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VIA U.S. MAIL

**City of Berlin
168 Main Street
Berlin, NH 03570**

August 23, 2019

Re: Comprehensive Public Rights-of-Way Ordinance

Dear DTC Client:

Executive Summary:

The purpose of this letter is to advise the City of Berlin of the benefits of adopting a comprehensive ordinance regulating access to public rights-of-way for wireless facilities and all other uses. Wireless telecommunications providers are increasingly deploying facilities in public rights-of-way, and federal and state laws impose strict requirements upon municipalities seeking to regulate the deployment of such facilities. State law requires Towns and Cities tax all users of the public rights-of-way, adding more obligations for management and licensing for all users of the public rights-of-way.

Traditional procedures for regulating the rights-of-way under RSA 231:159 are no longer sufficient. Furthermore, planning and zoning laws and procedures no longer apply to certain wireless deployments. A comprehensive public rights-of-way ordinance is an important step in ensuring that the municipality can continue to regulate access to and safety within the public rights-of-way, while complying with those federal and state laws.

This letter proposes a group representation with split billing to develop a template right-of-way ordinance. If you are interested, please kindly let us know by September 14, 2019.

DONAHUE, TUCKER & CIANDELLA, PLLC
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Background & Legal Requirements:

Both Congress (with the 1996 Telecommunications Act, (“TCA”) and amendments thereto) and the NH Legislature (with RSA Chapter 12-K, significantly amended in 2013) have passed laws to promote and streamline the deployment of wireless communications. The Federal Communications Commission (“FCC”) has also issued regulations to speed deployment of small cell wireless facilities, including an October 2018 final rule: “Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to infrastructure Investment,” effective January 14, 2019.

In general, these laws preserve municipal authority to regulate personal wireless services, but impose major limitations. These laws: (1) bar municipalities from discriminating among providers of telecommunications services; (2) require that municipalities comply with procedural requirements for making decisions, including a “shot clock,”; and (3) generally bar municipalities from effectively prohibiting an entity from providing telecommunications services

Municipalities cannot “unreasonably discriminate among providers of functionally equivalent services.” Under a broad reading of this provision, the municipality must ensure that it does not unreasonable discriminate between two wireless communication carriers, and also does not discriminate between wireless telecommunication carriers and other (wireline) telecommunications carriers. A comprehensive public-rights-of-way ordinance should apply to all entities seeking access to the public rights-of-way, whether for poles, conduits, attachments, or other equipment, thereby preventing any challenges on the basis of discriminatory regulations.

Federal and state law impose strict procedural requirements on municipalities regulating the deployment of wireless facilities. There are short timelines for acting on applications, and these timelines differ based on the type of facility that is proposed. A comprehensive public-rights-of-way ordinance should address handling applications for access to the public-rights-of-way in a timely manner and ensure that each type of applications is reviewed by the appropriate bodies.

Federal law also prohibits any municipal regulations that “effectively prohibit” the provision of telecommunications services. Therefore, a comprehensive public-rights-of-way ordinance needs to be crafted in a manner that ensures the municipality retains as much control over safety, location of deployments, and aesthetics without being vulnerable to a challenge on the grounds of effective prohibition.

We gave a presentation on this issue at a seminar sponsored by the NH Municipal Association and the NH Municipal Lawyers Association on May 30, 2019. A copy of the materials we provided at that presentation is available at www.dtclawyers.com/resources/articles. These materials include a more thorough overview of the applicable laws.

Split Billing Arrangement for Drafting Model Comprehensive Public Rights-of-Way Ordinance:

A number of DTC's general and special counsel municipal clients have expressed an interest in working with us collectively, so that the cost of developing a template ordinance could be shared among the group. We propose to set up a split bill arrangement, as we have done on utility tax appeals and other matters. Under this arrangement, we would divide the cost for developing the template ordinance equally among all clients participating in the group. We would bill each client separately for work done that specific municipality to customize the template to meet that client's needs and to assist in the adoption process, either by a select board or council, or through the annual town meeting.

Our rates would be our customary rates for other split bill telecom work. \$195/hour for partners, \$175/hour for associates, and \$115/hour for paralegals.

If you are interested or would require additional information, please contact one of us directly by September 14th. We look forward to hearing from you.

Very Truly Yours,
DONAHUE, TUCKER & CIANDELLA, PLLC



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