutional grounds and thus, the trial court did not – and could not, under settled law – apply either standard in ruling that the Ordinance was preempted.

Nevertheless, the Court need not even reach this issue because it was not raised to the trial court, as it is well-established that New Jersey's appellate courts generally decline to consider issues that are being raised for the first time on appeal.[4] See Point I, supra. That result is warranted here. Given that Westfield did not address the "facial" versus "as applied" issue in the voluminous briefings submitted to the trial court – nor at oral argument – this Court should decline to address Point I of its appeal brief.

[4] Westfield essentially concedes that this issue was not raised at the summary judgment stage, as it fails to cite to any briefing submitted to the trial court in which this argument was addressed. See Db23.

B. The standard of law advocated by Westfield on appeal is inapplicable.

i. PSE&G did not move for summary judgment on the grounds that the Ordinance was unconstitutional, so the trial court did not need to conduct a "facial" or "as applied" analysis.

Even assuming that this Court chooses to assess Point I in Westfield's brief – which, as set forth above, it should not – the standard of law upon which Westfield predicates its argument is inapplicable here.

The crux of PSE&G's summary judgment motion – and of the trial court's subsequent opinion granting that motion – was that the Ordinance was preempted by Supreme Court precedent. (Da007a) ("However, the Court finds that the Ordinance is preempted by the Supreme Court's decision in In re PSE&G as applied to high capacity transmission lines."). Despite this clear language, Westfield argues that the trial court actually found "portions of the Ordinance … facially invalid" (Db23), and that the court erred in doing so because it should have analyzed the Ordinance under an "as applied" standard. This argument conflates the issues presented below, and, more fundamentally, the difference between a constitutional challenge to a law and a challenge based on the doctrine of preemption. See Congressional Research Service, Library of Congress, The Constitution of the United States of America – Analysis and Interpretation, at 2317 (2013), *available at* www.gpo.gov/constitutionannoted ("State or local laws held to be preempted by federal law are void ***not because they contravene any provision of the Constitution,***

but rather because they conflict with a federal statute or treaty, and through operation of the Supremacy Clause.") (emphasis added).

Notably, there is no wording in the trial court's opinion to suggest that it found the Ordinance facially invalid. PSE&G did not argue that the Ordinance was unconstitutional – which it would have had to do in order for the "facial" versus "as applied" debate to be relevant here. See, e.g., Abbott by Abbott v. Burke, 199 N.J. 140, 234 (2009) ("A statute may be declared unconstitutional in one of two manners. First, it may be declared invalid 'on its face.' Second, a statute may be found unconstitutional 'as-applied' to a particular set of circumstances.").

As the cases upon which Westfield itself relies make plain, "when evaluating a facial challenge to legislation … the question is whether the 'mere enactment' of the legislation ***offends constitutional rights***." (Db26) (quoting N.J. Ass'n of Health Plans v. Farmer, 342 N.J. Super. 536, 552-53 (Ch. Div. 2000)) (emphasis added). Indeed, not a single case cited by Westfield in support of Point I of its brief addresses the issue of preemption; rather, each concerns claims relating to the purported unconstitutionality of a particular statute. See, e.g., In re Contest of November 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 210 N.J. 24, 29 (2012) (assessing facial and as-applied constitutional challenges to a durational residency requirement for New Jersey General Assembly representatives) (Db23-24); Main Union Assocs. v. Twp. of Little Falls Rent Leveling Bd., 306 N.J. Super. 404, 407

(App. Div. 1997) (affirming unsuccessful challenge to the facial constitutionality of the Rent Leveling Ordinance of the Township of Little Falls) (Db25-26); State v. Hester, 449 N.J. Super. 314, 318 (App. Div. 2017) (finding that the post-2014 amended community supervision for life law violated the Ex Post Facto Clauses with respect to the indictments of certain criminal defendants and was thus unconstitutional as applied) (Db26-27); Ran-Davs Cty. Kosher, Inc. v. State, 129 N.J. 141, 169 (1992) (holding that New Jersey's regulations preventing consumer fraud in the sale of kosher products are facially unconstitutional) (Db27); Matter of M.U.'s Application for a Handgun Purchase Permit, 475 N.J. Super. 148, 162 (App. Div. 2023) (assessing facial constitutional challenge to New Jersey statute restricting the issuance of handgun purchase permits and firearms purchaser identification cards) (Db27).

In short, Westfield does not rely upon a single case which utilizes the "facial" or "as applied" standard in a preemption context. Nor could it, as this standard is not applicable in a preemption context. Accordingly, its argument that the trial court erred by failing to conduct such an analysis should be rejected, and the trial court's Opinion and Order should be affirmed.

ii. PSE&G was not required to apply for a permit or exemption from Westfield.

Westfield's contention that PSE&G was required to apply for a permit for the construction of the 69kV line – or an exemption from the Ordinance – before moving for summary judgment is equally misplaced. Here, again, the cases upon which Westfield relies are inapposite, as they either wholly fail to address the doctrine of preemption or concern statutes outside of the context of the regulation of high-capacity transmission lines. See e.g., Conlon v. Bd. of Pub. Works of City of Paterson, 11 N.J. 363 (1953) (zoning ordinance deemed invalid because it usurped jurisdiction of the local board of adjustment) (Db29); Griepenburg v. Twp. of Ocean, 220 N.J. 239, 242 (2015) (zoning ordinance deemed a legitimate exercise of municipality's power to zone property) (Db29); Brunetti v. Borough of New Milford, 68 N.J. 576 (1975) (holding, among other things, that rent control ordinance was not facially unconstitutional on due process grounds) (Db29); AMG Assocs. v. Springfield Twp., 65 N.J. 101 (1974) (assessing validity of use variance) (Db29); Harvard Enter., Inc. v. Bd. of Adjustment of Madison Twp., Middlesex Cty., 56 N.J. 362 (1970) (assessing as applied challenge to constitutionality of ordinance requiring 2,000 feet of distance between proposed and existing gas stations) (Db29). In sum, Westfield points to no legal authority holding that PSE&G was required to comply with the terms of the Ordinance by requesting a permit or exemption prior to moving

for summary judgment on preemption grounds. The trial court's Opinion and Order should thus be affirmed.

POINT III
WESTFIELD'S REMAINING ARGUMENTS PRESENTED ON APPEAL ARE DEVOID OF MERIT (Da0006-0007)

Westfield puts forward a grab-bag of additional arguments in support of its appeal. The trial court properly considered these arguments and rejected them, finding In re PSE&G to be controlling and that the Ordinance is preempted by state law. As described below, these additional arguments do not withstand scrutiny.

A. The presumption of validity is inapplicable to Westfield's Ordinance.

Westfield incorrectly asserts that its Ordinance is entitled to a presumption of validity. (Db36). Where, as here, an ordinance is adopted in the absence of statutory authority or in derogation of a statute, it is not entitled to a presumption of validity. Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 489 (App. Div. 2019), aff'd in part, rev'd in part, 244 N.J. 75 (2020). Here, the presumption of validity is inapplicable because state law preempts the Ordinance. Thus, because the Ordinance was not "duly adopted pursuant to authority delegated by statute[,]" the presumption does not apply. Dial, Inc. v. City of Passaic, 443 N.J. Super. 492, 503 (App. Div. 2016).

Not only does the presumption of validity not apply to the Ordinance, Westfield has the burden to show that its challenged Ordinance is within an express

grant of statutory authority. See In re PSE&G, 35 N.J. at 371 ("[w]here the state has thus established an agency of its own with plenary power to regulate utilities, it is universally recognized that municipalities cannot properly interpose their local restrictions unless and only to the extent any power to do so is expressly reserved to them by statute."). Westfield is unable to meet its burden because the Ordinance falls outside the limited and narrow grant of statutory authority on municipalities with respect to the regulation of utility poles on public rights of way. Id.

In addition, Westfield relies upon Article IV, Section VII, Paragraph 11 of the New Jersey Constitution in support of its argument that the Ordinance is presumptively valid. (Db236). By its terms, Paragraph 11 cannot operate as an independent source of authority to municipalities when, as here, a municipal ordinance is "inconsistent with or prohibited by this Constitution or by law." N.J. Const., Art. IV, § VII, ¶ 11. As our Supreme Court has explained, "Paragraph 11 is not . . . an independent source of municipal power." Fraternal Order of Police, Newark Lodge No. 12, 244 N.J. at 93.

Moreover, Westfield's invocation of the arbitrary and capricious standard is a red herring. (Db37). PSE&G did not move for summary judgment on the grounds that Westfield adopted the Ordinance in an arbitrary, capricious, or unreasonable manner. The arbitrary and capricious standard has no application to PSE&G's motion for summary judgment or this appeal.

B. Westfield's reliance on the 1892 Resolution is misplaced.

Westfield seeks to takes refuge in a municipal resolution promulgated over 130 years ago at the dawn of electricity transmission and distribution (the "1892 Resolution") intended to codify the nascent relationship between Westfield and PSE&G's predecessor, Suburban Electric Company ("Suburban"). (Db37). By that 1892 Resolution, Westfield granted consent to Suburban to use the public right of way to construct utility poles. Westfield asserts that the 1892 Resolution expressly reserves the right for Westfield to impose "prudential rules and regulations" on Suburban as well as its successors and assigns, including PSE&G. (Db37). According to Westfield, the 1892 Resolution is the putative legal basis for its 2022 Ordinance purporting to regulate the height and specifications of utility poles on the public right of way in the Town.

Westfield's reliance on the 1892 Resolution is misplaced. The 1892 Resolution provides no support for the Ordinance. First, even if Westfield's putative construction of the 1892 Resolution were correct (which it is not), it is preempted by operation of New Jersey statutory and regulatory law enacted over the last century in response to the growth of what has become the modern day electrical grid, including the supervening authority of N.J.S.A. 48:7-1, N.J.S.A. 48:3-17.1, other provisions of Title 48 of the New Jersey Statutes, and the New Jersey Supreme Court's decision in In re PSE&G. As argued by PSE&G in opposition to Westfield's

motion for summary judgment, N.J.S.A. 48:7-1 is the only statute that provides any authority whatsoever to municipalities with respect to regulation of electric utility poles on public rights of way. The statute provides that the "use of the public streets [by electric utility poles] shall be subject to such regulations as may be **first imposed** by the corporate authorities of the city or town." (emphasis added). Plainly, the Ordinance is not a "first impos[ition]" of a municipal regulatory regime on the placement of utility poles within the meaning of N.J.S.A. 48:7-1. Instead, the Ordinance constitutes an amendatory regulatory regime that purports to modify and amend Westfield's consent conferred on PSE&G's predecessor over a century ago.

Under Westfield's construction of the 1892 Resolution, Westfield reserves the right to continue to impose new "prudential rules and regulations" on a public utility long after Westfield's first grant of consent to the public utility. However, that construction is without force and effect because it has been preempted by the Legislature's enactment of N.J.S.A. 48:7-1 and that statute's express limitation on the continuing exercise of municipal power over the placement and specifications of utility poles after the "first impos[ition]" of municipal consent. The Legislature last amended N.J.S.A. 48:7-1 in 1962 – 70 years after the 1892 Resolution. See L.1962, c. 198, § 95. Thus, Westfield's construction of its 1892 Resolution did not survive the Legislature's reenactment of N.J.S.A. 48:7-1.

The same conclusion is compelled by operation of N.J.S.A. 48:3-17.1, which

provides that when a public utility's use and occupancy of a public right of way (for an electric utility pole) has continued at substantially the same location for a period of ten years, such occupancy is presumed to be with the consent in writing of the owner of the land. It is undisputed that PSE&G has continuously used and occupied the public right of way in Westfield for its electric utility lines for over a century. For this reason alone, the purported enforceability of the 1892 Resolution is preempted by operation of the ten-year limitation period (and the resulting "presumption" with regard to municipal consent) imposed by N.J.S.A. 48:3-17.1. Notably, the Legislature first enacted N.J.S.A. 48:3-17.1 in 1945, over a half century after the 1892 Westfield Resolution. See L.1945, c. 231, p. 747, § 1. Thus, Westfield's construction of its 1892 Resolution did not survive the Legislature's enactment of N.J.S.A. 48:3-17.1.

Moreover, the 1892 Resolution is without force and effect because it has been nullified by the Supreme Court's decision in In re PSE&G, as applied to regional transmission facilities, such as PSE&G's Union County Project, as more fully discussed in Point I, supra. Consequently, Westfield's construction of its 1892 Resolution is preempted by operation of New Jersey statutory and regulatory law enacted over the past century.

Second, the 1892 Resolution does not allow Westfield to regulate PSE&G's Union County Project or any other necessary public utility installation on the public

right of way. The 1892 Resolution provides, in relevant part:

> Resolved, That the Township Committee of the Township of Westfield in the County of Union and the State of New Jersey, do hereby grant unto the Suburban Electric Co., of Elizabeth, New Jersey, their successors and assigns the right and privilege of erecting and maintaining such and so many poles and other necessary supports and fixtures **as may be necessary along, over or under the streets, lanes, avenues or alleys in said Township for the purpose of furnishing electric light, heat and power** and to place electric lamps over the sidewalks or over the streets wherever such lamps may be subscribed for by citizens, firms, corporations, etc., Provided however,
>
> First. That the said Suburban Electric Light Company, its successors or assigns shall be subject to such prudential rules and regulations as the said Township Committee may from time to time prescribe by ordinance or otherwise.

(emphasis added). The 1892 Resolution grants to the electric utility the right to erect and maintain poles and other necessary supports and fixtures as may be necessary. Thus, even if Westfield may adopt "prudential rules and regulations," such rules and regulations cannot operate to prevent utility infrastructure that is "necessary." The 1892 Resolution does not allow Westfield to preclude or restrict PSE&G's Union County Project or any other necessary public utility installation on the public right of way in Westfield.

Third, the 1892 Resolution is void under the authority of the decision in Public Service Corp. v. Westfield, 80 N.J. Eq. 295 (Ch. 1912), which operates to nullify

Westfield's putative expansive construction of the "prudential rule and regulation" language contained in the 1892 Resolution. Westfield heavily relies upon this 1912 decision, arguing that it validates the 1892 Resolution and "allows the Town to dictate where new poles are installed on its streets and highways, except for those poles and lines that existed prior to 1903[.]" (Db40). Furthermore, according to Westfield, the 1912 decision made clear that a certain 1898 Act of the Legislature (L. 1898, c. 197) "makes the 1892 Agreement still enforceable." (Db39). However, Westfield's interpretation of the 1912 decision is incorrect.

The 1912 decision construed the legal effect of the 1898 Act as follows:

> [T]he intention of the [1898] act was to validate proceedings purporting to be taken to authorize the construction, where the municipalities had, under their charter or other laws, the right to authorize. **It was not, I think, intended to increase the already existing power of the municipality, but to cure defective proceedings purporting to act under the power to authorize.**

Public Service Corp., 80 N.J. Eq. at 304 (emphasis added). Thus, the 1912 decision made clear that the 1898 Act did not transform any municipal act into an act of statutory law. Instead, the 1898 Act merely cured a defect in a municipal act that would otherwise have had no force and effect as a municipal act. Id. The 1912 decision clarified that all of the subsequent legislation preempting the field of Public Utility Law plainly had full force and effect against the 1892 Resolution since the latter was merely a resolution and nothing more.

Lastly, Westfield argues pursuant to the unpublished district court opinion in Pub. Serv. Elec. Co. v. Westfield, (D.N.J., September 5, 1918), that "the Town did indeed have the power to reasonably regulate power lines in a manner that it deemed appropriate[.]" (Db41). There, Public Service Electric Company sought to restrain Westfield's ability to remove certain poles erected on Grove Street, Rahway Road, Alston Road, and Scotch Plains Avenue. Importantly, the District Court merely held that because there was no federal question involved, "[t]he remedy of the complainant is in the state courts. It follows that an injunction must be denied, and the bill dismissed." (Da467a). Thus, Westfield's reliance on this case is devoid of merit for this reason alone. Perhaps more importantly, Westfield's reliance on the 1918 decision is misplaced in light of the New Jersey Supreme Court's ruling in In re PSE&G. When viewed against the backdrop of the robust statutory and regulatory scheme that has arisen since 1918, and subsequent controlling New Jersey Supreme Court precedent, it becomes clear that the 1918 case is irrelevant to the Court's inquiry in this matter.

C. Westfield's reliance on other "statutory authority" is misplaced.

Westfield provides a "laundry list" of statutes it asserts demonstrate the "State Legislature has created a statutory scheme of general application that requires

municipal consent in numerous scenarios relevant to public utilities." (Db42).[5] Four of the statutes listed by Westfield (N.J.S.A. 48:17-8, N.J.S.A. 48:17-10, N.J.S.A. 48:17-11, and N.J.S.A. 48:17-12) apply only to telephone poles. See Seals v. Cnty. of Morris, 210 N.J. 157,173-74 (2012) (stating that "[t]he utility pole in this case is an electric pole, not a telephone pole, and ... [t]he Legislature has chosen to treat these two types of utility poles in very different ways."). Thus, the four statutes governing telephone poles are inapplicable to the electric utility poles at issue in this case.

Likewise, N.J.S.A. 48:3-19 applies only to "joint use" of poles by two or more entities and N.J.S.A. 48:7-2 applies only to underground lines. Both statutes are inapplicable.

The only statute that is applicable is N.J.S.A. 48:7-1. However, as discussed above, that statute's conferral of authority on municipalities is exceedingly narrow and limited, and does not provide any statutory basis for Westfield's Ordinance.[6]

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[5] In passing, Westfield states that the Ordinance is explicitly based on the Federal Telecommunications Act, Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat ("FTA"). (Db37.) The FTA regulates "personal wireless service facilities," not electric utilities. 47 U.S.C. § 332(c).

[6] Westfield asserts in footnote 7 (Db45) that the trial court cited to N.J.S.A. 48:3-17.1 in its decision. This is incorrect. The trial court did not state that its opinion was based on N.J.S.A. 48:3-17.1. (Da006a). Rather, it simply referred to this statute under Section III – Law – in the decision. (Da0006a).

D. Westfield's reliance on the Red Bank case is misplaced.

Westfield argues that N.J. Nat. Gas Co. v. Borough of Red Bank, 438 N.J. Super. 164 (App. Div. 2014) (hereafter "Red Bank") establishes that municipalities retain some control over poles and electric lines even after permission is first granted to place said poles and lines. (Db45).[7] The Red Bank decision is wholly inapposite. In Red Bank, the Appellate Division held that a gas utility was not exempt from a municipal ordinance that regulated the placement of certain gas-related facilities on public streets. Id. at 185. Among other things, Red Bank turned on the construction and application of a statute, N.J.S.A. 48:9-17, that governs only natural gas utilities and has no application whatsoever to electric utilities. That alone renders the Red Bank decision as inapplicable to this case.

Furthermore, Red Bank involved a utility project that was situated wholly within the municipality, in stark contrast to the multijurisdictional electric transmission project that was the subject of the In re PSE&G decision (and the multijurisdictional electric transmission project that is the subject of this litigation). Notably, the Red Bank court properly drew this distinction and distinguished the

[7] Westfield also cites State v. Jersey Cent. Power & Light Co., 55 N.J. 363 (1970) for the proposition that "the State Legislature has evinced an intent to give municipalities some ability to regulate utilities within their boundaries". (Db46). This case exclusively involved the municipal zoning power. Id. at 368. This case arose in the context of a distinct statutory scheme that is not at issue in this litigation; thus, Westfield's reliance on Jersey Central is misplaced.

case from In re PSE&G. Therefore, the two cases are readily distinguishable for this reason alone.

For all of these reasons, Westfield's remaining arguments on appeal should be disregarded and the trial court's Opinion and Order granting summary judgment to PSE&G should be affirmed.

CONCLUSION

For the foregoing reasons, PSE&G respectfully requests that the Court affirm the trial court's Opinion and Order.

Respectfully submitted,

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Dated: Newark, New Jersey
January 5, 2024

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
Plaintiff-Respondent	**Appeal No. A-003602-22**
v.	**Civil Action**
TOWN OF WESTFIELD,	**On appeal from Law Division, Superior Court of New Jersey, Union County.**
Defendant-Appellant	**Docket No. Below: UNN-L 001092-22**
	Sat Below:
	Hon. Mark P. Ciarocco, J.S.C.

REPLY BRIEF OF TOWN OF WESTFIELD

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PRELIMINARY STATEMENT

In its opposition to the Town of Westfield ("Westfield") in this appeal, Public Service Electric and Gas Company ("PSE&G") bases its argument on the assertion that the route preferred by PSE&G through Westfield is necessary to enable it to carry out its "Project" for providing an additional source of power that may be deemed necessary for the provision of adequate electrical service. This is a central fallacy that undermines all of PSE&G's opposition. There is zero evidence that PSE&G's preferred route using Westfield's right-of-way has been determined to be necessary. To the contrary, the record fully establishes the existence of multiple technically feasible ways and routes for connecting additional stations without utilizing Westfield's right-of-way in its public streets.

Because the essence of PSE&G's argument on pre-emption is that the Ordinance is pre-empted because it is contrary to state statutes, it is incumbent on PSE&G to show not only that having a third source of power is necessary (which the Ordinance does purport to address), but ***also that the route through Westfield that PSE&G prefers to use is also necessary*** and that other routes that are not subject to the Ordinance are not available. This, it has not done; and the existence of other available routes that are not prohibited by the Ordinance prevents the existence of any such conflict.

The record, and the language of the Ordinance, is abundantly clear that the Ordinance does not contain an absolute prohibition on PSE&G's route ***if*** the route were actually necessary for the provision of adequate service. All PSE&G had to do was to apply for the ordinance exemption if the planned use of the right-of-way is truly necessary to provide adequate service, and establish that such circumstances exist. Absent such an application and its denial, the Ordinance does not prohibit a route necessary to provide adequate service, and the Ordinance does not come into conflict with any statute and therefore is not pre-empted.

STATEMENT OF FACTS IN REPLY

PSE&G does not address, and would have this Court ignore, critical facts that negate its arguments and the authorities it relies upon; principally the statute that requires the provision of adequate service and the case of *In re Pub. Serv. Elec & Gas Co.*, 35 N.J. 358 (1961).

1. Westfield Is The Owner of the Right-of-Way

Perhaps the most important fact that PSE&G ignores is that PSE&G's preferred route is to put its poles and lines in the right-of-way of the public streets controlled and regulated by Westfield. This severely undercuts PSE&G's key authority, *In re Pub. Serv. Elec & Gas Co.*, *supra*, which involved an ordinance that applied to any and all property located in the municipality, even if owned by others. Here, it is quite a different thing to say that a municipality does not have **any** say in

how the property which it owns is used by a third party. Moreover, as cited in Westfield's initial brief at pp. 42-43, the use of public streets and public rights-of-way is conditioned by many statutes on obtaining the consent of the municipality and/or the owner of the property on which the lines are to be erected.

2. Westfield's Right and Power to Regulate the Location and Manner of poles in its Right-of-Way Arises from a Long-Standing Contract Between the Parties

Second, PSE&G ignores, as did the court below and as it would have this Court ignore, the simple and unchallenged fact that an agreement ("the 1892 Agreement"), (DA-61a *et seq.*), exists between Westfield and PSE&G (by virtue of PSE&G being the successor to Suburban Electric) that provides that the utility "shall be subject to such prudential rules and regulations as the said Township Committee may from time to time prescribe by ordinance or otherwise . . ." (DA-65a) and which subjects the placement of poles to the supervision of the governing body such that it could regulate how and where lines are installed. In *In re Pub. Serv. Elec & Gas Co., supra*, there was no independent and ongoing contract right to prescribe rules and regulations pertaining to the location and dimensions of poles.

3. The Contract Between Westfield and PSE&G Has Been Ratified and Blessed by the Legislature

In addition, the 1892 Agreement was ratified and given legislative force by P.L. 1898, c. 197, p. 458 ("all contracts entered into by the several municipalities with electric light, heat and power companies, in the carrying out of which subways

or pole-lines have been erected by such companies, shall be taken to be legal and binding . . . ." No such legislative authorization for municipal control was present in *In re Pub. Serv. Elec & Gas Co., supra*.

4. The Continued Validity of the Contract Between Westfield and PSE&G has been Preserved and Recognized by the Same Legislature that Enacted N.J.S.A. 48:7-1, which PSE&G Claims Repealed the Contract

At page 33 of its Brief, PSE&G asserts that the 1892 Agreement and resolution did not survive the enactment of N.J.S.A. 48:7-1, stating that N.J.S.A. 48:7-1 was enacted in 1962, which is years after the resolution. PSE&G disregards the fact that the same 1962 enactment also saved from repeal P.L. 1898, c. 197, which declared such agreements to be valid and binding. N.J.S.A. 48:7-6. PSE&G's argument further disregards the well-settled law that repealers of statutes (in this case, P.L. 1898, c. 197) are not to be implied.

5. The validity of the Contract Between Westfield and PSE&G Has Been Recognized by Courts Since 1912

PSE&G's key authority, *In re Pub. Serv. Elec & Gas Co., supra*, did not involve a series of prior judicial rulings that the agreement between the parties regulated the placement of poles. See, *Public Service Corp. v. Westfield*, 80 N.J. Eq. 295, 303 (Ch. Div. 1912), affirmed, 82 N.J. Eq. 662 (E.&A. 1914) and *Public Service Electric Company v. Westfield* (D.N.J., Sept. 5, 1918) (DA at 461a *et seq.*). These judicial determinations have long since become *res judicata*.

6. Westfield's Ordinance Does Not Prohibit the Placement of Poles that Exceed the Ordinance's Requirements When the Poles are Necessary to Provide Adequate Service

The Ordinance also provides for an applicant to request an exception from any of the requirements of the Ordinance. DA at 49a. See also, DA at 51a. Grounds for the issuance of an exemption by the municipality include instances where the denial of a permit would violate federal or state law (DA at 51a). Thus, if as PSE&G argues (an argument which Westfield disputes), prohibiting the placement of the poles it seeks to place would conflict with state or federal law requiring the provision of adequate service, then the Ordinance does not conflict with state or federal law since the provision for an exemption prevents the existence of any conflict that could be the basis for a claim of preemption.

7. Preemption Requires that the Ordinance Conflict with a State Statute

It is well-settled that for preemption to take place, the Ordinance must conflict with a legislative enactment. *Feldman v. Lederle Labs.*, 125 N.J. 117, 135 (1991). Because the Ordinance allows for exemptions when necessary to provide adequate service (DA-51a), the statute which PSE&G relies upon to preempt the Ordinance (*i.e.,* N.J.S.A. 48:2-23) is not in conflict with the Ordinance.

8. PSE&G Has Not Established the Existence of Any Order by the Board of Public Utilities Requiring PSE&G to Route the Lines through Westfield

PSE&G filed to establish that the requirements for the application of N.J.S.A. 48:2-23 as the legislative basis that required preemption have been met. That statute

provides "[t]he board may, after public hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service . . . ." The record in this action is devoid of any order by the Board of Public Utilities to sustain any invocation of N.J.S.A. 48:2-23 as a ground for preemption.

9. At a Minimum, There Was and Still Is a Genuine Dispute of Material Fact as to Whether the Route Through Westfield is Required to Provide Adequate Service

The evidence before the trial court establishes that at least four other routes were available and feasible. DA-347a. The same documentary evidence shows that PSE&G did not select the route through Westfield because it was the only route that would permit the provision of adequate service; rather that route was preferred and selected by PSE&G because it was the least expensive to PSE&G. DA at 348a *et seq*.; DA-353a (preferred and selected route has the lowest cost of all alternative routes). Just because one alternative is less expensive than other alternatives does render the cheapest one "required."

The undisputed fact that other alternative routes for the transmission lines exist which are not subject to Ordinance means that the particular route chosen by PSE&G is not necessary to provide adequate service; and therefore, the Ordinance is not in conflict with the statute PSE&G says it conflicts with.

ARGUMENT

POINT I

THE WESTFIELD ORDINANCE IS NOT PREEMPTED BECAUSE IT DOES NOT CONFLICT WITH ANY STATUTE AND BECAUSE THE LEGISLATURE PERMITTED WESTFIELD TO HAVE THE POWER TO REGULATE THE POLES

The essence of preemption of ordinances by Legislative act was identified in *Feldman v. Lederle Labs.*, 125 N.J. 117, 135 (1991), *i.e.*, "when 'compliance with both federal and state regulations is a physical impossibility' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . . . ***The conflict, however, must be actual, not merely potential, speculative, or hypothetical.*** *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042, 1049 (1982)." [Emphasis added]. Although the *Feldman* court had before it a question of preemption by federal law, the requirement that there be a real, actual conflict between the enactments of the lower body with those of the superior body remains the essence of the doctrine of preemption. See, *Overlook Terrace Mgmt. Corp. v. Rent Control Bd.*, 71 N.J. 451, 461 (1976).

The *Overlook* court identified five considerations in determining whether local action has been preempted by state action. They are (1) Does the ordinance conflict with state law, (2) Was the state law intended, expressly or impliedly, to be exclusive in the field, (3) Does the subject matter reflect a need for uniformity, (4)

Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation, (5) Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

The answer to first two questions in the present matter is an unqualified "no." The express provisions in the Ordinance for an exemption from any restrictions or requirements on poles if those restrictions or requirements conflict with any state or federal law prevents any such real conflict from arising or existing; and the Legislature's express validation of pre-1898 agreements between municipalities and electric utilities (P.L. 1898, c. 197; and N.J.S.A. 48:7-6's more recent saving of that law from repeal) establishes that the Legislature did not intend to have exclusive power in the field pertaining to the placement of utility poles.

With respect to question number 5, the Ordinance does not stand as an obstacle to the accomplishment of the objectives of the Legislature[1] since it provides for an exemption from the pole requirements if in fact they conflict with any state law. As to question number 4, the enactment of P.L. 1898, c. 197, and its saving from repeal by N.J.S.A. 48:7-6 precludes any such finding – the Legislature could not have rationally intended a scheme that is so comprehensive as to exclude any municipal role when the Legislature itself provided for and validated such a role.

[1] PSE&G identifies the provision of adequate service as the Legislative objective.

See also, N.J.S.A. 48:7-1, which expressly requires that a person placing poles in any street first obtain the consent of the municipality of the manner in which the poles are placed.

As to the third question of whether the subject matter inherently needs statewide treatment in terms of jurisdictional power such that the constitution prohibits delegation of power to the municipality to enact such ordinances, PSE&G cites to no authority to support that proposition.[2] Thus, PSE&G necessarily hangs its hat on the asserted need for uniformity and relies on the case of *In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961).

In re Public Service Electric and Gas Co., *supra*¸ is distinguishable from the present matter on many grounds. First, the Borough of Roselle's ordinance prohibited all above ground power lines. Second, the application of Roselle's ordinance was with respect to all property in the municipality (including all private property), and not just with respect to streets and municipal rights-of-way. Westfield's Ordinance is limited to the public streets and rights of way. Third, and perhaps most importantly, Roselle's ordinance contained no provision for any exemption from its requirements if the requirements conflicted with any state law; destroying any uniformity between local and state requirements. Fourth, in *In re*

[2] Indeed, PSE&G has disclaimed in its brief any application of constitutional requirements when it asserts that the "as applied" doctrine is limited to constitutional preemption and does not apply in the present matter.

Public Service Electric and Gas Co., 35 N.J. 358, 371 (1961), there actually was an express finding by the Board of Public Utility Commissioners (after extensive hearings)[3] that the specific lines through Roselle were reasonably necessary to provide adequate service. Indeed, in *In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961), the Board of Public Utility Commissioners found that "no suitable alternative route" was available. Id. Here, PSE&G has failed to show that any public hearing was held on the necessity of the route through Westfield or that the Board of Public Utilities issued any such order finding the route to be necessary.[4] at 368. In the present matter, alternative routes are available. Fifth, PSE&G was not subject to any agreement with Roselle relating to erection of poles and placement of lines. Simply put, none of the circumstances relied upon in that case for the outcome are present in this matter.

The Westfield Ordinance presents entirely separate issues, such as the impairment of its contract with PSE&G, the Legislative recognition and validation of that agreement (and in doing so, the Legislature's recognition that state law was

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[3] Thus, it complied with the requirements for the issuance of an order after public hearing which are set forth in N.J.S.A. 48:2-23.

[4] In the present matter, any review by the Board of Public Utilities and PJM was admitted by PSE&G to have been with respect to establishment of a third substation to this area of the grid, and not to the route by which it would be connected with existing substations. DA-301a ("Q. Do you know if the ultimate route that's used has to be approved by either PJM or the BPU? A. No, it does not.")

not intended to be exclusive when it comes to placing poles and routing lines within the municipal rights-of-way), the limitation of the scope of the Ordinance to Westfield's right-of-way and its complete inapplicability to other available routes over private property, and the absence of any conflict between the Ordinance and state law because of, *inter alia*, the exemption allowed under the Ordinance in the event it would otherwise conflict with state law.

As recognized by the Supreme Court in *In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961), "[a] municipality, being a creation of the State, has, of course, only such powers as are delegated to it by the State." Id. at 370 Although that municipal power may be restricted when "the State Legislature has not spoken" and also involves "matters inherently in need of uniform treatment." Id. Here, however, the Legislature has spoken through P.L. 1898, c. 197, N.J.S.A. 48:7-6, and N.J.S.A. 48:7-1; and in doing so has granted the power without restriction. By conferring that power, the Legislature also determined that the placement and manner of construction of above ground lines is not a matter inherently in need of uniform treatment.

Just as important is that in *In re Public Service Electric and Gas Co., supra,* while the court noted that the Legislature conferred general supervision and regulation of and jurisdiction and control over all public utilities upon the Board of

Public Utility Commissioners (Id. at 371), the court qualified the extent of that power when it also stated:

> Where the state has thus established an agency of its own with plenary power to regulate utilities, it is universally recognized that municipalities cannot properly interpose their local restrictions ***unless and only to the extent any power to do so is expressly reserved to them by statute.***

Id. at 372 (emphasis added). In the present case, the power of Westfield to impose the restrictions has, in fact and law, been reserved to the municipality. P.L. 1898, c. 197; N.J.S.A. 48:7-6; N.J.S.A. 48:7-1. None of those statutes applied to the proposed line through Roselle.

The key to properly understanding the preemption found in *In re Public Service Electric & Gas Co., supra*, is the statement that "[w]hile some reservation of municipal control over the installation of overhead power lines and underground cables may be found in *R.S.* 48:7-1 and 2, this control is limited to a requirement of municipal consent where an electric company desires to use *public streets* for the construction of overhead or underground lines . . . ." Id. at 372-73. While the court did make reference in dicta to the provision of service to local residents, neither of the statutes that the court relied upon were in anyway limited to lines that provide local service. Thus, PSE&G's claim that the basis for the preemption in *In re Public Service Electric & Gas Co., supra*, was based on the distinction between local distribution and supply transmission is unsupported. The *ratio decidendi* of the

decision was that while municipalities have an ability to control the installation of power lines in public streets and rights-of-way, the line in Roselle was not along a public street or right of way. Moreover, with the Westfield Ordinance' exemption provision for exempting lines from the Ordinance's requirements if they would result in a violation of state or federal law, the Ordinance assures the ability of the Board of Public Utilities to assure the ability to fulfill the obligation of furnishing safe, adequate and proper service – it merely requires the Board to exercise that power and make the necessary determinations in accordance with its governing statutes (most notably N.J.S.A. 48:2-23 which requires an order issued after public hearing).

PSE&G's argument at p. 21 of its brief that approval of the BPU for the route is irrelevant must be rejected. First, the very statute PSE&G relies upon to create the conflict to preempt the ordinance *requires* an order from the BPU. Second, PSE&G's reliance on *Matter of Petition of New Jersey Nat. Gas Co. for Permission to Revise Rates for Appliance Serv.*, BPU Docket No. GR91010051 (93 N.J.A.R.2d (BRC) 19 (N.J. Adm.)), Final Agency Decision (June 4, 1992), has no bearing on that issue. That administrative decision concerned the ability of a utility to engage in non-utility business activities; and as such is contrary to PSE&G's arguments that the BPU's regulatory authority preempts the Ordinance. Third, PSE&G's argument that the BPU ultimately has the power to determine how to exercise is discretion

requires, at a minimum, that BPU actually exercise its discretion; however, here it has not done so, since it has not made a determination that the Westfield route is actually necessary for the provision of adequate service.

Further, PSE&G's attempt to avoid the application of an "as applied" analysis requirement based on the assertion that such an analysis only applies to constitutional challenges is contrary to accepted precedents. See, *e.g., Redd v. Bowman,* 223 N.J. 87, 106 (2015) (holding that statue, as applied, was not invalid); *New Brunswick Cellular Tel. Co. v. Old Bridge Tp. Planning Bd.*, 270 N.J. Super. 122, 140 (Law Div. 1993) (remanding to board for determination whether application of zoning requirements impair the national interest).

POINT II

WESTFIELD PROPERLY RAISED AND/OR PRESERVED THE ARGUMENTS IT ASSERTS ON APPEAL

Westfield adequately preserved its arguments. With respect to the issue of "as applied" versus "facial" challenge to Westfield's ordinance, the issue was briefed and otherwise preserved on multiple occasions; specifically at PA-25a, PA-41a, PA-10a at n. 3; DA-252a (request # 8); DA-382a (interrogatory # 13); Transcript at 6:23-7:8; and Transcript 27:9 — 28:4. With respect to the assertion that Westfield did not brief or otherwise preserve the issue that Westfield did not distinguish *In re Public Service Electric & Gas Co.*, 35 N.J. 358 (1961) because Westfield does not

base its authority on the Municipal Land Use Law or general police power, that issues was addressed at DA-90a *et seq.*; PA-15a – PA-16a; PA-26a – PA-27a; PA-30a; PA-40a. Regarding the issue the issue that N.J.S.A. 48:2-23 is inapplicable, it was preserved in the aggregate at PA-35a; DA-347a; DA-301a; and DA-323a. With respect to N.J.A.C. 14:5-7.1 and N.J.A.C. 14:3-8.5(d), Westfield did not brief the inapplicability of those regulations because there was no reason to believe that the court below would not read and give effect to the express language of those regulations.

CONCLUSION

For the foregoing reasons, this Court must vacate the summary judgment entered in favor of PSE&G by the court below.

Respectfully submitted,

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Dated: February 8, 2024

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