

State of New Hampshire
Supreme Court

NO. 2016-0151

2016 TERM
SEPTEMBER SESSION

DIRECTV, Inc.

v.

Town of New Hampton

RULE 7 APPEAL OF FINAL DECISION OF THE
BELKNAP COUNTY SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*,
NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

QUESTION PRESENTED. 1

STATEMENT OF INTEREST. 2

 I. Contributions of Broadcasters to New Hampshire. 2

 II. Radio and Television Stations Share Similarities to DIRECTV’s
 Facility. 5

STATEMENT OF THE CASE. 7

ARGUMENT. 8

 I. Municipal Taxation of DIRECTV’s Equipment is Judicial
 Resurrection of the Business Machinery Tax the Legislature
 Specifically Abandoned in 1970. 8

CONCLUSION. 10

CERTIFICATION. 10

TABLE OF AUTHORITIES

Federal Cases

United States v. Gilbert Associates,
345 U.S. 361 (1953). 8

United States v. Town of Marlborough,
305 F. Supp. 718 (D.N.H. 1969). 8

New Hampshire Cases

Crown Paper Co. v. City of Berlin,
142 N.H. 563 (1997). 8, 9

Eyers Woolen Co. v. Town of Gilsum,
84 N.H. 1 (1929). 8

King Ridge, Inc. v. Town of Sutton,
115 N.H. 294 (1975). 8

Kolodny v. City of Laconia,
96 N.H. 337 (1950). 8

New England Telephone v. City of Franklin,
141 N.H. 449 (1996). 9

Petition of Gilbert Associates,
97 N.H. 411 (1952). 8

Souhegan Nail, Cotton & Woolen Factory v. McConihe,
7 N.H. 309 (1834). 8

Town of Newport v. Town of Unity,
68 N.H. 587 (1896). 8

Federal Statute

47 U.S.C. § 309. 2

New Hampshire Statutes

RS 39:2 (1850)..... 8

CS 41:2 (1854)..... 8

GS 49:3 (1867). 8

GL 53:3 (1878). 8

PS 55:3 (1901). 8

1917 LAWS 6:1 8

PL 60:6 (1926)..... 8

RL 73:8 (1942)..... 8

RSA 72:7 (1955)..... 8

1970 LAWS 5:3 8

Secondary Authority

Comments of Governor Walter Peterson, Hearing on H.B. 1, before Special Session Joint Senate and House Ways and Means Committee (Mar. 31, 1970). 8

Stan Arnold and William Ardinger, *Top Ten Reasons Why New Hampshire’s BET May Provide An Answer to State Tax Reform*, STATE TAX NOTES 583, 585 (Nov. 29, 2004). 9

Edward W. Brouder, Jr., GRANITE AND ETHER: A CHRONICLE OF NEW HAMPSHIRE BROADCASTING (1993). 2

QUESTION PRESENTED

- I.** By allowing municipal taxation of DIRECTV's equipment, did the court improperly resurrect the business machinery tax the legislature specifically abandoned in 1970?

STATEMENT OF INTEREST

I. Contributions of Broadcasters to New Hampshire

There are 114 radio stations and 13 television stations licensed in New Hampshire. They are geographically diverse, covering the state from Colebrook to Nashua, Claremont to Portsmouth. *See* Map of New Hampshire Radio and Television Broadcasting Stations, *infra*.¹ All but a handful are members of the New Hampshire Association of Broadcasters.

Since 1922, New Hampshire's radio and television stations have contributed in innumerable ways to the artistic, cultural, and political fabric of the state. *See* Edward W. Brouder, Jr., GRANITE AND ETHER: A CHRONICLE OF NEW HAMPSHIRE BROADCASTING (1993). Broadcasters' FCC licenses require they operate for the "public interest, convenience, and necessity." 47 U.S.C. § 309. Although programming and broadcasting is expensive, their product is free and open to the public. People use radio and television daily, and particularly in emergencies. All stations participate in the Federal Emergency Alert System, and also in New Hampshire's Amber Alert and Silver Alert to locate missing children and elderly. Through the New Hampshire Association of Broadcasters, radio and television stations in New Hampshire annually air hundreds of public service announcements. In the past year, WBIN and WMUR hosted several televised political debates. Every year several radio stations, including WZID and WGIR Manchester, and WHEB in Portsmouth, for example, raise hundreds of thousands of dollars in various radiothon campaigns for homeless, veterans, and children's causes.

¹A map of radio and television stations licensed to broadcast in New Hampshire is included in this brief at page 4 to provide a visual representation of the geographic breadth of the industry. The map is not part of the record below. The approximate locations of their studios and transmitters is shown, as determined by FCC sources. All but a few are members of the New Hampshire Association of Broadcasters. An interactive version of the map, which provides stations' identifications and can be zoomed, can be found at www.AppealsLawyer.net/broadcasters_map/.

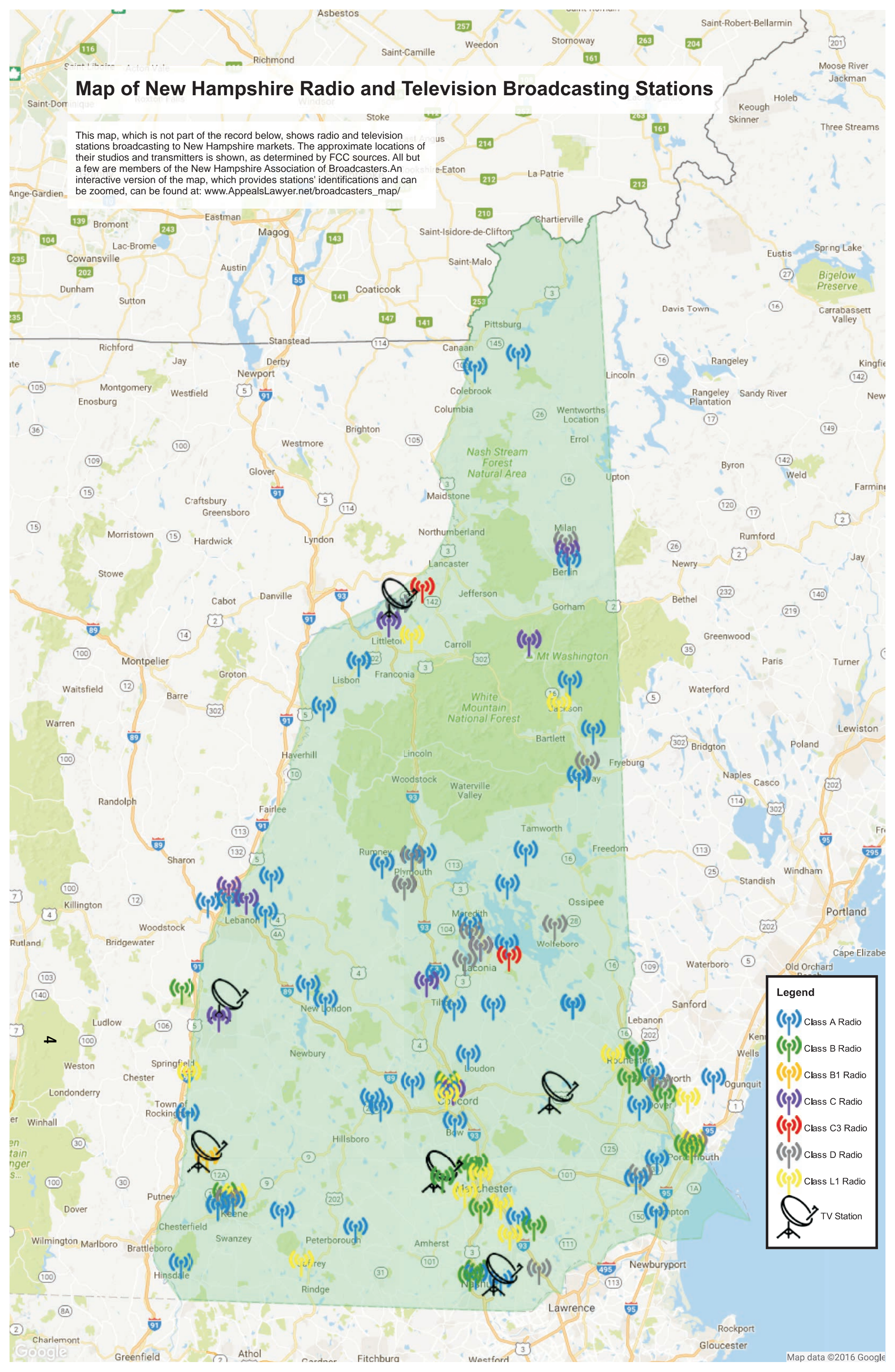
About two-thirds of broadcasters are small businesses as defined by the SBA, and collectively New Hampshire broadcasters directly employ about 600 people.

Some stations are simple operations, broadcasting locally, such as WEMJ in Laconia. Some are un-staffed, with a satellite dish relaying content produced elsewhere and re-broadcasting locally, such as WEEY in Swanzey. Others are large multi-transmitter operations, such as New Hampshire Public Radio based in Concord, with 13 relay facilities allowing it to overcome topography and cover the state.

Broadcasters range from stations such as WNTK radio in New London with just two employees, to WMUR television in Manchester with a staff upwards of 150. In content, some radio stations run mostly music, mostly news, or religious programming. Some carry Spanish language programming, such as WNEU and WPXG television in Merrimack and Concord. Some are student- or school-operated, such as Franklin Pierce College's WFCP in Rindge and WUNH in Durham.

Map of New Hampshire Radio and Television Broadcasting Stations

This map, which is not part of the record below, shows radio and television stations broadcasting to New Hampshire markets. The approximate locations of their studios and transmitters is shown, as determined by FCC sources. All but a few are members of the New Hampshire Association of Broadcasters. An interactive version of the map, which provides stations' identifications and can be zoomed, can be found at: www.AppealsLawyer.net/broadcasters_map/



Legend

- Class A Radio
- Class B Radio
- Class B1 Radio
- Class C Radio
- Class C3 Radio
- Class D Radio
- Class L1 Radio
- TV Station

II. Radio and Television Stations Share Similarities to DIRECTV's Facility

At its core, a radio or television station consists of a studio of some sort where programming originates, and transmission apparatus broadcasting content to the public.

For some, the studio is an un-staffed downlink site capturing content from elsewhere; for others it is a comprehensive organization creating original programming. Transmission for small stations consists of a transmitter and metal tower with antenna, with power output and tower height determined and regulated by the Federal Communications Commission. Larger operations may have sophisticated installations including buildings, transmission plants with primary and backup transmitters, metal towers with antennae, microwave equipment for relaying content to and from the studio location, satellite uplink and downlink dishes of varying types and sizes, and backup battery and electrical generator equipment for electrical conditioning and power outages.

Signal received at or originating in a station's studio, or from a remote location, must be channeled to the transmission gear. For small stations, that might be merely a wire going up a pole. For larger stations not located at the transmission site, the content signal may need to be relayed from studio to rooftop and then microwaved by dishes to a hilltop antenna site. Also, content developed locally but shared more widely is uplinked by dish to satellite. At the antenna site, the signal is received from the studio, via direct line-of-sight terrestrial transmitters and receivers, or downlinked from satellite. It is then moved up the tower and transmitted to viewers and listeners.

Content signal is easily degraded, even over short distances, as it moves along each step of the process, and care is taken to minimize degradation. This is accomplished by modulating, or manipulating, the signal in a variety of ways. Each of these manipulations is a two-step procedure. When signal gets sent it is modulated into the most efficient form for its intended

travel; at its destination it gets demodulated into a form appropriate to that step. Modulation and demodulation occurs in equipment that generally is arranged in racks connected by wires sometimes contained in conduits.

Although a direct item-by-item comparison is unnecessary, all members of the New Hampshire Association of Broadcasters employ equipment similar to some present at DIRECTV's New Hampton facility and listed in the superior court's orders regarding taxability. Depending on their size and sophistication, radio and television stations comprise antennae and satellite dishes, conduits containing wiring, racks of modulation and demodulation equipment with temperature and climate controls, battery backups and generators, towers and stanchions, and electrical grounding against signal interference and lightning. Some of these items are simply necessary for the operation of a station, and some are required by federal regulation. For example, since its inception in 1932, WFEA in Merrimack has hundreds of feet of copper strapping radially buried on its property surrounding its transmission towers. This is a condition of its FCC license, and all AM stations have similar arrangements because of the need to modulate the amplitude of each station's signal and protect other stations on the same frequency.

Most broadcasters pay taxes on their facilities.² Although some stations' tax bills denote improvements on the land, they do not necessarily enumerate detailed bases for appraisal. Stations that are profitable, like any New Hampshire business, are subject to the business profits tax and the business enterprise tax. No station known to the New Hampshire Association of Broadcasters pays property tax on their business machinery.

²Some are exempt from property taxation due to their educational or non-profit status or religious affiliation.

STATEMENT OF THE CASE

After the Town of New Hampton taxed DIRECTV's facility including business machinery, DIRECTV applied for abatement. This resulted in two orders of the Belknap County Superior Court (*James D. O'Neill, III, J.*), dated April 6, 2012 and December 5, 2014 (appended to appellant's brief), determining that a variety of items, otherwise personal property, were taxable real estate. DIRECTV appealed, and the New Hampshire Association of Broadcasters hereby expresses support for DIRECTV's position.³

³DIRECTV is not a broadcaster, and thus not eligible to be a member of the New Hampshire Association of Broadcasters.

ARGUMENT

I. **Municipal Taxation of DIRECTV's Equipment is Judicial Resurrection of the Business Machinery Tax the Legislature Specifically Abandoned in 1970**

Enacted in 1850, New Hampshire's "stock in trade" tariff taxed "factory buildings, and machinery." RS 39:2 (1850); CS 41:2 (1854); GS 49:3 (1867); GL 53:3 (1878); PS 55:3 (1901) (recodifications variously including and excluding comma after "buildings"); *see also Souhegan Nail, Cotton & Woolen Factory v. McConihe*, 7 N.H. 309 (1834) (exemplifying difficulty of tax collection in pre-currency economy governed by private tax enactments). In 1917, several anachronistic words were deleted, leaving the levy on commercial "[b]uildings, mills, *machinery*, wharves, ferries, toll-bridges, locks and canals and aqueducts." 1917 LAWS 6:1; PL 60:6 (1926); RL 73:8 (1942); RSA 72:7 (1955) (emphasis added).

Under those statutes, municipalities taxed waterworks, *Town of Newport v. Town of Unity*, 68 N.H. 587 (1896), milling machines, *Eyers Woolen Co. v. Town of Gilsum*, 84 N.H. 1 (1929), knitting machines, *Kolodny v. City of Laconia*, 96 N.H. 337 (1950), and electroplating machines, *Petition of Gilbert Associates*, 97 N.H. 411 (1952), *rev'd on other grounds, United States v. Gilbert Associates*, 345 U.S. 361 (1953). *See also, United States v. Town of Marlborough*, 305 F. Supp. 718 (D.N.H. 1969) (unspecified industrial machinery); *Crown Paper Co. v. City of Berlin*, 142 N.H. 563 (1997) (chemical vats).

In 1970, the legislature rearranged business taxation in New Hampshire. It deleted the word "machinery" from RSA 72:7, *see King Ridge, Inc. v. Town of Sutton*, 115 N.H. 294, 296 (1975); 1970 LAWS 5:3, leaving the statute in its current form, and enacted the "business profits tax" ("BPT"). The BPT was a departure in tax philosophy, moving from taxation of the instruments of production to taxation of commercial income. *Comments of Governor Walter Peterson, Hearing on H.B. 1, before Special Session Joint Senate and House Ways and Means Committee* (Mar. 31, 1970)

(“This proposal gives us the opportunity to move toward a fairer tax structure ... in New Hampshire, by substituting the concept of ability to pay, as defined by net profits, for the outmoded approach of taxing personal property employed by business.”); *Crown Paper Co.*, 142 N.H. at 567 (“In 1970, as part of a larger change in the tax system featuring the enactment of the business profits tax, RSA 72:7 was amended and “machinery” deleted. By creating the business profits tax while simultaneously removing classes of property from taxation, the State shifted from taxing factory machinery to taxing business profits.”); *see also*, Stan Arnold and William Ardinger, *Top Ten Reasons Why New Hampshire’s BET May Provide An Answer to State Tax Reform*, STATE TAX NOTES 583, 585 (Nov. 29, 2004) (BPT is “a tax on business net income”).

Unlike many states, “[a]bsent legislative authority, taxes cannot be assessed in New Hampshire.” *Crown Paper Co.*, 142 N.H. at 567; *New England Telephone v. City of Franklin*, 141 N.H. 449, 452 (1996) (“As a general rule taxes cannot be assessed and collected in this State except by authority of the legislature.”).

Thus, since 1970, business machinery can no longer be taxed by towns as commercial property.

In its two taxability orders regarding DIRECTV’s satellite uplink facility in New Hampton, the superior court lists many moveable items which are business machinery: antennae and satellite dishes, conduits and wires connecting them to modulation and demodulation equipment, temperature and climate controls, battery backups and generators, towers and stanchions, and electrical grounding. These are among the machines DIRECTV supplied for use in its business, no different from milling machines and knitting machines of another era.

Fixtures are taxable real estate. But the lower court’s overly expansive view of moveable machinery as fixtures is a judicial resurrection of the business machinery tax the legislature

specifically abandoned in 1970.

For New Hampshire broadcasters, ranging from small stations on marginal budgets to large ones with sophisticated operations, a decision of this court upholding the taxability of the items in the superior court's order creates uncertainty regarding municipal taxation of much of their business machinery. It would also send a strong signal to businesses considering equipment investment in New Hampshire that they may be property-taxed on those investments, in addition to their state business taxes.

CONCLUSION

For the foregoing reasons, this Court should declare that none of DIRECTV's equipment taxed by the Town of New Hampton should be subject to municipal property taxation.

Respectfully submitted,

New Hampshire Association of Broadcasters
By its Attorney,
Law Office of Joshua L. Gordon

Dated: September 28, 2016

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATION

I hereby certify that on September 27, 2016, copies of the foregoing will be forwarded to Margaret Nelson, Esq., for DIRECTV, Inc., and to Judith E. Whitelaw, Esq., for the Town of New Hampton.

Dated: September 28, 2016

Joshua L. Gordon, Esq.