THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0570

Northern New England Telephone Operations, LLC
d/b/a/ FairPoint Communications

v.

Town of Acworth

BRIEF OF THE APPELLANTS, TOWNS OF DURHAM AND HANOVER

Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Merrimack County in
Docket No. 220-2012-CV-100

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To Be Argued By:
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CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

RSA 72:8-a Telecommunications Poles and Conduit.

All structures, poles, towers, and conduit employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate in the town in which such property or any part of it is situated. Except as provided in RSA 72:8-c, the valuation of such property shall be based on its value as real estate. Other devices and equipment, including wires, fiber optics, and switching equipment employed in the transmission of telecommunication, cable, or commercial mobile radio services shall not be taxable as real estate.

RSA 72:23 Real Estate and Personal Property Tax Exemption.

The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:

I. (a) Lands and the buildings and structures thereon and therein and the personal property owned by the state of New Hampshire or by a New Hampshire city, town, school district, or village district unless said real or personal property is used or occupied by other than the state or a city, town, school district, or village district under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property. The exemption provided herein shall apply to any and all taxes against lands and the buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts, which have or may have accrued since March 31, 1975, and to any and all future taxes which, but for the exemption provided herein, would accrue against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts.

(b)(1) All leases and other agreements, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a county, city, town, school district, or village district, entered into after July 1, 1979, shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property no later than the due date.

231:160-a Exception for Existing Locations.

Any poles, structures, conduit, cables or wires, the location of which have already been approved by the local land use board as part of a subdivision, site plan, or other development approval, shall, if such location becomes a public highway, be deemed legally permitted or licensed without further proceedings under this subdivision; provided, that copies of the appropriate utilities' easements, work plans, or other data showing locations of such structures, are submitted to the municipality for recording purposes.

RSA 231:161 Procedure.

Any such person, copartnership or corporation desiring to erect or install any such poles, structures, conduit, cables or wires in, under or across any such highway, shall secure a permit or license therefor in accordance with the following procedure:

I. Jurisdiction.

(a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(b) City Maintained Highways. Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor

and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this subdivision for selectmen; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herein. The commissioner shall also have the same authority as conferred upon the selectmen by RSA 231:163 to revoke or change the terms and conditions of any such license. The commissioner is hereby authorized to delegate all or any part of the powers conferred upon him by the provisions of this section to such agent or agents as he may duly appoint in writing; he shall cause such appointments to be recorded in the office of the secretary of state, who shall keep a record thereof.

(d) The word "selectmen" as used in the following paragraphs of this section shall be construed to include all those having jurisdiction over the issuance of permits or licenses under paragraph I hereof.

II. Permits. The petitioner may petition such selectmen to grant a permit for such poles, structures, conduit, cables or wires. If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduit, cables or wires. Such permit shall designate and define in a general way the location of the poles, structures, conduit, cables or wires described in the petition therefor. Such permit shall be effective for such term as they may determine, but not exceeding one year from the date thereof, and may, upon petition, be extended for a further term not exceeding one year. A permit

shall not be granted to replace an existing utility pole on any public highway unless such replacement pole is erected at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20-foot requirement.

III. Effect of Permit. Except as otherwise provided herein, the holder of such permit shall during the term thereof be entitled to have and exercise all the rights, privileges and immunities and shall be subject to all the duties and liabilities granted or imposed hereby upon the holder of a license hereunder.

IV. Licenses. The petitioner may petition such selectmen to grant a license for such poles, structures, conduit, cables or wires. If the public good requires, the selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduit, cables or wires described in the petition.

V. Provision of Licenses. The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduit and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the placement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

VI. Effect of License. All licenses granted under the provisions hereof shall be retroactive to the date the petition therefor is filed. The word "license" as hereinafter used herein, except in RSA 231:164 shall be construed to include the word "permit". The holder of such a license, hereinafter referred to as licensee, shall thereupon and thereafter be entitled to exercise the same and to erect or install and maintain any such poles, structures, conduit, cables, and wires in approximately the location designated by such license and to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures,

transformers and other attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service; and to place in such underground conduit such number of ducts, wires and cables as they are designed to accommodate, and to supply and install in connection with such underground conduit and cables the necessary and proper manholes, drains, transformers and other accessories which may reasonably be required.

RSA 516:29-b Disclosure of Expert Testimony in Civil Cases.

I. A party in a civil case shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the New Hampshire rules of evidence.

II. Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report signed by the witness. The report shall contain a complete statement of:

(a) All opinions to be expressed and the basis and reasons therefor;

(b) The facts or data considered by the witness in forming the opinions;

(c) Any exhibits to be used as a summary of or support for the opinions;

(d) The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;

(e) The compensation to be paid for the study and testimony; and

(f) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

III. These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required in accordance with the court's rules.

IV. The deposition of any person who has been identified as an expert whose opinions may be presented at trial, and whose testimony has been the subject of a report under this section, shall not be conducted until after such report has been provided.

V. The provisions of this section shall not apply in criminal cases.

CHAPTER 208

HB 1198-FN-LOCAL - FINAL VERSION

2016 SESSION

AN ACT relative to the valuation of poles and conduit owned by telephone utilities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

208:1 Reference Change. Amend RSA 72:8-a to read as follows:

72:8-a Telecommunications Poles and Conduit. [Except as provided in RSA 72:8-b,] All structures, poles, towers, and conduit employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate in the town in which such property or any part of it is situated. Except as provided in RSA 72:8-c, the valuation of such property shall

be based on its value as real estate. Other devices and equipment, including wires, fiber optics, and switching equipment employed in the transmission of telecommunication, cable, or commercial mobile radio services shall not be taxable as real estate.

208:2 New Section; Property Taxation; Valuation of Poles and Conduit Owned by Telephone Utilities; Rulemaking. Amend RSA 72 by inserting after section 8-b the following new section:

72:8-c Valuation of Telecommunications Poles and Conduit; Rulemaking.

I. The value of wooden poles or conduit employed in the transmission of telecommunications owned in whole or in part by telephone utilities, as described in RSA 362:7, or providers of Voice over Internet Protocol ("VoIP") service or IP-enabled service, each as defined in RSA 362:7, or commercial mobile radio services, for purposes of tax assessment against said entity, shall be determined by the following formula: the Replacement Cost New (RCN) of the telecommunications pole or conduit, less depreciation calculated on a straight-line basis for a period of 40 years with a residual value of 20 percent.

II. On or before July 1 of the tax year, the department of revenue administration shall provide to every municipality a schedule of telecommunications pole and conduit RCN, using national published telecommunications standard cost data guides calculated annually using a 5-year rolling average.

III. The commissioner of the department of revenue administration shall adopt rules pursuant to RSA 541-A relative to how telecommunications pole and conduit RCN shall be established, including a process for receiving public input prior to such establishment.

208:3 New Section; Taxable Property; Inventory; Telecommunications Poles and Conduit. Amend RSA 74 by inserting after section 18 the following new section:

74:19 Inventories of Telecommunications Poles and Conduit.

I. In order to properly determine the value of property under RSA 72:8-c, an inventory of telecommunications poles and conduit shall be filed with the department of revenue administration and with the municipality where the property is located by each owner of telecommunications poles and conduit. Each form may include the following information:

(a) Name and address of a contact person if the owner is a trust or corporation.

(b) Detailed description of the telecommunication poles using most recent readily available information held by the owner.

(c) Description of conduit using most recent readily available information held by the owner.

(d) The filer's dated signature certifying that the information indicated on the form is true.

II. The inventory of telecommunications poles and conduit required by this section shall be filed with the department of revenue administration and with the municipality where the property is located by the owner of telecommunications poles and conduit no later than July 1. Persons required to file the inventory of telecommunications poles and conduit who willfully fail to file or willfully make false statements on the forms shall be guilty of a violation.

III. Any person or corporation required to file an inventory of telecommunications poles and conduit shall be subject to the provisions of RSA 74:12.

208:4 Reference Change. Amend RSA 75:1 to read as follows:

75:1 How Appraised. The selectmen shall appraise open space land pursuant to RSA 79-A:5, open space land with conservation restrictions pursuant to RSA 79-B:3, land with discretionary easements pursuant to RSA 79-C:7, residences on commercial or industrial zoned land pursuant to RSA 75:11, earth

and excavations pursuant to RSA 72-B, land classified as land under qualifying farm structures pursuant to RSA 79-F, buildings and land appraised under RSA 79-G as qualifying historic buildings, qualifying chartered public school property appraised under RSA 79-H, residential rental property subject to a housing covenant under the low-income housing tax credit program pursuant to RSA 75:1-a, renewable generation facility property subject to a voluntary payment in lieu of taxes agreement under RSA 72:74 as determined under said agreement, telecommunications poles and conduit pursuant to RSA 72:8-c, and all other taxable property at its market value. Market value means the property's full and true value as the same would be appraised in payment of a just debt due from a solvent debtor. The selectmen shall receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination.

208:5 Effective Date. This act shall take effect September 1, 2016.

STATEMENT OF THE CASE

Prior to 2011, the equipment and use of the public rights-of-way by telecommunications companies was exempt from taxation. As of April 1, 2016, the valuation of the equipment (but not the use of the rights-of-way) is determined by a formula established by the legislature. Between 2011 and 2016, hundreds of tax abatement cases were filed by the taxpayer seeking reduction or elimination of the value assigned to its poles and use of the rights-of-way by the towns. Those appeals were consolidated, and the parties proceeded with discovery.

The trial court (McNamara, J.) bifurcated the cases into two phases: taxability issues and valuation issues. Test towns were chosen for both phases to represent all of the issues in each phase. In Phase I, the trial court issued an Order on Motions for Summary Judgment, dated December 14, 2015, attached at 57 (hereafter "Order on Motions for Summary Judgment"). That Order decided the legal issues in the case, such as whether the licenses issued by the towns to the taxpayer for use of the rights-of-ways were required to include specific, statutory language before the towns could tax the taxpayer for its assets and use of the rights-of-way. Only two of those legal issues are contested here–whether licenses which arise as a matter of law impliedly include that statutory language and whether the taxpayer occupies the public rights-of-way pursuant to an implied in fact perpetual lease.

The parties then selected three towns to serve as test cases on the issue of how the assets were to be valued. Those three towns were Belmont (tax year 2011), Durham (tax year 2013) and Hanover (2011)[1]. After a five day trial, the court issued an Order dated July 20, 2018 regarding the fair market value of the poles and conduit, as well as the taxpayer's use of the rights-of-way (hereafter

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[1]While there were two different tax years at issue, this was of no consequence to the analysis or the consideration of the issues.

"Order"). That Order is attached at 93. Many of the issues decided in that Order are presented here on appeal.

The Towns of Hanover and Durham sought reconsideration of that Order (Belmont having prevailed at the trial), which was denied by Order on Motion for Reconsideration, dated August 31, 2018, attached at 129 (hereafter "Order on Motion for Reconsideration"). This appeal followed. The taxpayer did not file a cross-appeal.

STATEMENT OF FACTS

While the facts specific to each issue will be set out more fully below, the basic facts are these. The Towns of Hanover and Durham assessed the poles and conduit owned by the taxpayer, as well as the taxpayer's use of the rights-of-way, and sent the taxpayer bills for its proportional share of the towns' tax burdens. The equalized[2] assessed values are as follows:

Town	**Poles and Conduit**	**Use of Rights-of-way**	**Resulting Tax[3]**
Durham	$3,793,565	$1,122,778	$146,363
Hanover	$2,507,404	$878,578	$62,426

The taxpayer appealed these assessments. During the five day trial, both parties presented testimony regarding their opinion of the correct fair market value of the assets. The towns asserted that the actual fair market value was:

Town	**Poles and Conduit**	**Use of Rights-of-way**	**Resulting Tax**
Durham	$2,955,500	$477,900	$102,217
Hanover	$3,953,700	$984,100	$91,036

[2]As the Court is no doubt aware, assessments represent a percentage of the fair market value of the property. The Department of Revenue Administration sets that "equalization ratio" for each town each year. For 2011, the Town of Hanover's equalization ratio was 101.3%; for 2013 Durham's was 97.9%.

[3]Hanover's 2011 tax rate was $18.20/$1,000. Durham's tax rate for 2013 was $30.41/$1,000.

The taxpayer asserted the actual fair market value was:

Town	Poles and Conduit	Use of Rights-of-way	Resulting Tax
Durham	$1,073,807	$221,021	$38,549
Hanover	$1,193,155	$244,753	$26,510

In arriving at their values, the parties all relied on experts. The towns utilized George E. Sansoucy, P.E. as their expert. Sansoucy, who has been recognized as an expert in valuing utility properties for the purposes of taxation by this Court as well as many other courts in New Hampshire. The details of Sansoucy's approach are set forth in the applicable sections below.

The taxpayer utilized the services of Anne Bulkley to arrive at its asserted value. Bulkley has limited experience valuing telecommunication assets and whose testimony has primarily been in other states. The details of Bulkley's approach are also set forth herein.

The trial court, which acknowledged that the entire purpose of the trial was merely to find facts and render a decision which could be appealed to this Court, see Transcript of Trial at 5-6, determined a value for the taxpayer's poles, conduit, and use of the public rights-of-way in each town and instructed the parties to submit a proposed final order applying the appropriate equalization ratio to the trial court's final opinions of total value in each town. The parties did so, making three corrections to the trial court's findings, and the proposed order was approved by the Court as follows:

Town	Court Determined Value	Equalized Value	Resulting Refund
Durham	$1,311,089	$1,283,556	$107,333
Hanover	$1,685,647	$1,707,560	$31,348

August 13, 2018 Final Order in Test Cases, attached at 127.

The trial court's decision was flawed for both legal and factual reasons, and it should therefore be reversed by this Court.

SUMMARY OF ARGUMENT

The trial court inappropriately shifted the burden of proof to the towns to prove that the assessments of taxpayer's property were correct, apparently believing that it was required to adopt one of the expert's opinion of value. This is not so. If the taxpayer's expert's opinion is not credible, the taxpayer has not met its burden of proof and the appeal is dismissed.

In reaching her opinion of value, taxpayer's appraiser, Anne Bulkley relied heavily on a so-called "New England Utility Survey" which she had conducted to obtain data for her cost approach analysis. Bulkley provided scant information about the Survey, and refused to provide the raw data to the towns or the court, even in a redacted format. Nonetheless, the trial court found that her reliance on the Survey was reasonable and her opinions of value based on the Survey were credible and probative. This Court should reverse that decision, because no reasonable person could have concluded that Bulkley's testimony was credible where the raw data upon which her conclusions were based was hidden from both the towns and the trial court.

This omission is even more glaring because the parties expressly chose not to waive the statutory expert disclosure requirements under RSA 516:29-b They were therefore required to include in their expert disclosures, among other things, "The facts or data considered by the witness in forming the opinions." RSA 519:26-b, II. The taxpayer clearly failed to comply with this requirement. Without that information, "there is no way for the Court or the Towns to evaluate the accuracy of the . . . data, what exactly [the expert] received for data, the scope of or the specific decisions [the expert] made, and her application of the data." Order at 6, attached at 99.

The trial court acknowledged that Bulkley did not comply with the disclosure requirements of RSA 516:29-b, and further recognized that her refusal to disclose "could diminish the probative value of the assumption made by Bulkley that the data is reliable." Order at 6, attached at 99. Inexplicably, the trial

court nevertheless concluded that the data is "probably reliable and probative" because the towns' attorneys did not move to compel its production. Order at 7, attached at 100. The trial court's determination that the towns must have believed the Survey was reliable and probative because the towns' attorney did not seek to compel disclosure effectively and improperly switched the burden of proof from the taxpayer to the towns.

The trial court also erred in finding held that guy wires and anchors were not subject to taxation. This ruling contradicts the plain language of RSA 72:8-a, which provides that all structures, poles, towers and conduit are taxable, while equipment employed in the transmission of services is not. Guys and anchors are clearly "structures" as that term is used in the statute because they are constructed in conjunction with poles to keep them upright and stable. They are therefore taxable.

Even if it were not clear that the term "structures" includes the guys and anchors, the statutory scheme here contemplates two categories of property: those parts which actively transmit services; and those that are the physical hosts for such transmission parts. The former are exempt from taxation; whereas the latter are taxable as real property. Guys and anchors do not actively transmit services. They are structural supports for the poles which host the transmitting equipment. Therefore, under the principle of *ejusdem generis*, they are taxable. The trial court erred in holding that RSA 72:8-a does not provide for the taxation of guys and anchors, and this Court should reverse.

The trial court held as a matter of law that poles which are licensed as a matter of law pursuant to RSA 231:160-a are not subject to taxation, absent the towns taking action to amend those licenses to include the language found in RSA 72:23. This interpretation of RSA 231:160-a is incorrect, and should be reversed by this Court. RSA 231:160-a provides an exemption from the process outlined in RSA 231:161, which requires the taxpayer to affirmatively seek licenses from towns when it wishes to construct poles in a public highway. It is in

essence an implied contract, and in every contract, "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it." U.s. Ex Rel. Hoffman v. City of Quincy, 71 U.S. 535, 550 (1867). The required taxing language from RSA 72:23 therefore is part of the license which arises as a matter of law.

RSA 231:160-a was adopted in 1989, long after the requirement that all agreements for the use or occupation of town property provide for the payment of taxes was adopted as part of RSA 72:23. Presumably the legislature was aware of this requirement when it adopted RSA 231:160-a. There is nothing in the language of the statute or in the legislative history of the bill that indicates that the legislature intended such automatically licensed poles to escape taxation unless the town undertook an affirmative action to amend the automatic license to include the taxation language, and it makes no sense to assume that the legislature intended automatically licensed poles be licensed in a way that is not consistent with statutory requirements.

The trial court further ruled that (a) the taxpayer's licenses to use the public rights-of-way were not leases and (b) taxpayer's interests in the use of the municipal rights-of-way were not perpetual. The trial court's holding is predicated upon a misapplication of applicable statutes and case law, and this Court should reverse it. The taxpayer's interest in the use and occupancy of the public rights-of-way constitute a perpetual lease, pursuant to which, as a matter of law, the taxpayer is deemed to be the owner of its interest in the public rights-of-way for property taxation purposes. Because the taxpayer is deemed the owner, the rights-of-way are not exempt town property and therefore the requirements of RSA 72:23 need not be met before the town can tax the taxpayer's use of the rights-of-way.

The trial court held that the taxpayer's pole licenses were not essentially leases because RSA 231 requires the taxpayer to acquire a "license" from the municipalities to use or occupy rights-of-way. The trial court erred in its analysis

because the evidence here clearly demonstrated that the taxpayer's use and occupancy of municipal rights-of-way is, in substance, a lease. Moreover, municipalities do not have the authority to unilaterally terminate the taxpayer's use and occupancy of municipal rights-of-way. While municipalities can impose limited restrictions on the exact placement or height of a pole, the fact remains that a municipality cannot prohibit, restrict, or otherwise unilaterally terminate a utility's use of municipal rights-of-way.

For the many of the same reasons set forth above, the trial court further erred in determining that the taxpayer's interest in the rights-of-way was not perpetual. Contrary to the trial court's view that the selectmen may not revoke or materially change a license. The selectmen may require the licensee to "remove" a pole only if they designate a new location for the pole,; and may not do so in a way that results in a disruption of the taxpayer's business or provision of service. In both law and fact, the taxpayer's use and occupancy of municipal rights-of-way is perpetual. The trial court erred in ruling that the taxpayer's interest in the use of the public rights-of-way does not constitute a perpetual lease and this Court should reverse that ruling.

Assuming *arguendo* that the Court does not reverse the trial court's decision for one of the many legal reasons set forth above, the Court should reverse the trial court's conclusion of pole value because the trial court did not properly account for many of the costs that should have been included in the value of the poles, such as the costs of digging, backfill, and concrete associated with the installation; mobilization costs; and contributions in aid of construction. Additionally, although the trial court held that assemblage costs, "should be associated with the value of the poles and conduit themselves," it then failed to add those assemblage costs to its value of the poles and conduit despite ruling them taxable. Finally, the trial court refused to include in the value of the poles and conduit the income earned by the taxpayer from "attachers;" other utilities that attach their equipment to and utilize the pole and pay for the right to do so.

The trial court also rejected the opinions of both experts regarding the depreciation rate to be applied in valuing the poles. Instead, the trial court adopted the depreciation rate set forth in HB 1198 (2016), a bill enacted well after the tax years in question, which requires that telecommunication poles be valued using replacement cost new depreciated by a 40 year depreciation rate. The court's reliance on HB 1198 in reaching the fair market value of the taxpayer's poles was an error and this Court should reverse that decision. HB 1198 (2016) amends, among other statutes, RSA 75:1 and adopts a new statute, RSA 72:8-c. The effect of the legislation was to provide that telecommunications poles and conduit were not to be assessed at fair market value, but instead were to be assessed pursuant to RSA 72:8-c. Despite the fact that this formula expressly does not result in the fair market value of poles, the determination of which should have been the object of the trial in this case, the trial court nonetheless chose to utilize it to calculate the fair market value of poles.

The trial court also erred in adopting Bulkley's approach to valuing the taxpayer's use of the public rights-of-way. Bulkley essentially adopted Judge Morrill's *dicta* in Verizon New England, Inc. v. City of Rochester, 2006 WL 3742673 (NH Super. November 9, 2006), in order to reach her conclusion of value. However, there is *no evidence* in the record to support the trial court's finding that applying Judge Morrill's findings results in a credible opinion of market value in *this* case. The trial court's finding that the use of the utility corridor should be evenly divided between all attachers and the taxpayer is likewise not supported by the record and should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

On questions of statutory interpretation, this Court is "the final arbiter of the legislature's intent as expressed in the words of a statute considered as a whole." Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003)(citation omitted). Trial court decisions regarding the admissibility of and weight given to an expert's report and testimony are reviewed under an unsustainable exercise of discretion standard. See, e.g., Cook v. Sullivan, 149 N.H. 774, 780 (2003).

II. THE TRIAL COURT ERRED IN SHIFTING THE BURDEN OF PROOF FROM THE TAXPAYER TO THE TOWNS

Though it cited the proper burden of proof standard in its decision, the trial court did not, in fact, apply that standard in this case. As has been well established by the statute and this Court, "[i]n a tax abatement case, the taxpayer bears the burden of establishing by a preponderance of the evidence that the town's assessment resulted in it bearing a disproportionate share of the town's burden." Order at 3, attached at 96 (citing Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003)). Nonetheless, the trial court did not hold the taxpayer to its burden in this case, instead shifting that burden to the towns to prove that the assessments were correct. This was legal error, and constitutes a basis for reversing the trial court's decision in its entirety.

The trial court appears to have believed that it could not find both experts' opinions of value lacking, and instead was required to adopt one of the expert's opinion of value; this is not so. Though framed as a "battle of the experts" case, a tax abatement battle occurs only if there is an initial finding that the taxpayer's expert offers a credible opinion of market value. If the taxpayer's expert's opinion is not credible, the taxpayer has not met its burden of proof and the appeal is

dismissed. In that situation, it is irrelevant whether the trial court finds the municipal expert's opinion of value credible or not; the town does not bear a burden to establish that the assessment is correct. In this case, no reasonable person could have found the Bulkley's opinion of value credible. As set forth in more detail in Section III, infra, neither the trial court, the towns, nor this Court can determine whether Bulkley's analysis is credible, because she refused to disclose the very basis of her findings. Without that information, there is no way to know even the most basic things necessary to establish credibility, such as whether her arithmetic is correct, much less to determine, as the trial court did, her data included bedrock installation costs. The trial court's finding that Bulkley was a credible witness is simply not supported by the facts, and its comparison of the experts' reports based on that finding resulted in the burden being shifted from the taxpayer being required to demonstrate that it was overassessed to the towns having to demonstrate that the assessments were correct. This was error, and should be reversed by this Court.

III. THE TRIAL COURT ERRED IN ACCEPTING THE TAXPAYER'S EXPERT'S TESTIMONY AS CREDIBLE, RELIABLE AND PROBATIVE

In reaching her opinion of value, Bulkley relied heavily on a so-called "New England Utility Survey" (hereafter "Survey") which she had conducted to obtain data to use for her cost approach analysis. However, Bulkley provided scant information about the Survey, despite requests from the towns that she do so. In fact, the only substantive information she provided about the Survey was that the data came from individuals she knew at six subsidiary companies which operate in New England and that some of those subsidiaries are owned by the same parent company. See Transcript of Trial at 171-174, Appendix to Brief of the Appellants Towns of Durham and Hanover ("App.") at 10-14. She refused to

identify the utilities with which she spoke or where in New England they were located. She also refused to provide the raw data she received from the undisclosed utilities, even in a redacted format. Despite Bulkley's refusal to provide the raw survey data, the trial court found that her reliance on the Survey was reasonable and her opinions of value based on the Survey were credible and probative.[4] The trial court's decision was untenable and unreasonable and prejudiced the towns. This Court should reverse that decision.

Trial court decisions regarding the admissibility of and weight given to an expert's report and testimony are reviewed under an unsustainable exercise of discretion standard. See, e.g., Cook v. Sullivan, 149 N.H. 774, 780 (2003). This Court's "only function is to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." Osman v. Wen Lin, 169 N.H. 329, 339 (2016)(quotation omitted). In this case, no reasonable person could have concluded that Bulkley's testimony that was based on the Survey was credible, because the raw data upon which her conclusions were based was hidden from both the towns and the trial court.

The parties in this case expressly chose not to waive the statutory expert disclosure requirements under RSA 516:29-b. See Case Structuring and ADR Orders, App. at 24. The parties were therefore required to include in their expert disclosures, among other things, "a complete statement of: (a) All opinions to be expressed and the basis and reasons therefor; [and] (b) The facts or data considered by the witness in forming the opinions." RSA 519:26-b, II. The taxpayer clearly failed to comply with this requirement, both prior to and even at

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[4]The trial court adopted Bulkley's value for poles (which relied upon both her survey and RSMeans (RSMeans is a construction cost estimating manual)) and adopted her survey-derived value for conduit, finding her RSMeans conduit value not credible.

trial. See Transcript of Trial at 170, App. at 9 ("Mr. Mitchell: Do you have the raw data here? Mr. Will: We have – no."); Order at 6. As the trial court noted in its decision, citing to RSA 516:29-b, "[a]s a general rule, an expert is required to provide in discovery all data upon which he or she relies." Order at 6, attached at 99. Without that information, "there is no way for the Court or the Towns to evaluate the accuracy of the . . . data, what exactly [the expert] received for data, the scope of or the specific decisions [the expert] made, and her application of the data." Order at 6, attached at 99.

It cannot seriously be argued that Bulkley was not required to provide the raw data upon which she relied in reaching her opinion of value. RSA 516:29-b is largely identical to Federal Rule of Civil Procedure 26(a)(2). Cases directly analyzing the specific issue presented here–the production of raw survey data as part of the mandatory discourse of an expert opining on the results of the survey–uniformly hold that the raw survey data must be produced as "data" that was "considered." JJI International, Inc. v. The Bazar Group, Inc., C.A. No. 11-206ML (DRI Apr. 22, 2013), App. at 30, (citations omitted).

The reason for the requirement that the data be disclosed is simple and self evident. Without it, neither the towns, nor the trial court, nor this Court have any idea whether the data utilized by Bulkley is, in fact, reliable and probative. Here, neither the towns, nor the trial court, nor this Court have any information regarding what specific costs were included in the data, what specific adjustments were made to that raw data, what calculations were made from that data, or even whether those calculations are arithmetically correct. Despite its inability to actually determine what data was collected, how that data was analyzed, or whether that analysis was objective or subjective, the trial court nonetheless "accepted Bulkley as a credible witness, and relied upon her

testimony, under oath, about what the Survey disclosed." Order on Motion for Reconsideration at 3, attached at 132. The trial court's "function requires more than simply taking the expert's word for it." K W Plastics v. United States Can Co., 131 F.Supp.2d 1289, 1292 (M.D.Ala 2001). The court is required to ensure that expert testimony relies not only upon a reliable methodology, "but also a sufficient factual basis and reliable application of the methodology to the facts." Id. (citation omitted). This the trial court failed to do.

The trial court's determination that the Survey was reliable was, in part, based on its assumption that the data included the increased cost of installing poles and conduit in bedrock, a factor which both parties agreed was important to the cost approach, and which the trial court specifically held that installing poles in bedrock was more costly than in soil and in fact "is often one of the largest cost components of a pole installation" and further that "the percentage of poles in bedrock [in each town] is obviously significant" in the cost analysis." March 12, 2018 Order on Motion in Limine at 9, App. at 42. Yet despite its inability to review the raw data and without any supporting evidence, the trial court concluded that "there is no doubt pole installation in New England would involve some percentage of bedrock or ledge installation. Any data base involving pole installation in New England – as Bulkley testified the Survey is – would include real world ledge boring costs." Order at 11, attached at 104. Further, the trial court necessarily presumed that any bedrock installation cost included in the Survey would be the same for each town, regardless of the number of poles actually installed in bedrock in each town. No reasonable person could have so concluded.

The trial court acknowledged that Bulkley did not comply with the disclosure requirements of RSA 516:29-b. Order at 6, attached at 99. The trial court further recognized that her refusal to disclose "could diminish the probative value of the assumption made by Bulkley that the data is reliable." Id. Inexplicably, the trial court nevertheless concluded that the data is "probably reliable and probative" because the towns' attorneys did not move to compel its production during discovery. Order at 7, attached at 100. In fact, the towns had been trying to obtain Bulkley's work papers since October 24, 2017. See Defendants Belmont's, Durham's and Hanover's Second Set of Request for Production of Documents Propounded to Plaintiff, App. at 46. For reasons largely beyond its control, the taxpayer did not respond to this request until March 7, 2018. See Responses to Defendants Belmont's, Durham's and Hanover's Second Set of Request for Production of Documents Propounded to Plaintiff, App. at 52. Therefore, there was limited time to review and digest the documents before trial, much less before Bulkley's deposition on April 2, 2018. Moreover, the burden to seek a protective order was not on the towns. Superior Court Rule of Civil Procedure 29(b) provides that the party *from whom discovery is sought* may seek a protective order relating to confidential research within the time set to respond to the discovery request. No such request was made by the taxpayer, and the trial court's determination that the towns must have believed the Survey was reliable and probative because the towns' attorney did not seek to compel disclosure effectively and improperly switched the burden of proof from the taxpayer to the towns.

The factual basis of Bulkley's testimony, the Survey, was undisclosed in violation of the requirements of RSA 516:29-b. This Court should therefore reverse the trial court's finding that Bulkley's testimony based on the Survey was

credible and could be relied upon in determining whether the taxpayer met its burden of proving it bore a disproportionate share of the towns' respective tax burdens.

IV. THE TRIAL COURT COMMITTED SEVERAL REVERSIBLE LEGAL ERRORS

A. The Trial Court Erred by Ruling That Guy Wires and Anchors Are Not Taxable Structures

With scant analysis, the trial court held that "guy wires and anchors are not subject to taxation. . . [because n]o statute specifically authorizes [their] taxation." Order at 11-12, attached at 104-05. This ruling contradicts the plain language of RSA 72:8-a.

At the time relevant to the present appeal, RSA 72:8-a provided that:

> [A]ll structures, poles, towers, and conduit employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate . . . The valuation of such property shall be based on its value as real estate. Other devices and equipment, including wires, fiber optics and switching equipment employed in the transmission of telecommunication, cable, or commercial mobile radio services shall not be taxable as real estate.

(emphasis added).

Guys and anchors are clearly not "devices and equipment" as those terms are used therein. "Device" is defined as "a piece of equipment or mechanism designed to serve a special purpose or perform a special function." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1994) at 317. Guys and anchors clearly are neither equipment nor mechanisms.

Instead, guys and anchors are "structures" as that term is used in the statute. "Structure" is generally defined as "something (as a building) that is constructed." *Merriam-Webster's Collegiate Dictionary* (10th ed. 1994) at 1167 (parentheses in original). Guys and anchors are constructed in conjunction with poles to keep them upright and stable. See, e.g., New York State Cable Television Association v. New York State Public Service Commission, 511 N.Y.S.2d 1013, 1014 (1987)("utility anchors and guys should be viewed as related to the physical integrity of the pole and an integral part of the pole structure."); Running Fence Corporation v. Superior Court of California, 124 Cal.Rptr. 339, 411 (1975)(poles, guys, anchors all "structural parts" of an art fence). They are therefore taxable.

Even if it were not clear that the term "structures" includes the guys and anchors, as this Court has held on several occasions, including the recent case of Forster v. Town of Henniker, 167 N.H. 745, 752 (2015)(citation omitted), when the legislature includes both general and specific words in a list, this Court will construe general words "to embrace only practices similar to those included in the enumerated list." The statutory scheme here clearly contemplates two categories of property: those parts which actively transmit services; and those that do not but instead are the physical hosts for such transmission parts. The former are exempt from real estate taxation; whereas the latter are taxable as real property.

In holding that guys and anchors are not subject to taxation, the trial court implicitly found that they fall into the former category of property. Guys and anchors, however, do not actively transmit services. Instead, they are structural supports for the poles which host the transmitting equipment. Therefore, under the principle of *ejusdem generis*, the only logical conclusion is that guys and

anchors are taxable.[5] The trial court erred in holding that the statutory language of RSA 72:8-a does not provide for the taxation of guys and anchors, and this Court should reverse.

B. The Trial Court Erred by Concluding That Poles Which Are Automatically Licensed Are Exempt from Taxation

In its Order on Motions for Summary Judgment, the trial court held that only where pole licenses issued by the town include language found in RSA 72:23 could the taxpayer's use of the rights-of-way be taxed. That holding is not contested on appeal. However, the trial court then went on to hold that poles which are licensed as a matter of law pursuant to RSA 231:160-a are not subject to taxation, absent the towns taking action to amend those licenses to include the language found in RSA 72:23. Specifically, the trial court held that "RSA 231:160-a intends to protect the equipment from forced removal. It does not follow that it intends that the use tax may automatically be imposed." Order at 23, attached at 116. This interpretation of RSA 231:160-a is incorrect, and should be reversed by this Court.

RSA 231:160-a provides that:

> Any poles, structures, conduit, cables or wires, the location of which have already been approved by the local land use board as part of a . . . development approval, shall, if such location becomes a public highway, be deemed legally permitted or licensed without further proceedings under this subdivision. . .

[5]Although there is nothing ambiguous about the statute, the legislative history supports this conclusion. See Minutes of Hearing before the House Committee on Local and Regulated Revenues, App. at 65; see also Committee Report, App. at 67.

This statute provides an exemption from the process outlined in RSA 231:161, which requires the taxpayer to affirmatively seek licenses from towns when it wishes to construct poles, structures, conduit, cables and wires in any public highway, and which provides towns with the opportunity to include the taxation language from the inception of the license. It is in essence an implied contract, and in every contract, "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it." U.s. Ex Rel. Hoffman v. City of Quincy, 71 U.S. 535, 550 (1867); see also Trustees of Philips Exeter Academy v. Town of Exeter, 90 N.H. 472, 484 (1940). The required taxing language from RSA 72:23 therefore is part of the license which arises as a matter of law.

RSA 231:160-a was adopted in 1989, long after the requirement that all leases and other agreements for the use or occupation of town property provide for the payment of properly assessed taxes was adopted as part of RSA 72:23. Presumably the legislature was aware of this requirement when it adopted RSA 231:160-a. See, e.g., Appeal of Wintle, 146 N.H. 664, 336(2001)(quotation omitted). There is simply nothing in the language of the statute or in the legislative history of the bill that indicates that the legislature intended such automatically licensed poles to escape taxation unless the town undertook an affirmative action to amend the automatic license to include the taxation language, and it makes no sense to assume that the legislature intended automatically licensed poles be licensed in a way that is not consistent with statutory requirements.

Moreover, the trial court's conclusion that it would not be unduly burdensome for the towns to amend the licenses to include the taxability language, see Order on Motions for Summary Judgment at 23, attached at 80, is

not supported by the facts. Such a process requires towns, every time they accept a road, to also vote to amend the licenses created by such acceptance to include the language required by RSA 72:23, I(b). While this may seem like a minimal step, it requires prior notice and a public hearing before such a change can be made. See RSA 231:163. Meanwhile, the taxpayer who is using the public way and which is fully aware of its responsibility to pay taxes on both its improvements and its use of the rights-of-way, escapes all tax liability unless and until the town does so. This transfers the taxpayer's tax burden to all of the other taxpayers in town. This can hardly be the outcome expected by the legislature in 1989 when it was assured that RSA 231:160-a would have a positive effect on the public interest. See Minutes of April 3, 1989 Senate Committee on Public Affairs Hearing, App. at 68.

RSA 231:160-a was adopted to streamline the administrative method for licensing poles; it was not intended to adopt any new policy. See id. The trial court's conclusion that RSA 231:160-a was merely intended to protect poles from forced removal pursuant to 231:173 is simply not supported by either the language or legislative history of RSA 231:160-a, and this Court should find that such automatically arising licenses include in their terms all required language from RSA 72:23.

C. The Trial Court Erred When it Determined That the Taxpayer's Use and Occupancy of Public Rights-of-way Was Not Pursuant to a Perpetual Lease That Gave Rise to an Independently Taxable Property Interest

The trial court ruled in its Order on the Towns' Motion for Reconsideration regarding its Order on Summary Judgment Motions ("Order on Reconsideration (Summary Judgment)") that (a) the taxpayer's licenses to use the public rights-of-

way were not leases and (b) taxpayer's interests in the use of the municipal rights-of-way were not perpetual. The trial court's holding is predicated upon a misapplication of applicable statutes and case law, and this Court should reverse it.

As a general rule, the public rights-of-way are exempt from taxation pursuant to RSA 72:23, I; however, non-governmental users and occupiers of the rights-of-way must pay taxes on their use of the governmental property. Here, the taxpayer's interest in the use and occupancy of the public rights-of-way constitute a perpetual lease, pursuant to which, as a matter of law, the taxpayer is deemed to be the owner of its interest in the public rights-of-way for property taxation purposes. Because the taxpayer is deemed the owner, the rights-of-way are not exempt town property and therefore the requirements of RSA 72:23 need not be met before the town can tax the taxpayer's use of the rights-of-way.

There are three circumstances under the common law in which a lessee of property is subject to taxation: (1) the leasehold interest is perpetual; (2) the leasehold is renewable indefinitely; or (3) the lessee has agreed to pay taxes on the value of the land. See Appeal of Reid (New Hampshire Bd. of Tax & Land Appeals), 143 N.H. 246, 249 (1999). The lessee in the first two situations is deemed the owner of the leased area, while the third is not. Id. Agreement to taxation is not required where the lessee is deemed the owner. Id.

> A holder of a defeasible title having the income or use of the land, may be taxable for the land….Such persons, enjoying the product out of which the land tax may be taken, *may be regarded, for the purpose of taxation, as the owners of the land,* although the value of their title may be much less than the value of the land…In reality the plaintiff's estate is not a leasehold at all, for it is well

> settled law that a perpetual lease upon condition conveys to the lessee a determinable or base fee. 'Every estate which may be of perpetual continuance is deemed to be a fee, and may within the definition of Lord Coke, of a fee-simple absolute, conditional, qualified, or base fee.'

Piper v. Meredith, 83 N.H. 107, 109-10 (1927)(internal citation omitted)(emphasis added).

The trial court held that the taxpayer's pole licenses were not essentially leases because RSA 231 requires the taxpayer to acquire a "license" from the municipalities to use or occupy rights-of-way. The trial court erred in its analysis and should have instead looked at the substance of the taxpayer's interest to determine whether such use did in fact constitute a lease. See Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co., 154 S.W.3d 432, 439 (Mo. Ct. App. 2005). The evidence here clearly demonstrated that the taxpayer's use and occupancy of municipal rights-of-way is, in substance, a lease. For example, in Alexandria the taxpayer's use and occupancy of municipal rights-of-way dates back to the 1930s and 1940s. At no time has Alexandria sought to terminate or otherwise interfere with the taxpayer's use and occupancy of the public rights-of-way. See Town of Alexandria's Objection to FairPoint's Motion for Summary Judgment and Cross-Motion for Summary Judgment on Ultra Vires Claims, App. at 89.

The nature of the taxpayer's use is such that the portion of the rights-of-way occupied by the taxpayer cannot be used by the municipality because the taxpayer has placed permanent structures on those portions of the rights-of-way. See Alexandria's Memorandum of Law in Support of Motion for Summary Judgment at 26, App. at 98. Further, the taxpayer retains all income from its use

of the municipal right-of-way including, but not limited to, revenue from customers, income from attachers to the poles or conduits, and fees for the taxpayer's common carrier facilities by competitors. Id. These facts are much more akin to those found to constitute a lease in Piper v. Meredith, than to the "transient and impermanent" interest that constitutes a license. See, Waterville Estates Ass'n. v. Town of Campton, 122 N.H. 506, 509 (1982).

Moreover, municipalities do not have the authority to unilaterally terminate the taxpayer's use and occupancy of municipal rights-of-way due to both the impact such termination would have on the taxpayer's franchise rights issued by the Public Utilities Commission ("PUC") and the limited scope of authority granted the selectmen to amend licenses under RSA 231:160 et. seq. While a municipality may alter licenses it issues, a municipality's authority is limited by the "public good" standard. See RSA 231:163. The application of this "public good" standard with regard to pole licenses is limited by RSA 374 and the PUC rules, because the taxpayer is a public utility. Towns therefore cannot exercise their authority so as to affect the provision of service. See Parker Young Co. v. State, 83 N.H. 551, 555-57 (1929).

The trial court erred when it stated that a municipality's ability to "control the manner of use, such as location and size" meant that the taxpayer's use and occupancy was not a lease. Order on Reconsideration (Summary Judgment) at 4, attached at 86. While municipalities can impose limited restrictions on the exact placement or height of a pole, the fact remains that a municipality cannot prohibit, restrict, or otherwise unilaterally terminate a utility's use of municipal rights-of-way. In these circumstances, such characteristics require the finding that, as a matter of law, the taxpayer's interest constituted a lease.

For many of the same reasons set forth above, the trial court further erred in determining that the taxpayer's interest in the rights-of-way was not perpetual. The taxpayer's use of the public rights-of-way is regulated by both the PUC pursuant to RSA 374 and the town selectmen pursuant to RSA 231:160 et. seq. The taxpayer must first obtain permission from the PUC to operate in a particular municipality. See RSA 374:22. The taxpayer is specifically authorized by statute to utilize the public rights-of-way for its telecommunications property, subject to the requirement that it obtain a pole license from the selectmen as to the specific location of the poles. RSA 231:160, RSA 231:161. The selectmen must issue the pole license if they find doing so is required for the public good. RSA 231:161, IV. Once issued, the licensee "shall thereupon and thereafter" be entitled to maintain is property in the rights-of-way in the approximate location approved under the license.

Contrary to the trial court's view that the selectmen may revoke or materially change a license, they cannot. The selectmen may require the licensee to "remove" a pole only if they designate a new location for the pole, see RSA 231:177 – 231:179; and may not do so in a way that results in a disruption of the taxpayer's business or provision of service. See RSA 362:7, II. For example, the selectmen can order the licensee to relocate a pole to a different location nearby so that the town can widen the road but it cannot order the poles moved to a different road such that service cannot be provided to the original road. See Parker Young., 83 N.H. 551 (1929)(municipalities' authority to regulate the location of poles was superseded by the PUC's authority to grant franchise rights to public utilities). In short, while municipalities retain the ability to manage the use of their public rights-of-way, that authority is limited, and municipalities

cannot regulate that use to such an extent so as to indirectly cause the discontinuance the taxpayer's services within a franchise area. Id.

In both law and fact, the taxpayer's use and occupancy of municipal rights-of-way is perpetual. The trial court erred in ruling that the taxpayer's interest in the use of the public rights-of-way does not constitute a taxable perpetual lease and this Court should reverse that ruling.

IV. THE TRIAL COURT ERRED IN REACHING ITS CONCLUSION OF VALUE OF TAXPAYER'S POLES

Assuming *arguendo* that the Court does not reverse the trial court's decision for one of the many legal reasons set forth above, the Court should reverse the trial court's conclusion of pole value because the trial court did not properly account for many of the costs that should have been included in the value of the poles, thus allowing property to escape taxation; and because the trial court used an incorrect depreciation schedule.

A. The Trial Court's Determination of Value of the Poles Does Not Properly Account for All Costs

The trial court adopted Bulkley's value[6] for poles. Bulkley arrived at her value by giving RSMeans and her undisclosed Survey derived values equal weight in her reconciliation. The omission of taxable value from both approaches resulted in such value also being omitted from her reconciled value that the trial court utilized in arriving at its depreciated value for poles.

Unlike Bulkley, Sansoucy included in his value the appropriate installation and construction costs from RSMeans. See RSMeans Heavy Construction Costs Data, Defendants' Exhibit G, pp. vii, ix, App. at 75-76. Sansoucy concluded that

[6]As used in this section, "value" means the replacement cost new value before depreciation is applied.

the pole installation costs set forth in RSMeans were reasonable based on his review of the *taxpayer's* actual installation costs, and actual costs provided by the Littleton Water & Light Department. These were actual, real world New Hampshire costs. Nonetheless, the trial court did "not credit this testimony because the samples it used were too small to provide a reasonable check on the RSMeans derived installation costs." Order at 9, attached at 102. This total rejection of the RSMeans costs was not fact based and was unreasonable given that the trial court later acknowledged that RSMeans is "generally accepted in the industry," and "the Department of Revenue Administration requires municipalities to use RSMeans in order to provide standard cost data" Order at 9 and fn 4, attached at 102. Further, the trial court specifically held that "RSMeans is entitled to weight as the testimony from both experts is that it is generally accepted in the utility industry." Id. Contrary to Sansoucy's approach, Bulkley purposefully *excluded* from her RSMeans analysis the costs of digging, backfill, and concrete associated with the installation. She testified that her RSMeans value was initially higher than her Survey value so she called two contractors to see if they used RSMeans. Based on those two conversations, Bulkley concluded that the RSMeans costs were too high and chose to simply delete the installation costs from her RSMeans analysis. See Transcript of Trial at 76, 162-164, App. at 5-8. The resulting value was then consistent with her Survey value because their inclusion was leading her to a value that was higher than she wanted to reach. Ms. Buckley's failure to include these costs in her analysis erroneously allowed property to escape The trial court's adoption of Bulkley's flawed analysis renders the trial court's valuation erroneous.

The trial court also rejected Sansoucy's mobilization costs, on the asserted ground that there was "no historical data detailing how mobilization costs were

actually incurred for installing [taxpayer's] poles and it is reasonable to believe that a distribution system would be reproduced with greater efficiencies." Order at 10, attached at 103. The trial court's assumption had no factual basis and resulted, again, in property escaping taxation. It also was contrary to the instructions provided by RSMeans that mobilization costs were not included in the provided pole costs and should be individually added to pole costs. See Defendants' Exhibit G, App. at 73. Further, the parties and the trial court were valuing the cost of individual poles, not the cost to replace a whole distribution system. Mobilization costs were therefore critical to the analysis.

The trial court's use of Bulkley's Survey value did not correct the omission of mobilization costs. The trial court concluded, again without evidence, that Ms. Buckley's Survey costs "*presumably* include mobilization costs." (emphasis added). However, there was no evidence that supported the trial court's determination. Even if the reported Survey costs did include appropriate mobilization costs, Bulkley's RSMeans value did not, and the trial court's conclusion therefore did not include all taxable costs.

Although little specific information is known about Bulkley's Survey, Bulkley testified that the respondents provided their costs as reported on a mandatory reporting document they filed with the Federal Energy Regulatory Commission ("FERC"), specifically the account known as "Code 364." Code 364 does not include the cost of poles which are paid for by others, known as "contributions in aid of construction" ("CIAC"), and thus the cost of CIAC poles was not included in her Survey value. See Transcript of Trial at 720, App. at 23. CIAC, however, is required to be included in the valuation of taxable property in New Hampshire. See, e.g., Southern N.H. Water v. Hudson, 139 N.H. 139, 142 (1994). Bulkley

again allowed property to escape taxation; the trial court committed the same error by adopting her flawed Survey derived RCN.

B. The Trial Court's Determination of Value Fails to Include the Assemblage Costs

Both experts included "assemblage costs," i.e. the cost of creating the right to use the rights-of-way, in their valuations of the taxpayer's use of the pubic rights-of-way, albeit different amounts. Quoting Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598, 604 (2000), the trial court held that assemblage costs, "should be associated with the value of the poles and conduit themselves, and not as part of the use of the ROW, and therefore does not believe they need to be added to the ROW analysis." Order at 24, attached at 117. The trial court therefore did not include assemblage costs in its calculation of the value of the use of the public rights-of-way, but it then failed to add those assemblage costs to its value of the poles and conduit despite ruling them taxable. This was error, and should be reversed by this Court.

C. The Trial Court Erred by Ruling That the Value of Income Streams Associated with Attachers to Poles or Conduit Do Not Add Value to Said Pole or Conduit

In valuing the poles, the town's expert, George Sansoucy, utilized the replacement cost new less depreciation method. He then added to the value determined by that approach the income earned by the taxpayer from "attachers;" other utilities that attach their equipment to and utilize the pole and pay for the right to do so. Despite the fact that Sansoucy valued two separate components of the poles to reach a total value, the trial court held that "adding" income received from the poles to their replacement cost was improper because, it noted, appraisers must chose one approach and cannot combine them to inflate the

value of property. This holding misstates what Sansoucy did.

As Sansoucy explained in his report and testimony, the taxpayer receives payments from other users of its poles and conduit. Sansoucy considered these to be rents paid for vacant space on the taxpayer's poles and conduit. This vacant space is not required for the taxpayer's use of the poles. As Sansoucy testified without dispute, the poles would simply be shorter if there were no attachers. Pursuant to the parties' contracts, the attachers are required to pay for the maintenance and installation of the attachments, as well as the property taxes on those attachments; but the taxpayer must fully maintain the poles and conduit regardless of the attachers. Sansoucy therefore considered the rent to be "triple net," which means that all revenue from those sources is net income with no expenses. See Sansoucy Appraisal at 115, App. at 64. Failing to consider that income from the poles would, in Sansoucy's opinion, be irresponsible as it would allow taxable property to escape taxation. See Transcript of Trial at 452-454, App. at 19-21.

As this Court has held on several occasions regarding the assessment of utility property, "the trier of fact may use any one *or a combination* of five appraisal techniques in valuing utility property . . . [t]ypically all relevant factors must be considered, but a trier of fact need not allocate specific weight to any one of the approaches listed. Rather, judgement is the touchstone." Tennessee Gas Pipeline Company v. Town of Hudson, 145 N.H. 598, 600 (2000)(citation omitted)(emphasis added). When the existing facts are appropriate, an appraiser will perform the cost, sales, and income approaches and reconcile the results to an opinion of value. The parties agreed that the sales approach was not viable in this case, and that there was no available data regarding the income from the taxpayer's own use of the poles and conduit for its telecommunication purposes.

Had there been such income data, the appraisers could have considered the income approach, *including* taxpayer's income from both its telecommunication use of the poles and conduit and the rental income from the attachers. However, here there was only information regarding the income from the attachers. Bulkley ignored the value added to the poles and conduit through the attacher income, while Sansoucy used a combination of the cost approach and the income approach to capture the full value of the poles and conduit so as to properly reflect their fair market value.

There is nothing in New Hampshire case law which indicates that Sansoucy's approach is inappropriate or overstates the fair market value of the poles and conduit, and the taxpayer presented no such authority to the trial court. The simple fact is that a pole with attachers has a higher value than one without them because of the additional income from those attachers, and since the object of an appraisal is to value the highest and best use of the property, Mr. Sansoucy's approach was the correct one. The trial court erred in finding that the value of the poles was not increased as a result of the income from the attachers, and this Court should reverse that decision.

D. The Trial Court Erred in Relying upon House Bill 1198 (2016) as a Proper Method of Determining the Depreciable Life of a Pole

The trial court rejected the opinions of both experts regarding the depreciation rate to be applied to the replacement cost new ("RCN) to arrive at the replacement cost new less depreciation ("RCNLD") cost approach value of poles. Instead, the trial court adopted the depreciation rate set forth in HB 1198 (2016), a bill enacted well after the tax years in question, which requires that telecommunication poles be valued using replacement cost new depreciated by a 40 year depreciation rate. The court's reliance on HB 1198 in reaching the fair

market value of the taxpayer's poles was an error and this Court should reverse that decision.

HB 1198 (2016) amends, among other statutes, RSA 75:1 and adopts a new statute, RSA 72:8-c. RSA 75:1 provides that real property used for specific purposes, such as open space and conservation land and historic buildings, shall not be assessed at fair market value for property tax purposes, but instead is valued pursuant to specific methods set forth in other statutes which are not designed to result in a fair market value. HB1198 added poles and conduit to the list and adopted RSA 72:8-c to set forth the method of valuation to be utilized instead of the fair market value. The effect of the legislation was to provide that telecommunications poles and conduit were not to be assessed at fair market value, but instead were to be assessed pursuant to RSA 72:8-c. RSA 72:8-c provides that the value of poles is to be determined according to a formula: "Replacement Cost New (RCN) of the telecommunications pole or conduit, less depreciation calculated on a straight line basis for a period of 40 years with a residual value of 20 percent." Despite the fact that this formula expressly does not result in the fair market value of poles, the determination of which should have been the object of the trial in this case, the trial court nonetheless chose to utilize it to calculate the fair market value of poles.

In relying on the statute, the trial court noted that the 40 year depreciable life was determined recently by the New Hampshire Legislature and "doubtlessly focused on the New England climate." Order at 13-16, attached at 106-09. Nothing in the statutory language or the legislative history supports the trial court's assumption. In fact, the 40 year depreciation period ultimately settled upon in the bill was the result of "several meetings and lengthy discussions." See April 12, 2016 letter from New Hampshire Municipal Association ("NHMA") to

Senate Ways & Means Committee, App. at 77, and the trial court took judicial notice that HB 1198 resulted from "lobbying on it by all sorts of people." Transcript of Trial at 479, App. at 22. The history of those discussions and that lobbying is set forth in detail in the NHMA letter. An Assessing Standards Board ("ASB") subcommittee was established. Several members of that subcommittee believed the depreciation schedule "should be 50 years, not 40, based on substantial information indicating the poles typically last much longer than 50 years." Id. at 2. The ASB therefore unanimously recommended a 50 year depreciation. The sponsors of HB 1198 for some reason ignored this recommendation and instead followed the recommendation of the telephone companies, including the taxpayer, and submitted a bill which provided for a 30 year depreciation. Id.; see also April 12, 2016 FairPoint Testimony before the Senate Ways & Means Committee, App. at 80. The full House ultimately adopted a floor amendment to increase that depreciation period to 40 years, because "the floor amendment's sponsors doubted the House would accept" a 50 year period. NHMA Letter at 2.

The court's reliance on HB 1198 (2016) to determine the depreciation schedule of poles is further undercut by its refusal to also use that bill to determine the depreciation schedule of the conduit,[7] purportedly because neither expert advocated for such a depreciation schedule. See Order at 19, attached at 112. However, neither expert advocated for a 40 year depreciation for valuing the poles either;[8] yet, the trial court adopted the newly enacted statutory depreciation period for that analysis. Such selective use of the statute's 40 year depreciation period makes no logical or legal sense. This Court should therefore reverse the

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[7]HB 1198 (2016) applies to the valuation of both poles and conduit.
[8]Sansoucy utilized a depreciation period of 60 years; Bulkley, 30 years.

trial court's determination that a 40 year depreciation period for the poles is appropriate, where that holding was based on nothing more than a negotiated, compromise piece of legislation that applied only prospectively, and which does not even purport to result in a determination of the fair market value of the poles.

VI. THE TRIAL COURT ERRED IN ACCEPTING, RELYING UPON AND FINDING PROBATIVE THE TAXPAYER'S VALUATION OF THE RIGHTS-OF-WAY

The trial court adopted Bulkley's approach to valuing the taxpayer's use of the public rights-of-way. Bulkley essentially adopted Judge Morrill's *dicta* in Verizon New England, Inc. v. City of Rochester, 2006 WL 3742673 (NH Super. November 9, 2006), App. at 82, in order to reach her conclusion of value. In Verizon, Judge Morrill estimated the width of the rights-of-way used by utilities (the "utility corridor"), the value of the utility corridor, and the percentage of the utility corridor used by the taxpayer. The trial court found this approach to be credible, and also found Bulkley's adoption of the specific widths and percentages of use which Judge Morrill applied to be probative. See Order at 31, attached at 124. However, there is *no evidence* in the record to support the trial court's finding that applying Judge Morrill's findings results in a credible opinion of market value in *this* case.

The trial court found that the facts in evidence only supported adopting a portion of Judge Morrill's analysis and that the parties had not provided any evidence upon which it could determine whether the amounts Judge Morrill assigned to the width of the utility corridor and percentage of its use were appropriate in this case. The trial court provided several examples of methods through which data *could* have been obtained and provided to the Court, but were not. See Order at 30, attached at 123. The taxpayer bore the burden of

providing facts to support its position that the facts in Verizon were substantially the same as the facts in this case such that adoption of Judge Morrill's utility corridor width and percentage of use resulted in a reliable and credible valuation of the rights-of-way. The taxpayer chose not to. Without any facts in evidence, the trial court *assumed* that the number of poles and conduit replaced annually in each of the individual towns would be the same as in Rochester in the Verizon case. The Court *assumed* a number of poles that would be inspected and treated each year in the towns without consideration of the age of the poles in the towns or evidence as to the number inspected and treated each year in each individual town. The trial court erred in its finding that the facts in evidence supported the adoption of the values Judge Morrill assigned to the width of the utility corridor and allocation of use of the utility corridor.

The trial court's finding that the use of the utility corridor should be evenly divided between all attachers and the taxpayer is likewise not supported by the record. The trial court's finding that the utility corridor is 25 feet wide was based in large part on the taxpayer's need to maintain, repair, inspect, treat and replace the poles and conduit. See Order at 29-30, attached at 122-24. There was no evidence that attachers bear any responsibility for those tasks or that they would utilize more than the portion of the ROW occupied by their wires. In fact, the undisputed evidence established that the pole owners were responsible for those duties. See Sansoucy Appraisal at 18-22, App. at 56. Further, there was no evidence as to the number of attachers with whom the rights-of-way use should be divided or whether the same number of users were present along the full length of the rights-of-way in each town. The trial court's finding that the use of the utility corridor should be allocated equally between taxpayer and all attachers should be reversed.

The trial court could not find that the taxpayer met its burden of proof that it bore a disproportionate share of the towns' tax burdens unless it first found that Bulkley presented a credible opinion of value. No reasonable person could have done so on this record. The facts in the record do not support a finding that Bulkley provided a credible opinion as to the width of the utility corridor or percentage of use by the taxpayer, rendering her opinion of the value of the use of the rights-of-way not credible. The record and factual findings of the trial court do not support the factual conclusion that Bulkley provided a credible opinion of value. Therefore, this Court should find that the taxpayer did not meet its burden of proof and reverse the decision of the trial court.

CONCLUSION

The trial court could not find that the taxpayer met its burden of proof that it bore a disproportionate share of the towns' tax burdens unless it first found that Bulkley presented a credible opinion of value. No reasonable person could have done so on this record. Bulkley's opinion of the value of the poles and conduit relied upon data which was not disclosed as required by state law, omitted taxable value that should have been included. The trial court took this unreliable value and applied an inappropriate and inapplicable depreciation rate to reach a value that does not reflect the actual fair market value of the assets. Likewise, the trial court wrongfully relied upon the taxpayer's opinion of value regarding its use of the rights-of-way, despite the fact that the facts of this case do not support the application of the law upon which Bulkley relied. Coupled with the legal errors made by the court regarding the nature of the taxpayer's use of right of way and poles that are automatically licensed by operation of law, the trial court's decision must be reversed in its entirety.

REQUEST FOR ORAL ARGUMENT

The Towns of Durham and Hanover request oral argument not to exceed 15 minutes, to be presented by Laura Spector-Morgan, Esquire.

CERTIFICATIONS

The appealed decisions were in writing and are appended to this Brief.

This document complies with the 11,000 word limit established by Order dated February 28, 2019. It contains 10,962 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

I have forwarded copies of the foregoing brief to Matthew Johnson, Esquire, Joshua M. Wyatt, Esquire, and Shawn M. Tanguay, Esquire via the Court's electronic filing system's electronic service.

Respectfully submitted,

TOWNS OF DURHAM AND HANOVER

By Their Attorneys
MITCHELL MUNICIPAL GROUP P.A.

Date: April 29, 2019 By: */s/ Laura Spector-Morgan*

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NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated December 14, 2015 relative to:

ORDER

12/14/2015

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications NNE

v.

Town of Acworth

No. 220-2012-CV-100

ORDER

The Petitioner, Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint"), brought actions against a number of New Hampshire municipalities alleging that the municipalities acted *ultra vires* in assessing taxes in a manner that failed to comply with the statutorily prescribed procedure. The Court's May 12, 2014 Order consolidated the actions into a "test case" structure in which certain municipalities would act as representative municipalities. FairPoint now moves for summary judgment on eight test case *ultra vires* claims against certain representative municipalities, including the Town of Alexandria, the Town of Alstead, the Town of Belmont, the Town of Dublin, the Town of Durham, the Town of Landaff,[1] the City of Manchester, and the City of Portsmouth (collectively the "Municipalities"). The Municipalities object and cross-move for summary judgment. The Court held a hearing on October 23, 2015. Based on the following, FairPoint's

[1] The Town of Landaff fully abated FairPoint's tax year 2011 taxes after FairPoint filed its Motion for Summary Judgment. FairPoint has represented it would soon file a nonsuit against the Town of Landaff, thereby rendering the motion moot as to the Town of Landaff. (FairPoint's Consol. Obj. 1 n.1.)

Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Municipalities' Cross-Motions for Summary Judgment are GRANTED in part and DENIED in part.

I

On cross-motions for summary judgment, the Court must consider the evidence in the light most favorable to each party in its capacity as the nonmoving party, and, if no genuine issue of material fact exists, determine whether the moving party is entitled to judgment as a matter of law. Granite State Mgmt. Resources v. City of Concord, 165 N.H. 277, 282 (2013).

The parties have stipulated to the historical facts relevant to each municipality's taxation of FairPoint and do not dispute the following relevant material facts. As a provider of telecommunication services, FairPoint owns poles, conduit, and other related personal property located within each of the named Municipalities. The Municipalities are permitted to assess two types of ad valorem property tax on FairPoint's property: (1) a tax measured by the value of FairPoint's use and occupation of the public rights-of way assessed pursuant to RSA 72:6; and (2) a value tax measured by the value of FairPoint's poles and conduit assessed pursuant to RSA 72:8-a.

A

When assessing these taxes against FairPoint, the Municipalities must comply with the prescribed statutory scheme. In New Hampshire, "taxation must be authorized by statute." In re Reid, 143 N.H. 246, 252 (1998) (quoting Indian Head Nat'l Bank v. Portsmouth, 117 N.H. 954, 955 (1966)). The Legislature has provided, "All real estate, whether improved or unimproved, shall be taxed except as otherwise provided." RSA 72:6. In defining "real estate," RSA 72:8-a states, "Except as provided in RSA 72:8-b, all

structures, poles, towers, and conduits employed in the transmission of telecommunication, cable, or commercial mobile radio services shall be taxed as real estate in the town in which such property or any part of it is situated."[2]

There are certain statutory tax exemptions delineated in RSA 72:23, I(a)–(b), which states:

> The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:
>
> (a) Lands and the buildings and structures thereon and therein and the personal property owned by the state of New Hampshire or by a New Hampshire city, town, school district, or village district *unless* said real or personal property is used or occupied by other than the state or a city, town, school district, or village district under a lease *or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property.* The exemption provided herein shall apply to any and all taxes against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts, which have or may have accrued since March 31, 1975, and to any and all future taxes which, but for the exemption provided herein, would accrue against lands and buildings and structures thereon and therein and the personal property owned by the state, cities, towns, school districts, and village districts.
>
> (b) *All leases and other agreements*, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, *shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property* no later than the due date . . . . All such leases and agreements shall include a provision that "failure of the lessee to pay the duly assessed personal and real estate taxes when due shall be cause to terminate said lease or agreement by the lessor." All such leases and agreements entered into on or after January 1, 1994, shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee.

(Emphasis added).

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[2] The legislature repealed RSA 72:8-b in 1998.

"[T]elephone . . . poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways," if the party seeking to erect such equipment secures a permit or license. RSA 231: 160–161. RSA 231:161 establishes a licensing scheme for parties to place telephone equipment in public rights-of-way. Jurisdiction for issuing such licenses lies with the selectboard of the town in which such right-of-way is located or the board of mayor and council of the city in which such right-of-way is located. RSA 231:161, I(a)–(b). "The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires." RSA 231:163; see Rochester II, 151 N.H. at 269–70 ("Under the plain language of [RSA 231:163], a city may change the terms and conditions of a license that it has issued whenever the public good requires.")

In New England Tel. & Tel. Co. v. City of Rochester, the New Hampshire Supreme Court addressed the effect of RSA 72:23, I, on the licensing procedure set forth in RSA 231:160–163. 144 N.H. 118 (1999) [hereinafter Rochester I]. The parties in that case disputed whether licenses issued under RSA 231:161 constituted "agreements" within the meaning of RSA 72:23, I(b). Id. at 121–22. The Supreme Court held that "[t]he terms of RSA 72:23, I(b) are applicable to the [telephone company's] pole licenses" and "requires [the municipality] to shift the tax burden imposed by RSA 72:6 to the [telephone company] by making tax liability a condition of the pole licenses." Id. The Supreme Court also held in Verizon New England Inc. v. City of Rochester that RSA 72:23 "does not include an exemption for private companies that use or occupy public property to provide a public service." 151 N.H. 263, 267 (2004) [hereinafter Rochester II]. The holding observed that "[a]ccording to the plain language of the statute, leases

and other agreements which permit the use or occupation of public property must provide for the payment of properly assessed real estate taxes." Id. at 266–67.

Municipal property tax assessments adhere to a statutorily mandated schedule. "The property tax year shall be April 1 to March 31 and all property taxes shall be assessed on the inventory taken in April of that year . . . ." RSA 76:2. In other words, "real estate taxes are assessed as of April 1 in each year and the tax year begins on that date. The tax for the whole year is an obligation of the owner as of April 1 and the tax becomes due and payable as of that date." Town of Gilford v. State Tax Comm'n, 108 N.H. 167, 169 (1967) (internal citations omitted). However, "[i]f the selectmen, before the expiration of the year for which a tax has been assessed" discovers a person liable for a tax by law has not been so taxed, they may impose the tax "upon abatement of such tax and upon notice to the person liable for such tax." RSA 76:14. A select board's failure to correct an assessment or add excluded property must occur before the expiration of the tax year in order to be effective. Granite State Mgmt. & Resources v. City of Concord, 165 N.H. 277, 293 (2013).

B

FairPoint has identified four general, recurring factual scenarios and the municipality representative of each of those scenarios. The first three broad scenarios contain variations, each with a representative municipality. The fourth broad scenario was represented by the Town of Landaff, against which FairPoint has represented it would file a nonsuit. (FairPoint's Consol. Obj. 1 n.1.)

The first broad category ("Scenario 1") involves the tax on the value of the use and occupation of a public right-of-way. Under this factual scenario, all RSA 231:161 licenses lack any form of RSA 72:23, I(b) language prior to the assessment of the use tax, and the

municipality has not undertaken a universal amendment of existing 231:161 licenses. The Town of Dublin is the representative test municipality for this factual scenario. FairPoint's 231:161 licenses in Dublin do not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property," RSA 72:23, I(b), and Dublin has not sought to enact a universal amendment. For the 2011 tax year, Dublin valued FairPoint's use and occupation of public rights-of-way at $431,900 and assessed $9,735.03 of taxes for the same.

In the first variation of the first category ("Scenario 1(a)"), the fact relating to the universal amendment is the only variation. Rather than undertaking no universal amendment, the municipality amended the licenses after the 2011 tax year. The City of Manchester is the representative municipality for this variation. Initially, FairPoint's 231:161 licenses in Manchester did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(b). However, on October 29, 2013, Manchester approved a universal amendment of existing licenses to state: "The Licensee shall pay all properly assessed real and personal property taxes including real and personal property taxes on structures or improvements added by the Licensee no later than the due date." For the 2011 tax year, Manchester valued FairPoint's use and occupation of public rights-of-way at $8,000,000 and assessed $175,680 of taxes for the same.

In the next variation of the first category ("Scenario 1(b)"), the municipality undertook a universal amendment, but the amendment did not include RSA 72:23, I(b) language. The City of Portsmouth is the representative municipality for this variation. Initially, FairPoint's 231:161 licenses in Portsmouth did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said

property." RSA 72:23, I(b). On November 21, 2011, Portsmouth approved a universal amendment "to amend all leases and other agreements, the terms of which provide for the use or occupation of others of real or personal property owned by the city to include payment on properly assessed taxes" effective tax year 2011 and all years after. For the 2011 tax year, Portsmouth valued FairPoint's use and occupation of public rights-of-way at $9,029,200 and assessed $155,934.28 of taxes for the same. For the same tax year for the airport district, Portsmouth valued FairPoint's use and occupation of public rights-of-way at $1,455,200 and assessed $13,780.74 of taxes for the same.

In the third variation of the first broad category ("Scenario 1(c)"), the municipality undertook a universal amendment of the licenses during the 2011 tax year, after April 1, 2011, but before March 31, 2012. Portsmouth is the representative municipality for this variation under the undisputed facts iterated above.

The fourth and final variation of the first category ("Scenario 1(d)") involves a municipality's attempt to approve a universal amendment of the licenses but did not provide prior notice of the proposed amendment to FairPoint. The Town of Belmont is the representative municipality. Initially, FairPoint's 231:161 licenses in Belmont did not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property." RSA 72:23, I(b). On September 11, 2013, the Belmont Board of Selectmen held a public hearing determined that it would be in the public good to amend all RSA 231:161 licenses to include the language in RSA 72:23, I(b). FairPoint did not have prior notice of the meeting, but was sent a notification via certified mail on September 17, 2013, that the licenses had been amended. For the 2011 tax year, Belmont valued FairPoint's use and occupation of public rights-of-way at $195,000 and assessed $4,204.20 of taxes for the same.

The second broad category ("Scenario 2") tracks the first category but involves the tax on the value FairPoints's poles and conduits. Under this factual scenario, all RSA 231:161 licenses lack any form of RSA 72:23, I(b) language prior to the assessment of taxes under RSA 72:8-a, and the municipality has not undertaken a universal amendment of existing 231:161 licenses. The Town of Alstead is the representative test municipality for this factual scenario. FairPoint's 231:161 licenses in Alstead do not "provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property," and do not "state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee." RSA 72:23, I(b). Alstead has not sought to enact a universal amendment. For the 2011 tax year, Alstead valued FairPoint's property taxable pursuant to RSA 72:8-a at $922,831 and assessed $20,789.88 of taxes for the same.

In the first variation of the second category ("Scenario 2(a)"), rather than not enacting a universal amendment, the municipality enacted a universal amendment after the 2011 tax year. Manchester is the representative municipality for this scenario. In addition to the facts relating to Manchester previously iterated, prior to the October 29, 2013 universal amendment and for the tax year 2011, Manchester valued FairPoint's property taxable pursuant to RSA 72:8-a at $7,899,500 and assessed $173,473.02 of taxes for the same.

In the second variation ("Scenario 2(b)"), the municipality enacted a universal amendment but the amendment did not include the RSA 72:23, I(b) language concerning "structures or improvements added by the lessee." Portsmouth is the representative municipality for this factual variation. In addition to the facts relating to Portsmouth set forth above, for the tax year 2011, Portsmouth valued FairPoint's

property taxable pursuant to RSA 72:8-a at $6,120,500 and assessed $105,701.06 of taxes for the same.

In the third variation of the second broad category ("Scenario 2(c)"), the municipality undertook a universal amendment of the licenses during the 2011 tax year, after April 1, 2011, but before March 31, 2012. Portsmouth is the representative municipality for this variation under the undisputed facts iterated above.

Finally, the fourth variation of the second category ("Scenario 2(d)") involves a municipality's attempt to approve a universal amendment of the licenses but did not provide prior notice of the proposed amendment to FairPoint. The Town of Belmont is the representative municipality. In addition to the facts relating to Belmont set forth above, prior to the universal amendment approved on September 11, 2013, the RSA 231:161 licenses did not "state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee." RSA 72:23, I(b). For the tax year 2011, Belmont valued FairPoint's property taxable pursuant to RSA 72:8-a at $952,400 and assessed $20,533.74 of taxes for the same.

The third general factual category ("Scenario 3") involves a municipality enacting a universal amendment of RSA 231:161 licenses, but, on a going forward basis, not including any RSA 72:23, I(b) language regarding payment of taxes. The Town of Durham is the representative municipality for this variation. FairPoint's has property taxable pursuant to RSA 72:8-a licensed by Durham pursuant to RSA 231:161. Effective March 21, 2005, Durham approved a universal amendment that included language substantially similar to the language of RSA 72:23, I(b). Since the universal amendment, Durham has issued RSA 231:161 licenses that do not contain any reference to RSA 72:23, I(b). For the tax year 2011, Durham issued a single tax valuation of $2,532,300,

including both the value of FairPoint's use of public rights-of-way and the value of its property taxable pursuant to RSA 72:8-a, and Durham assessed a total of $65,510.60 of taxes for the same. This assessment was based partly on RSA 231:161 licenses issued to FairPoint after the universal amendment.

One variation of the third broad category ("Scenario 3(a)") involves when a municipality never effectuated a universal amendment but has issued past RSA 231:161 licenses with language referencing the payment of taxes. The Town of Alexandria is an example of this variation. FairPoint's has property taxable pursuant to RSA 72:8-a licensed by Alexandria pursuant to RSA 231:161. Although Alexandria has not approved a universal amendment, it has issued RSA 231:161 licenses to FairPoint in the past referencing RSA 72:23, I(b) and requiring payment of "all properly assessed real and personal taxes." However, Alexandria has also issued licenses to FairPoint that do not include the same language. For tax year 2011, Alexandria valued FairPoint's use and occupation of public rights-of-way at $1,236,500 and assessed $27,661 of taxes for the same.

C

FairPoint contends that the language of RSA 72:23, I(a)–(b), permits taxation of municipal-owned property only when that property is occupied by a party other than the state or municipal corporation if there exists an agreement that expressly provides for the taxation of that property. FairPoint argues that municipalities must strictly comply with the statutory requirements for assessing taxes, including the requirement that all RSA 231:161 licenses include the language FairPoint maintains is mandated by RSA 72:23, I(a)–(b). Consequently, FairPoint concludes the municipalities that have not strictly complied with the statutory requirements for assessing taxes have acted *ultra*

vires by assessing such taxes without the mandated language in the licenses. In addition, FairPoint contends with respect to timing, that tax-shifting language must be included within any pole licenses no later than April 1, 2011 to form a basis for any tax year 2011.

The Municipalities' cross-motions contain a number of overlapping arguments briefly summarized as follows: (1) RSA 72:23, I, does not apply to taxation of poles and conduit; (2) RSA 72:23, I, applies only to property owned by the Municipalities; (3) lack of strict compliance with RSA 72:23, I, does not result in FairPoint being tax exempt; (4) the requirements of RSA 72:23, I, can be read into pole licenses by operation of law; (5) the Municipalities have independent authority to tax perpetual leases pursuant to RSA 72:6 and 73:10; (6) pole licenses silent to the requirements of RSA 72:23, I, may nonetheless serve as a basis for taxation; (7) universal amendments to pole licenses provide a basis for taxation; and (8) universal amendments undertaken after April 1, 2011, may operate retroactively to form the basis for taxation.[3]

Durham's objection also contends that FairPoint is estopped from asserting that its property is exempt because FairPoint submitted licenses without the language of RSA 72:23, I(b) after the 2005 universal amendment, even though FairPoint knew the amendment required all future licenses to include the language. In Belmont's Cross-Motion for Summary Judgment, it also seeks summary judgment in its favor that (1) the unlicensed poles and their use of the rights-of-way are taxable, and (2) the poles licensed as a matter of law pursuant to RSA 231:160-a necessarily include the language set forth in RSA 72:23, I, and are taxable as such.

[3] Several of the Municipalities also assert FairPoint's Motion for Summary Judgment must be denied because it fails to meet the requirements of RSA 491:8-a, III. The Court finds this argument unpersuasive because the Court's May 23, 2014 Order required the parties to confer and agree upon stipulated facts for the summary judgment proceedings.

III

The central issue is whether RSA 72:23, I(a)–(b) acts as a tax exemption that requires municipalities to include tax-shifting language in FairPoint's RSA 231:161 licenses in order to impose taxes on FairPoint's use of public rights-of-ways and poles and conduit. Resolving the parties' cross-motions for summary judgment requires interpreting RSA 72:23, I(a) & (b). When construing a statute, the Court first examines "the language of the statute, and, where possible, ascribe[s] the plain and ordinary meaning to the words used." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 605–06 (2010). The Court must not "consider what the legislature might have said nor add words that [the legislature] did not see fit to include." Rochester II, 151 N.H. at 266. "When a statute's language is plain and unambiguous, [the Court will] not look beyond it for further indication of legislative intent." Gen. Insulation Co., 159 N.H. at 606 (citations omitted). "[A]n interpretation that renders statutory language superfluous and irrelevant is not proper interpretation." State v. Duran, 158 N.H. 146, 155 (2008).

When interpreting a tax statute, "the right to tax must be found within the letter of the law and is not to be extended by implication." Pheasant Lane Realty Tr. v. City of Nashua, 143 N.H. 140, 143 (1998) (quotation omitted). "If a taxing statute . . . is ambiguous, [the court will] construe it against the government and in favor of the taxpayer." N.H. Resident Ltd. Partners of Lyme Timber Co. v. N.H. Dept. of Rev., 162 N.H. 98, 102 (2011). However, "[a] tax exemption statute is construed not with rigorous strictness but 'to give full effect to the legislative intent of the statute,' and, absent formal legislative history, intent must be gleaned from the plain language of the statute." Wolfeboro Camp School, Inc. v. Town of Wolfeboro, 138 N.H. 496, 499 (1994) (quoting In re Estate of Martin, 125 N.H. 690, 691 (1984)); see also Say Pease IV, LLC v.

N.H. Dept. of Rev. Admin., 163 N.H. 415, 417 (2012) (citing First Berkshire Bus. Tr. v. Commissioner, N.H. Dept. of Rev. Admin., 161 N.H. 176, 180 (2010)) (stating that the Court will not "strictly construe statutes that impose taxes, but instead examine their language in the light of their purposes and objectives"); In re Town of Pelham, 143 N.H. 536, 538 (1999) (interpreting RSA 72:7, which defined "buildings" as taxable real estate, to determine whether trailers were taxable property within the meaning of RSA chapter 72). Exemptions provided by RSA 72:23 "shall be construed to confer exemption only upon property which meets the requirements of the statute under which the exemption is claimed. The burden of demonstrating the applicability of any exemption shall be upon the claimant." RSA 72:23-m.

Whether a statute grants a municipality the authority to levy a tax must be construed strictly. However, whether an exemption applies is not construed with rigorous strictness but with the goal of giving full effect to the legislative intent. The central issue in this case is not whether the municipalities have the authority to assess the taxes at issue, because pursuant to RSA 72:6, which provides that "[a]ll real estate . . . shall be taxed except as otherwise provided," municipalities plainly have the broad authority to tax real estate. Moreover, under RSA 72:8-a, telecommunication poles and conduits "shall be taxed as real estate". There is nothing ambiguous about either statute, and no reason to construe them strictly. Further, it is not clear that the Court need apply the rule of strict statutory construction to RSA 72:23, I, because in interpreting the statute, the Court is actually interpreting an exception to the general rule of taxation.

A

With respect to the tax on the value of FairPoint's use of the public rights-of-way, the plain language of RSA 72:23, I(b), unambiguously requires municipalities to tax private use of public property by expressly including tax-shifting language in RSA 231:161 licenses. RSA 72:23, I(a), provides a real estate tax exemption for "[l]ands . . . *owned* by the state of New Hampshire or by a New Hampshire city [or] town." (Emphasis added). However, an exception to the exemption exists where "said real or personal property is used or occupied by other than the state or a city [or] town . . . *under a lease or other agreement the terms of which provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property.*" RSA 72:23, I(a) (emphasis added). RSA 72:23, I(b) elaborates on the requirements of leases and agreements that permit parties other than the state or municipality to use or occupy the public rights-of-way by stating:

> *All leases and other agreements*, the terms of which provide for the use or occupation by others of real or personal property owned by the state or a city, town, school district, or village district, entered into after July 1, 1979, *shall provide for the payment of properly assessed real and personal property taxes by the party using or occupying said property* no later than the due date . . . . *All such leases and agreements* entered into on or after January 1, 1994, *shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes*, and shall also state whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee . . . .

(Emphasis added).

The plain language of RSA 72:23, I(a) & (b) unambiguously conveys the statute's intent. The exemption in RSA 72:23, I(a) exists to require municipalities to tax private use of public rights-of-way. This is evident by the language mandating that agreements allowing for private use of public property require the private parties to pay property taxes. The language unequivocally mandates that the taxing municipality include

specific language that shifts the tax burden imposed by RSA 72:6 to the licensee as a condition of RSA 231:161 licenses—which, pursuant to the holding in Rochester I, 144 N.H. at 121–22, constitute "agreements" within the meaning of RSA 72:23, I(b). The portion of RSA 72:23, I(b) that states that all agreements or leases "shall clearly state the lessee's obligations regarding the payment of both current and potential real and personal property taxes," is most reasonably construed as a notice provision. In re Reid, 143 N.H. 246, 253 (1998). The legislative intent expressed is plainly to put private parties on notice of their tax obligations. The Supreme Court has stated that its "review of the plain language of RSA 72:23, I, reveals that it contains both an enabling provision that simply allows municipalities to collect tax revenues on land that is otherwise tax exempt when it is leased to third parties, and a tax provision that ensures that the lessees are aware of, and consent to, taxation of their leasehold." Reid, 143 N.H. at 253. In Reid, the Supreme Court held that leases that did not include a tax provision were not taxable. Id.

Therefore, the Court concludes that the statute requires municipalities to shift the tax burden to private parties using or occupying public property, and the tax-shifting language serves as notice of the private parties' tax obligations. The absence of the language required by RSA 72:23, I(b) precludes a municipality's statutory authority to collect taxes assessed based on the value of a private party's use of a public right-of-way.

B

Analysis of RSA 72:23, I, yields a different result when applied to taxes based on the value of FairPoint's poles and conduit. The plain language of RSA 72:23, I, unambiguously applies only to real and personal property *owned* by the municipality. The language of RSA 72:23, I(a) & (b) repeatedly states that the exemption only applies

to"[l]ands and the buildings and structures thereon and therein and the personal property *owned* by the state of New Hampshire or by a New Hampshire city [or] town." (Emphasis added). The only reference to structures added by the licensee is in the last sentence of RSA 72:23, I(b), which states, "All such leases and agreements . . . shall also state whether the lessee has an obligation to pay real and personal property taxes on structures or improvements added by the lessee"-a less exacting record

As noted, paragraphs (a) and (b) of RSA 72:23, I, serve distinct functions. RSA 72:23, I(a) is "an enabling provision that simply allows municipalities to collect tax revenues on land that is otherwise tax exempt when it is leased to third parties," while RSA 72:23, I(b) is a "tax provision that ensures that the lessees are aware of, and consent to, taxation of their leasehold." Reid, 143 N.H. at 253. In essence, paragraph (a) refers to *what* property may be taxed despite being otherwise exempt, and paragraph (b) refers to *how* that property is to be taxed when the exemption does not apply. Because paragraph (a) only exempts property owned by the municipalities, structures owned by private parties occupying a right-of-way is not exempt property, and the taxation provision in paragraph (b) does not apply to a municipality's authority to tax the property owned by the private party. Consequently, the authority to tax the property owned by the private party occupying a right-of-way is not conditional on providing notice in the lease or agreement. Instead, the more reasonable interpretation is that the legislature intended the language in RSA 72:23, I(b) to provide clarification to members of the public that the tax exemption does not apply if they use or occupy municipal or public property.

This conclusion is consistent with the New Hampshire Supreme Court's conclusion in Reid. The petitioners in Reid leased property owned by a municipality, but

the terms of the leases did not address the types of taxes for which the petitioners were liable. 143 N.H. 247–48. Although the municipality assessed taxes based on the value of the structures owned by the petitioners built on the leased property, the petitioners did not challenge those taxes. Id. at 248. Rather, the only tax challenged was the tax based on the value of the petitioners' leasehold interest. Id. The Supreme Court reasoned that its interpretation of RSA 72:23, I, to require notice in order for leaseholds to be taxable was consistent with RSA 73:10, which provides that "[r]eal and personal property shall be taxed to the person claiming the same, or to the person . . . in possession and actual occupancy thereof, if such person will consent to be taxed." Id. at 252. Extending this reasoning to the present issue demonstrates that notice in the lease or agreement is not a condition of taxing private property located in a public right-of-way. If real property is to be taxed to the person claiming to own the property and consent to taxation is only required if the person does not actually claim to own the property, then requiring tax-shifting language in the lease or agreement as evidence of consent to taxation is not a logical interpretation of RSA 72:23, I, when applied to property owned by a private party and located in a public right-of-way.

Therefore, when the statute is construed with the goal of giving full effect to the legislative intent, the Court concludes that the exemption in RSA 72:23, I(a) does not apply to taxes assessed pursuant to RSA 72:8-a based on the value of FairPoint's poles and conduit located within public rights-of-way, and the absence of language in RSA 231:161 licenses relating to the taxability of structures added to public property by private parties does not preclude the Municipalities from assessing taxes based on the value of FairPoint's poles and conduit as long as the license states "whether the lessee has an obligation to pay real and personal property taxes on structures or improvements

added by the lessee". RSA 72:23, I(b). Indeed, even if the statute were analyzed more strictly as a taxing statute, the result would be the same. RSA 72:23, I(a) simply does not address lease of property which is not owned by a municipality.

IV

Part I, Article 23 of the New Hampshire Constitution states, "Retrospective laws are highly injurious, oppressive and unjust." The New Hampshire Supreme Court has interpreted this provision stating "that a statute, or its application, that 'creates a new obligation . . . in respect to transactions . . . already past, must be deemed retrospective.'" Cagan's, Inc. v. N.H. Dep't of Rev. Admin., 126 N.H. 239, 249 (1985) (quoting Woart v. Winnick, 3 N.H. 473, 479 (1826)). However, retroactivity of a taxing statute alone does not render a statute unconstitutional "when there was clear legislative intent" to apply it retroactively. Id. (citing Estate of Kennett v. State, 115 N.H. 50, 55 (1975)).

Pursuant to RSA 76:14, "[i]f the selectmen, before the expiration of the year for which a tax has been assessed" discovers a person liable for a tax by law has not been so taxed, they may impose the tax "upon abatement of such tax and upon notice to the person liable for such tax." This statutory language makes clear that the legislature intended that a tax is not necessarily unconstitutionally retroactive if it was not assessed as of April 1 of that tax year so long as the following conditions are met: (1) the municipality must be required to assess the tax; (2) the selectmen must provide notice; and (3) the selectmen must abate the tax to apply only after notice was provided. Additionally, any correction must occur before the expiration of the tax year. Granite State Mgmt. & Resources v. City of Concord, 165 N.H. 277, 293 (2013). With respect to when municipalities may amend pole licenses, thereby providing notice of intent to

correct tax assessments and the notice required by RSA 72:23, I(b), RSA 231:163 states, "The selectmen, *after notice to any such licensee* and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires."

In applying these rules to the universal amendments at issue in this case, the Court finds that a municipality without the required RSA 72:23, I(b) language in its pole licenses may correct that deficiency before the expiration of the tax year and properly assess a tax based on the value of FairPoint's use of the municipality's public rights-of-way for the 2011 tax year if it complies with certain statutory requirements: (1) FairPoint must actually be liable for the use tax; (2) FairPoint must receive notice of the universal amendment prior to the approval of the amendment; and (3) the municipality must abate the tax to reflect only the portion of the year during which the universal amendment was effective. Because the Court finds both that RSA 72:23, I(a) mandates that municipalities are required to assess this use tax and that the lack of the tax-shifting language in RSA 72:23, I(b) precludes that assessment, the requirement under RSA 76:14 that the untaxed party actually be taxed is satisfied.

V

Applying this analysis to the designated factual scenarios renders varying results. The Court addresses each scenario and any variation in turn.

Scenario 1 involves the tax on the value of the use and occupation of a public right-of-way. Under this scenario, all RSA 231:161 licenses lack the language required by RSA 72:23, I(b), and no universal amendment has been undertaken. Because the Court finds that RSA 72:23, I(b) requires municipalities to include specific language in FairPoint's pole licenses to put FairPoint on notice of its tax obligations, the

municipality may not assess the use tax in this scenario. Consequently, the Town of Dublin, the Scenario 1 test municipality, acted *ultra vires* in assessing a tax on the value of FairPoint's use and occupation of public rights-of-way for the 2011 tax year.

In Scenario 1(a), the City of Manchester attempted to enact a universal amendment on October 29, 2013. Because the enacted universal amendment was after the expiration of the 2011 tax year, it does not effectively correct the 2011 assessment. Consequently, Manchester's universal amendment cannot serve as a basis for the 2011 use tax assessment.

The City of Portsmouth in Scenarios 1(b) and (c) approved on November 21, 2011, a universal amendment "to amend all leases and other agreements, the terms of which provide for the use or occupation of others of real or personal property owned by the city to include payment on properly assessed taxes." This language mirrors the language in RSA 72:23, I(a). This language substantially complies with the language required by RSA 72:23, I(b) because it provides sufficient notice of the licensee's tax obligations to satisfy the notice requirements of RSA 72:23, I(b). The Court therefore finds that Portsmouth's universal amendment is not defective, and because the correction was before the expiration of the 2011 tax year, the amendment operates pursuant to RSA 76:14 to correct Portsmouth's erroneous assessment for the 2011 tax year. However, Portsmouth is required to abate the tax to reflect only the portion of the year during which the universal amendment was effective. Accordingly, Portsmouth's assessment of the use tax after the approval of the universal amendment was not *ultra vires*.

In Scenario 1(d), the Town of Belmont sent notice of its universal amendment to FairPoint *after* the meeting where the Belmont Board of Selectmen approved the

amendment. Because the Court finds that RSA 231:163 requires municipalities to send notice *prior* to amending RSA 231:161 licenses, Belmont's universal amendment was improper and cannot serve as a basis for the 2011 use tax assessment.

With respect to Scenario 2 and all of its variations, because the RSA 72:23, I(a) exemption does not apply to personal property owned by parties other than the Municipalities, this lack of language does not preclude the Municipalities from assessing taxes against FairPoint based on the value of FairPoint's poles and conduit located in public rights-of-way. Consequently, Alstead, Manchester, Portsmouth, and Belmont did not act *ultra vires* when assessing taxes against FairPoint based on the value of FairPoint's poles and conduit.

Turning to Scenario 3, which involves Durham previously approving a universal amendment but subsequently issuing licenses that do not contain the tax-shifting language required by RSA 72:23, I(b), the Court finds that Durham did not act *ultra vires* when assessing taxes based on the value of FairPoint's poles and conduit. Nor did Durham act *ultra vires* by assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses issued prior to the universal amendment on March 21, 2005. However, any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses issued after the universal amendment that do not contain the required tax-shifting language would be *ultra vires*.

Similarly, with respect to Scenario 3(a), in which some of FairPoint's licenses issued by Alexandria contain tax-shifting language while others do not, the Court finds that Alexandria did not act *ultra vires* when assessing taxes based on the value of FairPoint's poles and conduit or when assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses containing the tax-shifting language.

But any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses that do not contain the required tax-shifting language would be *ultra vires*.

VI

The Town of Belmont also moves for summary judgment on two additional issues: (1) whether unlicensed poles located within Belmont's rights-of-way are taxable; and (2) whether a pole located within a public right-of-way shown on a plan approved by the planning board is licensed as a matter of law pursuant to RSA 231:160-a with all statutorily required provisions included.

A

Belmont first argues that FairPoint is estopped from asserting that unlicensed poles located in public rights-of-way are exempt from taxation because there is no agreement as FairPoint contends is required by RSA 72:23, I. Belmont reasons that the lack of a license is caused solely by FairPoint's failure to comply with the statutory requirement that it obtain licenses for its poles. FairPoint counters that requiring the removal of the equipment, not taxation, is appropriate remedy for unlicensed poles. For the purposes of summary judgment, the parties have stipulated that FairPoint owns at least one unlicensed pole in Belmont.

RSA 231:173 states, "If any such pole, or structure, or underground conduit or cable, or any attachment or appurtenance thereto, is willfully placed or maintained in any highway without valid license therefor, it shall be removed upon demand by the authority having jurisdiction to issue licenses pursuant to this subdivision . . . ." The language of RSA 231:173 unambiguously provides the remedy for unlicensed poles, and

the Court will not therefore conclude that the unlicensed poles are taxable because of FairPoint's failure to obtain a license.

B

Belmont next argues that poles licensed as a matter of law pursuant to RSA 231:160-a are licensed with all the statutorily required provisions included. Belmont reasons that when poles are licensed by operation of law, then it follows that statutory requirements are read into the license by operation of law. FairPoint responds that the language of RSA 72:23, I(b) cannot be imputed to these licenses because the default outcome is not the ability to tax.

RSA 231:160-a states, "Any poles, structures, conduits, cables or wires, the location of which have already been approved by the local land use board as part of a subdivision, site plan, or other development approval, shall, if such location becomes a public highway, be deemed legally permitted or licensed without further proceedings." When read in conjunction with RSA 231:173, which allows municipalities to require the removal of unlicensed equipment, the most reasonable statutory interpretation of this provision does not lend to the conclusion that the notice requirements of RSA 72:23, I(b) are imputed to the licensees. RSA 231:160-a intends to protect the equipment from forced removal. It does not follow that it intends that the use tax may automatically be imposed. This is particularly true because the plain intent of RSA 72:23, I(b) is to ensure the licensee is aware of its taxation obligations. Moreover, as FairPoint notes, it would not be unduly burdensome for a municipality to comply with RSA 72:23, I. Therefore, the Court finds that a pole licensed as a matter of law pursuant to RSA 231:160-a does not automatically include the statutorily required tax-shifting language.

VII

Consistent with the foregoing, FairPoint's Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Municipalities' Cross-Motions for Summary Judgment are GRANTED in part and DENIED in part.

SO ORDERED

12/14/15
Date

Richard B. McNamara
Richard B. McNamara
Presiding Justice

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated March 1, 2016 relative to:

ORDER

3/2/2016

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications NNE

v.

Town of Acworth

No. 220-2012-CV-100

ORDER

The Petitioner, Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint"), brought actions against a number of New Hampshire municipalities alleging that the municipalities acted ultra vires in assessing taxes in a manner that failed to comply with the statutorily prescribed procedure. The parties cross-moved for summary judgment on the test cases' ultra vires claims. The Court's December 14, 2015 Order held that the municipalities, including the Town of Alexandria, the Town of Alstead, the Town of Belmont, the Town of Dublin, the Town of Durham, the City of Manchester, and the City of Portsmouth (collectively the "Municipalities"), did not act ultra vires when assessing taxes based on the value of FairPoint's poles and conduit or when assessing taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses containing the tax-shifting language required by RSA 72:23, I; however, any assessment of taxes based on the value of FairPoint's use of public rights-of-way pursuant to licenses without the required tax-shifting language would be ultra vires. The Alexandria, Belmont, Durham, and

Portsmouth now move for clarification and reconsideration.[1] FairPoint objects. Based on the foregoing, the motions are GRANTED as to the inconsistency on pages 17 and 18 of the Order, and are otherwise DENIED.

I

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. R. 12(e). Reconsideration is appropriate if the movant sustains its burden of showing that the court overlooked or misapprehended any points of law or fact that warrant a different result than that determined by the Court.

The Town of Alexandria raises five issues in its Motion for Clarification and/or Reconsideration and its supplement to that motion. First, it seeks clarification of the language on pages 17–18 of the Order because it is inconsistent with the Court's ultimate ruling. The Court agrees. The language "as long as the license states 'whether the lessee has an obligation to pay real and personal property taxes on structures and improvements added by the lessee'" shall be stricken. Alexandria's motion to clarify is therefore granted to that extent.

Second, Alexandria contends the Order did not explicitly address its argument that taxing the value of FairPoint's use of the Alexandria's rights-of-way is not ultra vires because the use was analogous to a "perpetual lease." It renews its argument that perpetual leases are taxable under RSA 72:6 and RSA 73:10 regardless of the presence of RSA 72:23, I(b) tax-shifting language. It cites In re Reid, which stated that perpetual

[1] The City of Manchester also moved for clarification and reconsideration. However, FairPoint later filed an assented to motion to stay resolution of Manchester's motion because the parties have reached a settlement in principle and are working on memorializing that settlement in a written agreement. The Court therefore does not address Manchester's motion.

leases "are taxable to the lessee because the lessee 'enjoys all the benefits of ownership, [and therefore] . . . should bear an owner's share of the public expense.'" 143 N.H. 246, 249 (1998) (quoting Piper v. Meredith, 83 N.H. 107, 110 (1927)).

Although the Court acknowledged Alexandria's perpetual lease argument, it now takes the opportunity to expand upon it. As FairPoint points out in its objection, licenses are not leases. Unlike leases, "a license does not ordinarily constitute a property interest." New England Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118, 120 (1999) [hereinafter Rochester I]. Nor are the licenses necessarily perpetual interests. Under RSA 231:163, a municipality has the authority to "revoke or change the terms and conditions of any such license." See also Verizon New England Inc. v. City of Rochester, 151 N.H. 263, 269–70 (2004) [hereinafter Rochester II] ("Under the plain language of [RSA 231:163], a city may change the terms and conditions of a license that it has issued whenever the public good requires.").

Alexandria points out that it has never terminated any of FairPoint's licenses, and some of those licenses date back to the 1930s and 1940s. It further argues, relying on Parker Young Co. v. State, 83 N.H. 551, 555–57 (1929), that it cannot terminate FairPoint's use of the rights-of-way because doing so would interfere with FairPoint's franchise rights granted by the Public Utilities Commission (PUC). However, both arguments are inapposite. A municipality choosing not to exercise the power to revoke or change a license does not amount to granting a perpetual interest when the municipality retains discretion to exercise that power. Further, Parker Young does not stand for the proposition that a municipality may never terminate a license. Rather, it states that, while municipalities may not determine who may or may not occupy the rights-of-way with poles and wires, licensing power nonetheless allows a municipality to

regulate and control the use of its rights-of-way to ensure the utility does not unduly interfere with other public purposes. Id. In other words, while Alexandria may not entirely forbid FairPoint's use of the rights-of-way, Alexandria may control the manner of use, such as location and size. See also N.H. Code of Admin. Rules, Puc 1301.01 ("Nothing in this rule shall be construed to supersede, overrule, or replace any other law, rule or regulation, including municipal and state authority over public highways pursuant to RSA 231:159 et seq."); RSA 362:7, III(d) (stating that the PUC's authority to regulate telephone franchises "shall not be construed to . . . [a]ffect the authority of the state or its political subdivisions . . . to manage the use of public rights-of-way"). Accordingly, Alexandria's perpetual lease argument lacks merit and is not a point of law that warrants a different conclusion from the Court's December 14, 2015 Order.

Third, Alexandria requests reconsideration based on FairPoint's alleged failure to comply with RSA 491:8-a. Because FairPoint did not submit any affidavits or discovery evidence, Alexandria concludes FairPoint could not demonstrate an absence of any genuine issue of material fact. It points out that the parties did not actually agree to stipulated facts. This argument, however, is overly technical. RSA 491:8-a, III explicitly provides that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". Alexandria has pointed to no issue of fact which is in dispute, and indeed, has itself moved for summary judgment. Therefore, Alexandria's RSA 491:8-a argument is not a point of law overlooked or misapprehended in the Court's December 14, 2015 Order.

Fourth, Alexandria requests reconsideration as to the statement on page 10 of the Order indicating that "Alexandria has not approved a universal amendment" of FairPoint's pole and conduit licenses. It contends this statement is untrue because it approved a universal amendment on December 17, 2013. But, as FairPoint notes, whether Alexandria approved an amendment in 2013 is immaterial to whether it assessed taxes ultra vires in 2011 because the universal amendments are not retroactive. Therefore, this point of fact does not merit reconsideration or clarification.

Finally, Alexandria's supplement to its motion requests reconsideration that it did not provide FairPoint the necessary notice to tax FairPoint for its use of the rights-of-way. It points to a single pole and conduit license that includes the language of RSA 72:23, I(b), and concludes that this license was sufficient notice to tax all every licensed pole regardless of whether the other licenses included the same language. Even assuming this argument could be implicit in Alexandria's prior pleadings, this argument lacks merit. The plain language of RSA 72:23, I(b) requires that "All leases and other agreements" shall include tax-shifting language. (Emphasis added). Alexandria's conclusion that only one license's inclusion of the tax-shifting language is sufficient notice for all licenses contravenes the plain language of the statute. Therefore, it is not a point of law or fact overlooked or misapprehended in the Court's December 14, 2015 Order.

II

The Town of Belmont and the Town of Durham raise four issues in their Motion for Clarification and/or Reconsideration. First, they contend the December 14, 2015 Order contains an inconsistency on page 21. The Order stated, "Nor did Durham act ultra vires by assessing taxes based on the value of FairPoint's use of public rights-of-

way pursuant to licenses issued prior to the universal amendment on March 21, 2005." As FairPoint's objection correctly notes, this statement is not inconsistent with the Court's ultimate holding. As the preceding sentence in the Order observes, Durham had approved a universal amendment in 2005, but subsequently issued licenses without the tax-shifting language. By approving the universal amendment in 2005, pre-2005 licenses included the tax-shifting language. Therefore, assessing taxes in 2011 based on FairPoint's use of public rights-of-way pursuant to those licenses was not ultra vires. Accordingly, this is not an inconsistency that requires clarification.

Second, Belmont argues that the Order did not specifically address its argument that it had provided FairPoint notice of its 2013 hearing concerning amendments to FairPoint's pole licenses. Contrary to Belmont's assertion, the Order addressed this argument on pages 7 and 20–21 and found that the parties did not dispute that FairPoint did not have notice of the hearing because Belmont sent the notice after the hearing, which contravenes RSA 231:163. Belmont states that paragraph 6 of its affidavit in support of its Objection to FairPoint's Motion for Summary Judgment indicated that it had provided FairPoint prior notice. However, that paragraph says only that the Belmont Town Administrator followed regular mailing procedures; it does not state that those procedures occurred prior to the hearing. Indeed, Exhibit 1 of FairPoint's Consolidated Objection to the Municipalities' Cross-Motions for Summary Judgment included certified mail receipts showing the notice was not sent until after the hearing. Consequently, this is not a point of fact or law overlooked or misapprehended.

Third, Belmont requests reconsideration of the Court's rejection of its argument that FairPoint is estopped from relying on its failure to obtain pole licenses to meet its burden of proving that it is exempt from taxation. The Court reasoned that the remedy

for unlicensed poles was removal. However, Belmont contends that such a remedy is illusory because under Parker Young Co. v. State, 83 N.H. 551, 555–57 (1929), it cannot terminate FairPoint's use of the rights-of-way because doing so would interfere with FairPoint's franchise rights granted by the PUC. Additionally, it states that under the Federal Telecommunications Act of 1996, 47 U.S.C. § 253, it may not prevent a telecommunication provider from providing service. However, as similarly discussed above, these limits on municipalities' authority to regulate the use of their public rights-of-way do not prohibit a municipality from requiring removal of a pole. Such authority regulates the location and manner in which FairPoint may use the public rights-of-way; it does not prevent FairPoint from providing service. Therefore, this is not a point of law that warrants a different conclusion from the Court's December 14, 2015 Order.

Finally, Belmont requests reconsideration of the Court's ruling that licenses arising as a matter of law under RSA 213:160-a do not permit taxing the value of FairPoint's use of the public rights-of-way. Belmont reasons that the ruling brings about unintended consequences because it would have no authority to amend those licenses, and those poles would therefor escape taxation indefinitely, which is contrary to the constitutional and statutory requirements that each property owner pay its fair share of the municipality's total tax burden.

Belmont's assertion that it would have no authority to impose taxes on poles licensed by operation of law under RSA 231:160-1 is contrary to the plain language of the licensing scheme in RSA chapter 231. Belmont reasons that it cannot amend a license that does not exist, which is a result contrary to the constitutional requirements concerning proportional taxation. However, simply because a license does not exist in the traditional form, it does not follow that there is no "license" subject to amendments.

Indeed, even though poles are "deemed" to be licensed, RSA 231:160-1 nonetheless requires "the appropriate utilities' easements, work plans, or other data showing locations of such structures, [to be] submitted to the municipality for recording purposes." As such, there is a record supporting a license by operation of law.

Moreover, there is no indication in RSA 231:163, which provide municipalities' the authority to amend licenses, that the legislature sought to limit municipalities' authority to revoke or amend licenses based on how those licenses were created. Under the statutory scheme, poles and wires may only be "erected, installed and maintained" within public rights-of-way "as provided in this subdivision." RSA 231:160. The subdivision affords two methods to obtain authority to erect poles. First, under RSA 231:160-a, if a local land use board had already approved the location of the poles and that location later becomes a public highway, those poles are to "be deemed legally permitted or licensed without further proceedings under this subdivision." Second, under RSA 231:161, the utility may apply for a permit or license through the statutorily prescribed procedure. In either circumstance, the poles are licensed by the terms of the subdivision. Under RSA 231:163, municipalities may "revoke or change the terms and conditions of any such license." This language is most reasonably interpreted as applying to any license arising under the subdivision's licensing scheme, including licenses arising by operation of law under RSA 231:160-a. Had the legislature sought to limit amending authority to only licenses issued under RSA 231:161, it could have so stated, but the Court will not now "consider what the legislature might have said nor add words that [the legislature] did not see fit to include." Rochester II, 151 N.H. at 266.

Consequently, a reasonable interpretation of the taxing scheme in RSA 72:23, I, and the licensing scheme in RSA chapter 231, concludes that municipalities have the

authority to amend licenses that arise by operation of law. Such an interpretation serves the purposes of both statutory schemes, which is to provide notice of tax obligations, allow municipalities to regulate public rights-of-way, and to protect poles not initially located in public rights-of-way from forced removal. See Wolfeboro Camp School, Inc. v. Town of Wolfeboro, 138 N.H. 496, 499 (1994) (quoting In re Estate of Martin, 125 N.H. 690, 691 (1984)) ("A tax exemption statute is construed not with rigorous strictness but 'to give full effect to the legislative intent of the statute.'"); State Emps. Ass'n of N.H., SEIU, Local 1984 v. N.H. Div. of Pers., 158 N.H. 338, 343 (2009) (quoting Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 431 (2007)) ("When interpreting two statutes that deal with a similar subject matter, [the Court will] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes."). By exercise of this amending authority over licenses arising by operation of law, it would not be unduly burdensome for municipalities to comply with RSA 72:23, I, while simultaneously ensuring pole owners receive proper notice of their tax obligations. Indeed, common sense dictates that notice of such tax obligations would be particularly important in circumstances where existing pole locations become part of a public right-of-way. Accordingly, this request for reconsideration does not raise any points of law or fact previously overlooked or misapprehended that warrant a different result as that reached in the Court's December 14, 2015 Order.

III

The City of Portsmouth also requests reconsideration of the Court's statement that Portsmouth's universal amendment substantially complied with RSA 72:23, I. Portsmouth argues that the facts show it included all of the statutory language.

However, as FairPoint's objection observes, the amendment failed to include the specific language of RSA 72:23, I(b). Accordingly, this is not a point of law overlooked or misapprehended in the Court's December 14, 2015 Order.

Consistent with the foregoing, Alexandria's Motion for Clarification and/or Reconsideration is GRANTED to the extent that it corrects an inconsistency on pages 17–18 of the December 14, 2015 Order, and DENIED as to the remaining issues; Belmont and Durham's Motion for Clarification and/or Reconsideration is DENIED; and Portsmouth's Motion for Clarification and/or Reconsideration is DENIED.

SO ORDERED

3/1/16
Date

Richard B. McNamara
Presiding Justice

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated July 20, 2018.

7/25/2018

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications-NNE

v.

Town of Acworth

No. 220-2012-CV-100

ORDER

These consolidated cases involve the taxation of telephone poles, appurtenant equipment and rights-of-way used by the Plaintiff Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications (" FairPoint"). These cases began in 2013 when – after emerging from bankruptcy – FairPoint sought an abatement of taxes on telephone poles, conduit and rights-of-way against virtually all the towns in the State of New Hampshire. FairPoint's cases were transferred to this Court by the Chief Justice of the Superior Court in 2013. FairPoint has brought new cases every year since that time, and cases since that time have either been transferred or stayed, pending this Court's ruling on the first cases. The cases involve interpretation of unique statutes: RSA 72:8-a and RSA 72:23. A number of cases have settled, one legal issue involving the cases has been determined conclusively by the New Hampshire Supreme Court, but other legal issues can only be appealed after a final order is issued on the valuation of the telephone poles, appurtenant equipment and rights-of-way.

Accordingly, counsel for FairPoint and a number of the Towns chose as test cases the 2011 tax abatement cases for the Towns of Hanover, New Hampshire, Durham, New Hampshire and Belmont, New Hampshire. The manner in which these Towns taxed FairPoint raises all of the issues raised by the other cases, and a final order in these cases will allow the parties to either appeal or accept the Order and obtain guidance on the other cases.

The parties agree that the equalization ratio as determined by the Department of Revenue Administration ("DRA") reflects the general level of market value assessed in each Town. Accordingly, the Court will simply set forth the value of the property found. The parties shall set forth a proposed form of order, within 10 days of the Clerk's notice of the date of decision, applying the equalization ratio to establish the appropriate tax and determine whether or not abatement is due. The Court will then issue a final order.

VALUE OF PROPERTY

TOWNS	Poles	Conduit	ROW Use (Poles) – ROW Use (Conduit)	
Belmont	$1,077,673	$644,732	$116,763	$6,144
Durham	$818,650	$988,910	$219,869	$24,883
Hanover	$797,835	$2,114,525	$202,060	$18,961

I

BACKGROUND

In a tax abatement case, the taxpayer bears the burden of establishing by a preponderance of the evidence that the town's assessment resulted in it bearing a disproportionate share of the town's burden. Porter v. Town of Sanborn, 150 N.H. 363, 367 (2003). A taxpayer challenging a tax assessment must show that his property is assessed at a higher percentage of fair market value than other assessed properties. See, e.g., Verizon New England, Inc. v. City of Rochester, 151 N.H. 263, 272 (2004). The Superior Court frequently considers such cases and they are usually resolved with expert appraisers applying settled principles of appraisal of real estate, which are then applied to facts involving the particular property. This case is unusual because it involves taxation of property – telephone poles, appurtenant equipment and rights-of-way – which are governed by specific statutes that have not been much discussed in New Hampshire law. See RSA 72:8-a and RSA 72:23.

After the Court issued a lengthy order on the various legal issues that had not been decided by the New Hampshire Supreme Court on April 27, 2016, the Court and the parties determined that the best way to proceed was for the Court to find specific facts in test cases so that a final judgment could enter and the legal conclusions reached by the Court could be appealed, if necessary. Accordingly, discovery proceeded and counsel advised the Court that the issues which would resolve all of the questions in all pending cases but could be considered by a final order in the 2011 cases involving Hanover, New Hampshire, Belmont, New Hampshire and Durham, New Hampshire. Following trial, submission of memoranda and exhibits the Court addresses the issues of valuation of property as follows.

II

TELEPHONE POLES

A. The Parties' Methodology

Both parties relied upon one expert witness. FairPoint's expert witness was Ann Bulkley ("Bulkley") of Concentric Energy Advisors, Inc. ("Concentric"). Bulkley holds a master's degree in economics, a bachelor's degree in economics/finance and according to her resume has served as an expert in valuing utility property for more than 2 decades. The Towns relied upon George E. Sansoucy, P.E., LLC ("GES"). George Sansoucy ("Sansoucy") of GES is a licensed civil engineer who holds a master's degree in sanitary/environmental engineering and has been operating a consulting engineering appraisal firm since 1980. Since 1990, the firm has been actively involved in the evaluation, appraisal, assessment and valuation of public and private utility property of all kinds throughout the United States. The Court finds both experts qualified.

Three methods may be used to value property for tax purposes: the replacement cost approach, the comparable sales approach and the capitalization of income approach. Appeal of Sawmill Brook Development Co., 129 N.H. 410, 413 (1970). In this case, each party's expert relied primarily on the cost approach in valuing the poles/conduit which is particularly applicable where the property being appraised involves relatively unique or specialized improvements for which there exist no comparable properties on the market. Neither expert was able to develop an income approach, based on the pole and conduit property alone, nor were they able to develop a model based on comparable sales of telephone and conduit networks. However, GES did attempt to value the poles by adding income received from the poles to their replacement cost. GES provided no authority for that this methodology is generally accepted by appraisers; an expert must choose either the

replacement cost approach, the comparable sales approach or the capitalization of income approach, but cannot combine them and thereby inflate the value of the property. The Court rejects this approach.

Apart from that variation, each party's expert also followed the same general replacement cost less new depreciation approach ("RCNLD")[1]. Both experts also followed the same general way of reaching RCNLD. They both proceeded by taking RCN minus depreciation to a 20% floor, expressed as follows:

RCN-Depreciation (to a 20% floor) = Total Value

Both experts agreed that depreciation was taken down to 20% because some telephone poles exceed their expected useful life.

One of the primary disputes in the case is just what the useful life of a telephone pole is. Ironically, in cases arising after September 1, 2016, the New Hampshire Legislature has determined that every municipality shall determine the value of poles and conduits by the following formula:

> [T]he replacement cost new (RCN) of the telecommunications pole or conduit, less depreciation, calculated on a straight-line basis for a period of 40 years with a residual value of 20%.

RSA 72:8-a.

One of the difficulties in determining value is that telephone poles were installed many years ago, and Court finds that the historical data relating to their costs and the cost of installation is questionably reliable, in part based on the anomalies apparent in the data . Both experts recognized these anomalies and tried to deal with them in different ways; Concentric by grouping data by decade and GES by dropping data it believed anomalous.

[1] This methodology is required by statute in cases arising after 2016.RSA 72:8-c.

Consequently, the analysis of telephone pole RCN by both experts differed significantly. Bulkley took the position that the paucity of FairPoint's installed cost data precluded use of the reproduction cost and meant that it was necessary to perform a replacement cost approach. Using FairPoint's pole data concerning height, location vintage and ownership percentage, Concentric developed a weighted RCN approach that equally weighted: (1) a trended cost approach based on confidential installation cost data received by Bulkley from 6 utilities in New England; and (2) a construction cost estimate derived from RS Means Cost Data ("R S Means"). Tr., Day 1, 33:25-34:2; Tr. Day 1, 27. RS Means is a tool used by utilities to estimate construction costs.

The Towns criticize Bulkley because she used a survey of undisclosed utilities rather than data provided by her client, Fairmont. Concentric refers to this data as Bulkley's New England Utility Survey ("Utility Survey"). Bulkley's response to this criticism was that what historical data was available from FairPoint was not sufficiently detailed. GES also criticized Bulkley because the data upon which she relied was "confidential" and not disclosed to the Towns. As the Towns point out in their post-hearing memo, there is no way for the Court or the Towns to evaluate the accuracy of the Utility Survey data, what exactly Bulkley received for data, the scope of or the specific decisions Bulkley made, and her application of the data because she refused to provide the raw data on the ground that she had promised the parties that she obtained the data from that their information would be kept confidential. (Town's Post Hearing Mem., p. 5.).

As a general rule, an expert is required to provide in discovery all data upon which he or she relies. See RSA 516:29-b. The fact that the data Concentric relies upon has not been disclosed to GES and to the Court could diminish the probative value of the assumption made by Bulkley that the data is reliable. On the other hand, the Towns never

moved to obtain the data, or sought to preclude Bulkley's testimony[2]. It is hard to imagine why the information could not have been produced pursuant to a protective order. The fact that the Towns failed to move to compel production of the data does not suggest lack of diligence on the Towns' part, but rather that they recognize that the data is probably reliable and probative.

Bulkley testified that the data from the New England Utility Survey came from several hundred thousand pole installations and a significant number of conduit miles from utilities in New England, including some in New Hampshire. According to her testimony, the geographical proximity of the pole installations made them useful comparatives related to FairPoint installations. She testified that she has done a significant amount of work in the Midwest, which, unlike New England, tends to have sandy soil and she recognizes the significant difference in New England soils, and the effect that would have on cost. Tr., Day 1, 36.

Bulkley testified that her conclusions were corroborated by Sansoucy's analysis of PSNH cost data. The PSNH cost data (obtained from Sansoucy) came from the Federal Energy Regulatory Commission ("FERC") account 324, the uniform system of accounts used by electrical utilities for regulatory reporting of cost data on utility pole installation. Utilities are required to correctly report that cost data because it forms a part of rate setting and, ultimately, return on investment. Tr., Day 1, 42:23–43:2.

Bulkley's methodology required some assumptions. The majority of the pole survey data came from poles approximately 35 feet and conduit survey information severally came in only 2 categories of sizes. FairPoint's contained the unique characteristics of each

[2] According to FairPoint the issue of confidentiality was not raised until trial; when it was raised at trial, the Court noted that "if it was important, you could have filed a motion to compel..." (FairPoint Reply Memo, p.2, citing Tr. Day 1 at 71:4-6.).

pole, including its height.

To bring the Utility Survey costs current, Concentric trended the data using the Handy Whitman Index, which is used by most experts who appraise utilities in order to bring past costs to current value. GES also used the Handy Whitman Index. The use of the Handy Whitman Index is not disputed; both experts recognized past costs needed to be brought to present value.

There was a difference in how the parties addressed anomalies in the data. For example, data from 1941 showed that pole installation cost $5130 per pole and in 1942 $608. Cost data in this case was presented that went back to the early 20th century and examination of what cost figures exist shows clear outliers. Obviously, given the fragmentary data, anomalies would be expected and would need to be corrected for. GES suggested outliers should simply be identified and removed. Bulkley decided to use a weighted cost by decade, thereby preventing a very small sample or anomaly from undermining the benchmark. Tr., Day 143:7–44:18; 46:2–48:2; Ex. 38 at 16–17. The Court believes that Bulkley's approach is the better one, because removing a particular anomaly requires a subjective decision made on little information, often from a period of time far removed from the present.

GES criticizes Bulkley for not using FairPoint data to determine the actual cost of poles themselves. However, Bulkley testified — and the Towns do not dispute — that no FairPoint data exists for years prior to 1980. Tr., Day 1, 160:2–16. The testimony at trial was that GES was provided information on 3161 pole invoices involving some 37,000 poles. The evidence at trial was that there were approximately 9500 poles in the three Defendant Towns alone — which illustrates that 37,000 poles is a very small sample. Under these circumstances, it was reasonable to use the Survey data instead of the very

small sample of FairPoint poles. While GES purported to rely upon installation data from FairPoint, in fact, GES relied on only 47 work orders that included installation cost for 92 poles. Exhibit BB, Ex. AA. Using this small sample, and a small sample from Littleton Water and Light Department, GES determined that the projected installation cost it had derived from RS Means were reasonable. The Court does not credit this testimony, because the samples it used were too small to provide a reasonable check on the RS Means derived installation costs[3].

Both Bulkley and GES used an estimating tool referred to as RS Means to estimate the cost of construction. Ironically, although both parties rely on RS Means, and, according to the testimony, it appears that the New Hampshire Legislature has required that after 2016 municipalities should rely on RS Means in assessing taxes on poles and conduit, both experts criticized RS Means; Bulkley, claiming that RS Means is "often on the higher side" and is often not relied on in the construction industry for bidding purposes, and GES suggesting that RS Means' understanding of New Hampshire labor rates is flawed. Nonetheless, the Court believes that RS Means is entitled to weight as the testimony from both experts is that it is generally accepted in the utility industry[4].

B. Calculation of RCN

The fundamental difference between the experts involves the manner in which the parties calculated RCN. Essentially, rather than attempting to reconstruct the actual cost paid by FairPoint by using estimates and extrapolation, Bulkley relied upon data from the Utility Survey, and then attempted to determine if that data could be confirmed by other information such as RS Means, and the PSNH survey introduced into evidence regarding

[3] Uncontrolled small sample evidence broaches the logical fallacy of inductive reasoning: "I saw 5 Ford automobiles. They were all red. Therefore, all Ford automobiles are red".

[4] In fact, there was testimony at trial that the Department of Revenue Administration requires municipalities to use RS Means in order to provide standard cost data. RSA 72:8-c.

value of Public Service poles in New Hampshire obtained from FERC.[5] GES, beginning with a sample of FairPoint poles, attempted to construct a model of the cost that Sansoucy believed would be required. The flaw in GES's approach, however, is that it requires numerous assumptions, each of which is subject to variables, and some of which are completely subjective.

GES calculated the unit price per pole as a combination of 8 primary cost components: (1) material and labor site work costs; (2) mobilization costs; (3) guy wire and anchor costs; (4) pole foundation costs in ledge or bedrock; (5), compaction and disposal costs; (6) general contractor overhead and profit; (7) owner's costs (to account for field personnel, engineering, permitting and office overhead); and (8) an allowance for the cost of funds during construction. The fundamental problem with projections by assumption is that assumptions must be built upon assumptions.

For example, GES assumed that mobilization costs would be incurred for every 3 poles installed. There is no historical data detailing how mobilization costs were actually incurred for installing FairPoint's poles and it is reasonable to believe that a distribution system would be reproduced with greater efficiencies than mobilizing 3 poles at a time. This is also illustrated by the much lower Utility Survey costs, which presumably include mobilization cost. Similarly, GES included a general contractor's overhead and profit; however, FairPoint confirmed that company employees install the poles in the Towns and it does not utilize general contractors.

Perhaps most importantly, as addressed in the Motion in Limine, GES's pole cost estimates reflected excavation cost for the poles that included an estimate for installation in ledge or bedrock. GES further assumed that 75% of the bedrock measured in 8.28

[5] There was evidence that approximately 94% of FairPoint's poles are co-owned by PSNH.

square miles of Durham is more than 6 feet below the surface. Ex. A at 72–73. Sansoucy justified his opinion by saying that if you "walk through Durham there is rock everywhere". Tr., Hearing Mar. 5, 2018 (motions in limine) 109:1-2. Based on an analysis of subsurface rock in Durham, GES assumed that 10% of the poles in all three Towns would incur similar ledge boring costs. There is no real basis for this conclusion, and during the hearing on the Motion in Limine to exclude the testimony, GES admitted that the ledge boring costs are essentially an extraordinary assumption, within the meaning of USPAP[6]. Since there was no proof of this extraordinary assumption at trial, the Court is not persuaded by the opinion based upon it.

The issue of ledge and bedrock illustrates why the Utility Survey is preferable to an assumption. There is no doubt that pole installation in New England would involve some percentage of bedrock or ledge installation. Any data base involving pole installation in New England – as Bulkley testified the Utility Survey is – would include real world ledge boring costs.

GES also considered the cost of guy wires and anchors as part of the cost of poles. GES estimated that 20% of all poles in each of the Towns required guy wire and anchor installations and 50% of those installations were estimated to be anchored in concrete. However, guy wires and anchors are not subject to taxation. RSA 72:8-a only permits

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[6] EXTRAORDINARY ASSUMPTION: an assumption, directly related to a specific assignment, as of the effective date of the appraisal result, which, if found to be false, could alter the appraiser's opinions or conclusions.

Comment: Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.

USPAP at 3.

taxation for "structures, poles, towers and conduits" and expressly excludes from taxation "other devices and equipment, including wires, fiber optics and switching equipment." No statute specifically authorizes taxation of guy wires and anchors. It is well settled that the right to tax "must be found within the letter of the law and may not be extended by implication". Pheasant Lane Realty Trust v. City of Nashua, 143 N.H. 140, 143 (1998). The Department of Revenue Administration ("DRA") does not include guys and anchors in its pole values. Tr., Day 4, 592:9. Anchors and guys, which do not appear to be justified, add substantially to GES's values.

The Court finds persuasive the fact that the conclusions reached by Bulkley are essentially consistent with the information obtained from other sources, including GES's own PSNH pole data study, and that GES's conclusions based upon estimated costs, are far higher. Pole values calculated by the Utility Survey, by Concentric using an RS Means analysis, from GES's Public Service data and from the New Hampshire DRA data are all relatively similar, while the GES data, derived *a priori* far exceeds the other data:

	Belmont	Durham	Hanover
Concentric Utility Survey	$2,471,804	$2,019,277	$2,176,248
Concentric: RS Means	$2,151,608	$2,051,998	$1,423,669
GES PSNH Pole Data	$2,242,515	$1,878,245	$1,746,470
NH DRA Data	$2,322,132	$1,805,219	$1,846,527
GES Estimate	$4,503,606	$3,663,552	$3,541,538

An analysis of real world data is preferable to an estimate for the obvious reason that the real world experience may show that it has been possible to resolve an anticipated problem more efficiently than predicted, or that a problem that was anticipated to cause little difficulty did in fact cause great difficulty and expense. The New Hampshire Supreme

Court has recognized that the replacement cost approach tends to inflate fair market value by setting a price that exceeds a level of actual market price negotiations. Manchester Housing Authority v. Reingold, 130 N.H. 598, 602 (1988).

Moreover, the Court is troubled by the fact that GES has been involved in municipal utility taxation for many years and has rendered different opinions involving the same property in different years without adequate explanation. Sansoucy was vigorously and effectively cross examined on contradictory opinions of value of the same poles at issue in this case that he has given at other times. For example, in the Town of Durham in 2011, GES arrived at a unit cost of 30 foot poles of $1050. Ex. 22. Those costs increased to $1125 in 2013.Ex. 21. In 2015, 30 foot poles were valued at $2,731. Ex. 23. The values then fell to $2,623. In this litigation, GES opines the same 30 foot pole is now worth $1680. GES did not provide an adequate explanation for these variations, and its failure to do so limits the Court's willingness to accept its conclusions. See FairPoint's Post-Hearing Mem., p. 29–31.

In sum, the Court accepts the values of the poles set forth by FairPoint.

C. Pole Depreciation

Both experts believe that only physical deterioration should be considered in determining depreciation. Neither party introduced any evidence or considered functional or economic obsolescence. FairPoint argues for an average of 30 years for telephone poles. Sansoucy believes the appropriate standard for depreciation is 60 years.

Concentric relies essentially on two methods to determine average service life of the poles and conduit: the 1995 Federal Communications Commission's ("FCC) determination of 25 to 35 years of useful life; and the 40 year life determined by HB 1198 in 2016, currently set forth as RSA 72:8-c. The New Hampshire Legislature requires that after September 1, 2016, a 40 year depreciable life be applied to telephone poles.

FairPoint argues that the FCC determination was the result of a litigated process before the FCC, which engaged in an extensive review of many depreciation studies and input. Tr., Day 1, at 96:5-7. FairPoint argues that the Court should accept the midpoint of the depreciation ranges. However, Bulkley conceded that the 40 year depreciation schedule set forth in the current New Hampshire statute RSA 72: a-8-c, I was reasonable, although "at the higher end". Tr., Day 1, at 97:14-22.

Sansoucy argues that neither standard, the 25 to 35 year FCC standard, or the 40 year New Hampshire standard is appropriate, because they both referenced book depreciation and "book depreciation cannot be used as a substitute for physical depreciation in the cost approach." Respondent's Post-trial Memorandum of Law, page 15 (citing Appeal of New Hampshire Electric Cooperative Inc., 170 N.H. 66, 79 (2017)).

The Court disagrees. It is true that in Appeal of New Hampshire Electric Cooperative, the New Hampshire Supreme Court stated that "book depreciation, unlike actual depreciation, is based on historical cost or another previously established figure that may have no relation to current market value." Id. at 79. However, the New Hampshire Supreme Court has specifically held that:

> [T]he trier of fact may use any one or a combination of five appraisal techniques in valuing public utility property: original cost less depreciation *(rate base or net book)*, comparable sales, cost of alternate facilities, capitalized earnings, and reproduction cost less depreciation. Typically all relevant factors must be considered, but a trier of fact need not allocate specific weight to any one of the approaches listed. (Emphasis supplied).

Tennessee Gas Pipeline Co., v. Town of Hudson, 145 N.H. 598, 600 (2000) (emphasis added) (brackets and ellipse omitted) *quoted in* Public Service Company of New Hampshire v. Town of Bow, 170 N.H. 690, 692 (2018).

Sansoucy argued that the poles should be depreciated with a 60 year useful life. He

relied primarily upon pole studies that his firm has done, and a study in the City of Boston and a study of National Grid poles in upstate New York. The Massachusetts Appellate Tax Board found that all of these studies were flawed because they do not consider any retirement data, thereby ignoring an entire segment of poles. Commonwealth of Massachusetts, Appellate Tax Board, docket number F316346 and F319254 (August 11, 2017), appendix 6.

For purposes of determining physical depreciation, it is important to evaluate the retirement of assets -- not just the ages of those that remain in service. For example, if 100 poles were placed in service in 1970 and 25 of those polls remain in service in 2011, those poles that remain in service would be 41 years old. However, the information that is not reflected in this example is the average age upon retirement of the other 75 poles that are no longer in service[7]. The Court is therefore not persuaded by the GES analysis.

But the Court is also not persuaded by Concentric's adoption of the FCC depreciation standard of 25 to 35 years. In the first place, although the FCC standard may have been created pursuant to legislative hearings and legislative fact-finding, it was created more than 20 years ago. Second, and more important, the Court can only assume[8] that the FCC, which established one national standard, considered data from across the country, including data from states with climates far different from New Hampshire. It seems reasonable to suppose, for example, that telephone poles in dry desert climates, such as California, Nevada, Arizona and New Mexico, would be subject to a different rate

[7] Only focusing on poles that remain in service to estimate the useful service life of all assets is analogous to determining the average life expectancy of human beings by evaluating the age of individuals in a retirement home. For example, the average age of individuals in a retirement home may be 87 years old and since those individuals are still alive, on average those individuals may be expected to live a few additional years. However, this does not, in turn, mean that the average life expectancy of human beings is 87 years or higher. Concentric Rebuttal Report, p. 29, n. 52.

[8] Neither party has specifically addressed this point.

of physical depreciation than telephone poles in a New England climate.

On the other hand, the determination made by the New Hampshire Legislature that a 40 year depreciable life should be applied was made very recently, and with input from all of those interested in the industry, including the Towns' expert, GES, and doubtlessly focused on the New England climate. The Court finds that the appropriate period of physical depreciation for poles is 40 years. The Court therefore finds the replacement cost less new depreciation for the telephone poles in each town as of the valuation date of April 1, 2011 for the Towns as follows:

Belmont	$1,077,673
Durham	$818,650
Hanover	$797,835

III

Conduit

A. Value

Valuing conduit is even more difficult than valuing telephone poles; as Bulkley noted at trial, the conduit is obviously underground and unlike poles, cannot be inspected. Both parties relied on information about the footage of conduit provided by FairPoint. Tr. Day 1, 85: 6–10.

The basic approach of Concentric and GES to valuing conduit was the same approach the experts took in valuing poles. Concentric relied upon its Utility Survey, and then prepared an estimate using an RS Means analysis to check the reliability of the Survey. As with respect to its pole analysis, GES simply analyzed all of the factors in conduit costs and estimated all costs from RS Means. This led to significant difference between the experts.

GES vigorously challenges Bulkley's analysis because she explicitly dropped certain charges out of the RS Means analysis. As with the pole analysis, Bulkley excluded certain RS Means charges that she believed would unreasonably increase the estimate, specifically, excavation, backfill, and concrete. The Court is not persuaded that simply excluding certain charges is a reasonable way to come to a conclusion of value based upon the supposition that the valuations are high. On the other hand, Concentric's reason for using the RS Means analysis was simply as a check on the Utility Survey. One would expect that the estimates from RS Means would exceed real world costs. Dropping some of those costs is best understood as advocacy and not a principled determination of cost. It does not diminish the probative value of the Utility Survey.

Conversely, the Court is not persuaded by GES's approach, which is based entirely on estimates. GES engaged in a replacement cost analysis of the conduit, using the RS Means data without resort to any actual data. GES found 19 different items that it believed were weighted unit costs or conduit installation. GES Expert Report, Table 17, pg. 81. Some of these items would be necessary in some cases, but plainly, not in every case. See, e.g., GES Expert Report, Table 17, pg. 81, Row 19 "New Grass" and Row 14 "Rock Removal".

The point is not that such charges might not be legitimate, but that there is no real way to estimate how frequently they will be necessary. As the Court noted, in considering different methods of valuing poles, an analysis of real world data is preferable to an estimate for the obvious reason that the real world experience may show that it has been possible to resolve an anticipated problem more efficiently than estimated, or a problem that was anticipated to cause little difficulty did in fact cause great difficulty and expense. It bears repeating that the New Hampshire Supreme Court has recognized that the replacement cost approach tends to inflate fair market value by setting a price that exceeds

a level of actual market price negotiations. Manchester Housing Authority, 130 N.H. at 602. Accordingly, the Court finds the following conduit values, which are Concentric's Utility Survey conduit RCN:

Belmont $644,732

Durham $988,910

Hanover $2,114,525

B. Depreciation

There is less information available on conduit depreciation then on pole depreciation. Because conduit is underground, it is difficult to examine and determine its physical depreciation until it fails. Concentric relied upon the December 17, 1999, FCC study, which states that the average service life of the conduit system is 50 to 60 years. Plaintiff's Exhibit 34.

GES criticized Concentric's analysis because it was based upon "book value." As explained, given the difficulty in valuing utility assets, book value is one of several legitimate factors that can be used to value assets. GES believed that conduit should be assigned a 50 year physical depreciation rate. It noted that while PVC conduit is expected to last much longer than 50 years, the use of PVC has only been common for the last 50 years and there is insufficient data to reliably assign a longer life. GES Expert Report, p. 105.

Effective September 1, 2016, the New Hampshire Legislature has determined that the value of conduit employed in transmission of telephone communications owned in whole or in part by telephone utilities should be calculated on a straight-line basis for a period of 40 years, with a residual value of 20%. RSA 72:8-c, I. But neither expert advocated for a 40 year standard. Rather, both experts in this case reached remarkably

similar conclusions about the useful life of conduit; Concentric believed the useful life is 55 years, and GES believed the useful life was 50 years. Concentric's value is based upon the 1999 determination by the FCC, which as the Court noted is almost 20 years old.

The Court found the FCC's conclusions with respect to poles unpersuasive, in part because the FCC analysis was national in nature. However, while the fact that the FCC study is national, rather than limited to New England in scope, it is less important in the area of conduit, because conduit is buried; weather conditions presumably have less impact on physical depreciation of underground conduit. GES claims that its value is based on its analysis of the New England market. GES Expert Report, p. 105. Given the sharp dispute between the experts regarding pole depreciation, and the lack of persuasive force to either argument, the Court accepted the Legislature's determination that a 40 year depreciable life is appropriate for poles. But in light of the fact that both experts believe the useful life of conduit is between 50 and 55 years, the Court declines to accept the guidance of RSA 72:8-c, I. Concentric's depreciable life of 55 years is longer than the estimate made by GES, and the Court believes that it constitutes a tacit admission. Annot., Valuation for Taxation Purposes as Admissible to Show Value for Other Purposes, 39 ALR 2nd 209 (1955). Furthermore, the Court credits GES's view that, although there is not much reliable data because PVC pipe only began being used in the 1970s, the useful life of PVC pipe probably exceeds 50 years. Accordingly, the Court will apply a 55 year depreciable life to conduit. The values of the conduit, after depreciation (RCNLD) are as follows:

Belmont	$156,611
Durham	$271,418
Hanover	$643,060

IV

Right of Way

Part of the value of the property owned by FairPoint in the Towns is the ability to place conduit and telephone poles in public rights-of-way ("ROW"). Under RSA 72:23, I, real or personal property used or occupied by other than the State or a city, town, school district or village district under a lease or other agreement that provides for the payment of properly assessed real and personal property taxes by the party using or occupying said property is not exempt from taxation. The statute mandates that all leases and other agreements that provide for the "use or occupation" by others of real or personal property must provide for the payment of real estate property taxes. RSA 72:23, I.

A. Expert Approaches to Valuation

The critical issue here is the valuation of FairPoint's use of the ROW attributable to the placement of telephone poles and conduit in the ROW within the relevant Towns. Both experts employed relatively similar approaches to calculating this value and their approaches are comparable to those of the appraisers in Verizon New England, Inc. v. City of Rochester, 2006 WL 3742673 (N.H. Super. November 9, 2006). As the court noted in that case:

> Public ways host a variety of "occupations and uses." Citizens use them for travel and occupy them for short and long-term parking. Businesses similarly use and occupy public ways to transport and deliver goods. Utilities use and occupy public ways to deliver their services: telephone, cable, water, sewer, electricity and natural gas.

Verizon, WL 3742673 at * 1.

Both appraisers assumed that FairPoint's poles and conduit occupied a portion of the area adjacent to the public roadways throughout the Towns. Then, each appraiser determined an average fee simple value per acre in the town. Using that fee simple figure, the appraisers made a number of adjustments, recognizing that FairPoint is one of several

users of each pole. Then each appraiser determined the fee simple value of the entire ROW, prior to determining the value of the portion of the utility exclusively occupied. The approach taken by both appraisers is similar to that taken by all of the appraisers who testified in Verizon:

> (1) Calculate the length of Verizon's cables, wires and conduits and under the ground;
> (2) Estimate the extent (width) of the corridor "used and occupied" by Verizon's poles, wires, cables and conduits;
> (3) Multiply items one and 2 to arrive at the total acreage "used and occupied" ;
> (4) Assess value using the "across the fence method," which basically calculates the fair market value of the corridor by using the comparable value of property abutting it; and
> (5) Estimate the percentage of Verizon's use and occupation of the corridor and value accordingly.

Verizon, WL 3742673 at *1.

Concentric characterized the appropriate analysis as the diminution in use of the adjacent property as a result of the easement. Tr., Day 1, 126:21–127:19. Centronic's analysis purported to follow the analyses in Verizon and appears in Plaintiff's Exhibit 38. See also Tr., Day 1, 116–136. GES's analysis appears in Tr., Day 4, 428–450, and Ex X. There was no dispute about the amount of conduit and cable in each of the Towns because that information was available from FairPoint's records. Similarly, there is limited dispute about the number of miles of roads in the Towns.

Bulkley described her approach as an "across the fence" methodology. She explained this methodology as a way of estimating the value of the land by taking into consideration the value of adjacent land. Tr., Day 1, 116:21–25. Because she took the position that the public way "didn't really have a market value," she valued the corridor with respect to value of the property next to it. Tr., Day 1, 117:2–9. She described her approach "at a high level" as determining how many acres that are being valued as part of

the right of way, then, with the value per acre of that right-of-way, calculating separately the diminution in value resulting from the use of the right-of-way by FairPoint. Tr., Day 1, 121–114. From publicly available information, she obtained the amount of miles of roads in each Town, and converted it into acres. She then concluded that a 15 foot right-of-way would be reasonable for poles and 10 feet for conduit. Tr., Day 1, 122:12–23. She then took the value of all of the land by obtaining the value of residential and commercial lands' assessed value, and divided that by the acreage in the community to get the dollar value per acre of residential land and commercial and industrial land. Tr., Day 1, 125:3–10.

Consistent with Judge Morrill's decision in Verizon, Bulkley testified that 10% approximates the diminution in value of the ROW due to use by utilities. Bulkley did not provide any quantitative analysis supporting the 10% diminution in value; she stated only that she "relied on the Verizon decision". Tr., Day 1 126: 21–25. Then, based upon the number of pole attachers, (other utilities and cable companies) the figure was reduced proportionately. Tr., Day 1, 128:24–132.

While GES's approach was similar to Bulkley's, there were several differences. First, the experts differed slightly in the mileage of roads in each town. Bulkley took mileage from New Hampshire Department of Transportation ("DOT") information; GES obtained information from the Towns themselves. Because the DOT obviously has greater resources than towns, the Court accepts the DOT figure,[9] and finds that there are 75.904 miles of road in Belmont, 100.795 miles of road in Hanover and 62.93 miles of road in Durham.

Bulkley took the position that a 15 foot wide utility corridor for telephone pole ROW's and 10 feet for conduit is appropriate. Sansoucy testified that New Hampshire

[9] Ironically, the DOT figure, presented by FairPoint's expert, is higher than the figure presented by Hanover and Durham.

Department of Transportation regulations suggest an 8 foot corridor is necessary for utilities. Ex. X; Tr., Day 4, 426:17–429:2. Bulkley's basis for the 15 and 10 foot corridors is the Verizon decision. In that case, Verizon's appraiser sought to calculate only the land, air and underground space actually "occupied" by Verizon's wires, poles and conduits. The Verizon court noted that the analysis "gives no weight to Verizon's right to 'use' the public way," because the appraiser contended that "this right to 'use' the streets and roads is essentially identical to the public's right". Verizon, WL 3742673 at *5. The Verizon court rejected this view, because it ignored the Legislature's intent expressed in RSA 72:23, I to include that portion of public property used *or* occupied as taxable property and noted that use of the conjunction *or* in RSA 72:23, I "has to be presumed intentional". Id. Judge Morrill reasoned that, "considering the width of Verizon's trucks, the frequency of their 'use' of the public way, the extent and length of their 'use,' the court selects a corridor of fifteen feet in width for poles and wires and ten feet in width for buried conduit and wires". Id.

The Verizon court recognized that utility poles and equipment on those poles must be maintained, repaired or even replaced, and that the utility corridor must be clear. There was substantial evidence in this case about the maintenance, repair and anchoring of telephone poles as well. Sansoucy testified that utility companies maintain and check telephone poles on a regular basis, even boring samples out of them to determine their stage of preservation. Utilities also use a product called "Osmos," which is injected into the pole to extend its useful life. Sansoucy testified credibly that a significant number of poles required anchors or guys, some of which extend some significant distance from the poles. GES Expert Report, Appendix A, pg. 14–104. Although the anchors and guys are not subject to taxation, their existence as well as the requirements of pole maintenance and

repair and replacement establishes that an 8 foot corridor does not adequately reflect the utility's usage of the ROW.

Bulkley also made a decision to divide the number of attachments by the number of poles to determine the percentage used by FairPoint. GES criticizes this approach because it fails to recognize "that FairPoint's daily use of the corridor's wire is wider than the attaches, because FairPoint uses a width equal to the diameter of the poles it owns, while the attacker's use is limited to the wire/cables attached to the poles". Town's Post Hearing Mem., p. 32. This distinction is not reasonable, because to the extent that the attacher's equipment is on the pole, it uses the pole the same degree as any other user or otherwise its equipment would fall to the ground.

B. Assemblage Costs

GES criticizes Bulkley's failure to include assemblage costs, which it characterizes as the cost of creating the right to use the ROW. Sansoucy testified that this cost constituted "a very low number". Tr., Day 4, 50:5–21. The New Hampshire Supreme Court has specifically left open the issue of whether legal expenses associated with the transfer of property and the costs of surveys and State environmental permits may be considered in determining the value of an easement. Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598, 604 (2000). The Court believes that these costs should be associated with the value of the poles and conduit themselves, and not as part of the use of a the ROW, and therefore does not believe they need to be added to the ROW analysis.

C. Allocation of Percentage of Use of the ROW

(i) The Experts' Views

The most significant difference between the parties' experts' valuations was the determination of what portion of the utility corridor of the ROW should be allocated to

FairPoint's use and occupancy based upon the licenses it has from the municipalities. Bulkley allocated 10% of the ROW's value to FairPoint; GES assigned 70%.

While Bulkley reached the same result as the Verizon court, she did not adopt its analysis precisely:

> Q. And why? Why did you think that (the 10% diminution of value of the public ROW) was reasonable?
>
> A. Because the public way has already – so you're basically saying, what is the change in *value to the owners of the land* from adding that public way? [The] public way was already established, it's being used by the community to remove snow from the center of the street; it has fire hydrants in it; and sidewalks in. So that is already in use in place for the public, and *the use to the owner of the land* hasn't changed significantly by the addition of the utilities in the public way. (Emphasis supplied).
>
> Q. And that easement exists whether there is telephone poles or not on it, correct?
>
> A. That's correct. On all of these main roads there would still be this easement, and all of these services for the public would be in the public way.

Tr., Day 1, 127:4–17.

The pole licenses are not easements, although both parties have analogized the licenses to easements. In New Hampshire, an easement is valued by determining the value by which the easement reduces the value of the fee of the servient estate. Lot Lake Colony Association v. Barnstead, 126 N.H. 136, 138 (1985); see also Tennessee Pipe Line Co. v. Town of Hudson, 1997 WL 34613593 (N.H. Super. Nov. 6, 1997), *aff'd* 145 N.H. 598 (2000). "When easements are valued, the value of the easement interest is added to the estate of the easement holder, and a corresponding reduction is made to the value of the underlying fee." Tennessee Pipe Line, 145 N.H. at 603. This is the law in most jurisdictions. 72 Am. Jur.2d State and Local Taxation § 659 (May 2018). Bulkley valued the easement by considering the dominant estate to be the properties of adjacent landowners. In Verizon,

Judge Morrill considered the ROW to be the servient estate and found that the public viatic use of the ROW -- the right of the public to travel readily -- was only impacted 10% by the utilities. Bulkley's error, however, did not affect her calculation because ultimately the value of the ROW was determined by both experts to be based on the value of the land in the Town; so it does not matter whether she used the value of adjacent land or the value of the ROW.

Some tax must be imposed, because the Legislature has specifically required a tax to be imposed on the occupancy and use of municipal land and FairPoint plainly derives a benefit from its use or occupancy of municipal land. See RSA 72:23, I. Moreover, it is obvious that the benefit FairPoint obtains is substantial; suppose, for example, landowners with no parking area for their vehicles in an urban part of Concord or Manchester, New Hampshire, could obtain a municipal license to park their vehicles in an adjacent public right-of-way. Such a license would have substantial market value.

The Court recognizes that the traditional approach of valuing an easement is not completely apposite. Ordinarily, the relevant consideration is how the existence of the easement reduces the value of the servient estate. But Bulkley testified without contradiction that a utility easement may actually add value to land; that a parcel of land that has utility service may have greater value than a parcel of land that does not have utility service. Tr., Day 1, 128:3–7. It is likely, that utility service enhances the value of the land adjacent to the Town's roads. Unimproved land is of less value for residential or commercial purposes if there is no utility service.

Doubtless FairPoint derives a benefit from use and occupation of the municipal ROWS. In fact, its business model can be said to depend upon the ROWs; without the ROWs, it would not be able to place poles in the ground and provide service to customers.

But both experts testified that they could not value the network of poles and conduit on a sales or income basis. And there is no market for the ability to place objects in municipal rights of way.

Ultimately, despite the fact that the existence of utility service increases the value of the land and renders it difficult to apply the traditional easement valuation analysis, the value of the license can be determined by considering the degree of impairment of the public's use of the right-of-way, taking the value of the land with utility services, without regard to the fact that placement of the poles and conduit, at some point in the past increased the value of the right-of-way by increasing the value of the land served by the right-of-way, which has utility service. The law permits valuation in this way, because taxes are to be assessment as of April 1, and the improvement that increased the value of the land-placement of utility poles to provide utility service, in every case, occurred before that date and therefore need not be considered. See, e.g., Carr v. Town of New London, 170 N.H. 10, 13 (2017).

(ii) The Verizon Approach

In reaching the conclusion that the use of the ROW should be valued at 10% of the total in Verizon, Judge Morrill analyzed the legal rights and duties created by a license. He noted that licenses are temporary, with a term of one year. RSA 231:161, II. Moreover, a license holder is prohibited from ever acquiring any interest in the land. RSA 231:174. Because the primary use and purpose of roads and streets is viatic, any new poles must be erected in a way that will not interfere with the town's free and convenient use of public travel of the highway. RSA 231:168; Verizon, WL 3742673 at *5. For these reasons Judge Morrill concluded that "Verizon's license rights are a long way from fee simple ownership", and treated the corridor used by the utilities as an easement:

> Consequently, at best a utility corridor reduces the value of the land that it uses and occupies by ten percent. Or stated another way, after the easement is imposed, ninety percent of the value of the servient estate remains.

Verizon, WL 3742673 at *8.

Although it is true that all licensees only obtain a temporary right to use the ROW, under RSA 231:161, IV-VI, licensees such as FairPoint, after having obtained a permit, are thereafter entitled to reinstall and maintain any poles in approximately the same location. While a municipality may require the licensee to remove the pole from the authorized location, if it does so it is required to provide a substitute location for the pole and notify the licensee of that location when it issues a notice to remove. RSA 231:179, 180; Town's Post Hearing Mem., p.30. But there was no testimony that would suggest that the length of time a utility may maintain its use of the ROW is relevant to taxation in a particular year.

Sansoucy identified the adverse impact a utility corridor would have on the viatic use of the ROW. Tr. Day 3:446:7–11. Once utility poles are placed, nothing can be built in the ROW and the municipality gives up "basically all viatic rights to that corridor. But they do have the right to pass and repass at various angles, etc." Tr., Day 3, 447:6–8. Sansoucy admitted that his opinion of what percentage of the ROW should be determined to have been diminished by the placement of utility poles was based totally on "opinion and judgment". Tr. Day 4, 447–448. He concluded that the use of the utility easement constituted 70% of the value of the ROW. His opinion provides no rationale; it is mere *ipse dixit*.

(iii) Quantification of Value

Based upon the testimony, the Court finds as follows: (1) the use of the utility corridor of the ROW can be valued by averaging the value of the land in the Town in which the ROW is located; and (2) calculating the diminution of the value of the land in the ROW

by the utility's occupation or the excessive use of the land by the utility.

Impairment of value of a ROW by a utility's equipment can be caused by three different factors: (1) physical obstruction of the ROW by objects such as poles; (2) physical obstruction of the ROW caused by maintenance or repair of the poles or conduits; and (3) damage to the ROW by enhanced use of the ROW by utilities maintaining and repairing poles and conduit. The Court credits the approach taken by Bulkley, following Judge Morrill's decision in Verizon, that a 15 foot width for poles and 10 foot width for conduit is a viable utility corridor that recognizes the need for maintenance and repair. The Court also credits Bulkley's approach of dividing the value of the use of the ROW by the number of users utilizing the pole. Sansoucy's approach that "FairPoint's daily use of the corridor is wider than the attachers' because FairPoint uses a width equal to the diameter of the poles it owns, while the attachers' use is limited to the wire/cables attached to the poles," Town's Post hearing Mem., p. 32, is not persuasive for the obvious reason that in order for the user's equipment to remain in the air, it utilizes the diameter of the poles as much as FairPoint does.

Judge Morrill's rationale for finding a 10% use of the utility corridor was based in part upon his recognition that the utility would need a corridor for maintenance, repair or replacement and cutting brush. At least the first step towards quantification of the impairment of the ROW and corroboration of Judge Morrill's rationale is possible by application of the facts found in this case.

For example, since the Court has found the depreciable life to be 40 years for poles and 55 years for conduit, it follows that 2.5% of the poles in any Town will be replaced

every year and .0095% of the conduit in any Town will be replaced in any year[10]. This replacement will result in an enhanced use of utility corridor of the ROW. In addition, beginning at 30 years, each pole is inspected and potentially tested or treated with chemicals, which requires further enhanced use of the ROW. Therefore, each year 3% of the poles must be inspected and treated.

This enhanced use of the may be able to be reasonably quantified. It may be possible, for example to analyze specific use of an ROW by a traffic study, which could be done as a small sample, with adequately designed controls. It should also be possible to determine the degree, if any, of damage to land or roadway in the ROW as a result of excavation to repair conduit. See, e.g., Liberty Utilities v. City of Concord, 164 N.H. 14 (2012). Such an analysis has not been undertaken by either party. But the relatively insignificant enhanced use of the ROW by utilities, which has been established by the evidence introduced at trial, provides the Court with guidance.

Judge Morrill concluded that the corridor "interferes little with the primary viatic use of the public ways and detracts little from its value". Verizon, WL 3742673 at *8. The Court agrees. Given the minimal level of use established by what quantification is possible, and has been undertaken by the Court, the Court can find with confidence that the reduction in value is nowhere near the 70% suggested by GES, without any rationale whatsoever.

(iv) Conclusion

Both experts agreed that the three traditional approaches to valuation — comparable sales approach, income capitalization approach and replacement cost

[10] The Verizon opinion found that "[a]ccording to Verizon's records, annually 2.4% of its poles are replaced," which is consistent with a quantitative analysis of a 40 year useful life found by this Court. Verizon, WL 3742673 at *4.

approach — are not useful in determining the value of the utility's occupation of the utility corridor of the ROW. Neither the parties nor the Court has found any authority on the subject apart from the 2006 Superior Court decision by Judge Morrill in Verizon.

The New Hampshire Supreme Court has explicitly recognized the difficulty in establishing fair market value for property owned by a utility: "[T]he search for fair market value is not an easy one, and is akin to a snipe hunt carried on at midnight on a moonless landscape". Appeal of Pennichuk Waterworks, 160 N.H. 18, 37 (2010) (quotation omitted) (*quoted in* Public Service Company of New Hampshire v. Town of Bow, 170 N.H. 539, 542 (2018)). As the Court recently noted "it is extraordinarily difficult to value public utilities". Public Service Company, 170 N.H. at 542.

The Court cannot precisely fix the percentage of use of the ROW by reference to any quantitative data. Nonetheless, the factors relating to the value of the occupation enumerated by Judge Morrill in Verizon and incorporated by Bulkley are appropriate and reasonable and recognized by FairPoint itself. There is no doubt that Bulkley's opinion is an approximation, as was Judge Morrill's. But under New Hampshire law, the fact that a valuation of property by an owner is an approximation is not fatal. McNamara v. Moses, 146 N.H. 729, 733 (2001); Phillips v. Verex Corporation, 138 N.H. 240, 247 (1994). Bulkley's opinion is not only probative but admissible as an admission. See Annot., Valuation for Taxation Purposes as Admissible to Show Value for Other Purposes, 39 ALR 2nd 209 (1955) ("[A]n owner's valuation of his own property, or evaluation in which he participated, for tax purposes, is usually held admissible... where the value of the property is in issue, in most instances on the ground that the owner's valuation constitutes an admission against interest..."); 5 Nichols on Eminent Domain,§ 18.12[1] ("An owner, simply by virtue of ownership of the property, is considered to have sufficient knowledge of

the value of his or her property to make such owner's opinion competent in his or her favor... There is no requirement that the owner make his or her own computations or employ his or her own formula, or that he or she independently determine the property's value. All that is required for the owner's statement to constitute an admission is that he or she state a value... Even if the owner does not make the... statement, the declaration is admissible if it was made by an authorized agent or if it was adopted by the owner".).

Accordingly, based upon the evidence presented, the Court finds the value of the use of the ROWs as follows, by Town[11]:

Belmont

Poles	$116,763
Conduit	$6,144

Durham

Poles	$219,867
Conduit	$$24,833

Hanover

Poles	$202,060
Conduit	$$18,961

The parties shall set forth a proposed form of order, applying the appropriate utilization rate to the values found, within 10 days from the Clerk's notice of decision, so

[11] These figures are taken from Plaintiff's Exhibit 54.

that the Court may issue a final Order.

SO ORDERED

7/20/18
DATE

Richard B. McNamara,
Presiding Justice

RBM/

THE STATE OF 127 HAMPSHIRE
Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE v. Town of Acworth

Enclosed please find a copy of the Court's Order dated August 13, 2018 relative to:

[Proposed] Final Order in Test Case Trials for Towns of Belmont (Tax Year 2011), Hanover (Tax Year 2011), and Durham (Tax Year 2013) - "So Ordered" by Judge Richard B. McNamara on August 13, 2018

8/16/2018

Tracy A. Uhrin
Clerk of Court

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications – NNE

v.

Town of Acworth

Consolidated Docket No. 220-2012-CV-100

[PROPOSED] FINAL ORDER IN TEST CASE TRIALS FOR TOWNS OF BELMONT (TAX YEAR 2011), HANOVER (TAX YEAR 2011), AND DURHAM (TAX YEAR 2013)

1. Following trial, and upon review of the parties' post-trial submissions, the Court finds and rules that FairPoint is entitled to the following abatements and refunds with respect to the taxation of FairPoint's poles, conduit, and use of public rights of way:

Town	Tax Year	Assessment	Court-determined Value	EQ Ratio	Equalized Court-determined value (assessment)	Difference to be abated	Tax Rate	Refund
Belmont	2011	$952,400	$1,357,191	1.157	$1,570,270	-$617,870	21.56	$0
Durham	2013	$4,813,100	$1,311,089	0.979	$1,283,556	$3,529,544	30.41	$107,333.43
Hanover	2011	$3,430,000	$1,685,647	1.013	$1,707,560	$1,722,440	18.2	$31,348.40

2. This Order is intended to be the Court's final decision on the merits.

SO ORDERED.

Date: 8/13/18

Presiding Justice

103

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main St.
P.O. Box 2880
Concord, NH 03301-2880
1-855-212-1234

NOTICE OF DECISION

LEAD FILE 220-2012-CV-100
Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, NNE
v. Town of Acworth

Enclosed please find a copy of the Court's Order dated August 31, 2018 by Judge Richard B. McNamara.

9/10/2018

Catherine J. Ruffle
Clerk of Court

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, LLC-NNE

v.

Town of Acworth, et al

No. 230-2012-CV-00100

ORDER

The Defendants in this case, the Towns of Belmont, Durham and Hanover ("the Towns") have moved to reconsider this Court's Order on the valuation of property owned by the Plaintiff, Northern New England Telephone Operations, LLC d/b/a FairPoint Communications, LLC- NNE ("FairPoint"). For the reasons stated in this Order, the Motion is DENIED.

A Motion to Reconsider must state the issues of fact or points of law the Court has overlooked or misapprehended. Superior Court rule 12 (e). As demonstrated below, the Towns' arguments are essentially nothing more than reargument of facts the Court has already considered and rejected.[1]

The Towns first argue that the Court erred because it did not address whether FairPoint had met its burden of proving that the Towns' assessments resulted in it bearing

[1] See, e.g. Town's Memorandum at ¶ 18' "The Court cannot find that FairPoint met its burden of proof that it bore a disproportionate share of the town's tax burdens unless it first finds that Ms. Bulkley presented a credible opinion of value; it cannot do so on this record."

a disproportionate share of the respective Towns' tax burden. But the Court did specifically make findings as to the value of FairPoint's property in each Town. Order of July 25, 2018 ("Order"), p. 32. The Towns argue that "the Court's factual findings establish that the Court found that [FairPoint's expert], Ms. Buckley's opinions of value were not credible". Memorandum of Law in Support of Motion to Reconsider ("Town's Memorandum"), ¶ 4. The Towns' argument is actually that the Court could not find valuation without accepting all of the Towns' expert's opinion.[2] This, of course, is not the law.

The credibility of any witness is for the trial judge to determine as a matter of fact. New Hampshire Water Company v. Town of Hudson, 139 N.H. 139, 144 (1994). Like a jury, a trial court sitting as the trier of fact can accept all, part or none of an expert's testimony. Public Service Company of New Hampshire v. Town of Bow, 170 N.H. 539, 542 (2018). While the Court did not accept all of Ms. Bulkley's opinions, it found many of her conclusions credible and based its findings in part upon her conclusions and in part on other data and information provided at trial.

The Court specifically stated in its Order that it relied on a Utility Data Survey ("Survey") which Bulkley testified about in great detail. Order, *passim*. The Towns argue that the Court's reliance on Ms. Bulkley's Survey should not have been accepted because the raw Survey data was not disclosed to the Court and that "the Court found that it could

[2]See Town's Memorandum at ¶ 5: "The Court found that 3 of the four indicators of values that contributed to Ms. Bulkley's final opinion of value were not credible. The Court rejected Ms. Bulkley's RS Means approach because she arbitrarily chose to exclude taxable costs in an effort to lower the resulting evaluations. Order at 17. As the result of the Court's rejection of Ms. Bulkley RSM approach, 50% of the basis for Ms. Bulkley's final opinion of value was therefore found not to be credible. The Court also rejected Ms. Bulkley's decision to use the FCC's depreciation rate for poles, finding that the rate was not applicable to poles in New Hampshire. Order at 15-16. Due to the Court's finding, another 25% of the basis for Ms. Bulkley's determination of value was found not credible".

not evaluate the accuracy of the Survey data, what the data contained, the scope of the decisions Ms. Bulkley made or even what decisions were made, or how she applied the data because the raw survey data was not disclosed to the Court". Town's Memorandum", ¶ 6.

The Court found no such thing. The Court accepted Bulkley as a credible witness, and relied upon her testimony, under oath, about what the Survey disclosed, which was corroborated by other information in the case. The Court simply pointed out in its Order that the Town's capable and experienced lawyers would doubtless have sought and challenged the data underlying the Survey if they believed it was inaccurate. They did not.

Based on Bulkley's credible testimony, and the fact that her testimony about the Survey data was corroborated by other testimony produced at trial, the Court does not doubt the veracity of the Survey. While the Towns challenged the credibility of the Survey through cross-examination and rebuttal testimony by its expert Mr. Sansoucy, the Court found (and finds) their arguments and evidence unpersuasive.

The Towns argue that "the record does not support" the Court's finding that Bulkley's replacement cost new ("RCN") based on the utility Survey was credible because of its consistency with other sources. ("Town's Memorandum"), ¶ 10. The Court disagrees; importantly, this argument casts in bold relief the fact that the Motion to Reconsider is not raising any new facts, but simply constitutes an attempt to reargue the Town's case. The Court sees no need to recite once again the reasons upon which it relied to find Bulkley's RCN opinion reliable. The Town's argument suggests that the Court should reject actual values based upon a survey involving utilities in New England, in favor of than *estimates*

based upon data obtained from the United States, from RSMeans. It is it suffices to say that the Court is entitled to accept valuations based upon data that it found more reliable, for the reasons stated in the Order.

The Towns also argue that the Court erred in making "unsupported assumptions" as to what mobilization data were included in the Survey. As pointed out in the FairPoint's Memorandum in Opposition to the Motion to Reconsider ("FairPoint Memorandum") the mobilization data was, in fact included in the account 364 data. FairPoint Memorandum, ¶ 8.

The Towns claim that FairPoint failed to introduce evidence establishing that the Survey data included reliable information about the cost of bedrock installations. In fact, Bulkley testified to the fact that the Survey included data regarding installation in New England soil which was rocky, and she was aware is very different from the soil in the Midwest where she had done prior work. Order, p. 7. Bulkley provided the only credible testimony on bedrock installation costs. The Court specifically found in its Order that the Town's expert's estimate of installation costs due to bedrock was essentially an "extraordinary assumption" within the meaning of USPAP, and since there was no proof of the extraordinary assumption at trial, his testimony was therefore rejected. Order, p. 11.

The Towns argue that the Court erred in its right-of-way analysis, because it adopted Judge Morrill's analysis in Verizon New England v. City of Rochester, 2006 WL 3742673 (N.H. Super. Nov. 9, 2006). Again, the Court did no such thing. Rather, the Court considered the matter *a priori* and used Judge Morrill's opinion only as persuasive authority. The Court quantified the value of the ROW to the extent possible by relying upon facts found in this case relating to the depreciable life of the pole and conduit, and

the necessity for treatment of poles with preservative. Order, pp. 28-29.

The other arguments made by the Towns -the claim that the use of the utility corridor should be evenly divided between all attachers and FairPoint and that somehow FairPoint should be required to value its property by considering income from attachers in addition to replacement cost-in effect, valuing property by adding the income and replacement cost approach- provide no new information, and provide no basis for reconsideration.

It follows that the Motion to Reconsider must be DENIED.

SO ORDERED

8/31/18
DATE

Richard B. McNamara,
Presiding Justice

RBM/