

**TELECOMMUNICATIONS AS INFRASTRUCTURE:  
MANAGING RIGHTS OF WAY AND MUNICIPAL INFRASTRUCTURE  
IN THE AGE OF TELECOMMUNICATIONS AND THE INFORMATION ECONOMY**

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**I. OVERVIEW:**

Municipalities should treat their telecommunications infrastructure as a valuable asset which corresponds to economic development. This outlines how municipalities can practically and comprehensively address telecommunications infrastructure issues including rights-of-way issues, cable franchising issues, wireless zoning issues, universal service issues and telecommunications planning issues.

**II. MANAGING TELECOMMUNICATIONS: WHAT SHOULD MUNICIPALITIES DO?  
PLAN; LEGISLATE; IMPLEMENT; PLAN**

- A. Themes for a planning strategy for going forward
  - 1. This is economic development; in an information economy, telecommunications infrastructure is an economic development issue
  - 2. Establish a strategic planning model which features:
    - a. Ascertainment of future needs (not technology)
    - b. Inventory of existing infrastructure
    - c. Analysis
    - d. Implementation plan
    - e. Back to ascertainment and inventory; a continuous planning process
  - 3. Policy Themes for Strategy
    - a. Government as proprietor of important asset; the public right-of-way
    - b. Government as consumer of telecommunications services
  - 4. Act Comprehensively
    - a. Be proactive
    - b. Play the whole field

- c. Leverage opportunity and create synergy
    - d. Legislate comprehensively
  - 5. Comprehensive telecommunications ordinance
    - a. Policies governing public right-of-way (Board of Selectmen or governing body)
    - b. Cable franchise policies and procedures, including ascertainment (PEG, I-Net, etc.) (Board of Selectmen or governing body)
    - c. Zoning of wireless telecommunications facilities (zoning of broadcast facilities also) (Legislative body)
    - d. Universal service policy implementation (Board of Selectmen; Library Trustees School Board)
    - e. Funding mechanism for telecommunications planning to be undertaken on a continuous basis at the local level and for implementation:
      - 1. Subset of master plan process
      - 2. Other
      - 3. Use of non-capital reserve or trust funds to target for telecommunications planning
        - a. Cable franchise fee or portion thereof
        - b. Lease payments for use of town owned land for wireless telecommunications facilities;
        - c. License or permit fees for use of right-of-way
- B. Dedicate internal resources to the task
  - 1. Information Services
  - 2. Ad hoc, including community resources
  - 3. Subset of master plan process
  - 4. Work with school boards, departments; work with library trustees; library staff; business community

**III. PUBLIC RIGHTS-OF-WAYS**

A. Telecommunications Act of 1996

1. Section 253 Removal of Barriers to Entry

(a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and Local Government Authority - Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-ways on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

2. Summary:

a. The Act preempts all state and local laws that prohibit or having the effect of prohibiting an entity from providing telecommunications services.

b. The Act preserves for local communities:

1. All state and local laws that involve management of local rights-of-way.

2. All state and local laws that require telecommunications providers to pay compensation for local rights-of-way.

3. As long as (1) and (2) are non-discriminatory, publicly disclosed and compensation is fair and reasonable and competitively neutral, the Act permits compensation for use of right-of-way.

B. Laws of the State of New Hampshire

1. 231:168 Interference with Travel. The location of poles and structures and of underground conduits and cables by the selectmen shall be made so far as reasonably possible so that the same and the attachments and appurtenances thereto will not interfere with the safe, free and convenient use for public travel of the highway or of any private way leading therefrom to adjoining premises or with the use of such premises or of any other similar property of another licensee. The location of any such pole or structure or underground conduit or cable, when designated by the selectmen pursuant to the provisions of this subdivision shall be conclusive as to the right of the licensee to construct and maintain the same in the place located without liability to others except as is expressly provided in RSA 231:175 and 231:176. In no event shall any town or city or any official or employee thereof or of the department of transportation be under liability by reason of the death of or damages sustained by any person or to any property occasioned by or resulting from the location, construction, or maintenance of any pole, structure, conduit, cable, wire, or other apparatus in any highway, pursuant to the provisions of this subdivision.
2. 231:175 To Indemnify Town. The proprietors of every line of wire strung in a highway shall indemnify the town against all damages, costs and expenses to which it may be subjected by reason of any insufficiency or defect in the highway occasioned by the presence of the wires and their supports therein.
3. New England Telephone and Telegraph Co. v. City of Rochester, 6 August 1999 decision of the New Hampshire Supreme Court. In this case, the City of Rochester amended its licenses issued pursuant to RSA 231:161 which permitted NETT to occupy rights-of-way in the City. The amendment was based on RSA 231:163, which permits licenses to be amended or altered “whenever the public good requires” and the amendment required NETT to pay property taxes. The Supreme Court held that the City was authorized to impose the condition under RSA 72:23 which authorizes the municipality to impose property taxes on a use or occupation of public land pursuant to a lease or other agreement which provides for payment of properly assessed taxes. The Supreme Court held that the RSA 231:161 license or permit was such a lease or agreement and that the City could amend the license, based on public good, to require payment of property taxes. The Court noted that the measure of public good is if an act is not forbidden by law and is to be reasonably permitted under all the circumstances.

This holding means that municipalities should review all licenses it has issued for use and occupation of its rights-of-way and evaluate, as a matter of public policy, whether those licenses should be amended to require payment of real and personal property taxes under RSA 72:23. The real taxes are owed on the real property within the right-of-way which is occupied by the license holder or permit holder. Accordingly, to assess this tax, an inventory of the public right-of-way, a valuation of the public right-of-way, an ascertainment of the area occupied by the licensee within the right-of-way and an apportionment of value to those license holders will be required.

4. Summary:

- a. Municipalities may regulate the location of utility equipment and structure so that they will not interfere with the safe, free and convenient use of the public ways for public travel, or interfere with the safe, free, and convenient use of any other similarly licensed property. (RSA 231:168)
- b. Owners of utility equipment shall secure municipalities against damages, costs and expenses caused by the presence of the equipment in the highway.
- c. The interpretation of New Hampshire law regarding the extent of regulation and compensation allowable is unsettled.
- d. As a result of the NETT v. Rochester case described above, municipalities should review all licenses for use of the public right-of-way to determine whether those licenses should be amended in the public good to provide for payment of real and personal property taxes. If the decision is made to amend the licenses in that manner, than an inventory of the rights-of-way will be required to properly assess such a tax.

C. What Can New Hampshire Municipalities Do to Recover the Cost of Allowing Telecommunications and Other Providers to Use the Public Rights of Way?

1. Local government control of the public rights-of-way through local legislative action:
  - a. Identify public rights-of-way as an asset funded and maintained by public funds
  - b. Recognize that private use of the public asset affects the useful life of the asset and creates a cost.
  - c. Identify the cost of annual maintenance and repair, including inspections.
  - d. Identify loss due to accelerated degradation of the asset.
  - e. Implement fee schedule to reimburse the local government for these costs.
2. Menu of Potential Costs Incurred in Right-of-Way Management
  - a. Administrative Fees
    1. Cost of processing applications
    2. Publication costs
    3. Inspection costs
  - b. Maintenance and Repair Costs

1. Annual right of-way maintenance and repair cost for streets including plowing, sanding, typical repairs excluding utility cuts
2. Equipment and Personnel Costs
3. Inventory current utility use of rights-of-way (See Attachment A)
  - a. Miles of line and type of line
    1. Above ground
    2. Under ground
    3. Distribution lines connecting to each house
    4. Large volume transmission lines
    5. Include an inventory of other utilities such as water, sewer and gas pipelines
    6. Inventory all permits; permit procedure
  7. Develop method of determining true costs of degradation (See City of Cincinnati Study “Impact of Utility Cuts on Performance of Street Pavements”); identify:
    - a. Type of pavement
    - b. Pavement condition before utility cut
    - c. Effectiveness of past overlay designs
    - d. Traffic and growth estimates
    - e. Lateral extent of damage caused by pavement cuts, severity of damage, additional strengthening or overlay required to return the pavement to its original condition
5. Action Items for Municipalities:
  - a. Inventory all existing permits and users, occupants of rights-of-way; this must be done in response to the NETT v. Rochester case for property tax calculations under RSA 72:23;
  - b. Review all licenses and consider amending licenses to impose property tax in “the public good.”
  - c. Conduct town specific field evaluation of pavement damage and quality of restoration and costs of restoration.
  - d. Assess previously done studies and compare to conditions of the municipality.

- e. If Town provides water or sewer services, review costs of acquisition and maintenance and compare Town owned utility costs with projections for private utility costs.
  - f. Ascertain property right of municipality in right-of-way.
6. How to Assess
- a. License or Permit fee
  - b. Proportionality; rational nexus

#### **IV. CABLE FRANCHISING**

##### **A. Strategic Overview**

1. The emerging information economy means that the telecommunications infrastructure of each New Hampshire municipality is increasingly as important as any other part of the municipal infrastructure. The ability of the municipality to foster and sustain a state-of-the-art telecommunications infrastructure will promote economic development and improve quality of life. The cable franchise is an essential element of the municipality's telecommunications infrastructure.

There are several key strategic objectives and several critical tactical considerations which must be taken into account in executing a successful cable franchise renewal. These are summarized below:

##### **a. Cable On-line Services**

One of the strategic objectives of a cable franchise renewal should be to promote access to the Internet for businesses and residents. Much has been written about the Internet, but its transforming quality cannot be overstated. Federal law is largely silent on the question whether Internet access through the use of a cable modem is a telecommunications or cable service. There are several critical advantages to negotiating to include Internet access within the definition of cable service or cable on-line services.

The Internet has been described as the "network of networks." The transforming nature of the Internet has been compared to the introduction of the wheel or the invention of the printing press. The Internet transforms communication by making possible economical mass world-wide communications and information sharing on a real time, interactive basis. The Internet is used now primarily for interactive data and print media. Soon, voice and video communications will be added and the streaming of linear, video and audio programming will follow shortly. Potentially, the functions which could be offered over a cable on-line service include:

- \_ Internet telephony (local and long distance)
- \_ Video telephonic conferencing
- \_ Internet access
- \_ Data transmission and routing
- \_ Data storage and management
- \_ Internet web-site hosting
- \_ Voice messaging
- \_ E-mail

- Transaction intermediation (home banking, etc.)
- Package content

The advantages of having cable on-line services classified as a cable service are several. Revenue derived from Internet based services will be subject to franchise fee requirements imposed as part of the franchise agreement. The provisions of the Cable Act permitting the franchising authority to establish requirements in the franchise for public, educational or governmental use (“PEG”) access could be applied to on-line cable services delivered through the franchise agreement. The provisions of the Cable Act requiring commercial leased access could be applied to the provision of on-line cable services through the franchise agreement. Other than including revenue derived from cable on-line services as part of franchise fee calculations, the law in these areas remains unsettled. Nevertheless, the municipality should put itself in a position to assert its interests as the law develops by establishing and achieving the strategic objective of having cable on-line services delivered as part of the franchise agreement.

b. Promoting Competition

According to the most recent assessment of the state of competition in the delivery of video programming, the cable industry controls 85% of the multi-channel video marketplace. The market share of the cable industry decreased by 2% over the past year. Although the direct broadcast satellite industry has grown at a rate of almost 43% since 1997, and electric utilities are emerging as the next most likely competitors for the video programming market, a recent FCC report notes that competition from telephone companies, which was the competition Congress intended to promote with the Telecommunications Act of 1996, has not emerged. In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FCC 98-335, 1998 WL892964 (released December 23, 1998)

In this sobering, non-competitive environment, the municipality must establish as a strategic objective the promotion of competition. This will include surveying all policy options available to promote overbuild of the existing cable system, and may include active solicitation of competing providers, including open video system providers under the 1996 Act. Care must be taken in negotiating and crafting a franchise agreement which does not create an effective disincentive for competitive providers.

There are other important tactical considerations for the municipality in this franchise renewal. These include preserving the municipality’s legal options regarding rate regulation, although the consideration and administration of rate regulation should be undertaken apart from the franchise renewal, providing for flexible and adequate PEG and leased channel access, providing for a dynamic standard written into the franchise agreement to ensure that the municipality has a state-of-the art cable system throughout the franchise, ensuring adequate consumer protection standards and writing into the franchise strict transfer of ownership and control provisions.

B. History of Federal Law of Cable Regulation

1. Before 1984
2. Cable Communications Policy Act of 1984
3. Cable Consumer Protection and Competition Act of 1992
4. Telecommunications Act of 1996



- C. Franchise Renewal Process
  - 1. New Hampshire Law
  - 2. Section 626 of 1984 Act
    - a. Identify future cable related community needs and interests.
    - b. Review performance of cable operator under the franchise.
    - c. Renewal based on:
      - 1. Cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
      - 2. Quality of the operator's service, including signal quality, response to consumer complaint, and billing practices, but without regard to the mix, quality or level of cable services or other services provided over the system, has been reasonable in light of community needs;
      - 3. The operator has the financial, legal and technical ability to provide the services, facilities and equipment as set forth in the operator's proposal;
      - 4. The operator's proposal is reasonable to meet the future cable related community needs and interests, taking into account the cost of meeting such needs and interests.
  - 5. Formal process/Informal process
  - 6. Practical Review of Franchise Renewal Process
    - d. TCA of 1996; process unchanged
  - 3. 1996 TCA Substantive And Strategic Impact
    - a. Cable Service v. Telecommunication Service
      - 1. Public Right-of-Way
      - 2. Franchise Fee
      - 3. Internet Access
    - b. Open Video System Providers ("OVS")
      - 1. Franchise Implications
    - c. Rate Regulation
    - d. Transfers

- e. Access Programming
  - f. Institutional Network
  - g. Other
4. Competition or The Lack of It
- a. Cable is de facto monopoly
    - 1. Telephone companies have not entered as OVS providers except in Midwest.
    - 2. Cable still controls nearly 90% of multi-channel video programming distribution (MVPD) market.
  - b. Where will the competition come from?
    - 1. DBS: Direct Broadcast Satellite.
    - 2. MMDS: multichannel multipoint distribution service (Wireless cable) microwave distribution system broadcasting up to 33 analog channels.
3. LMDS local multipoint distribution service: experimental, low power, cellular like.
4. SMATV: satellite master antenna television system: used for receiving satellite transmitted programming and distributing television signals within a unit such as an apartment building (no use of public right-of-way).
5. Electric utility competition.
6. DSL: symmetrical digital subscriber line: telephonic, one-way service to home over regular telephone copper wire, television programming channels can be delivered using compressed video technology.
5. Governmental Use of Cable System
- a. PEG Access; community of interest between operator and municipality
  - b. Institutional Network
    - 1. Competition from digital wireless
    - 2. Other Internet access providers
6. Practical Agenda
- a. Inventory

- b. Ascertainment of Future Cable Related Needs.
- c. Implementation plan as larger telecommunications planning

**V. ZONING OF PERSONAL WIRELESS TELECOMMUNICATIONS SERVICES**

**A. Overview**

Federal law and New Hampshire law grant to municipalities the power to enact zoning regulating the placement of personal wireless service facilities within the geographical boundaries of the municipalities. That power should not be left on the shelf. Municipalities should be proactive in this area.

Municipalities should through the exercise of the zoning power establish where and how these facilities should be sited. Once the municipality establishes where these facilities can be sited, the municipality should establish a hierarchy of siting values so that the siting most favored by the municipality is the easiest siting for the wireless applicant to obtain. Conversely, the siting which is least desirable from the municipality’s point of view should be the most difficult siting for the wireless applicant to obtain.

**B. Legal Framework**

**1. The Federal Law**

Preservation of local zoning authority. 47 U.S.C. Section 332 (c) (7) (Section 704).

**SEC. 704.FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS**

(a) National Wireless Telecommunications Siting Policy -- Section 332(c)(47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) Preservation of local zoning authority.--

(A) General Authority.-- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations. --(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

- (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
- (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
- (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The Court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

C. What Does the Federal Law Mean?

1. First Circuit: Omnipoint Communications v. Town of Amherst, New Hampshire.

a. Overview

In only the third case decided by a Court of Appeals and the first case decided by the First Circuit, the United States Court of Appeals for the First Circuit held recently that the Town of Amherst did not violate the Telecommunications Act of 1996 when it denied applications for special exceptions and variances to enable Omnipoint Communications to site four 190 foot towers within the Town.<sup>1</sup> The Court of Appeals vacated a decision of the United States District Court of New Hampshire holding that Amherst had violated the Telecommunications Act of 1996 ("TCA") by effectively prohibiting the provision of wireless services. A number of important lessons and guiding principles can be drawn from the decision of the Court of Appeals.

At the heart of the case is what the Court of Appeals characterizes as "[a] statutory provision ... [which] ... is deliberate compromise between two competing aims — to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." The TCA preserves local zoning authority subject to two substantive and three procedural limitations. The substantive limitations are that municipalities may not "... unreasonably discriminate among providers of functionally equivalent services ..." and that municipal regulation may "... not prohibit or have the effect of prohibiting the provision of personal wireless services." The three procedural limitations on the exercise of local zoning authority are that municipalities act within a reasonable period of time on applications for placement of wireless facilities, that denials be in writing and supported by substantial evidence contained in a written record and that denials may not be based on radio frequency environmental effects.

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<sup>1</sup>Town of Amherst, New Hampshire v. Omnipoint Communications Enterprise, Inc., 176 F.3d 9 (1<sup>st</sup> Cir. 1999).

b. Abstract of the principles from decision:

1. Wireless providers, like other developers, are subject to local zoning and must plan their deployment of systems in the context of what local zoning permits. In the Amherst case, the Court of Appeals noted that Omnipoint had a rigid deployment scheme which it refused to modify in the face of the Town's zoning requirements. The Court stated: "Omnipoint did not present serious alternatives to the Town .... this one proposal strategy may have been a sound business gamble, but it does not prove that the Town has in effect banned personal wireless communication."

2. The TCA contemplates that municipalities are free to deny applications to site wireless facilities. A single denial or set of denials will not constitute an effective prohibition unless the denials are of a quality and nature that render futile any future applications by the wireless provider for zoning permits or relief. The Court of Appeals stated: "Obviously, an individual denial is not automatically a forbidden prohibition violating the 'effects' provision. But neither can we rule out the possibility that -- based on language or circumstances -- some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service."

3. The burden is on the wireless provider to demonstrate that the Town has effectively prohibited personal wireless services. The Court stated: "But the burden for the carrier invoking [the effective prohibition] provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try."

4. Municipalities should be flexibly and constructively engaged. The Court of Appeals noted: "Ultimately, we are in the realm of tradeoffs: on one side are the opportunity for the carrier to save costs, pay more to the town, and reduce the number of towers; on the other are more costs, more towers, but possibly less offensive sites and somewhat shorter towers. Omnipoint may think that even from an aesthetic standpoint, its solution is best. But subject to an outer limit, such choices are just what Congress has reserved to the town. [citations omitted] We need not decide now whether and to what extent legitimate zoning requirements could require a carrier to accept a wireless system that is functional but offers less than perfect performance."

5. The substantial evidence requirement, one of the procedural limitations placed on local zoning by the TCA, is to be applied based on a municipality's own zoning requirements, as administered under New Hampshire law. The Court of Appeals stated: "... [T]he substantial evidence requirement is centrally directed to those rulings that the Board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like."

2. Fourth Circuit: AT&T Wireless v. City of Virginia Beach

a. Prohibition; single denial or set of denials does not constitute prohibition

b. Discrimination; the act explicitly contemplates reasonable discrimination among providers and favoring one over another is not by itself actionable

c. Decision in writing and supported by substantial evidence contained in a written record; NH standard of review; generalized concerns of citizens acceptable evidence

3. Legislative history
  - a. House Bill
  - b. Conference Committee Report
  - c. Prohibition
4. The frame created by other cases
  - a. Easton; Discrimination found and 1983 remedy available
  - b. Orange County II; the balance struck is the balance struck
- D. New Hampshire Law
  1. House Bill 733 or RSA 12-J: Deployment of Personal Wireless Service Facilities
    - a. RSA 12-J is effective as of August of 2000.
    - b. The statute states that carriers wishing to build personal wireless service facilities (PWSFs) in New Hampshire should consider commercially available alternatives to tall cellular towers. The alternatives stated in the statute are:
      1. lower antenna mounts which do not protrude far above surrounding tree canopies;
      2. disguised PWSFs such as flagpoles, artificial tree poles, light poles and traffic lights, which blend with surrounding area;
      3. camouflage PWSFs mounted on existing structures and buildings;
      4. custom design PWSFs to minimize visual impact; and/or
      5. other available technology
  2. Under RSA 12-J, wireless carriers doing business in the State, or their appointed agents, shall:
    - a. Be subject to municipal land use regulations, including those regulating the height of such facilities;
    - b. Comply with all federal, state and municipal law, including federal radio frequency radiation regulations;

c. Provide information at the time of the application to construct an externally visible PWSF, or prior to construction if no approval is required, to both the municipality and to the New Hampshire Office of State Planning, as follows:

1. A copy of the FCC license establishing eligibility to deploy their system in the area being applied for or a copy of a contract between such a licensed provider and the applicant, along with a copy of that license;
2. Upon request of the municipality, detailed maps showing all the carrier's current externally visible tower and monopole PWSF locations in New Hampshire within a 20 mile radius of the proposed externally visible PWSF, both active and inactive;
3. Upon request, site descriptions for each of those locations including antenna height and diameter and a depiction of all externally visible structures;
4. Upon request, a description of why less visually intrusive alternatives for the facility which the applicant seeks approval for were not proposed.

d. The applicant can be required to pay reasonable fees for experts engaged by the municipality to review the application, including regional notification costs, in accordance with RSA 676:4, I(g).

e. Any municipality or state agency which receives an application to construct a PWSF which will be visible from any other New Hampshire municipality within a 20 mile radius shall provide written notification to all such municipalities within that 20 mile radius by letter to the governing body of such municipalities along with published notice.

E. Practical Framework

1. Industry
  - a. Predictable, certain process
  - b. Time; path of least resistance
2. Legal
  - a. Section 704; fundamental tension
  - b. First Circuit; Amherst case
  - c. Fourth Circuit; Virginia Beach case
  - d. Second Circuit; Willoth case
  - e. Best case; zoning is largely preserved

- F. What does it mean for municipalities?
  - 1. Figure out what you want; be proactive
  - 2. Create path for industry
    - a. Exploit self-interest of industry
    - b. Make your choice path of least resistance
  - 3. How?
    - a. Hierarchy of siting values
    - b. Your best siting = easiest siting for industry to obtain
    - c. Your least desirable permitted siting = hardest siting for industry to obtain
  
- G. Best case - legally - preserves local zoning
  - 1. Act on basis of NH zoning
  - 2. Master plan = rational basis
  - 3. Zoning fundamentally consistent with master plan
  - 4. Practically test zoning
    - a. Does it prohibit or effectively prohibit
    - b. Does it provide reasonable opportunity for siting
  - 5. Use the tools provided by RSA 12-J (HB 733)

**VI. FCC REGULATION OF VIDEO PROGRAMMING RECEPTION DEVICES AND SATELLITE EARTH STATION ANTENNAS:**

- A. Section 207/Regulation of MMDS, DBS Service and Television Broadcast Reception Devices:
  - 1. Section 207 directs the FCC to adopt regulations to “prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.”
  - 2. FCC Implementation



- a. Any restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property is prohibited to the extent it “impairs” the installation, maintenance or use of:
  - (i) an antenna that is designed to receive DBS service that is one meter or less in diameter or is located in Alaska;
  - (ii) an antenna that is designed to receive video programming services via multipoint distribution services and that is one meter or less in diameter or diagonal measurement; or
  - (iii) an antenna that is designed to receive television broadcast signals.
- b. “Impair” is defined as (i) unreasonably delaying or preventing installation, maintenance or use; (ii) unreasonably increasing the cost of installation, maintenance or use; or (iii) precluding reception of an acceptable quality signal.
- c. A restriction that is otherwise prohibited is permitted if:
  - (i) it is necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applicable to the extent practicable in a nondiscriminatory manner to other appurtenances, devices or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas to which local regulation would normally apply; or
  - (ii) it is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register or Historic Places, and imposes no greater restrictions on antennas than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight and appearance; and
  - (iii) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.
- d. Local governments may apply to the FCC for a waiver of the rule. A waiver may be granted upon a showing of local concerns of a highly specialized or unusual nature.
- e. Parties may petition the FCC or a court for a declaratory ruling as to whether a particular restriction is permissible or prohibited.
- f. So long as the property owner consents, a person residing on the property owner’s property with the property owner’s permission is treated as an antenna user and has the same rights as the property owner with regard to third parties, including local governments and associations, other than the property owner.

3. FCC Action

a. In re Star Lambert and Satellite Broadcasting and Communications Assn.. Of America, 12 FCC Rcd. 10,455 (1997). City ordinance imposed certain restrictions on the installation and placement of video programming antennas. FCC preempted ordinance provisions that: (a) imposed permit and fee requirements; (b) established antenna location and setback requirements; (c) required compliance with building and utility codes; and (d) imposed \$500 per day fine for violations of the ordinance.

B. Large Satellite Earth Station Antennas (greater than 2 meters in diameter):

1. Any state or local zoning, land-use, building or similar regulation that “materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable.”

2. A state or local requirement will be considered reasonable if it:

(i) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and

(ii) furthers the stated objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

3. Nonfederal regulation of radio frequency emissions is not preempted by this rule.

4. Any person aggrieved by the application or potential application of a state or local requirement in violation of the FCC rules may, after exhausting all nonfederal administrative remedies, file a petition with the FCC requesting a declaration that the state of local regulation is preempted.

5. FCC Actions

(i) In re Petition of City of Rockwood, Ill., Order, DA 98-1606, 1998 WL 469681 (1998). City sought to enforce restrictions on the installation of a ten-foot in diameter satellite receive-only earth station antenna in a historic area of the City. FCC found city’s zoning ordinance and historic preservation ordinance based upon reasonable, clearly defined aesthetic objectives, without unnecessarily burdening federal interest. Therefore, FCC found that city needed no waiver.

(ii) In re Petition of James Moffat, Report and Order, 13 FCC Rcd. 4184(1997). FCC preempted as unreasonable local ordinance regulating seven foot, six inch satellite antenna. Town did not offer health or safety reasons for denial of antenna owner’s request to mount antenna on roof, and did not attempt to justify the restriction in the regulation’s text or in another publicly available document. Town used “inexplicit and undefined aesthetic concepts,” rendered verbally, to deny variance.

- (iii) In re Petition of Willie and Chun Ok Brown, Report and Order, 12 FCC Rcd. 9626 (1997). FCC preempted as unreasonable local ordinance regulating installation of 2.3 meter satellite dish antenna on pole in excess of 14 feet. FCC concluded that township “materially limited” antenna owners’ reception, and that township’s request that owners buy a smaller, more expensive antenna imposed “more than minimal costs.”

C. Small Satellite Earth Station Antennas (less than 2 meters in diameter)

1. Any state or local zoning, land-use building, or similar regulation that affects the installation, maintenance, or use of a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted shall be presumed unreasonable and is therefore preempted. (This prohibition does not apply to DBS service antennas that are one meter or less in diameter or that are located in Alaska. Such antennas are governed by rules summarized in Section VI.A.2 above.)
2. A state or local authority cannot enforce such regulation unless the authority has obtained a waiver from the FCC or a final declaration from the FCC or a court that the presumption has been rebutted. A presumption of unreasonableness may be rebutted upon a showing that the regulation is:
  - (i) necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;
  - (ii) no more burdensome to satellite users than is necessary to achieve such objective; and
  - (iii) specifically applicable on its face to the antennas covered by the FCC’s rule.
3. A state or local government that wishes to maintain and enforce any regulations that are inconsistent with the FCC rules may apply to the FCC for a full or partial waiver of the rules. Such waivers may be granted by the FCC upon a showing by the applicant of local concerns of a highly specialized or unusual nature.
4. FCC Action
  - (i) In re Petition of City of St. Charles, Mo. For a Waiver of 47 C.F.R. 25.104(B)(1) Regarding preemption of Local Zoning Regulation of Satellite Earth Stations, Order, DA 98-1607, 1998 WL 469689 (1998): FCC waived preemption of local zoning restrictions on satellite earth stations less than two meters in diameter and located in commercial and industrial areas. FCC concluded that City had shown that local interest of preserving historic district justifies waiver.