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

REPLY 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

Walter L. Mitchell, Esquire #1778
Laura Spector-Morgan, Esquire, #13790
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Laconia, NH 03246

To Be Argued By:
Laura Spector-Morgan, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

QUESTIONS PRESENTED FOR REVIEW

Though not broken out into separate brief sections, each of the issues raised in the Notice of Appeal were, in fact, briefed. Specifically, Question IV was briefed at pages 43-44 of the *Brief of the Appellants, Towns of Durham and Hanover*, Question V was considered at pages 46-48, Question VI was discussed at pages 31-32 and Question IX was examined at pages 48-51. The Town of Belmont prevailed in the valuation phase below, and therefore there were no issues for it to raise to the Court in a brief.

ARGUMENT

I. THE TRIAL COURT COULD NOT REASONABLY HAVE DETERMINED THAT TAXPAYER MET ITS BURDEN OF PROOF

Taxpayer's brief ignores the fact it must first meet its burden of proving disproportionality before the trial court addresses the fair market value of the property. As discussed in great detail in the towns' brief, the trial court could not reasonably have found that taxpayer met its burden of proof where it rejected two of the four legs of Ms. Bulkley's pole valuation and thus her final opinion of the value of the poles.

First, Ms. Bulkley gave equal weight to the two cost analyses she used - the Survey and RSMeans. See Ms. Bulkley's reports, Trial Exhibit 38 at 36 and Trial Exhibit 39 at 36, transferred from the superior court. The trial court erroneously found that Ms. Bulkley used her RSMeans derived value to solely to *confirm* her survey value, Order at 17, when in fact she *relied* on it in arriving at the value for poles. Second, Ms. Bulkley gave equal weight to the two sources of depreciation she relied on - RSA 72:8-c[1] (40 years) and the FCC (30 years) - averaging to a 35 year depreciation rate. See id. The trial court found that the FCC depreciation rate was not credible and rejected that part of her cost analysis. These two findings resulted in the trial court rejecting Ms. Bulkley's final opinion of value, and utilizing just the survey value and statutory depreciation to arrive at its own value.[2]

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[1]Taxpayer complains that the towns relied upon and included in their Appendix a letter from the New Hampshire Municipal Association which was submitted to the Senate Ways & Means Committee at the Senate's April 12, 2016 hearing on HB 1198, which, it alleges, is not part of the legislative history because it is "not part of the docket." In fact, no written testimony is "part of the docket," but that does not make it any less part of the legislative history than are the minutes of the hearing at which the letter was summarized and submitted.

[2]Taxpayer correctly notes in its brief that the trial court did not rely on Ms. Bulkley's RSMeans analysis.

Taxpayer's brief does not address the fact that the trial court rejected Ms. Bulkley's opinion of value. While the trial court has broad discretion in weighing expert evidence, it is not without limits; its exercise of discretion must be tethered to the facts in evidence. The trial court rejected half of Ms. Bulkley's analysis, half of the basis of her valuation, as well as her final valuation itself - these factual findings cannot support a finding that taxpayer met its burden.

Taxpayer contends the towns did not preserve their argument that the trial court shifted the burden of proof to the them. In so doing, it mischaracterizes the towns' argument, which is that the trial court justified its finding that the survey based value was reliable on the fact that the towns' attorneys did not move to compel production of the undisclosed raw data. That issue was, in fact, addressed below. See Respondents' Post Trial Memorandum at 5-6, Appendix to Brief of the Appellants, Towns of Durham and Hanover ("Towns' Appendix") at 185-86.

The towns' argument that the trial court shifted the burden to the towns is not, as taxpayer argues, a challenge to Ms. Bulkley's credibility. The towns' argument is about who bears the burden of introducing into evidence the raw data which is required to reasonably analyze Ms. Bulkley's opinion of value. The fact that the towns knew the data existed and that Ms. Bulkley was not intending to produce it does not provide a factual basis for the trial court to decide that the data would have supported Ms. Bulkley's analysis or its conclusion that the towns' believed the missing data would support the expert's opinion. This is nothing less than a shifting of the burden to produce the data on which taxpayer's expert relied.

Moreover, the undisclosed raw data is not relevant to the admissibility of Ms. Bulkley's report. The report was clearly admissible. The missing raw data, however, is vital to a determination of what weight to give the report and the conclusions therein. Without it, the trial court could not make a sustainable decision on that issue.

II. THE TRIAL COURT ALLOWED TAXABLE PROPERTY TO ESCAPE TAXATION

Taxpayer claims in its brief, for the first time, that valuation is not a precise science and promotes the idea that there is an "acceptable range" of value for any given property. Taxpayer then attempts to use this new "range" theory to excuse three different errors/issues identified by the town (guys and anchors, assemblage costs of the rights of way, and contributions in aid of construction) by stating even if the town is correct that these taxable portions of the property were omitted, the impact of those errors is slight and Ms. Bulkley's resulting value (and that of the trial court) is "within the range." Taxpayer, however, does not identify what the acceptable range is, gives no facts as to why it claims the result is minimal in each instance, and places three factors of valuation into that unidentified range without acknowledging that the cumulative impact of those three factors is likely to take it out of the unidentified range.

A. Guys and Anchors

Taxpayer argues that DRA's interpretation of RSA 72:8-a as not including guys and anchors in the term "structures" constitutes "administrative gloss" such that the language should be interpreted as not including guys and anchors. This argument misconstrues the administrative gloss doctrine, which is applied against the government entity that is charged with implementing the statutory language; DRA plays no such role in this tax abatement case. Moreover, administrative gloss only applies when the statutory term in question is ambiguous. There is nothing ambiguous about the term "structure," and contrary to taxpayer's implication, the town did not assert that there was. Finally, administrative gloss only occurs where the implementing government unit consistently interprets the statutory language for a period of years. See, e.g., DHB, Inc. v. Town of Pembroke, 152 N.H. 314, 321 (2005). DRA was not required to value poles under RSA 72:8-a until the 2017 tax year, several years after the tax years in question. The doctrine simply does not apply here.

B. Assemblage Costs

Taxpayer's brief does not contest that the trial court's failure to add assemblage costs to its pole costs allowed taxable property to escape taxation, and taxpayer's assertion that even if the assemblage costs escaped taxation, assemblage costs are low and therefore Ms. Bulkley's failure to include them in her ROW cost did not render her opinions outside of the "reasonable range," misconstrues the towns' argument. The trial court's error was not based on Ms. Bulkley's failure to include assemblage costs in her ROW cost - the trial court erred in not adding in the assemblage costs to the cost of the poles where the trial court ruled the costs should be included. Taxpayer again promotes allowing property to escape taxation.

C. Contributions in Aid of Construction

Again, taxpayer does not dispute that CIAC is taxable under New Hampshire law, nor does it dispute that CIAC was not included in the pole costs derived from Ms. Bulkley's survey. Therefore, it cannot dispute that the trial court failed to include CIAC in its survey based pole valuation, and in so doing, again allowed taxable property to escape taxation. Taxpayer asserts that whether the survey participants had a small amount of taxable property unaccounted for is irrelevant, again taking the position that it is acceptable to allow property to escape taxation as long as the amount involved is small. However, even if the CIAC amount was *de minimis*, when added to the anchors and guys and assemblage costs, it becomes more significant. Moreover, there is nothing in the law which supports the idea that small portions of the value of real estate should escape taxation, as taxpayer would have the Court rule.

Taxpayer relies in part on Ms. Bulkley's use of FERC accounting in her survey to support the trial court's conclusion regarding CAIC, and correctly notes that Mr. Sansoucy testified that the FERC accounting is "'reliable." However, this selective use of Mr. Sansoucy's testimony is misleading. At that same time, Mr. Sansoucy also testified that the FERC data should not be utilized in a pole cost analysis without adjustment because it does not include CIAC and that he did not rely on his own PSNH

pole study because the PSNH costs were from its FERC Account 364. See Transcript of Trial at 719 - 24.

III. THE TRIAL COURT UNDERVALUED THE TAXPAYER'S USE OF THE RIGHTS OF WAY

A. The Trial Court Incorrectly Adopted the Reasoning of *Verizon New England, Inc. v. City of Rochester*, 2006 WL 374673 (NH Super. November 9, 2006)

The towns argued that there was no evidence in the record to support multiple assumptions the trial court made in adopting Judge Morrill's decision in the case of Verizon New England, Inc. v. City of Rochester, 2006 WL 374673 (NH Super. November 9, 2006). See Towns' Appendix at 82-88. Taxpayer asserts that the facts regarding the use of the ROW in Rochester, admittedly unknown, must apply equally to Durham and Hanover because the taxpayer, Verizon, was the predecessor-in-interest to FairPoint. Taxpayer provides no facts to support its assumption.

Taxpayer further attempts to provide a record where none exists by asserting that the towns' Exhibit X, Appendix to Reply Brief at 16, excerpts from the NH Department of Transportation supports Ms. Bulkley's view that the ROW is 15'. The exhibit shows a state regulation-width utility pole easement of 8'. Taxpayer contends that the easement depicted is 8' on one side of the road and 8' on the other side for a total of 16'. Nothing in the exhibit or the record supports this notion, and more importantly, neither Judge Morrill, the trial court, Ms. Bulkley, nor Mr. Sansoucy calculated easements based on the use of two sides of a street. Taxpayer's argument does nothing more than cause confusion.

Taxpayer contends that the evidence supports the trial court's finding that the value of the ROW should be divided equally among all users - taxpayer and attachers. The only evidence was Ms. Bulkley's testimony; she did not offer any hard evidence as to the attachers and taxpayer's respective uses of the width of the utility corridor.

The trial court found both that taxpayer had not submitted evidence as to the diminution of value of the underlying land caused by the utility corridor, Order at 22, and that there was no evidence submitted as to the scope of use of the ROW. Order at 30. The trial court could not then have reasonably found that taxpayer met its burden of proof where taxpayer did not submit evidence as to two material elements of valuing the ROW; it erred in finding that taxpayer met its burden of proving the value of taxpayer's use of the ROW.

Taxpayer's contention that Judge Morrill, the trial court, and Ms. Bulkley utilized a total utility corridor width of 15', of which poles utilize 15' and conduit utilizes 10' in conjunction with the poles, is contrary to the evidence; each used 15' for poles and an additional 10' for conduit. See Verizon, at 4, Order at 22-23, and Exhibit 54, Appendix to Reply Brief at 20. Taxpayer's position is also contrary to common sense; trenches for conduit and maintenance thereof cannot be installed under installed poles without undermining their stability.

B. RSA 231:160-a Claims

Taxpayer contends that the argument regarding RSA 231:160-a has been waived because only Belmont asserted it below, not Durham, and Belmont did not file a brief. It also asserted that Durham's adoption of all arguments put forth by co-defendants was not sufficient to preserve the issue for appeal by Durham. This argument is ludicrous given taxpayer's involvement all along in this complex litigation and the trial court's procedural Order of June 28, 2016, Appendix to Reply Brief at 21, specifically structuring the litigation so that all issues would be able to be appealed to this Court as the parties wished. Taxpayer filed tax appeals against "virtually all the towns in the State of New Hampshire," involving multiple tax years. June 28, 2016 Order at 1. The litigation was bifurcated and test cases utilized for judicial efficiency and to obtain guidance for the non-test case appeals. See June 28, 2016 Order at 1-2. The trial court and the parties agreed that the test case municipalities would not file duplicative pleadings. Instead, Belmont, Durham and the other text case towns

incorporated the objections and cross-motions for summary judgment set forth in their co-defendants pleadings. See Towns' Appendix at 142. As a result, Durham has the same authority to appeal the trial court's legal decision regarding Belmont's RSA 231:160-a argument as did Belmont.

Substantively, the towns do not argue, as taxpayer suggests, that the pole licenses impliedly contain the taxing language of RSA 72:23. The towns argue that the taxing language of RSA 72:23, I is included as a matter of law in the pole licenses which arise as a matter of law through RSA 231:160-a. Taxpayer failed to address this argument, thereby conceding that the language arises as a matter of law.

C. Taxpayer's Argument That its Use and Occupancy of the Towns' Right of Way Is Not Pursuant to a Perpetual Lease Is Predicated upon Incorrect Legal Principles

Taxpayer's arguments that its use and occupancy of the public ROW is not a *de facto* lease for un-specified term that cannot be terminated by a municipality are incorrect or conflate applicable principles of law.

First, taxpayer's argument that Durham did not tax taxpayer as a perpetual lease and, therefore, taxpayer does not have a perpetual lease is a non-sequitur. The methodology used to tax taxpayer's use and occupancy of the ROW, based on the identification of the value of land owned in fee and then ascribing a portion of the value to taxpayer based on the amount that taxpayer encumbered that land, Order at 25-27, focused on the extent and nature of the use, not the label ascribed to that use.

Second, taxpayer's claim that it has a license and not a perpetual lease is based on a conclusory assertion without factual support. Taxpayer's rights are substantively a lease. Taxpayer has the right to place infrastructure within the ROW, which excludes all other users from that portion of the ROW occupied by taxpayer. Taxpayer — and not the towns — has the sole authority to perform work on its poles and infrastructure.

Third, taxpayer's argument that the leases are not perpetual ignores the substantive rights taxpayer has to occupy municipal property. While RSA 231:160, et

seq. establishes protocols for the revocation of pole licenses, a municipality's ability to revoke that license is limited so as to effectively negate that ability. See Parker Young Co. v. State, 83 N.H. 551, 555-57 (1929). Taxpayer did not dispute that its franchise rights supercede the selectmen's authority to revoke.

Fourth, taxpayer argues that the Towns cannot tax it pursuant to a perpetual lease because its use is pursuant to a "public use," which was historically non-taxable, but was made taxable by RSA 72:23, I(b). Taxpayer's argument regarding "public use" is a red-herring. As recognized in Appeal of Reid, 143 N.H. 246 (1998), under the common law there are three different ways by which the third-party use of municipal property can be taxable, two of which are pertinent: (1) the third-party occupier consents to the tax in the lease or agreement and (2) the use and occupancy is pursuant to a perpetual lease. RSA 72:23, I(b) is merely a codification of the first common-law principal as it applies to municipal property; it is not, as taxpayer appears to suggest suggests, the exclusive means by which a third-party user of municipal property can be subject to taxation for that use. To so hold would add language to RSA 72:23, I(b) that does not exist and would require interpreting RSA 72:23, I(b) to overturn decisions of this Court — namely Appeal of Reid, supra, and Piper v. Meredith, 110 N.H. 290 (1970) — without clear legislative intent to do so.

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, and 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.

CERTIFICATIONS

This document complies with the 3,000 word limit established by the Court's rules. It contains 2,998 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 reply brief to Matthew Johnson, 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: July 18, 2019

By: */s/ Laura Spector-Morgan*

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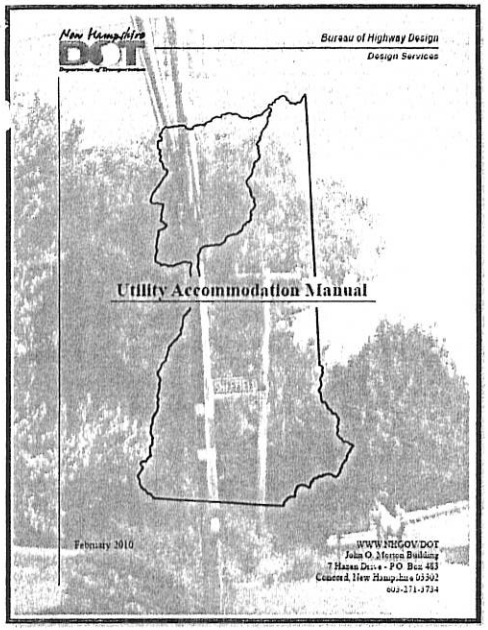
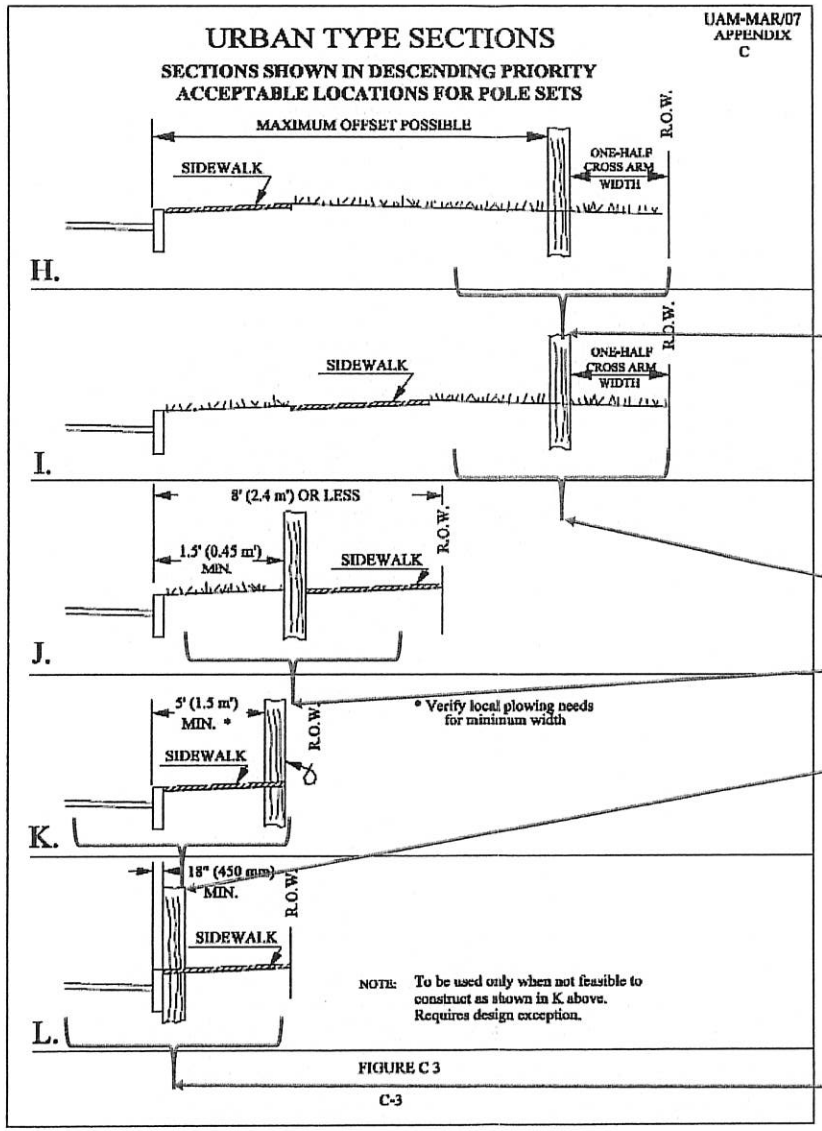
APPENDIX TO REPLY BRIEF

[1]	[2]	[3]	[4]	[5]	[6]	[7]	[8]	[9]	[10]	[11]	[12]	[13]	[14]	[15]	[16]	[17]	[18]	[19]
					Assumption of Land Traversed									No Fee Simple Ownership				
	Distance (miles)	Distance (feet)	Assumed ROW Width (feet)	Assumed ROW "Use" (acres)	Land in Curr. Use (acres)	Land in Resid. (acres)	Land in C/I (acres)	Total (acres)	Resid. Assessed Value ($)	C/I Assessed Value ($)	Resid. Avg. Assessmt ($/acre)	C/I Avg. Assessmt ($/acre)	Value of ROW (Pre-Adjmt)	Easement Adjmt. (%)	No. of ROW Users	No. Of Pole Attachers	Other Co. Use Adjmt. (%)	Value of ROW (Post-Adjmt)
Belmont																		
Poles																		
on Class II Road	8.88																	
on Class IV Road	0																	
on Class V Road	67.024																	
Total	75.904	400,773	15	138.007	9,175	5,585	1,807	16,567	$ 248,589,459	$ 56,485,350	$ 44,513	$ 31,253	$ 5,943,488	10%	4.0	1.1	19.6%	$ 116,763
						89%	11%											
Conduit	4.71	24,858	10	5.707							$ 44,513	$ 31,253	$ 245,764	10%	4.0	0.0	25.0%	$ 6,144
													$ 6,189,252					$ 122,907
Hanover																		
Poles																		
on Class II Road	5.035																	
on Class IV Road	4.671																	
on Class V Road	91.089																	
Total	100.795	532,198	15	183.264	19,527	5,195	466	25,188	$ 535,521,400	$ 94,315,700	$ 103,084	$ 202,394	$ 19,228,264	10%	8.0	0.7	11.4%	$ 219,869
						98%	2%											
Conduit	15.94	84,140	10	19.316							$ 103,084	$ 202,394	$ 2,026,648	10%	8.0	0.0	12.3%	$ 24,883
																		$ 244,753
Durham																		
Poles																		
on Class II Road	3.177																	
on Class IV Road	2.952																	
on Class V Road	56.801																	
Total	62.93	332,270	15	114.418	5,917	3,033	203	9,152	$ 251,615,000	$ 36,845,330	$ 82,962	$ 181,782	$ 9,742,717	10%	4.0	0.8	20.7%	$ 202,060
						98%	2%											
Conduit (feet)	7.50	39,604	10	9.092							$ 82,962	$ 181,782	$ 774,170	10%	4.0	0.0	24.5%	$ 18,961
																		$ 221,021

Notes corresponding to columns:

[1]- Road designations from the NH DOT report NH Town Miles by Legislative Class (2017)
[2] - Column [2] is data from the NH DOT report NH Town Miles by Legislative Class (2017)
[3]- Converts miles in Column [2] to feet by multiplying by 5280
[4]- Assumed ROW in Feet based on Verizon decision
[5]- Usage of ROW in acres calculated as [3]*[4]/43560
[6]- From MS-1 forms. Relied on the year prior to the appraisal due to the publication date of the MS-1 form
[7]- From MS-1 forms. Relied on the year prior to the appraisal due to the publication date of the MS-1 form
[8]- From MS-1 forms. Relied on the year prior to the appraisal due to the publication date of the MS-1 form
[9]- Sum of [6],[7],[8]
[10]- From MS-1 forms. Relied on the year prior to the appraisal due to the publication date of the MS-1 form.
[11]- From MS-1 forms. Relied on the year prior to the appraisal due to the publication date of the MS-1 form.
[12]=[10]/[7]
[13]= [11]/[8]
[14]= ([5]*residential %*[12])+([5]*C&I %*[13])
[15]- Assumed
[16]- Users of the right of way identified by each town
[17]- adjustment for additional pole attachers calculated as total pole attachers/total # poles
[18]- Percentage of users of the right of way calculated as 1/([16]+[17])
[19]=[14]*[15]*[18]





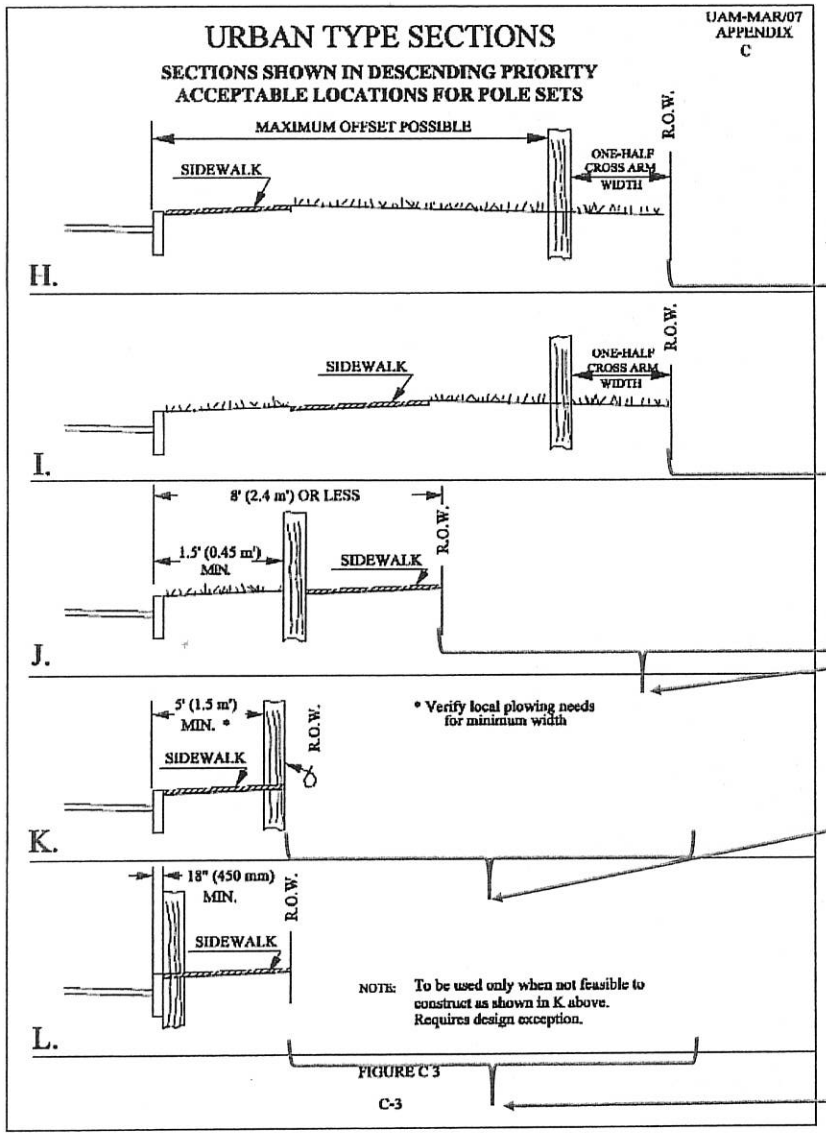
GES Appraisal

of

Utility Use of Public Right of Way

8- Foot Wide Utility Use of the Public Right-of-Way Appraised by GES

17



Concentric Appraisal

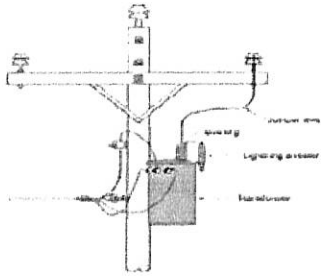
of

Utility Use of Public Right of Way

15 - Foot Wide
"Utility Corridor"
Located in
Town's Legal "Setback Limits"
Appraised by Concentric

George E. Sansoucy, PE, LLC's Use of Public Right of Way Valuation Methodology

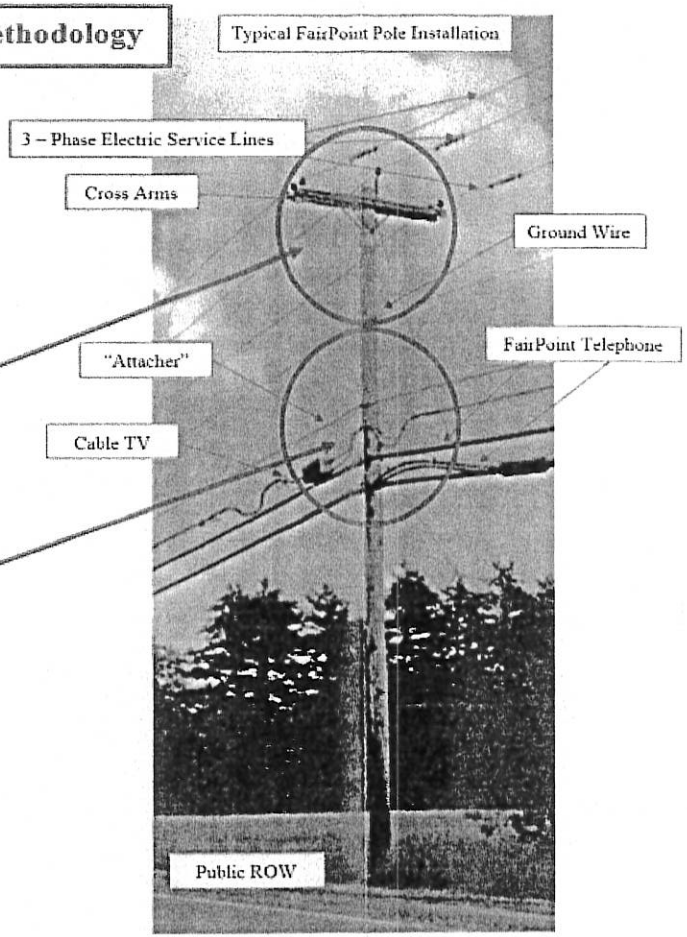
GES appraises FP's use of the public right-of-way (as shown on page 1) based on the assumption that the width of the above-ground, occupied right-of-way is defined by the typical 8-foot cross arms, which are installed on the pole by the electric utility as shown below.



A typical 45-foot pole requires all the wires to be in the top 20-feet, allowing for ± 18-feet of clearance from the street and ± 6-feet in the ground. The top 20-feet are typically allocated to the electric utility, telephone, cable TV and up to 4 attachers, as follows:

Electric Utility = 10-feet or 50%

FairPoint = 2.5-foot or 12.5%
Cable TV = 2.5-foot or 12.5%
Attacher #1 = 1.25-feet or 6.25%
Attacher #2 = 1.25-feet or 6.25%
Attacher #3 = 1.25-feet or 6.25%
Attacher #4 = 1.25-feet or 6.25%



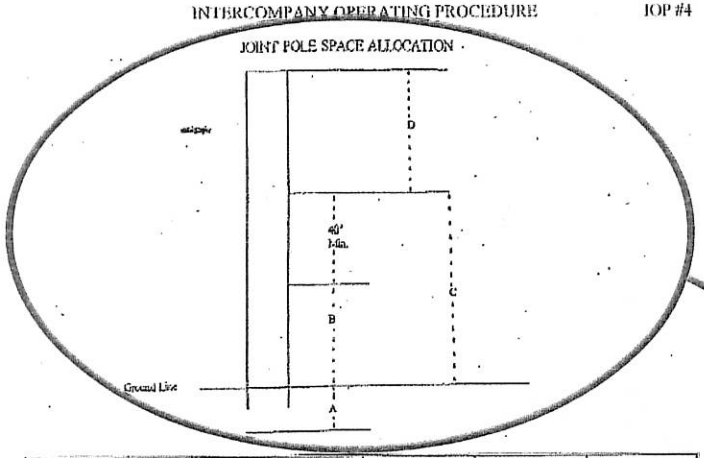
The 8-foot right-of-way width is therefore allocated to each user as follows:

Electric Utility = 50% or 4-feet wide
FairPoint = 12.5% or 1-foot wide
Cable TV = 12.5% or 1-foot wide
Attacher #1 = 6.25% or .5-feet wide
Attacher #2 = 6.25% or .5-feet wide
Attacher #3 = 6.25% or .5-feet wide
Attacher #4 = 6.25% or .5-feet wide

FP Acres in Belmont = 75.95 miles X 1-foot = 9.2 Acres X $44,553/Acre x 70% = $287,200 rounded
FP Acres in Durham = 59.78 miles X 1-foot = 7.25 Acres X $94,166/Acre x 70% = $477,900 rounded
FP Acres in Hanover = 98.83 miles X 1-foot = 11.98 Acres X $117,355/Acre x 70% = $984,100 rounded

INTERCOMPANY OPERATING PROCEDURE IOP #4

JOINT POLE SPACE ALLOCATION



Pole Length	Pole Ownership Elec/Comm. Note 1	A Normal Setting Depths Note 2	B Communication Max/Height Note 3	C Electric Minimum Height Note 3	D Electric Maximum Space Note 3
35	35/35	6'-0"	21'-2"	24'-0"	4'-6"
40	40/40	6'-0"	23'-8"	27'-0"	7'-0"
40	40/35	6'-0"	21'-2"	24'-6"	9'-6"
40	35/40	6'-0"	26'-2"	29'-6"	4'-6"
45	40/45	6'-6"	28'-2"	31'-6"	7'-0"
45	45/45	6'-6"	25'-11"	29'-3"	9'-3"
45	45/40	6'-6"	25'-8"	27'-0"	11'-6"
45	45/35	6'-6"	21'-2"	24'-6"	14'-0"
50	45/50	7'-0"	30'-5"	34'-9"	9'-3"
50	50/50	7'-0"	28'-2"	31'-6"	11'-6"
50	50/45	7'-0"	25'-11"	29'-3"	13'-9"
50	50/40	7'-0"	23'-8"	27'-0"	16'-0"
50	50/35	7'-0"	21'-2"	24'-6"	18'-6"

Average 24'8" | Average 28' | Average 10'6"

1. The minimum pole setting depth is as defined in the NESC.
2. Dimensions B, C, or D may be adjusted by mutual agreement between the joint owners to avoid a pole change out if the field and code conditions permit.
3. Space shall be made available for authorized 3rd party attachers through equal contribution by each owner whenever engineering standards allow. 45/40 indicates a 45' pole however FairPoint pays for and occupies the space as if it were a 40' joint pole. 40/45 indicates a 45' pole where PSNH pays for and occupies space as if it were a 40' joint pole.

9

Page | 4

I-A-1

JOINT USE/OWNERSHIP AGREEMENT

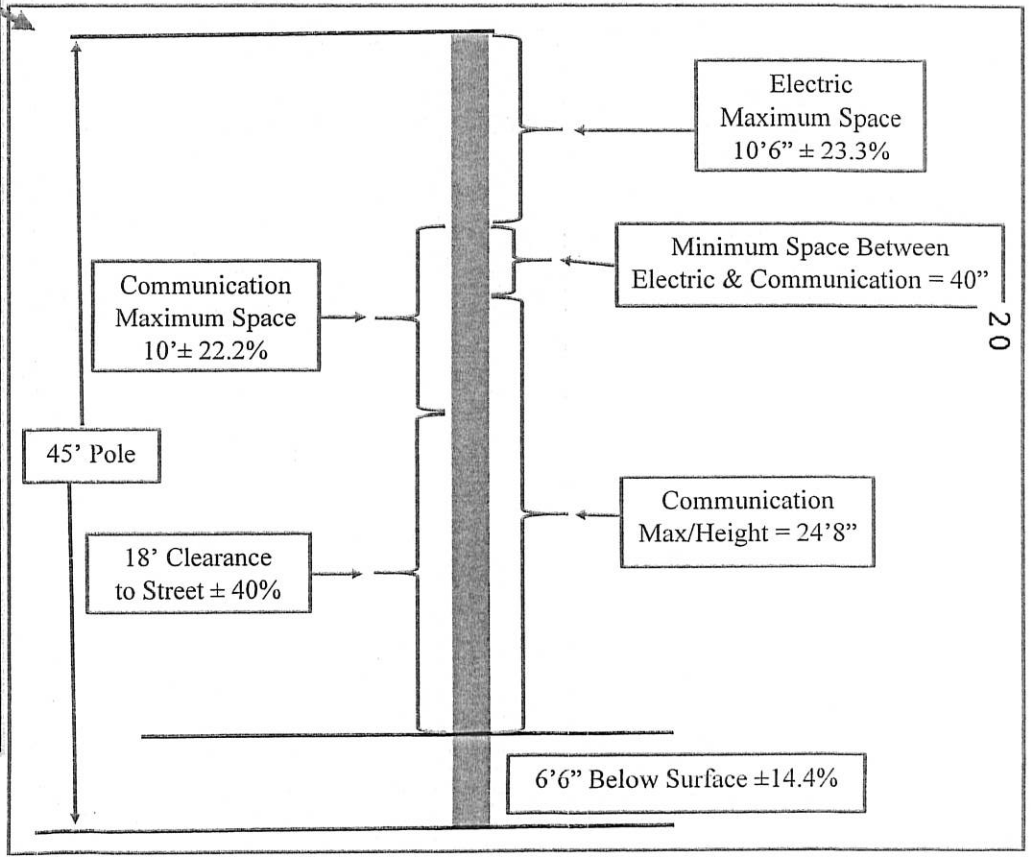
DATED: September 1, 2011

BETWEEN

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC
D/B/A FAIRPOINT COMMUNICATIONS – NNE

AND

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE



20

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 June 28, 2106 relative to: **Order**

7/19/2016

Tracy A. Uhrin
Clerk of Court

The State of New Hampshire

MERRIMACK, SS SUPERIOR COURT

Northern New England Telephone Operations d/b/a Fairpoint Communications

v.

Town of Acworth, et al

No. 2012-CV-0100

ORDER

A status conference was held in this matter on June 28, 2016. These cases have been consolidated, in order to resolve common legal questions, with the hope that with common legal questions resolved, settlement can occur. So far, equal protection claims and ultra vires was claims have been addressed by the Court. The equal protection issue has been finally resolved. However, the ultra vires claims have not been addressed by the New Hampshire Supreme Court, and there is no doubt that in order for there to be a final resolution of these cases, that Court will need to address that issue. Other legal issues, such as double taxation remain in the case, but do not appear to be fact based. Based on the comments from counsel, it appears that this Court's Order on the ultra vires issue has resulted in a relatively small number of the pending cases settling.

All parties also agree that, practically speaking[1], the only significant factually

[1] Technically, the equal protection claims could require discovery regarding intentional discrimination if Fairpoint takes the position that it was purposefully discriminated against. Similarly, there could be factual discovery necessary for the baseline issue of exactly what property exists and how much of the right-of-way is being used; but discovery of these issues should be straightforward, and certainly with respect to issues involving what property exists, amenable to being dealt with by interrogatory.

intense dispute in these cases is the valuation of the Plaintiff's property and use of the municipalities' rights of way. Based upon the representations of counsel, the Court understands that resolution of the valuation of Plaintiff's property and the value of the use of municipalities' right of way may require significant expert discovery and expert testimony. Counsel represented that there is no consensus among appraisers on how to value equipment such as that owned by Plaintiff and municipal rights-of-way.

All parties seem to believe that an interlocutory appeal would be useful in this matter. While an interlocutory appeal might advance the litigation, such appeals, in the Court's experience, are rarely accepted. Even if an interlocutory appeal is accepted by the New Hampshire Supreme Court it would not be reasonable to stay these proceedings since the cases will likely not be resolved merely because the ultra vires issue is resolved, in light of the lack of consensus on how to appraise the property at issue. The Court therefore believes that resolution of these matters will require trial on the merits of certain cases in order to provide the New Hampshire Supreme Court with an appropriate record so that it can resolve the critical factual dispute remaining, which the Court understands to be how the property in question should be valued.

The Court believes that the most reasonable way to proceed is to schedule trial of test cases so that the New Hampshire Supreme Court can consider the ultra vires issue as well as the issue of what methodology is appropriate for experts to use in valuing the plaintiff's property and the municipalities rights-of-way. Such test cases should include all variants of the factual circumstances which are relevant to the ultra vires issue, so it can be addressed by the New Hampshire Supreme Court.

Accordingly, the Court orders that Liaison Counsel and counsel for Plaintiff shall

meet and confer and by August 19, 2016 shall advise the Court as follows:

1. The parties shall identify test cases which will provide the New Hampshire Supreme Court with the opportunity to decide the critical issues in this case, i.e., the ultra vires issue, the double taxation issue and the expert methodology issue. Presumably the test cases will include those presented in the cross-motions on summary judgment on the ultra vires issue.

2. The parties shall prepare a scheduling order for discovery in the test cases and a proposed trial date, beginning no later than 6 months from October 19, 2016 to the Court. The cases shall be scheduled seriatim; counsel shall consult with the Clerk to arrange for a block of time for the cases to be tried. Each case shall be tried in no more than 2 days. The Court expects that since the parties will likely use the same experts, or at least after the first trial the Court will have ruled on the appropriate methodology experts should use, trial in subsequent cases will take less than 2 days. Each party will be entitled to one half of the trial time. The Court will divide the time between the parties, and the Monitor shall keep track of how much time each party uses during the trial.

3. If the parties cannot agree on a proposed order, then they may submit separate proposals. Liaison counsel shall attempt to obtain consensus from other municipal counsel, but if they cannot do so, any municipality may file its own proposal.

4. If the parties wish to seek an interlocutory appeal of the Court's ultra vires Order, they may do so, but the interrogatory appeal shall not stay trial of the test cases. If the parties seek interrogatory appeal, they shall submit a proposed,

non-argumentative interlocutory appeal statement for the Court's signature.

5. All cases other than the test cases shall be stayed pending resolution of the test cases.

6. A further status conference shall be held after September 1, 2016 and prior to September 19, 2016 at which a final order governing resolution of these cases shall be discussed.

6/28/16
DATE

Richard B. McNamara,
Presiding Justice

RBM/