Cable Franchise Agreements and Wireless Tower and Antenna Permitting

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Opportunities with Cable TV Franchises

• Most towns in NH have a cable TV provider.
• Cable TV systems also provide internet service – broadband – and often “voice” – telephone service.
• Municipalities only have jurisdiction over the cable TV portion of the company’s business.
• All services come over the same system.
Opportunities with Cable TV Franchises
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• The governing body is the “franchising authority” to negotiate a renewal franchise agreement with the cable TV provider.

• Cable TV providers may only be denied renewal of their franchises in a community once initially granted if they are in default of their current franchise agreements or their proposals are not “reasonable.”
Opportunities with Cable TV Franchises

• “Reasonable” is judged on economic as well as other grounds, in other words, would the company get a reasonable return on its investment?

• If the company offers the same, standard proposal for renewal of its franchises region- or nation-wide, it is deemed “reasonable.”
Opportunities with Cable TV Franchises

• “Public-Private Partnerships” can be fertile ground for extending the cable TV systems to parts of the community not currently served.
• Win-Win-Win: Cable company can get more subscribers; residents can get access to cable TV and broadband (and voice); the community can become more attractive for potential residents and businesses, increasing property values and boosting the tax base.
Opportunities with Cable TV Franchises

• How do we pay for it?
• Cable companies have formulas on the “density” of homes required to extend the cable TV system.
• Towns can solicit interest among residents in an unserved area, and, if there are enough willing to commit to a one- or more year cable TV service agreement, the company will extend.
Opportunities with Cable TV Franchises

• If not enough residents, Towns can (1) collect franchise fees from cable TV subscribers and use part or all of them to fund the extension, or (2) pay with appropriated dollars.

• Bonding for construction of municipal broadband infrastructure is not available for extension of the cable TV system, as the facilities will be owned by the cable TV company, not the Town.

• How can the Town start collecting (or increase) cable TV franchise fees?
Opportunities with Cable TV Franchises

• During the renewal of the cable TV franchise, the Town may required that the cable operator pay the Town franchise fees up to 5% of the gross revenue annually from the operation of the cable TV system (not voice or broadband services) in the Town.

• Franchise fees paid to the Town are like “rent” for the cable TV company’s use of the public rights-of-way to reach their customers.
Opportunities with Cable TV Franchises

• Like appropriated funds, cable TV franchise fees are general revenues and can only be spent for municipal purposes.

• Appropriated funds are generally raised through taxes.

• Cable TV franchise fees are like more narrowly assessed “taxes,” because only cable TV subscribers pay them to the company, who pays them to the Town.

• It is very unlikely to get “free” money from the cable TV company.
Opportunities with Cable TV Franchises

• For expenditure of either, it is important to establish a robust record of the anticipated benefit to the Town through the extension of the cable TV system, in terms of economic development, maintaining property values, providing resources to residents for education and business, as well as leisure and recreation.
Opportunities with Cable TV Franchises

The Municipality receives a letter from the current Franchisee advising they wish to commence the renewal process. This letter is forwarded to DTC, who then prepares an engagement letter to the Municipality, engaging us to act as your attorneys in this matter. The Municipality may form a Cable Committee to work with DTC.

DTC prepares two sets of audit questions regarding the current franchise agreement: one for the Municipality and one for the Franchisee. The answers to these questions help determine if the Franchisee has met all the conditions of the current franchise agreement.

Within six months of the date of the renewal letter, the Municipality holds an ascertainment hearing with concerned residents and municipal departments to determine if the terms of the current franchise agreement have been met and to discuss future needs—items the Municipality would like included in the new agreement. Minutes of the hearing (or transcript) should be kept, as the more complete the ascertainment record, the more negotiating power the Municipality will have. The Municipality may hold as many ascertainment hearings as necessary, provided the initial hearing takes place within 6 months of the renewal letter.

The final agreement may include conditions under which the Municipality may request annual reports from the Franchisee regarding subjects such as payments, services and upgrades. The Municipality should take steps to ensure this information is obtained regularly as it will make the next renewal process go smoothly.

The negotiation team recommends a franchise renewal to the Governing Body, which holds a public hearing on the proposed agreement. The final result is the best agreement that can be negotiated for the Municipality.

The Franchisee provides a counterproposal to the Municipality’s initial renewal proposal. DTC confers with the Municipality about negotiating the new agreement with the Franchisee. During this back-and-forth process, the results of the ascertainment hearing(s) bear fruit.

Based on the input from the Municipality and the results of the ascertainment hearing(s), with the assistance of DTC, the Municipality presents a renewal proposal to the Franchisee. DTC updates the matrix to include a comparison of the renewal franchise proposal.
Opportunities with Cable TV Franchises

• It is important to focus on step 6 of that graphic, the ascertainment of future cable related needs and interests of the community.

• In establishing the record, emphasis must be on the cable TV services provided by the company, not telephone or broadband, as cable TV is the only thing over which the governing body has control.
Wireless Tower and Antenna Permitting

WHAT YOU WILL LEARN:

✓ Overview of Federal Law on Applications to Local Land Use Boards for Personal Wireless Communications Facilities (commonly “cell” or “wireless” towers)

✓ Federal and State “Co-Location–As-of–Right” for Co-Location of Antennae on Existing Towers and on Other Structures Capable of Structurally Supporting Them and/or Modifications That Are Not “Substantial”

✓ Practical Suggestions for Boards
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• Wireless broadband services, including cell phone services, can provide access to broadband, although often not as robustly as “fixed” facilities, such as fiber or cable networks, through telephone companies or cable TV providers, or others.

• 5-G (or Fifth Generation) wireless networks and phones promise faster connections, shorter delays and better connectivity.
Wireless Tower and Antenna Permitting

• 5-G will require many more small “cells” to get the signal to homes, where it can be picked up by a router supplied by the wireless company, and to phones carried by customers as they travel.

• Most 5-G cells will arrive in urban areas first, with enough density of users to justify the cost of setting up the small cells.

• Where will those “cells” go?
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• Some may be on newly built lattice or monopole towers, but not likely for smaller cells.
• Many will be antennae attached to existing poles, buildings, water tanks, etc.
• Will the Town be able to review applications for such installations?
• Answer: It depends.
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• New towers and substantial modifications of existing structures will continue to be governed by local and state law and the federal Telecommunications Act of 1996 (TCA), which imposes additional requirements on zoning and planning boards when reviewing such applications.

• Briefly, those include (1) short timeframes (30 days from receipt of the application, not first consideration of the application, to request additional information, and 150 days to a final written decision, based on substantial evidence in a written record) and (2) substantive requirements, including that a decision to deny an application for a new tower may not result in effectively prohibiting the service of that applicant in the community.
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• Due to the unique requirements and short timelines of the TCA, which can pre-empt NH law, local zoning ordinances and planning board procedures, we strongly recommend that all Towns have a process in place for Town officials to be able to identify such applications as soon as they arrive, to date stamp them immediately and to bring them to the attention of the Town or regional planner or Town counsel promptly.
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• For Towns without planning or zoning boards, we recommend tasking a member of the select board to review such applications right away and determine what steps might be needed, including possibly retaining a regional planner, specialized legal counsel and/or an expert to assist the Town to meet its requirements under the law.
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• In NH, personal wireless services *antennae* can go on any structure that can support them, with *only* safety code review by the Town.

• RSA 12-K permits such antennae even if the structure needs to be modified, so long as the modification is not “substantial.”

• “Not substantial” includes an increase of up to 10% of the vertical height of the structure, or up to 20’, whichever is *greater*, or addition of a horizontal appurtenance 20’ wide, or the same width as the structure at that point.
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- Co-location applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review. RSA 12-K: 10, I.
  - Additional information required must be requested within 15 days;
  - Application *deemed granted* if no decision after 45 days.
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• Will wireless companies building out 5-G networks seek to get access to the public rights of way and the existing utilities poles already there?
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• Yes, in many cities and states, that is exactly the approach taken by some carriers such as T-Mobile (which plans to merge with Sprint) and AT&T, and infrastructure builders.

• What should Towns in NH expect?

• First, we have seen inquiries, generally phrased, such as “Does your town grant the same access for placing facilities in the public right of way to wireless carriers that it grants to utilities and cable TV companies?” Answer carefully.
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• Federal Telecommunications Act of 1996 (47 U.S.C. §253) requires that:

• **(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 of this title, 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-way 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.
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- **NH 231:160 Authority to Erect.** – Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.
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• It is important to answer the inquiry with the statement that “The Town will comply with all federal, state and local legal requirements.”

• Applicants would need to gain access to any poles on which they wished to locate from the pole owners.

• We strongly recommend that Towns consider adopting a comprehensive right-of-way ordinance, to address all telecommunications uses (not just “telephone”) and other facilities in the public rights of way, in a fashion that is non-discriminatory and neutral as to technology.
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• Why should we care, if the antennae can go anywhere with only safety review?
• Because some 5-G cells can be quite massive, up to 120’ and with multiple equipment cabinets, placing a large burden on the public right of way and creating some safety issues.
• A couple of pictures are worth a couple of thousand words...
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Small cell facility installations in Los Angeles and Atlanta
“An AT&T Mobility Small Cell on an existing utility pole in Oakland.”

“New wood pole (holding up cell and microwave antennas) and equipment enclosures for a ‘Small Cell’ (appears to be by ‘Mobilitie’ for Sprint) in the public right of way (where all other . . . utilities are already undergrounded) in Woodbridge, Virginia.”

Credit: Omar Masry
Thank you for your attention!

Questions?

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