



DONAHUE, TUCKER & CIANDELLA, PLLC

DEDICATED TO CLIENTS - DEDICATED TO COMMUNITY

225 Water Street, P.O. Box 630
Exeter, New Hampshire 03833
Telephone (603) 778-0686

111 Maplewood Avenue, Suite D
Portsmouth, New Hampshire 03801
Telephone (603) 766-1686

56 NH Route 25, P.O. Box 214
Meredith, New Hampshire 03253
Telephone (603) 279-4158

Web Site: www.DTCLawyers.com

TELECOMMUNICATIONS INFRASTRUCTURE IN NEW HAMPSHIRE: WIRELESS FACILITY SITING, CABLE TELEVISION, RIGHT-OF-WAY MANAGEMENT & LOCAL GOVERNMENT

By: Robert D. Ciandella, Esquire*

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, 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. Back to ascertainment and inventory; a continuous planning process

*Robert D. Ciandella is a partner with Donahue, Tucker & Ciandella, PLLC and Chairman of the firm's Telecommunications Practice Group. Katherine B. Miller, also a partner with the firm and member of the practice group, assisted in preparing this outline.

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. Funding mechanisms for telecommunications policy planning and implementation
- B. Dedicate internal resources to the task
1. Master plan process: RSA 674:2(g) states: “[The Master Plan shall include, at a minimum, the following required sections:]...(g) a utility and public service section analyzing the need for and showing the present and future general location of existing and anticipated public and private utilities, both local and regional, including telecommunications, utilities, their supplies, and facilities for distribution and storage.”
 2. Information Services
 3. Ad hoc, including community resources
 4. Work with school boards, municipal departments; work with library trustees; library staff; community anchor institutions: business, health, academic, other
 5. Use of reserve funds authority for telecommunications planning and implementation

- a. Cable franchise fee or portion thereof
- b. Lease payments for use of municipal land or buildings for wireless or wired telecommunications facilities;
- c. License or permit fees for use of right-of-way

III. PUBLIC RIGHTS-OF-WAYS

A. Uses of the Right-of-Way

1. Private Uses of Poles and Conduits

- a. Electric
- b. Telecommunications
- c. Cable
- d. Open Video Systems
- e. Internet Access as in Interstate Information Service
- f. Wholesale Network Services/New Hampshire Fast Roads, LLC
- g. Distributed Antenna Systems to Propagate Wireless Signals
- h. Other
 - (i) Multi uses of same plant
 - (ii) FairPoint as provider of cable services (Transfer docket at NH Public Utilities Commission, DT 07-011.)
 - (iii) Other telephone companies providing video (cable TV) services (TDS)

B. Government Use of Poles and Conduits

1. Historical

- a. Fire
- b. Police
- c. Public Safety

2. Legal Test

- a. Is it a barrier?

b. Is competitively neutral and nondiscriminatory?

c. Is it an unconstitutional taking?

3. Future

a. Emergency Management with Communication an Integral Part of a Fiber Based System

b. Governmental Communications Network

(i) Government must not be a telecommunications provider providing services to the public.

(ii) Based on Public Good.

(iii) Taking Issue.

c. Pole Attachment Fees/NH PUC

d. Income Opportunity Based on Limited Resource.

e. Make Ready.

C. Telecommunications Act of 1996

1. 47 U.S.C. 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:
 - i. All state and local laws that involve management of local rights-of-way.
 - ii. All state and local laws that require telecommunications providers to pay compensation for local rights-of-way.
 - iii. 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.

In Sprint Telephone, PCS v. County of San Diego, 543 F.3d 571 (2008), the Ninth Circuit Court of Appeals overruled its earlier cases to hold that Section 253(a) must be interpreted in the same way as the identical language in the TCA (**See section V B 1 below**): a challenge to a municipal ordinance regulation must show “actual or effective prohibition, rather than the mere possibility of prohibition” [of the ability to provide telecommunications services]. Id. At 578.

- D. Laws of the State of New Hampshire
- 1. RSA Chapter 231 allows placement of polls and conduits in the public right-of-way only as allowed by permit or license by the municipality, and not otherwise.
 - 2. RSA 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.

3. RSA 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.
4. Grant of RSA 231 license based on public good which is tied to public safety (Town of Rye v. Public Service Company of New Hampshire, 140 N.H. 365 (1988)).
5. "Rochester" line of cases:
 - a. New England Telephone and Telegraph Co. v. City of Rochester, 144 NH 118 (1999) "Rochester I". In this case, the City of Rochester amended its pole 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 requires 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.

- b. Verizon New England, Inc. v. City of Rochester, 151 N.H. 263 (2004), “Rochester II”.

In the second “Rochester” case, the New Hampshire Supreme Court rebuffed multiple challenges raised by Verizon (the successor to NETT Co.) holding that RSA 72:23, I(b) unambiguously requires that “leases and other agreements which permit use or occupation of public property must provide for the payment of properly assessed real estate taxes.” *Id.* at 266 – 267. The Court confirmed that Verizon’s right to use the right-of-way through its pole licenses subjected that use to taxation. Verizon challenged the City’s assessment of taxes on it on constitutional equal protection grounds claiming that the City was singling it out among the multiple users of the public’s right-of-way: gas and water utilities and cable television. Due to a recent change to the Court’s equal protection analysis in another case, it remanded the matter to the trial court.

- c. Verizon New England, Inc. v. City of Rochester, 156 N.H. 624 (2008), “Rochester III”

In the third Rochester case, Verizon prevailed on its claim that the City’s taxation of the company for its use of the right-of-way violated Constitutional due process protections, because its decision to tax Verizon, but not the other users of the right-of-way, was “unreasonable and arbitrary,” thus failing the “rational basis” test. *Id.* at 629.

- d. Bell Atlantic v. City of Concord, Docket No. 217-2000-EQ-00151, consolidated with later cases, through 2009 tax year (Merrimack County Superior Court) (McNamara, J.).

Tax abatement actions by FairPoint Communications, the successor to Verizon, continue. In this matter, the City has taxed other utilities using the right-of-way and fully briefed the factual issues which it claims distinguish the telephone company’s use of the right-of-way with that of the cable company, which uses the right-of-way pursuant to a franchise agreement, requiring substantial monetary and other benefits to the City. Judge McNamara granted summary judgment to FairPoint, ruling summarily that the City’s failure to tax all users of the public rights –of-way invalidated the tax on FairPoint, as a violation of state and federal equal protection guarantees. The case is pending on appeal to the NH Supreme Court.

- e. FairPoint/Granite State Telephone Co., and Dunbarton Telephone Co: 140 tax abatement cases for tax year 2011 and 180 for tax year 2012, currently pending in NH Superior Courts raising equal protection, valuation and other constitutional and legal claims against municipalities.

6. 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 Rochester cases described above, municipalities should review all licenses, and other agreements such as cable TV franchises, for use of the public right-of-way to determine whether those should be amended in the public good to provide for payment of real and personal property taxes. If the decision is made to amend them in that manner, then an inventory of the rights-of-way will be required to properly assess such a tax. Use amendment process to obtain current and future information on all users of poles and conduit of the licenses.

E. What Can New Hampshire Municipalities Do to Obtain Value from 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 portion of these costs.
2. Menu of Potential Costs Incurred in Right-of-Way Management
 - a. Administrative Fees
 - i. Cost of processing applications
 - ii. Publication costs

- b. Inspection costs
 - c. Maintenance and Repair Costs
 - i. Annual right of-way maintenance and repair cost for streets including plowing, sanding, typical repairs excluding utility cuts
 - ii. Equipment and Personnel Costs
3. Inventory current use of rights-of-way
- a. Entities
 - b. Facilities
 - i. Aboveground
 - ii. Underground
 - iii. Distribution lines connecting to each house
 - iv. Large volume transmission lines
 - v. Include an inventory of other utilities such as water, sewer and gas pipelines
 - c. Owners of facilities: telephone, incumbent local exchange carriers and competitive local exchange carriers, cable television, internet, antennae for wireless, such as Distributed Antennae Systems (“DAS”).
 - d. Inventory all permits; permit procedure
4. 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 Rochester cases for property tax calculations under RSA 72:23;
 - b. Review all licenses and franchise agreements and consider globally amending licenses to impose property tax in “the public good,” and to obtain information on other users (“attachers”) to poles and in conduits;
 - c. Conduct town specific field evaluation of pavement damage and quality of restoration and costs of restoration.
 - d. Extension of Existing Use of Municipal Infrastructure
 - i. Sewer Policy
 - (1) Install Conduit
 - (2) Reservation of Capacity
 - ii. Water Infrastructure
 - (1) Install Conduit
 - (2) Reservation of Capacity
 - e. Conduit
 - i. Reservation of Capacity Based on Public Good and Delivery of Emergency Services
 - f. Subdivision and Site Review Regulations
 - g. Municipal Owned Poles
6. How to Assess
 - a. License or Permit Fee/Franchise Fees (cable)
 - b. Property Tax proportionality; rational nexus
 - c. Pole Attachment Act; Section 224 of the Communications Act of 1934 (47 U.S.C. 224); RSA 374:34-a (PUC has jurisdiction to regulate pole attachments), N.H. Code of Administrative Rules, PUC1300.
 - i. A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it. (47 CFR Sec1.1403(a); PUC 1303).

ii. PUC regulations control the rates, terms and conditions of attachments to poles and conduits. Private negotiations for such attachments occur in the context of a tariff based regulatory regime.

NH Code of Administrative Rules, PUC 1300. NH PUC Rules follow 2007 FCC formula for pole attachment fees

d. Recent sweeping FCC revisions to pole attachment rate formulae and regulations, to ensure attachers to poles have timely and rationally priced access to utility poles in its pole attachment order¹. At present, not applicable to New Hampshire.

IV. CABLE FRANCHISING

A. Strategic Overview

1. The 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 improve quality of life and enhance property values. The cable franchise is an essential element of the municipality's telecommunications infrastructure.

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

a. Cable Services

One of the strategic benefits of a cable franchise renewal can be to enhance access to the Internet for businesses and residents. The transforming quality of access to high speed internet services cannot be overstated. Although the Federal Communications Commission ("FCC") and federal courts have held that internet services are not covered in the definition of "Cable Services," because of the business model of cable operators, the practical effect of enhancing the cable TV system's coverage in a municipality is greater availability of internet services, delivered over the same facilities.

b. Promoting Competition

The great majority of municipalities in the country have only one cable operator. In New Hampshire historically no cities or towns have wire line cable TV competition, but this is starting to change with telephone companies such as TDS seeking franchises to provide cable TV (video) services in areas where they provide telephone service. In assessing competition, the FCC considers direct broadcast systems (satellite) as competitors to

¹ Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), aff'd sub nom. American Elec. Power Service Corp. v. FCC, 708 F.3d 183 (D.C. Cir. 2013), (cert. denied, Am. Elec. Power Serv. v. FCC, 2013 U.S. Lexis 6513 (U.S. Oct. 7, 2013).

cable TV, although consumers may see them as “apples and oranges.” Care must be taken in negotiating and crafting a franchise agreement which does not create an effective disincentive for competitive providers, and attention must be paid to avoid violation of the “level playing field” requirement for competitive cable franchises. RSA 53-C:3-b, II. Legislation has been introduced, with the support of the NH Municipal Association, to delete the “level playing field” requirement.

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 RSA Ch. 53-C; Competitive franchises cannot be granted on terms “more favorable or less burdensome than those in any existing franchise within such municipality.” RSA 53-C:3-b, I. FCC rule: 90 day “Shot Clock” for municipal response to competitive franchise offer for entities in ROW (telephone companies); 120 days for others.²
2. Ascertainment Process (47 U.S.C. Sec. 546)
 - a. Identify future cable related community needs and interests.
 - b. Review performance of cable operator under the franchise.
 - c. Renewal based on:
 - i. Cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
 - ii. 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;
 - iii. The operator has the financial, legal and technical ability to provide the services, facilities and equipment as set forth in the operator’s proposal;
 - iv. The operator’s proposal is reasonable to meet the future cable

² Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rule Making, 22 FCC Rcd. 5101 (2006).

related community needs and interests, taking into account the cost of meeting such needs and interests.

3. Formal process/Informal process for renewal.
4. Practical Review of Franchise Renewal Process
5. TCA of 1996; process unchanged
6. Competition may be emerging in some areas, but many areas will have only one cable operator.
 - a. Cable is de facto monopoly in New Hampshire
 - i. Written Franchise Required (RSA 53-C:2 I) but must be nonexclusive (RSA 53-C:3-b)
 - ii. Shifting economics transforming practical monopoly status
 - b. Where will the competition come from?
 - i. DBS: Direct Broadcast Satellite.
 - ii. MMDS: multichannel multipoint distribution service (Wireless cable) microwave distribution system broadcasting up to 33 analog channels.
 - iii. LMDS local multipoint distribution service: experimental, low power, cellular like.
 - iv.. 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).
 - v. Telephone Company (Verizon's FiOS product in MA, not NH but TDS emerging), fiber to the premises
 - vi. 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. (FairPoint's "agnostic" technology)
 - vii. Internet: Increasingly, video content is available online.
7. Governmental Use of Cable System
 - a. PEG Access; community of interest between operator and municipality

- b. Institutional Network (cable operators are phasing out)
 - i. Competition from digital wireless
 - ii. Other Internet access providers
- 8. Practical Agenda
 - a. Inventory
 - b. Ascertainment of Future Cable Related Needs
 - c. Implementation plan as larger telecommunications planning
 - d. Monitor cable operator's compliance with franchise obligations

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.

Emerging policy at federal and state level to facilitate deployment of broadband infrastructure, including wireless, with some consequential changes to local permitting process.

B. Legal Framework

1. Federal Law: Preservation of local zoning authority.

47 U.S.C. Section 332 (c) (7) (Section 704 of the TCA).

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.

2. Policy Shift at Federal level to speed deployment of broadband, including wireless, to all areas. In 2009, Congress directed the FCC to develop a comprehensive National Broadband Plan to ensure every American has access to broadband services. American Recovery and Reinvestment Act. PL 111-5, 123 Stat. 115 §6001 (k)(2)(2009)(“ARRA”). In 2010, the FCC unveiled its “Omnibus Broadband Initiatives, Federal Communication Commission, Connecting America: The National Broadband Plan 109 (2010). <http://download.broadband.gov/plan/national-broadband-plan.pdf>. (the “Plan”)³FCC’s “Implementation of Section 224 of the Act”. A National Broadband Plan

³ The Plan is a radical shift in regulatory policy, away from inter-carrier compensation and support for universal telephone service in remote locations, and towards support for wireless and Internet-based services, as opposed to traditional landline telephone service, by means of subsidies and reductions in state access rates for carrier-to-carrier services. By contrast, NH moved away from traditional regulation of the telephone industry with the enactment last

for Our Future,” WC Docket No. 07-245 FCC Rcd. 11864 (2010); “Accelerating Broadband Infrastructure Deployment,” Executive Order 13616, 77 Fed. Reg. 36903 (June 14, 2012) (federal initiative to streamline procedures, requirements and policy across agencies to promote faster deployment of broadband infrastructure, including on federal highway rights-of-way).

3. Federal Law: “Co-Location As of Right,” PL 112-96; Middle Class Tax Relief and Job Creation Act of 2012, Title VI, Public Safety Communications and Electromagnetic Spectrum Auctions, Subtitle D – Spectrum Auction Authority, Section 6409 Wireless Facilities Deployment (47 U.S.C. Sec. 1455(a)(1)):

(a) Facility Modifications

(1) In general – Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request. – for purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves –

(A) Collocation of new transmission equipment;

(B) Removal of transmission equipment; or

(C) Replacement of transmission equipment.

(3) Applicability of environmental laws. – Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

See FCC *Notice of Proposed Rulemaking*, dated September 26, 2013, below at footnote 4, which among other things, proposes rules to implement this new law, tentatively creates an exemption from environmental notification requirements for certain temporary towers and seeks “comment on expediting [FCC] environmental review process, including review for effects on historic properties, in connection with proposed deployments of small cells, DAS, and other small-scale wireless technologies that may have minimal effects on the environment.”⁴

year (2012) of SB 48, which allowed the incumbent telephone company (FairPoint) to elect exemptions from almost all regulation by the NH PUC, which amounts to retail price deregulation. Wholesale rates will continue to be regulated. This may prove to be costly to consumers in areas with little competition.

⁴ In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238); Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59); Amendment of Parts 1 and 17 of the Commission’s Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers (RM-11688, terminated); 2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32) *Notice of Proposed Rulemaking*, FCC Release 13-122 (September 26, 2013).

NH has explicitly adopted the policy of facilitating deployment of broadband infrastructure, state law now echoes, and goes farther in this direction than federal law. (See Section V D. below)

5. FCC's "Shot Clock Order". In response to a petition by the wireless industry, the FCC issued an order clarifying the requirement of the TCA that local land use boards act on applications for wireless facilities within a "reasonable" time, by determining that it is presumed unreasonable for a board to take more than 90 days to decide on an application to co-locate an antenna on an existing structure or more than 150 days to decide on an application for a new wireless facility.

Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994 (2009), recon. denied, 25 FCC Rcd 11157 (2010), aff'd sub nom. City of Arlington, Texas v. Fcc, 668 F.3d 229 (5th Cir. 2012), aff'd, 133 S.Ct. 1863 (2013).

C. What Does the Federal Law Mean?

1. First Circuit:

a. Generally

i. Omnipoint Communications v. Town of Amherst, 176 F.3d 9 (1st Cir. 1999). In the first case decided by the First Circuit on this issue, the United States Court of Appeals for the First Circuit held 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.

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.

- ii. Section 332 of the TCA “permits courts to enter judgments overriding state or local restrictions, but only if the court finds that the state or local action or refusal to act violates one of the Act’s grounds for relief.” Indus. Communs. & Elecs v. Town of Alton, 646 F.3d 76 (1st Cir. 2011).
- b. Unreasonable Discrimination
 - i. “This limitation permits some discrimination, based on traditional zoning goals, as long as the distinctions drawn between providers are reasonable to protect legitimate zoning prerogatives.” USCOC of N.H. RSA # 2, Inc. v. City of Franklin, 2007 U.S. Dist. LEXIS 8938 (D.N.H. Feb. 6, 2007).
 - ii. Unreasonable discrimination occurs when a provider has “been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement or cumulative impact as the facilities in question.” USCOC of N.H. RSA # 2, Inc. v. City of Franklin.
- c. Prohibiting or Having the Effect of Prohibiting Personal Wireless Services
 - i. Although the TCA does not expressly provide that local boards may consider and apply effective prohibition principles when deciding the request, the First Circuit has recognized that boards should expressly consider this to reduce the chances of an overturned decision before the federal courts. Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002).
 - ii. “The effective prohibition clause can be violated even if substantial evidence exists to support the denial of an individual permit under the terms of the town’s ordinances.” Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002).
 - iii. Courts will find that a municipality’s denial of the requested approvals violates this effective prohibition clause where the existence of “a significant gap in coverage” is proven in an area and there are no other reasonable “alternatives to the carrier's proposed solution to that gap.” Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 48 (1st Cir. 2009).
 - iv. In the First Circuit, the courts “consider whether a significant gap in coverage exists within the individual carrier's network” as opposed to a “rule that considers not the individual carrier’s network but whether any carrier provides service to an area.” Omnipoint Holdings v. City of Cranston.

v. In determining whether or not a gap is “significant”, the following must be considered: “the physical size of the gap, the area in which there is a gap, the number of users the gap affects,” and “the percentages of unsuccessful calls or inadequate service during calls in the gap area.” Omnipoint Holdings v. City of Cranston; Omnipoint Communications v. Town of Amherst.

vi. The “only feasible plan” analysis: “A carrier cannot win an effective-prohibition claim merely because local authorities have rejected the carrier's preferred solution. On the other hand, if local authorities reject a proposal that is ‘the only feasible plan’ that denial could ‘amount to prohibiting personal wireless service.’ The burden is on the carrier to prove it ‘investigated thoroughly the possibility of other viable alternatives’ before concluding no other feasible plan was available.” Omnipoint Holdings v. City of Cranston.

vii. The municipality does not have to show that alternatives *do* exist; the burden is on the applicant is to show that alternative do not exist. Second Generation Props., L.P. v. Town of Pelham.

viii. “[A] single denial of an application can run afoul of the TCA if that denial is shown to reflect, or represent, an effective prohibition on personal wireless service.” Southwestern Bell Mobile Sys. v. Todd, 244 F.3d 51 (1st Cir. 2001).

d. Acting Within a Reasonable Period of Time

i. FCC’s Shot Clock Ruling: “By ruling of the Federal Communications Commission, a local government must act on siting applications . . . **within 150 days**—a timeframe that can be extended with the applicant's consent—and failure to act within this time is presumptively unreasonable.” New Cingular Wireless PCS, LLC v. Town of Stoddard, 2012 DNH 46 (D.N.H. 2012). Co-location applications have a 90-day deadline. The presumption is rebuttable by the municipality however. The deadline encompasses the entire process – including re-hearings. Note that the FCC has recently requested comment revisiting the remedy for failure to meet the Shot clock timelines and inquiring whether such violation should enable the applicant to “deem” the application granted after the expiration of the deadline, rather than needing to bring a court action to obtain relief. *Notice of Proposed Rulemaking* Sept. 26, 2013, at Paragraph 162 p. 59. (See **Footnote 4, above**).

e. Written Decision Supported by Substantial Evidence Contained in a Written Record

i. For example, if a variance is denied based upon the application of the variance factors under New Hampshire law, this decision must be supported by substantial evidence to be upheld by the federal courts.

ii. The federal courts do “not require formal findings of fact or conclusions of law in a board’s written decision. Nor need a board’s written decision state every fact in the record that supports its decision. By the same token, the board, in its decision, may not hide the ball. Its written denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons.” Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals.

iii. “A board may not provide the applicant with one reason for a denial and then, in court, seek to uphold its decision on different grounds.” Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals.

iv. “The substantial evidence test is highly deferential to the local board.” Second Generation Props., L.P. v. Town of Pelham.

v. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Second Generation Props., L.P. v. Town of Pelham

vi. The evidence relied upon by the board must be “contained in the administrative record.” Second Generation Props., L.P. v. Town of Pelham.

vii. “[A] few generalized expressions of concern with aesthetics cannot serve as substantial evidence on which a town could base a denial” but it can serve a basis for choosing one tower proposal over another proposal. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91 (1st Cir. 2002). However, particularized concerns about the specific proposal and its location and effect on the area will not be considered “generalized” aesthetic concerns. Southwestern Bell Mobile Sys. v. Todd.

f. Persons Adversely Affected May Bring an Action

i. In Indus. Communs. & Elecs v. Town of Alton, 646 F.3d 76 (1st Cir. 2011), the Court of Appeals explained that this provision does not give nearby property owners the right to bring their own claims under the Act as a result of a grant of *approval* for a personal wireless facility. The Court held that “the Act empowers those ‘adversely affected’ by state or local action ‘inconsistent with’ 47 U.S.C. §

332(c)(7)(B) the right to sue to overturn it, id. § 332(c)(7)(B)(v); the only actions ‘inconsistent’ with that subparagraph are *denials* of requests to construct wireless facilities[.]” (Emphasis added).

However, the Court did recognize that such property owners, if they are intervenors in the TCA case brought by the provider, and if they can establish Article III standing, may continue to maintain the defense of a municipality’s *denial* of the requested approvals, even where the municipality abandons the defense.

g. Abstract of the principles from the above decisions:

i. 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.”

ii. 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 in Amherst 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.”

iii. The burden is on the wireless provider to demonstrate that the Town has effectively prohibited personal wireless services. The Amherst 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.”

iv. Municipalities should be flexibly and constructively engaged. The Court of Appeals in Amherst 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.”

v. 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 in Amherst 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.”

D. New Hampshire Law

1. RSA 12-K: Deployment of Personal Wireless Service Facilities: New balance between public policy promoting local planning and control with equal public policy to promote access to broadband for all in New Hampshire. RSA 12-K:1.

2. 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:

- a. lower antenna mounts which do not protrude far above surrounding tree canopies;
- b. disguised PWSFs such as flagpoles, artificial tree poles, light poles and traffic lights, which blend with surrounding area;
- c. camouflage PWSFs mounted on existing structures and buildings;
- d. custom design PWSFs to minimize visual impact; and/or
- e. other available technology

3. Recent amendments incorporate, and extend, the federal “Co-location as of Right” law discussed above **Section V, B, 3**. Definition of “Co-location” (“the placement or installation of new PWSF’s on existing 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 PWSF’s in compliance with applicable codes”) RSA 12-K:2.X. It explicitly does not include “a substantial modification.” “Substantial modification” is defined as: “the mounting of a proposed PWSF on a tower or mount which, as a result of 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 either more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater; or

(b) Involves adding an appurtenance to the body of a tower or mount that protrudes horizontally from the edge of the tower or mount more than 20 feet, 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 2, 500 square feet; or

(d) Adds to or modifies a camouflaged PWSF in a way that would defeat the effect of the camouflage.”

RSA 12-K:2, XXV.

This last definition echoes the 2009 “Shot Clock” Order of the FCC setting up time limits for municipal review of applications for PWSF 150 days for new applications and 90 days for co-locations applications, with co-location defined in a similar way: attaching a new antenna to an existing structure (tower or building) in which the height of the structure is increased no more than 10%, or 20 feet, whichever is greater. **See Section V, B, 5, supra.**

4. Under RSA 12-K, 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 “substantial or a modification” of a tower, mount or 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:

i. 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;

ii. 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;

- iii. Upon request, a description of why less visually intrusive alternatives for the facility which the applicant seeks approval for were not proposed ;
 - iv. The requirement upon request, for site descriptions for each of the locations, including antenna height and diameter and a depiction of all externally visible structures has been **deleted**.
5. 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).
 6. Fall zones for antennae only and co-locations that are not substantial modifications are **deleted**. RSA 12-K:5,
 7. 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. If no approval is necessary, then the applicant is responsible for the notifications, RSA 12-K:7, II . Residents of the neighboring municipality itself may speak at any public hearing but do not have standing to legally challenge such decisions. RSA 12-K:7, III.
 8. Most significant changes are in new RSA 12-K:10 and RSA 12-K:11, pertaining to “Co-location as of Right” **a forty-five (45) day time line**. These new laws establish uniform application and approval criteria; for approval (contrasting with the 90 day timeline under the FCC’s “Shot Clock” Order) for review of application for PWSF Co-Locations. (**See Section V, B.4. above**) and requires approval with only review for compliance with building permit requirements, but no zoning or land use requirements or public hearing.

RSA 12-J: 10:

Notwithstanding any ordinance, bylaw, or regulation to the contrary, in order to ensure uniformity across New Hampshire with respect to the process for reviewing a collocation application and a modification application, each authority shall follow the following process:

I. 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.

II. The authority, within 45 calendar days of receiving a collocation application or modification application, shall:

(a) Review the collocation application or modification application in light of its conformity with applicable building permit requirements and consistency with this chapter. A

collocation application or modification application is deemed to be complete unless the authority notifies the applicant in writing, within 15 calendar days of submission of the specific deficiencies in the collocation application or modification application which, if cured, would make the collocation application or modification application complete. Upon receipt of a timely written notice that a collocation application or modification application is deficient, an applicant shall have 15 calendar days from receiving such notice to cure the specific deficiencies. If the applicant cures the deficiencies within 15 calendar days, the collocation application or modification application shall be reviewed and processed within 45 calendar days from the initial date received by the authority. If the applicant requires more than 15 calendar days to cure the specific deficiencies, the 45 calendar days deadline for review shall be extended by the same period of time;

(b) Make its final decision to approve or disapprove the collocation application or modification application; and

(c) Advise the applicant in writing of its final decision.

III. If the authority fails to act on a collocation application or modification application within the 45 calendar days review period, the collocation application or modification application shall be deemed approved.

IV. Notwithstanding anything to the contrary in this chapter, an authority may not mandate, require or regulate the installation, location, or use of PWSFs on utility poles.

V. A party aggrieved by the final action of an authority, either by an affirmative denial of a collocation application or modification application under paragraph II or by its inaction, may bring an action for review in superior court for the county in which the PWSF is situated.

RSA 12-K:11 Limitations on Applications:

I. In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may:

(a) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to, its designed service, customer demand for service, or quality of its service to or from a particular area or site.

(b) Evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts, or PWSFs.

(c) Decide which type of personal wireless services, infrastructure, or technology shall be used by the applicant.

(d) Require the removal of existing mounts, towers, or PWSFs, wherever located, as a condition to approval of a collocation application or modification application.

(e) Impose environmental testing, sampling, or monitoring requirements or other compliance measures for radio frequency emissions on PWSFs that are categorically excluded under the FCC's rules for radio frequency emissions pursuant to *47 C.F.R. section 1.1307(b)(1)*.

(f) Establish or enforce regulations or procedures for radio frequency signal strength or the adequacy of service quality.

(g) In conformance with *47 U.S.C. section 332(c)(7)(B)(iv)*, reject a collocation application or modification application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions.

(h) Impose any restrictions with respect to objects in navigable airspace that are greater than or in conflict with the restrictions imposed by the Federal Aviation Administration.

(i) Prohibit the placement of emergency power systems that comply with federal and New Hampshire environmental requirements.

(j) Charge an application fee, consulting fee or other fee associated with the submission, review, processing, and approval of a collocation application or modification application that is not required for similar types of commercial development within the authority's jurisdiction. Fees imposed by an authority or by a third-party entity providing review or technical consultation to the authority must be based on actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of a collocation application or modification application. Notwithstanding the foregoing, in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of a collocation application or modification application, and in no event shall an applicant be required to pay or reimburse an authority for consultant or other third-party fees based on a contingency or result-based arrangement.

(k) Impose surety requirements, including bonds, escrow deposits, letters of credit, or any other type of financial surety, to ensure that abandoned or unused facilities can be removed unless the authority imposes similar requirements on other permits for other types of commercial development or land uses. If surety requirements are imposed, they shall be competitively neutral, non-discriminatory, reasonable in amount, and commensurate with the historical record for local facilities and structures that are abandoned.

(l) Condition the approval of a collocation application or modification application on the applicant's agreement to provide space on or near any tower or mount for the authority or local governmental services at less than the market rate for space or to provide other services via the structure or facilities at less than the market rate for such services.

(m) Limit the duration of the approval of a collocation application or modification application.

(n) Discriminate on the basis of the ownership, including by the authority, of any property, structure, or tower when evaluating collocation applications or modification applications.

II. Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to:

(a) Limit or preempt the scope of an authority's review of zoning, land use, or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs.

(b) Prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to *RSA 672* through *RSA 677* and as set forth in this chapter.

Conforming changes are also made to (1) RSA 674:33 regarding no special exceptions or variance can be required for Co-Location or a modification of a PWSF as defined in RSA 12-K:2; (2) to RSA 674:43 re: no site plan review for such applications, and (3) RSA 676:13 regarding the timelines in new RSA 12-K:11 shall control over any other forms or sets of standards for the timeline for building inspectors to act on such applications.

This law brings state law in line with the requirements of the FCC's "Shot Clock" Order on approval of co-locations (and shortens the timeline) and implements the federal "Co-Location as of right" law enacted in 2012. 47 U.S.C. Sec. 1455 (a) (1). (See Section V, B, 3 above).

9. Daniels v. Town of Londonderry, 157, N.H. 519 (2008)

The Plaintiffs were abutters who appealed the ZBA's grant of variances to permit Omnipoint to construct a wireless communications tower. The Town held several public hearings over 6 months and heard testimony from Omnipoint's attorney, project manager, site acquisition specialist and two radio frequency engineers. Omnipoint also submitted several site plan maps. The ZBA hired its own radio frequency engineer as a consultant and heard testimony from two property appraisers.

The Court rejected the abutters' argument that the ZBA's grant of variances was "unlawful and unreasonable because the ZBA allowed a federal law, the [TCA] to preempt its own findings regarding statutory criteria." The Court recognized that the TCA "preserves state and local authority over the siting and construction of wireless communications facilities, subject to five exceptions specified in the Act." The Court found that the ZBA properly "discussed the TCA's role" in considering the variance applications, "accurately addressed the nature of the TCA" and "did not substitute the TCA in place of its own judgment with respect to the five variance criteria."

The Court held that while no portion of the variance criteria test is "mooted by application of the TCA," the "standards set forth in the TCA provide a gloss over the deliberative process." As such, the Court held that the Londonderry ZBA "was correct to characterize the TCA as an 'umbrella' under which a ZBA must evaluate an application to construct a telecommunications tower, as the TCA will preempt local law under certain circumstances."

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 cases as framed initially by Amherst

right. c. Best case - Zoning is largely preserved for towers but co-locations as of

- 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/address co-location as of right.
 - 1. Act on basis of NH zoning for towers
 - 2. Master plan = rational basis
 - 3. Zoning fundamentally consistent with master plan
 - 4. Use the tools provided by RSA 12-K
 - 5. Practically test zoning
 - a. Does it prohibit or effectively prohibit?
 - b. Does it provide reasonable opportunity for siting?
 - c. Wireless zoning as dynamic model.
 - 6. Revise procedures, site plan review to address co-location 45-day timeline.