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Managing Public Rights of Way: 5G Deployments and Taxation

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Municipal Authority on Management of the Public Rights of Way

The legislature has granted broad authority for municipalities to license and regulate their public rights of way (PROW). Boards of Selectmen are authorized to regulate the use of the PROW,[1] and City and Town Councils have the same powers.[2]

The authority for the Board or Council to regulate and license utility poles and conduits in the PROW is contained in RSA 231:159-189. This statute confers the authority to license or permit utility poles and structures, underground pipes, conduit and cables, "with the respective attachments and appurtenances" in the PROW for telegraph, television, electric power, water, and gas companies.[3]

Last amended in April of 1981, RSA 231:160-161, does not address the evolving issue of wireless facilities, but this does not preclude municipalities from regulating and requiring licenses for wireless facilities in the PROW, given municipalities' general power to regulate the use of the PROW, noted above. Additionally, Cities and Town Councils have authority to enact Codes or By Laws. Boards of Selectmen have the authority to enact what are referred to as "selectmen's ordinances."[4] Assuming your Town meets the requirements under the statute, a selectmen's ordinance, or even a detailed protocol adopted by the Board, outlining the process for handling applications for use of the PROW by ALL users, traditional utilities and wireless newcomers alike, may be the best path to take for the safe, efficient management of wireless facilities in your PROW.

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[1] RSA 47:17 VII
[2] RSA 44:2 and 47:5, RSA 49-D:2 and RSA 49-D:3.
[3] RSA 231:160-161
[4] RSA 41:14-a – 41:14-c.

Taxation of Private Use of PROW

Municipalities are required to tax private use of municipal-owned and state-owned property within the municipality.[5] RSA 72:23 requires that "all leases and other agreements" for use or occupation of municipal land "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." The New Hampshire Supreme Court has ruled that pole licenses are "leases or other agreements" to use the municipal right of way and therefore are subject to amendment to require payment of taxes.[6] Thus, although a municipality is required to tax private use of public property, the municipality's authority to assess that tax is conditioned upon the municipality including the requisite RSA 72:23 taxation language in the agreements authorizing the private use.

Fortunately, the process of amending pole licenses and pipeline agreements is relatively simple and supported by current New Hampshire law.[7] RSA 231:163 authorizes a petition for amendment of an existing license to "make such alterations therein as the public good requires." The New Hampshire Supreme Court has ruled that an amendment to require payment of taxes is required by the "public good."[8]

An example procedure for amending pole licenses and pipeline agreements is as follows:

1. A resident/taxpayer in a municipality brings a petition to amend all preexisting licenses to include the required taxation language. See RSA 231:163 (providing that "any person whose rights or interests are affect by any such license may petition the selectmen for changes in the terms"). This can be a municipal employee who lives in the community.
2. The municipality's governing body notices a meeting at least fourteen days in advance of the proposed hearing date.
3. The Municipality sends copies of the petition and hearing notice by certified mail/return receipt requested to each affected entity, including electric, telephone, gas, and water utilities.
4. The municipality's governing body conducts the public hearing. Following the public hearing, the municipality's governing body makes a finding that the public good supports the amendments and then votes to grant the petition.
5. The municipality sends copies of the granted petition by certified mail to each affected entity.

After the amendment process is complete, we recommend that the municipality keep the following documents: the signed petitions; the hearing notice and all certified mail green cards;

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[5] RSA 72:23.
[6] New England Telephone & Telegraph Co. v. Town of Rochester, 144 N.H. 118 (1999) ("Rochester I"); Verizon New England, Inc. v. Town of Rochester, 151 N.H. 263, (2004) ("Rochester II").
[7] See Rochester II; Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE v. Acworth, 220-2012-CV-100 (Merrimack Superior Court, decided December 14, 2015).
[8] Rochester I.

the meeting minutes approving the petitions; and the follow up letters and all certified mail green cards. In the event that a utility challenges the municipality's authority to tax the utility's use of the PROW, these documents prove that the municipality properly amended its pole and conduit licenses.

Municipalities also need to be wary regarding new applications for licenses to use the PROW. In our experience, even after a municipality completes the amendment procedure, a utility submitting a petition for a new pole license may prepare an order for the governing body to sign granting the license, that fails to include the required RSA 72:23 taxation language.

In 2018, RSA 72:23 was amended to impose a new notice requirement. By April 15 of each year, the "lessors" of agreements providing for use of municipal-owned and state-owned property must provide written notice and copy of the agreements to the municipality's assessing officials. Although it may not have been the intent of the amendment, this new requirement applies to each license for use of the PROW.

RSA 72:23 does not include any penalties for failing to comply with this notice requirement, which is a good thing, because perfect compliance with RSA 72:23's new notice requirement would be costly, time consuming, and impractical. Each municipality has an average of approximately 2,000 utility poles, and some of the pole and conduit licenses may date back more than a century.

A municipality's notice to its assessing officials should include a copy of the documents proving the municipality has amended its PROW licenses to include the required RSA 72:23 taxation language. However, given the burden of physically providing copies of all PROW licenses, it should be reasonable for a municipality to instead: (1) provide a copy of the documents proving the municipality has amended its PROW licenses to include the required RSA 72:23 taxation language; and (2) inform the assessing officials that PROW licenses can be viewed at the clerk's office.

The RSA 72:23 notice requirement also applies to the state, which grants PROW licenses for state-owned rights of way. New Hampshire Department of Transportation is aware of the notice requirement and, although it has been requested to do so it, has not yet provided copies of any licenses to any municipalities, as far as we know. It is our understanding that DOT is similarly trying to find a way to reasonably comply with RSA 72:23 without incurring the cost of providing a copy of every PROW license.

Federal and State Laws on Personal Wireless Telecommunications Facilities

As discussed above, municipalities have authority to regulate the PROW. However, in regulating the PROW, municipalities need to be careful to comply with both federal and state laws regulating personal wireless telecommunications facilities. Both Congress (with the 1996 Telecommunications Act, ("TCA") and amendments thereto) and the NH Legislature (with RSA

Chapter 12-K, significantly amended in 2013) have passed laws to promote and streamline the deployment of wireless communications. The Federal Communications Commission ("FCC") has also issued regulations to speed deployment of small cell wireless facilities, including a October 2018 final rule: "Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to infrastructure Investment," effective January 14, 2019.

Although the TCA preserves local authority to regulate personal wireless service facilities, the act (1) bars municipalities from discriminating among providers of telecommunications services; (2) requires that municipalities comply with procedural requirements for making decisions; and (3) generally bars a municipality from effectively prohibiting an entity from providing telecommunications services.[9]

Anti-Discrimination: Municipalities cannot "unreasonably discriminate among providers of functionally equivalent services." Under a broad reading of this provision, the municipality must ensure that it does not unreasonable discriminate between two wireless communication carriers, and also does not discriminate between wireless telecommunication carriers and other (wireline) telecommunications carriers.

Procedural Requirements: Municipalities are required to make decisions within specific time frames, to base denials on substantial evidence in a written record, and to issue denials in writing.[10] Furthermore, municipalities cannot regulate personal wireless service facilities on the basis of radio frequency emissions, so long as the facilities comply with the FCC's regulations concerning such emissions.[11]

Timeline: FCC rules impose "shot clocks" that govern the timing of municipal approval of personal wireless service facilities applications.[12] If a municipality fails to issue a decision on a siting application within the prescribed period, the applicant can petition a federal court or the FCC for expedited relief.[13]

Deadline for action on an application for collocation of small wireless facilities (on existing structures)	60 days.
Deadline for application on an application for collocation of other wireless facilities (on existing structures)	90 days.
Deadline for action on an application for construction of new small wireless facility	90 days
Deadline for action on an application for construction of other wireless facilities	150 days

[9] 47 U.S.C. §332 (c)(7).
[10] 47 U.S.C. §332 (c)(7)(B).
[11] 47 U.S.C. §332 (c)(7)(B)(iv).
[12] 47 C.F.R. §1.6003(c)(1)
[13] 47 U.S.C. §332 (c)(7)(B)(v).

These shot clock deadlines begin to run as soon as an application is submitted to the municipality. However, the clock can be paused if the municipality notifies the applicant within 30 days that the application is incomplete and identifies the missing information. For small wireless facilities applications, the municipality only has ten days to notify the applicant of an incomplete application. These short windows for ensuring that applications include all necessary information make it important for a municipality to have a quick process for reviewing applications for completeness. Depending on the size of a municipality, this may involve training an employee to specifically handle these applications or drafting a detailed checklist for use in verifying whether applications are complete.

Effective Prohibition: The TCA prohibits states and municipalities from having any laws or regulations that have the effect of prohibiting any entity from providing telecommunications services, unless the laws or regulations are competitively neutral and necessary to, among other things, protect public safety and welfare.[14] Thus, a municipality cannot regulate the placement, construction, and modification of personal wireless service facilities in a manner that prohibits or effectively prohibits the provision of personal wireless services.[15]

Local regulations have the effect of prohibiting wireless telecommunications services if they "materially inhibit" the provision or improvement of such services. The most common way that regulations materially inhibit provision of wireless telecommunications services is if application of the regulations would result in a provider having a gap in coverage of its services. There may also be an effective prohibition in the context of an effort to densifying a wireless network, introducing new services, or otherwise improving service capabilities. When a municipality's denial would effectively prohibit the provider from providing services in an area with a significant gap in service, the TCA can *require* approval of the application, preempting local and state laws and regulations.

Aesthetic Requirements: Some municipalities have concerns over the aesthetic impact of wireless facilities. In its recent Final Rule,[16] the FCC made it clear that aesthetics requirements are not preempted if they are: (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; and (3) objective and published in advance. Additionally, municipalities should ensure that the aesthetic requirements don't result in an effective prohibition of service, are reasonable, are not more burdensome than those applied to other types of infrastructure deployments, and are objective and published in advance. For example, if a municipality enacts strict, non-discriminatory aesthetic requirements, the regulations should have some mechanism for waiving the regulations to the extent necessary to ensure there is no effective prohibition on the provision or improvement of wireless telecommunication services.

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[14] 47 U.S.C. §253.

[15] 47 U.S.C. §332 (c)(7)(B)(i)(II).

[16] Federal Communications Commission, Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 FR 51867, at 9 (October 15, 2018).

Application Fees: The FCC acknowledges that municipalities incur costs in processing these applications. Municipalities can charge applications fees, provided: (1) the fees are a reasonable approximation of the municipalities costs; (2) only objectively reasonable costs are factored into the fees; and (3) the fees are not higher than those charged to similarly situated competitors in similar situations. The FCC further offers a safe harbor, identifying rates that are presumptively reasonable:

i. $500–application for collocation of up to five small wireless facilities (plus $100 for each additional small wireless facility).
ii. $1,000-application for a new pole intended to support one or more small wireless facilities
iii. $270-recurring fee per small wireless facility per year, including any PROW access fee or fee for attachment to municipally-owned structures in the PROW.

Even if the fee is presumptively reasonable, municipalities must be careful to ensure that such fees are non-discriminatory[17]. For example, if the municipality does not assess a fee on Consolidated Communications, a wireline telephone company, for installing a new utility pole, the municipality might run afoul of the FCC's rules by charging a wireless communications provider $1,000 for a new pole, even though the fee amount itself is presumptively reasonable.

State Law: In addition to federal requirements, NH law, RSA 12-K, exempts from zoning and planning laws wireless facilities and antennae that can be attached to existing structures and poles without a "substantial modification," and allows only safety code review by the municipality's code enforcement officer on a very short timeline: *only 45* days to approve or deny an application, or the application is deemed granted. RSA 12-K:10. Additionally, if the code enforcement officer identifies that information is missing within 15 days of receipt of the application, then that "shot clock" pauses, but not if additional information is requested after the first 15 days. This deadline has been shortened by the new FCC rule down to 10 days.

Municipal Response: Given the pressures seen in other parts of the country, it makes sense to adopt "competitively neutral and necessary" procedures now, in the form of an ordinance or protocol, before applications for small cell deployments or other wireless facilities in the PROW become more common in NH, or attempts are made in the NH Legislature to strip municipalities of their ability to manage the PROWs when it comes to small cell applications.

Municipalities may be tempted to bar wireless facilities from the public rights of way, but that approach runs counter to the protections under 47 U.S.C. Section 253, and could result in a lawsuit. Such facilities arguably cannot be categorically barred from the public rights of way, if the municipality allows *wired* telephone companies, such as Consolidated Communications or First Light, to install poles or conduit, with wires, fibers, etc., there. Also, because of both the technical and legal differences between the facilities covered by Section 253 and those covered

[17] 47 U.S.C. 253

by RSA 231, it is not wise just to graft wireless facilities onto an existing protocol for handling pole and conduit license applications under RSA 231.

To avoid problems with small cell applications and applications for antennas, a comprehensive right of way ordinance or a well-developed protocol makes sense. The FCC's Broadband Deployment Advisory Committee Model Code for Municipalities Working Group has provided several drafts of a Model Code ("Model Code") to handle wireless applications for access to the PROW. This document, although still in draft, is a good place to start.

Elements of a Telecommunications Right of Way Ordinance

A municipality must first determine whether it wishes to develop a comprehensive right of way ordinance that covers all users: cable television (already subject to a franchise agreement) electrical, water and gas utilities, wired "traditional" telephones companies such as Consolidated Communications and Granite State Telephone, as well as competitive telephone companies, broadband providers and wireless communication service providers. If it does *not*, it will need to compare carefully its existing protocols and codes for permitting use of the PROW by traditional telephone companies, to ensure they are not more or less burdensome. Requirements need to be competitively neutral and necessary. 47 U.S.C. 253.

Guided by the Model Code, a robust municipal code or protocol for managing the PROW should include:

- Clear definitions, matching the definitions of RSA 12-K and 47 C.F.R. Section 1.6001-1.6003, to the extent possible. (Where the state law is more restrictive on the municipality, we recommend following state law and vice versa).
- Distinctions between the kind of applications that can be administratively approved, by a code enforcement officer, such as those covered by RSA 12-K:10, and those that may need higher review.
- Requirements for access to the PROW, in terms of safety, "dig once" requirements, etc.
- Required elements of a complete application.
- Reasonable, non-discriminatory fees for applications.
- The process for review and approval at both administrative and higher levels.
- The timeline within which decisions will be made, to meet both RSA 12-K:10 and proposed rules 47 C.F.R. Section 1.6001-1.6003.

Conclusion

Armed with such an approach, municipalities should be able to facilitate deployment of wireless facilities in their communities, which maintain proper control over the uses of the PROW, for the safety and enjoyment of all.

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Comparison of FCC Order "Accelerating Wireless & Wireline Broadband Deployment" Effective 1/14/19 & NH RSA 12-K Requirements for Wireless Collocation Permitting, by Katherine B. Miller, Esq.

RSA 12-K: Collocations	FCC Order Small Wireless Facilities and "large" Wireless Facilities	Comments
Definitions:	**Definitions:**	
Def. Antenna: equipment from which wireless radios signals are sent and received by a PWSF	Def. Antenna facility: "an antenna and associated antenna equipment"	
Def. Equipment shelter: "enclosed structure, cabinet, shed vault or box near base of a mount within which are housed equipment for PWSFs, such as batteries and electrical equipment.	Def. Antenna equipment: "equipment, switches, wiring, cabling, *power sources, shelters or cabinets* ...located at the same fixed location as the antenna and … mounted or installed at the same time….	
Def. PWSF or Facility: PWSF as defined in TCA: 47 U.S.C. Sec. 332(c)(7)(C)(ii), including facilities used or to be used by a license provider of personal wireless services. A PWSF includes the set of	Def. Facility or Personal Wireless Service Facility ("PWSF"): " an antenna facility or structure that is used for the provision of personal wireless service, whether such service is	

equipment and network components, exclusive of the underlying tower or mount, including, but not limited to, antennas, accessory equipment, transmitters, receivers, base stations, power supplies, cabling, and associated equipment necessary to provide personal wireless services.	provide on a stand-alone basis or commingled with other wireless communications services.	
Def: Collocation: "placement or installation of new PWSFs on exiting towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs in compliance with applicable codes. ***"Collocation" does not include a "substantial modification."***	Def. Collocation: "mounting or installing an antenna facility on a pre-existing structure and/ or modifying a structure for the purpose of mounting or installing an antenna facility on that structure."	
Def. **Substantial Modification:** the mounting of a proposed PWSF on a tower or mount which, as a result of a single or successive modification applications: (a) Increases or results in the increase of the permitted vertical height of a tower, or the existing vertical height of a mount, by more than 10% or the height of one additional antenna array with separation from the nearest existing antenna, not to exceed 20',	Def. **Small Wireless Facilities:** facilities that meet each of the following: (1) The facilities (i) are mounted on structures 50' or less in height, including their antennas; OR (ii) are mounted on structures no more than 10% taller than other adjacent structures, OR (iii) do not extend existing structures on which they are located to a height of more than 50' or by more than 10%,	

whichever is greater, or (b) Involves an appurtenance to the body of a tower or mount that protrudes horizontally from the edge of the tower or mount more than 20' or more than the width of the tower or mount at the level of the appurtenance, whichever is greater, except where necessary to shelter the antenna from inclement weather or to connect the antenna to the tower or mount via cable, or (c) Increases or results in the increase of the permitted square footage of the existing equipment compound by more than 2500 square feet, or (d) Adds to or modifies a camouflaged PWSF in a way that would defeat the effect of the camouflage.	whichever is greater; (2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than 3 cubic feet in volume; (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; (4) The facilities do not require antenna structure registration (FAA); (5) Not located on Tribal lands; and (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified [by the FCC]."	
Def. Mount: the structure or surface upon which antennas are mounted and includes roof mounted, side-mounted, and	Def. Structure: ***a pole***, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal	

structure-mounted antennas on an existing building, as an well as an electrical transmission tower and water tower, ***and excluding utility poles.***	wireless services (whether on its own or commingled with other types of services).	
Def. Tower: a freestanding or guyed structure, such as a monopole, monopine, or lattice tower, designed to support PWSFs.		
Timeline/Shot Clock	**Timeline/ Shot Clock**	
Remedy for failing to meet timeline: application for collocation ***deemed approved.***	Remedy for failing to meet timeline: the "siting authority" is presumed not to have acted in a reasonable period of time, in other words in violation of TCA, and applicant needs to go to Court to get relief.	
Time to review an application for collocation on a Tower or Mount: ***45 days***	Time to review an application for collocation of a Small Wireless Facility on an existing structure: ***60 days***	
	Time to review an application for collocation ***other than*** a Small Wireless Facility on an existing structure: ***90 days***	
	Time to review an application for collocation of a Small Wireless Facility on a ***new*** structure: ***90 days***	
Not addressed.	Time to review an application for a deployment other than a Small Wireless Facility, using a new structure (i.e.	

	a traditional cell tower): ***150 days***	
	Batching: If an application has multiple deployments all of which are either Small Wireless Facilities on existing structures or on new structures, *then the timeline for the batch is the same as the timeline for one.*	
	Batching: If an application is a mix of the above two types, then the timeline is ***90 days.***	
	Municipalities cannot refuse to accept batched applications.	
Tolling Periods	**Tolling Periods**	
Timeline tolled if code enforcement officer identifies deficiencies and notifies application within ***15 days*** of receipt by the Town. If applicant responds in 15 days, then the original 45-day timeline, inclusive of those 15 days, applies. If not, the timeline is extended by the same period it took the applicant to cure the deficiency.	For Small Wireless Facility applications, if siting authority identifies the application as materially incomplete and clearly and specifically identifies the missing information and documents, and the rule or regulation requiring them within ***10 days*** of receipt, then the "shot clock" calculation restarts at zero when all the information and documents are provided.	
	For other (i.e. traditional cell tower) applications, if siting authority identifies the application as materially incomplete and clearly and specifically identifies the missing information and	

	documents, and the rule or regulation requiring them within ***30 days*** of receipt, then the "shot clock" stops until all the information and documents are provided.	
	Uses calendar days, unless last day falls on a "holiday," in which case deadline is on the next business day.	
Fees:	**Fees:**	
Not addressed.	Presumed reasonable: 1. (a) $500 for non-recurring fees, including a single up-front application that includes up to 5 Small Wireless Facilities, with additional $100 for each 1 beyond 5, ***or*** (b) $1000 for non-recurring fees for a new pole (i.e. not collocation) intended to support one or more Small Wireless Facilities, and 2. $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fees and fees for attachment to municipally-owed structures in the ROW.	
Local and State Zoning and Land Use Laws	**Local and State Zoning and Land Use Laws**	
Applications for collocations are ***exempt*** from local and state land use laws (zoning and planning board review) ***but not safety code review.***	Wireless facilities applications ***remain subject to*** local and state zoning and land use laws, ***except to the extent preempted by federal law or FCC regulation.***	