



Facts About the Pole Exemption

January 30, 2012

Current status

The property tax exemption for wooden poles and conduits owned by telecommunication companies expired on July 1, 2010. That year the House killed a bill to extend the exemption on a bipartisan 222-129 vote. Last year the House killed a bill to reinstate the exemption on a bipartisan 193-174 vote. Thus, the exemption has not existed for almost two years, and telecommunication companies began paying property taxes on their poles and conduits in 2011. They had not previously paid taxes on these poles and conduits since 1990. This year's **HB 1305** would reinstate the exemption.

History

Until 1990, the state assessed a *personal* property tax on telecommunication poles and conduits. The tax was paid to the state. During the same period, and continuing to the present, poles and conduits owned by *electric* utilities have been taxed as *real* property; the utility pays property taxes to the municipalities in which the poles and conduits are located. *See* RSA 72:8. In 1990, the state repealed the personal property tax on telecommunication poles and conduits. The same year, it enacted RSA 82-A, the communications services tax (CST), a tax (now 7 percent) on the gross charges for telecommunication services. This is a tax *on the customer*, not on the company.

After the repeal of the personal property tax on telecommunication poles and conduits, some municipalities began trying to tax the poles and conduits as real property. In 1996, the New Hampshire Supreme Court ruled that they could not do this, because telephone poles and conduits were treated as personal property, not real estate, under New Hampshire law.

In 1998, the legislature enacted RSA 72:8-a, stating that “all structures, poles, towers, and conduits employed in the transmission of telecommunication, cable or commercial mobile radio services shall be taxed as real estate” (thus effectively overruling the 1996 Supreme Court decision). However, at the same time, the legislature enacted RSA 72:8-b, which gave a *temporary* exemption to “any conduit that is not part of a building and any whole or partial interest in wooden poles, employed in the transmission of communications that are subject to the [CST].” That exemption was to last as long as the rate of the CST remained above 4.5 percent, but was to expire, in any event, on July 1, 1999.

The “temporary” exemption under RSA 72:8-b was extended in 1999, 2001, 2003, 2004, and 2005. In 2003 the reference to the rate of the CST was eliminated, so the exemption would remain in place as long as the legislature continued to extend it, regardless of the CST rate.

The pole exemption created an odd situation in which poles and conduits owned by electric utilities were fully taxable, yet identical poles and conduits owned by telephone companies were exempt. If a pole was owned jointly by an electric company and a telephone company—as most poles are—the electric company's share was taxed, and the telephone company's share was exempt.

The current law

As stated above, the exemption for telephone poles and conduits finally expired in 2010. Now, they are taxable in the same manner as electric poles and conduits.

Taxation of telephone poles in other states

According to a survey done by the legislature in 2003, at that time ***48 states taxed telephone poles as either real or personal property***. In some of those states the tax was imposed at the state level, but in many of those cases, the state shared the revenue with municipalities. Until 2010, *only two states—New Hampshire and Pennsylvania—did not tax the poles at all*. Now, to our knowledge, Pennsylvania is the only one.

Pole ownership and use

According to a legislative committee report issued in 2004, at that time Verizon used 505,000 poles in New Hampshire. Of those, 434,000 were owned jointly by Verizon and electric utilities; 15,000 were owned solely by Verizon; and 56,000 were owned solely by electric utilities (with Verizon's equipment attached to them). We understand that these numbers have not changed significantly since then, except that FairPoint bought Verizon's interest in the poles.

Telephone and electric companies routinely enter into agreements with other users, including electric, cable, and wireless telephone companies, to place attachments on the poles. They charge pole attachment fees to these users, and are able to recover a portion of the cost of maintaining the poles through these fees. According to the 2004 committee report, ***Verizon was earning \$1.85 million a year in attachment fees at that time***.

The tax impact of eliminating the exemption

According to documents that FairPoint Communications filed with the Public Utilities Commission in December 2011, the company paid approximately \$3 million in property taxes on its poles and conduits in 2011. Some municipalities did not submit tax bills in 2011, so the total amount paid in future years is likely to be somewhat higher, but it is unlikely to be more than \$5 million.

Because telecommunication companies are now paying taxes on their poles and conduits, overall property tax rates will be reduced proportionately. Admittedly, if the total amount statewide is only a few million dollars, the effect on an individual tax bill will be minimal—probably a few dollars a year. What matters, however, is not the dollar amount but the principle—telecommunication companies should not be immune from a tax liability that everyone else shares.

Some legislators claim that no one's tax bill will decline at all—they say municipalities will just spend the “new revenue” from the poles and conduits. The payment of taxes on poles and conduits, however, does not constitute “new revenue”; it is simply a broadening of the tax base. Increases in municipal revenues occur only when a city or town votes to raise additional funds. The existence or absence of the pole exemption does not affect the total amount of revenues raised by municipalities—it simply affects each taxpayer's proportionate share of the taxes that *are* raised.

It is true that no one can guarantee a reduction in anyone's tax bill. The broadened tax base could result in (a) more spending and a level tax rate, or (b) level spending and a lower tax rate, or (c) something in between. The actual effect will vary from town to town. What is undeniable, however, is that ***everyone's share of the tax burden has been reduced by the expiration of the pole exemption***.

A “new tax”?

Last year's legislature made an effort to eliminate new taxes and fees that had been instituted in the preceding four years. Telecommunications industry representatives tried to squeeze onto that wagon by claiming that the failure to extend the tax exemption in 2010 resulted in a “new tax.”

Fortunately, legislators were too smart to fall for that. Obviously, there is no “new tax” here. Everyone else pays property taxes. Electric companies have paid taxes on the exact same poles for over a century. The end of the pole exemption—which always was intended to be temporary—merely means that telecommunication companies are now paying the same taxes that everyone else has paid forever.

It is equally clear that *if the pole exemption is revived now, all taxpayers will see a proportionate increase in their tax rates. HB 1305 would increase taxes for all property taxpayers.*

Arguments for reinstating the exemption

No one disputes that the poles and conduits owned by telecommunication companies are identical to those owned by electric companies. No one claims there is any principled reason to exempt this class of property from taxation. All of the arguments for reviving the exemption are based on a desire to accommodate the telecommunications industry and its customers.

The cost to telephone customers. In recent years, the most common argument for continuing the exemption was that if landline telephone companies were required to pay taxes on their poles, they would pass the cost on to their customers, and this would disproportionately harm customers who are unable to switch entirely to wireless phone service. In fact, FairPoint is planning to impose a 99-cent-per-month “municipal property tax surcharge” on all of its land lines to recover the property tax expense. The PUC has allowed this “surcharge” on a temporary basis.

Whether this is necessary is highly questionable. It is unclear why FairPoint could not, for example, recover the expense through its unregulated internet business. It definitely can recover at least some of the cost through the attachment fees it charges to cable, electric, and wireless companies.

Even if all of the cost is borne by landline customers, it is unclear why there would be anything wrong with that. Property taxes are, for every other industry, a cost of doing business. Those costs are borne by customers. That is how business works. When one industry is exempt from property taxes, that burden is shifted to other taxpayers (including other businesses). It makes no sense to require *taxpayers* to bear one industry's costs of doing business.

The level playing field. A related argument is that landline phone companies need the exemption to maintain a “level playing field” with wireless companies, because wireless companies operate without poles and conduits, and therefore escape the tax.

Although wireless companies do not own wooden poles, they do own towers, and those towers have always been subject to property taxes. The wooden poles owned by landline companies were exempt until 2010. How anyone could consider that situation a “level playing field” is a mystery.

In any event, this issue does *not* pit landline companies against wireless companies. Representatives of the major wireless companies (and cable companies) have lobbied *for* reviving the exemption. Presumably this is because they recognize that they will bear part of the cost now that landline companies are paying taxes on the poles. Instead, this issue pits the entire telecommunications industry—all of which has benefited from the exemption—against municipalities and taxpayers.

The “double tax.” Another argument is that phone companies are already burdened by the CST, and the pole exemption is necessary to avoid a “double tax.” This is nonsense. The CST is paid by customers, not by the phone company. The company merely collects the tax for the state. In this respect, it is identical to the meals and rooms tax, the tobacco tax, the gasoline tax, and—most notably—the electricity consumption tax under RSA 83-E, which is *collected* by the electric utility, but *paid* by the customer. Yet no one suggests that restaurants, hotels, convenience stores, gas stations, or electricity poles should be exempt from property taxes.

Bad for business. Industry representatives have tried to portray elimination of the pole exemption as “anti-business.” It is anti-business only in the sense that it ended a special benefit that one industry had received for too long. In reality, it is *pro*-business because it relieves all the other businesses in the state, large and small, from paying taxes to support the telephone and cable companies.

Remember that ***these poles are income-producing property***, generating millions of dollars a year in attachment fees. *In what other industry can a company use property to produce business income, receive rental income from the property at the same time, and pay no tax on the property?*

Franchise fees and the Rochester case. A similar claim is that telecommunication companies are already paying taxes in the form of franchise fees or other charges. Phone companies do not pay franchise fees. The only “fee” they pay to municipalities is a *one-time* license fee of *ten dollars* to install poles in a public right-of-way. The fee is not ten dollars *per pole*—it is ten dollars for a single license to install whatever number of poles the company needs.

In 2004 the New Hampshire Supreme Court, in *Verizon v. City of Rochester*, held that the city had the right to tax Verizon on the value of its use of the city’s rights-of-way. When a municipality makes an agreement allowing a private party to use or occupy municipal property, RSA 72:23, I(b) requires that party to pay taxes on the value of the property interest. When phone, cable, gas, or electric companies are permitted to put their equipment in a municipal right-of-way, they have a property interest that is subject to taxation.

However, as the court made clear in a subsequent (2007) decision in the same case, that is a separate issue from taxation of the equipment itself. One does not preclude the other. As an analogy, if a town enters into a ground lease allowing a business to place its building on municipally owned land, RSA 72:23, I(b) would require the business to pay property tax on the value of the leasehold interest in the land; but it would still have to pay property taxes on the building itself (just as a homeowner pays property taxes on both the land and the house). Similarly, a phone company’s payment of taxes on its use of municipal property is not a justification for exempting it from taxation of its poles.

Cable companies do typically pay franchise fees to compensate municipalities for their use of the public right-of-way. These fees are a form of rent that are negotiated with the municipality; again, this has nothing to do with whether the poles and conduits should be taxed.

“Same pants, different pocket.” A frequently heard comment is “What difference does it make? We’ll pay for it in our taxes or in our phone bill. It’s all the same.” Following that logic, there is no reason for *any* business to pay property taxes—we could just let residential taxpayers support them. No doubt this would lead to lower prices for groceries, gasoline, and movie tickets, as well as lower phone bills—but dramatically higher property taxes. That certainly is one approach, but one that has never been favored in this country.

Exempting poles and conduits from property taxation is the equivalent of forcing municipalities to write a check to the phone company. It is a taxpayer-funded subsidy of private business, no different from a farm subsidy or a bank bailout. If the state wants to fund that subsidy itself, it may do so; but it should not force municipalities to do it.