

Comcast Corporation

v.

City of Claremont

Docket Nos.: 23337-06PT/23976-08PT

DECISION

The board held a consolidated hearing on these appeals on June 11, 2009. The hearing centered on the Motion for Summary Judgment (“Motion”) filed by “Comcast” and the “Objection” filed by the “City,” which contains a cross-motion for summary judgment (the “Cross-Motion”). Both motions¹ address the question of whether the City has the authority to levy tax assessments on Comcast’s use of public rights of way to provide cable services to residents of the City where Comcast provides these services under a franchise agreement as described further below. Resolution of this question, which may be one of first impression under New Hampshire law, is dispositive of these appeals because the parties filed a “Stipulation of Value” at the hearing regarding the property at issue in these appeals.

Comcast, as the taxpayer filing a summary judgment motion, has the burden of showing the assessments were unlawful and that it is entitled to judgment as a matter of law. See RSA

¹ The motions were filed for the tax year 2006 appeal, prior to the board’s May 8, 2009 Order consolidating that appeal with the tax year 2008 appeal. In that Order, the board stated it would hear and decide the motions with respect to both appeals.

491:8-a; RSA 76:16-a; Tax 201.18(g); Tax 201.27(f); and Tax 203.08(a). Because Comcast failed to meet this burden, the Motion is denied and the Cross-Motion is granted.

Comcast argued the City had no authority to levy the assessments and the Motion should be granted because:

- (1) under the November 16, 2006 Cable Television Franchise Agreement (the “Franchise Agreement,” Exhibit A to the Motion), entered pursuant to federal law (the “Cable Act” cited below) and state law (RSA ch. 53-C), Comcast pays a franchise fee equal to 5% of its gross revenues derived within the City;
- (2) the Franchise Agreement specifically grants Comcast the right to use the public rights of way and is “silent” as to taxes;
- (3) the City’s amendments of the “pole license” agreements it has with some utilities in March, 2007 to permit taxation is irrelevant to its ability to tax Comcast, because, among other things, a pole license is limited to one year in contrast to the Franchise Agreement which has a three-year term, no contract amendment was ever agreed to by Comcast, and under federal law Comcast is not a “utility”;
- (4) the tax is invalid because of the preemption doctrine;
- (5) Comcast should not have to “pay twice” for the rights it has bargained for in the Franchise Agreement or be subject to double taxation;
- (6) the board should enter an order finding (in the alternative, see Motion, p. 1 and 11):
 - (a) the City had no authority to levy the “public rights-of-way” property tax assessment (reflected in the “Supplemental Property Tax Warrant” for tax year 2006 (Motion, Exhibits B

and C) and subsequent assessments); or (b) the franchise fees paid by Comcast “encompasses” or ‘includes’ the tax; and

(7) in either event, the assessments on the public rights of way should be abated ‘completely.’

The City argued the assessments are proper, the Motion should be denied and the Cross-Motion should be granted because:

(1) property taxes are clearly distinguishable (“separate and distinct”) from franchise fees and the franchise fees are payable even if Comcast’s entire activities are conducted on private property rather than also on the City’s public rights of way;

(2) the franchise fees are paid to the City by Comcast, but are collected in their entirety from Comcast’s customers because Comcast itemizes the fees on the bills sent to its subscribers;

(3) the property tax statutes and case authorities clearly contemplate cable companies, no less than electric, telephone or gas utilities, are subject to the property tax;

(4) the assessments are consistent with the holding in the “Rochester” cases (identified below) which recognize a municipality may tax cable companies, as well as more standard utilities, for use and occupancy of public rights of way;

(5) Comcast has timely paid, without objection, property taxes on other property it owns in the City (on Cat Hole Road, Parcel 75-4), as well as the franchise fees, and the City is not attempting to tax the “franchise” itself;

(6) nothing in the federal Cable Act or the preemption doctrine precludes local property taxes assessed in a proportionate and non-discriminatory manner under RSA ch. 72; and

(7) Comcast is obligated to pay the tax assessed in each year based on the values set forth in the Stipulation of Value.

Board's Rulings

At issue in these appeals is whether the franchise fees of 5% of gross revenues paid by Comcast to the City in order to provide cable television services, as prescribed in the Franchise Agreement, precludes the City from assessing Comcast for property taxes as a matter of law. Both parties agree this issue can be decided by summary judgment, see RSA 491:8-a and Tax 201.18(g), and have submitted a Stipulation of Value agreeing to assessments on Comcast's property in the event the Motion is denied.

Based on the evidence and arguments presented at the hearing and the parties' pleadings, including the respective legal memoranda they have submitted, the board finds Comcast failed to meet its burden of proving as a matter of law its two central, alternative arguments: (1) the City had "no authority" to levy the property tax; and (2) the franchise fees paid to the City 'includes' the tax. Consequently, Comcast's Motion is denied and the City's Cross-Motion is granted for the reasons discussed below.

Turning to the second argument first, Comcast contends it is not obligated to pay "an additional duplicative real estate tax" apart from the fees specified in the Franchise Agreement. Property taxes levied by a municipality under RSA ch. 72, however, are separate and distinct from a franchise fee, which is based on gross revenues. Such a "fee" is collected by the City from Comcast based on a voluntary agreement and irrespective of whether or not Comcast owns any property subject to taxation in the City. As noted by the City, the 5% franchise fee:

"is collected in its entirety from Comcast's cable television customers" in the City, a practice authorized by 47 U.S.C. ¶542(g); is "nothing more than a pass through from the cable subscribers to the City"; and was "negotiated between the parties (the City and Comcast). It is not a tax."

See the City’s “Objection,” ¶7; and Post-Hearing Memorandum, p. 3. The City also references Section 3.12 of the Franchise Agreement, which provides the payments made by Comcast to the City are “consideration for the renewal franchise granted herein.” Id. The board agrees with the City’s argument that the franchise fees are “not a tax” on Comcast; nor are they the equivalent of a tax.²

As an alternative argument, Comcast emphasizes cable companies and the franchise fees municipalities are authorized to negotiate and collect from them are subject to both federal and state law and regulation: namely, the federal “Cable Act,” 47 U.S.C. § 521 et seq.; and RSA ch. 53-C (Franchising and Regulation of Cable Television Systems by Cities and Towns). In this regard, however, the Cable Act itself draws an important distinction between the maximum 5% “franchise fees” prescribed in the Cable Act and other ‘taxes, fees or assessments’ at the state or local level which a cable company may also be obligated to pay.

As used in the Cable Act, franchise fees are specifically defined to exclude any “tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services, but not including a tax, fee or assessment

² Even if the franchise fees could arguably be viewed as a franchise tax, however, there is ample authority for such taxation. Under the New Hampshire Constitution (in particular, pt. II, art. 5 and art. 6), franchise taxes are lawful and are separate and distinct from the property tax and other types of permissible taxes. See, e.g., Opinion of the Justices, 123 N.H. 349, 352 (1983) (“The taxation of franchises is expressly authorized by our State Constitution,” pt. II, art. 6); Opinion of the Justices, 111 N.H. 210, 212 (1971) (“correlation” of other taxes “with the general property tax is not required” and an “ad valorem property tax” may be imposed upon railroad, telephone and telegraph companies where “the incidence” of each tax “is determined by separate and distinct factors”); and Opinion of the Justices, 101 N.H. 549, 557 (1958) (“The exercise of a utility franchise is not a ‘common right’ (citation omitted), but rather a special right which the State may and does grant or withhold at pleasure, to perform acts which are monopolistic and therefore subject to public regulation in the public interest. (Citation omitted.)”; and “the right is undoubtedly property (citation omitted)”); accord, Opinion of the Justices, 84 N.H. 559 (1930) (property taxes on the franchises of electric and gas utilities are constitutional: “By express constitutional provision, franchises are taxable.”). The City, however, is not claiming a right to assess a franchise tax on Comcast, but rather a property tax pursuant to RSA ch. 72.

which is unduly discriminatory against cable operators or cable subscribers).” See 47 U.S.C. § 542(g)(1) and 542(g)(2)(A), quoted and discussed in Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas, 417 F.3d 216, 219 (1st Cir. 2005). The board finds such other ‘taxes, fees or assessments’ are not subject to “the five percent franchise fee cap – that Comcast already pays to the City.” (Cf. Comcast’s “Reply to Objection,” p. 1.)

Comcast’s reliance on federal preemption,³ as applied in Liberty Cablevision, is therefore misplaced. That case involved extra franchise fees which two municipalities within Puerto Rico (Caguas and Barceloneta), by local ordinance, attempted to impose on a cable company in addition to the separate cable franchise fees negotiated and paid through Puerto Rico’s “Telecommunications Regulatory Board.” Id. at 218 and 223. No such duplicate franchise fees (or so-called “prototypical franchise fee(s),” id. at 223) are involved in these appeals.

More generally, as the City notes in its Post-Hearing Memorandum at p. 2: “[f]ederal law does not preempt assessment of local taxes on cable service providers such as Comcast as long as the local tax is one of general applicability and is not discriminatory (47 USC 542(g)).” It is noteworthy the company in Liberty Cablevision did not challenge certain “license taxes” paid to these municipalities because, as described by the appellate court, they were “quintessential taxes of ‘general applicability’—for income derived from the municipalities,” distinguishable therefore from franchise fees. 417 F.3d at 223. The board finds the property tax challenged by Comcast also is a tax of general applicability and is not unduly discriminatory under this federal statute.

³ A “Preemption” provision is contained in 47 U.S.C. § 556(c).

Consequently, the City, by issuing the Supplemental Property Tax Warrant for tax year 2006 and subsequent assessments, did not act improperly under either federal or state law. See also Cross-Motion, pp. 7-8, and Post-Hearing Memorandum, p. 3, where the City notes: “local property taxes” that are “levied pursuant to RSA Chapter 72” are “taxes of general applicability as contemplated by federal law and do not ‘constitute a tax directed at the cable system.’” (Quoting from Liberty Cablevision, 417 F.3d at 223.)”

The City based its authority to assess the property tax at issue on RSA 72:23, I (b) which applies to “leases and other agreements” which provide for the “use or occupation” by others of “real or personal property” owned by the state or a “city, town, school district, or village district.” The supreme court has already decided that occupancy or use of public property, such as public rights of way, is subject to taxation by a municipality under RSA 72:23, I(b). N. E. Tel. & Tel. Co. v. City of Rochester, 144 N.H. 118, 120-21 (1999) (“Rochester I”). The parties appear to recognize RSA 72:6 embodies a very broad concept of what real property rights and interests are subject to taxation in New Hampshire.⁴ This is especially true in light of the expansive definition of “land” and “real estate” contained in RSA 21:21 (to “include land, tenements, and hereditaments, and all rights thereto and interests therein”).

Notwithstanding Comcast’s arguments to the contrary, the board finds the City does have authority to assess Comcast under RSA 72:23, I(b). The Franchise Agreement gives Comcast distinct and valuable property rights, including (in Sections 4.1 and 4.7) the right to:

use and occupy the public rights of way (“in, on, along, across, above, over and under the Streets, alleys, lanes and public places” of the City) in order to “construct, operate,

⁴ See, e.g., Comcast’s Request for Finding of Fact No. 10 (below): “New Hampshire law provides that all real estate shall be taxed unless otherwise exempted. RSA 72:6.”

and maintain” Comcast’s own “poles, wires, cables, underground conduits, manholes and other facilities”;
“attach or otherwise affix (Comcast’s) cables, wire, or optical fibers. . . to the existing poles on public Streets,” provided Comcast obtains the “permission and consent” of the utilities that ‘own’ such “pole facilities”; and
“erect its own poles and install its own conduit” on the public rights of way; with
“equal standing with the power and telephone utilities in the matter of placement of facilities on public ways. . .”

See also Motion, ¶ 4 at p. 2; and the City’s “Objection,” ¶¶ 3 and 4.

These sections of the Franchise Agreement reference RSA 231:160, et seq., the statutes which regulate the granting of permits and licenses for “television” as well as “(t)elegraph, . . . telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances” to be placed on “any public highways” (public rights of way), which rights can be reflected in what are commonly described as “pole licenses.” The fact television providers are subject to these so-called pole license statutes, along with other users of public rights of way, negates the conclusion that the statute only applies to “utilities,” narrowly conceived (such as electric, telephone and telegraph companies). The references to these statutes in the Franchise Agreement support the conclusion that Comcast had an understanding and awareness of the relevance of pole licenses and this statutory framework to its activities as a cable franchisee.⁵

Of direct relevance is the supreme court’s recent finding that the use and occupancy of public rights of way by a cable company like Comcast is “indistinguishable” from the use and

⁵ See also Section 17.1 of the Franchise Agreement, cited by the City, which requires Comcast to comply with all “applicable agreements, resolutions, rules and regulations heretofore or hereafter adopted pursuant to [the City’s] lawful police powers that do not materially impair or abrogate any of [Comcast’s] contractual rights under this Franchise and that are not preempted by state or federal law.”

occupancy of public rights of way by telephone, gas and electric utilities. See Rochester III,⁶ 156 N.H. at 629-30, where the supreme court faulted another municipality for:

disregard[ing] our prior holding in this case that the term “agreement” in RSA 72:23, I, means “‘harmonious understanding,’ or ‘the act of agreeing or coming to a mutual arrangement.’” Rochester I, 144 N.H. at 121, 740 A.2d 135 (citation omitted). Simply because other utilities [like the cable company and the gas company] arguably may not have had the same pole licenses as Verizon does not mean they did not have a mutual understanding and arrangement with the city to use and occupy public property.

...

Verizon uses and occupies the public ways through its pole licenses in a manner indistinguishable from the gas, cable, and electric companies that use and occupy the public ways under ‘other agreements’ with the city. As the trial court explained, each utility ‘supplies a public service to citizens over and under the roads and streets of Rochester. In order to do so, each must obtain Rochester’s permission.’ Each utility also has an agreement or ‘harmonious understanding’ with the city to use and occupy public ways: (1) the electric company has pole licenses; (2) the gas companies have consent from the city for their use and occupancy of the public ways, *see* RSA 231:184 (1993); and (3) the cable television company has a franchise agreement.

However, the city does not impose a real property tax upon the other utilities’ indistinguishable use and occupation of the public ways.

Consequently, while Comcast is technically correct that its ability to use the City’s rights of way generally stems from the Franchise Agreement, not a separate, written “pole license” agreement such as a telephone or electric utility (but not necessarily a gas company) might have, the board finds this is a distinction without a difference because, like these other companies, Comcast obtained the City’s permission to use and occupy the public rights of way which constitute public property subject to taxation under RSA 72:23, I(b). This finding is supported by the explicit reasoning and conclusion in Rochester III that: cable franchise agreements, gas company ‘understandings’ with the municipality (apparently unwritten) and electric company

⁶ Rochester III references and discusses two earlier, related appeals: Verizon New England v. City of Rochester, 151 N.H. 263 (2004) (“Rochester II”); and Rochester I, cited above.

pole license agreements are “indistinguishable”; and its holding that it was a violation of “equal protection” to impose a “real property tax” on Verizon, without also taxing the cable company and the gas company which did not have formal pole license agreements. Id. at 630-31.

The City had authority to amend its licenses to use the public rights of way after notice to the parties and a hearing and to assess a tax on users of them pursuant to RSA 72:23, I(b). See RSA 231:163; Rochester I, 144 N.H. at 119-20, and Rochester II, 151 N.H. at 268-270, which the City was aware of and cited before the City Council acted in March, 2007. Motion, Exhibit D (the March 7, 2007 Memorandum to City Council from Joe Lessard, the City’s “Interim Director of Assessing”).

The record reflects Comcast and other users of the public rights of way were given multiple written notices of the March 14, 2007 public meeting of the City Council, which at least one representative of Comcast (Miles Pelegriano, see Motion, Exhibit E (numbered page 63)) attended. At that noticed public meeting, amendments were discussed and adopted to give the City the right to tax under RSA 72:23, I(b). Based upon this City Council action, the City issued a Supplemental Property Tax Warrant to Comcast and other companies.

The board does not agree with Comcast (Motion, p. 8) that the City was without authority to do so and could not assess a tax each year without first amending the Franchise Agreement directly. If Comcast had been offered such an amendment and refused to sign it or “consent,” and the City had then decided to exempt Comcast and not issue the Supplemental Property Tax Warrant, the tax as applied to Verizon or any other user of the public rights of way would

probably have been unconstitutional on “equal protection” grounds under Rochester III, 156 N.H. at 630-32.⁷

In this respect, the board finds no valid reason to distinguish Comcast’s use of the public rights of way and its obligation for tax assessments from that of common utilities, whether or not cable companies should be considered ‘utilities’ for any other purpose(s) under federal and state law.⁸ On point is at least one provision of the Cable Act, 47 U.S.C. § 542 (g)(2)(A), mentioned above, which expressly recognizes “both utilities and cable operators” can be subject to a state or local “tax, fee or assessment” provided it is not “unduly discriminatory against cable operators or cable subscribers.” (Emphasis added.) Congress therefore specifically envisioned cable companies, like “utilities,” could be subject to state and local taxation.

Section 17.1 of the Franchise Agreement also supports the City Council’s right to adopt the amendment and issue the Supplemental Property Tax Warrant and make subsequent assessments, even without Comcast’s consent to amend this agreement. In this section, Comcast agreed to comply “with all generally applicable” resolutions, rules and regulations adopted by the City. In reviewing this section, the board finds the City’s action in issuing the Supplemental Property Tax Warrant did not single Comcast out and did not ‘materially impair or abrogate any’

⁷ The City’s Post-Hearing Memorandum (at p. 4) states the City “assessed property taxes in a proportionate and non-discriminatory manner on all property owned by Comcast and all entities similarly situated having the same interest in the City’s right of way. (Citing Rochester III.) In addition to Comcast, these entities include Public Service Company of New Hampshire, New Hampshire Electric Cooperative and FairPoint Communications, Inc. (formerly Verizon).”

⁸ Comcast emphasizes the Cable Act contains a provision, 47 U.S.C. § 541 (c), stating a cable system is not “subject to regulation as a common carrier or utility by reason of providing cable service” (Request for Finding No. 19), but this cannot, and does not, mean that cable companies are not subject to state and local taxation. See, e.g., Liberty Cablevision, 417 F.3d at 218, 219 and 223, which cites other provisions in the Cable Act that expressly permit such taxation.

of its rights under the Franchise Agreement, but merely taxed those rights on an equal footing with other entities occupying and using the public rights of way. While, as Comcast argues (Motion, pp. 7-8), there is no specific provision in the Franchise Agreement stating Comcast can be taxed “under RSA 72:23,” mere ‘silence’ regarding taxation cannot be interpreted to mean a blanket exemption from property taxation and no case law or other authority has been cited to support this argument. In New Hampshire, it has long been established that taxation is the rule and exemption is the exception⁹ and this principle is also reflected in the statutes. See RSA 72:6 (“All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.”).

For all of these reasons, the board denies the Motion and grants the Cross-Motion.

A motion for rehearing, reconsideration or clarification (collectively “rehearing motion”) of this decision must be filed within thirty (30) days of the clerk’s date below, not the date this decision is received. RSA 541:3; Tax 201.37. The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; Tax 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board’s decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule Tax 201.37(g). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion.

⁹ See, e.g., Boody v. Watson, 63 N.H. 320, 321 1885), and Portsmouth Shoe Co. v. City of Portsmouth, 74 N.H. 222, 223-24 (1907).

RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board's denial.

Attached as Addendum A hereto are the board's responses to the separate requests for findings of facts and rulings of law submitted by Comcast and the City.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Addendum A

The parties' requests for findings of fact and rulings of law are replicated below, in the form submitted and without any typographical corrections or other changes. The board's responses are in bold face. With respect to the proposed findings and rulings, "neither granted nor denied" generally means one of the following.

- a. the request contained multiple requests for which a consistent response could not be given;
- b. the request contained words, especially adjectives or adverbs, that made the request overly broad or narrow so that the request could not be granted or denied;
- c. the request contained matters not in evidence or not sufficiently supported to grant or deny;
- d. the request was irrelevant; or
- e. the request is specifically addressed in the decision.

Under Tax 201.36(c), each party is limited "to a combined total of 25 requests for findings of fact and/or rulings of law," unless leave is granted "prior to or at the hearing." Since Comcast did not request prior leave, the board will apply this rule and respond to only the first 25 of Comcast's requests. In addition, some of Comcast's requests reference various, numbered "Agreed-Upon Exhibits," which the board understands to mean the exhibits attached to its Motion (designated A through H), since no separate exhibits were introduced at the hearing. Because the context of each requested finding makes it evident what exhibit the request is referencing, the board will not note the exhibit discrepancies further below.

COMCAST’S REQUESTS FOR FINDINGS OF FACTS AND RULINGS OF LAW

1. Comcast provides cable television services to subscribers throughout the City of Claremont, New Hampshire (“Claremont”). (Appellant’s Statement of Undisputed Facts at ¶1).

Granted.

2. On or about November 16, 2006, Comcast and Claremont entered into a Cable Television Franchise Agreement (“Franchise Agreement”). (Agreed-Upon Exhibits at ¶3).

Granted.

3. Among other things, the Franchise Agreement grants Comcast the non-exclusive right to “construct, operate and maintain in, on, along, across, above, over, and under the streets, alleys, lanes and public places ...the poles, wires, cables, underground conduits, manholes and other facilities necessary for the maintenance and operation” of Comcast’s cable system throughout Claremont. (Agreed-Upon Exhibit No. 3 at §4.1).

Granted.

4. The Franchise Agreement also requires Comcast to pay Claremont a franchise fee equal to five percent (5%) of Comcast’s gross revenues derived within the city and as further defined therein. (Agreed-Upon Exhibit No. 3 at §9.1).

Granted.

5. The Franchise Agreement provides that “[t]his Franchise contains the entire understanding of the parties with respect to the subject matter hereof and supersedes all other prior understandings and agreements oral or written. This agreement may not be modified except in writing signed by both parties.” (Agreed-Upon Exhibit No. 3 at §17.13).

Granted.

6. The Franchise Agreement also provides that it “is a contract and...neither party may take any unilateral action which materially changes the explicit mutual promises in this contract. Any changes to the Franchise must be made in writing, signed by Grantee and Grantor, and such amendments and modifications shall be made in compliance with the notice and public hearing requirements of applicable state law.” (Agreed-Upon Exhibit No. 3 at §17.5).

Neither granted nor denied.

7. The Franchise Agreement further provides that both parties agree “to be legally bound by all provisions and conditions set forth in this Agreement, together forming a mutually binding contractual agreement.” (Agreed-Upon Exhibit No. 3 at §19).

Granted.

8. To date, the Franchise Agreement has not been amended by the parties. (Appellant’s Statement of Undisputed Facts at ¶9).

Neither granted nor denied.

9. On March 30, 2007, Claremont sent Comcast a letter enclosing a Supplemental Tax Warrant. The Supplemental Tax Warrant identified the property location as “City Rights-of Way,” assigned a value to the rights-of-way of \$2,252,200.00, and assessed a tax of \$79,745.82. (Agreed-Upon Exhibit Nos. 7-8).

Granted.

10. New Hampshire law provides that all real estate shall be taxed unless otherwise exempted. RSA 72:6.

Granted.

11. New Hampshire law exempts from taxation any real estate “owned by the state, cities, towns, school districts, and village districts” unless it is used or occupied by another “under a lease or other agreement the terms of which provide for the payment of properly assessed [taxes] by the party using or occupying said property.” RSA 72.23, I (a).

Granted.

12. Agreements that permit private parties to use or occupy public property shall contain language that the party using the property pay properly assessed real estate taxes, and that a failure to pay said taxes constitutes cause to terminate the agreement. RSA 72:23, I (b).

Granted.

13. Claremont issues licenses to utilities and other persons that desire to “erect or install any such poles, structures, conduits, cable or wires in, under or across any such highway...” RSA § 231:161.

Granted.

14. At the City Council meeting where the RSA 231:161 pole licenses were amended, Claremont's position was that the amendment "is not taxing the equipment; it's taxing their use of the right-of-way." (Agreed-Upon Exhibit No. 6).

Granted.

15. Claremont has amended the licenses it issues to utilities under RSA § 231:161 to require the payment of real estate taxes on the assessed value of the real estate interest. (Agreed-Upon Exhibit Nos. 4-6).

Granted.

16. Comcast, unlike utilities and other entities that require a RSA § 231:161 license to set poles and to place wires and facilities on poles and through public rights-of-way, is subject to a completely separate regulatory regime—the federal Cable Act—and does not hold or require any license issued by Claremont under RSA 231:161 to use the public rights-of-way. (Agreed-Upon Exhibit No. 5).

Neither granted nor denied.

17. The federal Cable Act directs that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b) (1).

Granted.

18. Under federal law, a "franchise shall be construed to authorize the construction of a cable system over public rights-of-way..." 47 U.S.C. § 541(a) (2).

Granted.

19. Comcast is not a utility under the federal Cable Act. 47 U.S.C. §541(c).

Neither granted nor denied.

20. Comcast has never applied for, nor does it hold any Claremont licenses for use of the rights-of-way that are subject to either RSA 231:161 or Claremont's pole license amendment. (Appellant's Statement of Undisputed Facts at ¶16).

Neither granted nor denied.

21. New Hampshire law implements the federal regulatory scheme through Chapter 53-C, which provides that “[n]o company shall construct, commence construction, or operate a cable television system in any municipality without first obtaining a written franchise from the franchising authority...” RSA 53-C: 2(I).

Granted.

22. In accordance with federal and state law, Claremont and Comcast entered into the Franchise Agreement in November 2006 granting Comcast the following rights:

Pursuant to RSA 53-C and the Cable Act, the Grantor hereby grants to Grantee the non-exclusive right to construct, operate and maintain in, on, along, across, above, over and under the Streets, alleys, lanes and public places of the Grantor, the poles, wires, cables, underground conduits, manholes and other facilities necessary for the maintenance and operation of a Cable System throughout the entire territorial area of the Grantor...

These franchise rights include all of the same rights that the Claremont's RSA 231:161 pole licenses provide to non-cable television entities, which neither hold a cable television franchise nor pay a separate five percent franchise fees to Claremont. (Agreed-Upon Exhibit No. 3 at §4.1).

Neither granted nor denied.

23. New Hampshire law requires that for Claremont to tax the rights-of-way use of a party, the agreement to use the rights-of-way “must contain language (1) requiring the party using or occupying the property to pay properly assessed real estate taxes, and (2) stating that failing to pay duly assessed taxes constitutes sufficient cause to terminate the lease or agreement.” RSA 72:23(I) (b); *New England Tel. & Tel. Co. v. City of Rochester*, 144 N.H. 118, 121 (1999).

Granted.

24. To implement RSA 72:23(I) (b)’s requirement, Claremont amended various utility pole licenses to impose the RSA 72:23 tax on entities holding utility pole licenses for use of Claremont’s rights-of-way. (Agreed-Upon Exhibit Nos. 5-6).

Granted.

25. Comcast does not use Claremont’s right-of-ways pursuant to RSA 72:23.

Denied.

CITY’S REQUESTS FOR FINDINGS OF FACTS AND RULINGS OF LAW

1. On or about November 16, 2006, Comcast, as Grantee, entered into a Cable Television Franchise Agreement (hereinafter “Agreement”) with the City of Claremont, as Grantor, with an effective date of July 1, 2006, under which Comcast agreed to provide cable television services throughout Claremont pursuant to the provisions stated therein. (Exhibit A, Appellant’s Motion for Summary Judgment)

Granted.

2. Pursuant to the Agreement, Comcast operates a cable television system within the boundaries of the City comprised of approximately 97.5 miles of cables primarily located on, over and under the public right-of-way. (Comcast Response to City's First Set of Interrogatories)

Granted.

3. As consideration for the contractual right to operate a cable franchise system within the City, Comcast pays to the City a franchise fee of 5 percent on Comcast's gross revenues received from its subscribers from within the boundaries of the municipality. (Agreement Sections 3.12 and 9.1)

Granted.

4. Comcast's obligation to pay a franchise fee to the City is a matter of contract and is not a tax enacted under the authority of New Hampshire law. (Agreement Section 3.12)

Granted.

5. The franchise fee paid to the City under the Agreement is separate and distinct from the municipal property tax that is permitted under New Hampshire law and is authorized and therefore is not preempted by 47 USC Section 542(g). (N.H. Const. Part II, Art. 6; *Opinion of the Justices*, 123 N.H. 349 (1983))

Granted.

6. The lack of any relationship between the franchise fee, based on gross revenue, that Comcast pays to the City and its obligation to pay the general property tax does not render either unconstitutional. (*Stephenson v. Stephenson*, 111 N.H. 210 (1971))

Granted, but notes the citation is to Opinion of the Justices (not “Stephenson v. Stephenson”).

7. The municipal property tax assessed against Comcast’s property pursuant to RSA Chapter 72 is a proportionate and reasonable tax pursuant to Part II, Section 5 of the New Hampshire Constitution and is a non-discriminatory tax of general applicability.

Granted; cf., the Stipulation of Value.

8. The City has issued property tax bills for Comcast’s property situated in Claremont for the 2006, 2007 and 2008 tax years. (Joint Stipulation submitted to Board June 11, 2009).

Granted.

9. Comcast has assented to the taxing authority of the City and has waived, or is otherwise estopped from raising, any argument it may have that the municipal property tax is preempted by federal law by virtue of its timely payment of the municipal property tax assessed on its property located at Cat Hole Road (Parcel 75-4).

Denied.

10. The New Hampshire Supreme Court has held that the nature of the use and occupancy by telephone, gas, cable and electric companies of the public right-of-way under agreement is indistinguishable. (*Verizon New England, Inc. v. City of Rochester*, 156 N.H. 624 (2007)).

Granted.

11. An entity does not have to be in physical contact with the ground in order to be subject to assessment of property taxes. (*Town of Ossipee v. Whittier Lifts*, (149 N.H. 679 (2003)); *Public Service Co. of N.H. v. Town of Seabrook*, 126 N.H. 740, 745 (1985)).

Granted.

12. Comcast has, as an attachment lessee, subjected itself to the licensing requirements, including the obligation to pay property taxes, of the underlying pole owners. (*Town of Ossipee v. Whittier Lifts*, (149 N.H. 679 (2003))).

Neither granted nor denied.

13. Comcast is the owner, as successor-in-interest to Adelphia, of at least two utility poles located on the City's public right-of-way, which are subject to validly issued pole licenses. (City's Supplemental Response to Comcast's 1st set of Interrogatories).

Neither granted nor denied.

14. All licenses existing and issued for use of the City's public right-of-way by any entity were amended, after public hearing duly noticed, by vote of the Claremont City Council on March 14, 2007. (Exhibits D & E, Appellant's Motion for Summary Judgment)

Granted.

15. Comcast had actual notice of the amendment of its pole licenses and attended the March 14, 2007 public hearing on such amendment, without voicing opposition to the proposed amendment.

Granted.

16. Taxes assessed on Comcast's property, wherever located in the City of Claremont, are valid and have been properly assessed in accordant with state and federal law.

Granted; cf., the Stipulation of Value.

Certification

I hereby certify a copy of the foregoing Decision has this date been mailed, postage prepaid, to: Christopher Maffucci, Esq., Casner & Edwards, LLP, 303 Congress Street, Boston, MA 02210, counsel for the Taxpayer; Jane F. Taylor, JD, City Solicitor, City of Claremont, 58 Opera House Square, Claremont, NH 03743, counsel for the City; and Edward C. Tinker, Chief Assessor, City of Claremont, 58 Opera House Square, Claremont, NH 03743.

Date: August 7, 2009

Melanie J. Ekstrom, Deputy Clerk

Comcast Corporation

v.

City of Claremont

Docket Nos.: 23337-06PT/23976-08PT

ORDER

The board has reviewed the “Taxpayer’s” September 2, 2009 Motion for Reconsideration (“Motion”). In accordance with RSA 541:5 and Tax 201.37(d), the board issues this suspension Order until it rules on the Motion.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to: Christopher Maffucci, Esq., Casner & Edwards, LLP, 303 Congress Street, Boston, MA

Comcast Corporation v. City of Claremont
Docket No.: 23337-06PT/23976-08PT
Page 26 of 29

02210, counsel for the Taxpayer; Jane F. Taylor, JD, City Solicitor, City of Claremont, 58 Opera House Square, Claremont, NH 03743, counsel for the City; and Edward C. Tinker, Chief Assessor, City of Claremont, 58 Opera House Square, Claremont, NH 03743.

Date: September 10, 2009

Anne M. Stelmach, Clerk

Comcast Corporation

v.

City of Claremont

Docket Nos.: 23337-06PT/23976-08PT

ORDER

The board has reviewed the September 2, 2009 Motion for Reconsideration (“Motion”) filed by the “Taxpayer” with respect to the August 7, 2009 Decision, as well as the September 11, 2009 “Objection” filed by the “City.” The suspension order entered on September 10, 2009 to allow the board more time to consider the Motion is hereby dissolved and the Motion is denied.

Reconsideration motions are governed by RSA 541:3 and Tax 201.37. The board finds no “good reason” to grant the Motion. Resolving disputed facts and the application of facts to the law is clearly within the purview of the board. See, e.g., Appeal of Land Acquisition, 145 N.H. 492, 494 (2000), citing RSA 76:16-a, V and Appeal of Andrews, 136 N.H. 61, 64 (1992). The Taxpayer has failed to meet its burden of establishing the board overlooked or misapprehended either the facts or the law and such error affected the board’s ultimate decision. See Tax 201.37 (e); cf. Tax 201.37(g).

Consequently, the board will not address each of the arguments presented in the Motion. Many of them are addressed in the Decision and most are also discussed in the Objection, which attached a recent superior court Order addressing a similar legal issue and reaching a consistent outcome: Northern New England Operations, LLC v. Town of Conway, Carroll County Superior Court Docket Nos. 01-E-079, et al. (July 2, 2009 Order, Houran, J.) -- hereinafter "FairPoint." Although not binding on the board, FairPoint involved the question of whether a municipality could levy a tax on certain public utilities without also levying the same tax on a cable company, thereby violating the constitutional right to equal protection under the law developed in the "Rochester" (I, II and III) cases decided by the supreme court (further identified and discussed in the Decision at pp. 7 and 9-10). The superior court concluded the cable company (Time Warner) was subject to the municipal tax, along with the public utilities having formal "pole license" agreements with the Town. Although the board was not aware of Judge Houran's ruling at the time of the Decision, FairPoint dovetails with the board's reasoning and finding that the Taxpayer, a cable company, is subject to the tax levied by the City, along with the utilities having formal pole license agreements with it. In other words, it would have been a violation of equal protection, under the law developed in the Rochester cases, for the City to levy the tax on those utilities but not on the Taxpayer. See Decision, pp. 10-11.

For brevity's sake and because of the detailed discussion and findings already contained in the Decision, the board will not address each of the other issues mentioned in the Motion, except to note the board does not agree: (i) with the Taxpayer's characterization in the Motion (at pp. 1-3) of the proposed additional findings submitted (beyond the 25 prescribed in

Tax 201.36(c)), and its objection to the board's rulings regarding them (see Decision, p. 14); and
(ii) the Taxpayer's "due process" rights were violated by the City.

Any appeal must be by petitioner filed with the supreme court within thirty (30) days of
the Clerk's date shown below. RSA 541:6.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid,
to: Christopher Maffucci, Esq., Casner & Edwards, LLP, 303 Congress Street, Boston, MA
02210, counsel for the Taxpayer; Jane F. Taylor, JD, City Solicitor, City of Claremont, 58 Opera
House Square, Claremont, NH 03743, counsel for the City; and Edward C. Tinker, Chief
Assessor, City of Claremont, 58 Opera House Square, Claremont, NH 03743.

Date: September 30, 2009

Anne M. Stelmach, Clerk