

MEMORANDUM

TO: Claire Silverman
League of Wisconsin Municipalities

FROM: Anita Gallucci

DATE: February 9, 2017

RE: Update of April 11, 2016 Memorandum on Regulation of WITN's Poles in Local Right-of-Way¹

Last April we provided a memorandum addressing certain questions regarding the authority of municipalities to regulate the placement of mobile service support structures in local ROW. That issue arose after many League members were contacted by Wisconsin Technology Networking, LLC ("WITN") requesting permits to place 75-foot poles and/or 125-foot monopoles in local ROW. Since that memorandum, we have learned much more about who WITN is and what the company's business model appears to be. Moreover, while we have a better idea of what sort of regulatory and practical issues are posed by the placement of these very large poles in local ROW, there are still open legal questions, not the least of which is whether WITN is, as it has claimed, a public utility to be treated just as any other public utility in the ROW. This memorandum is intended to update the April 2016 memorandum and to explain the open legal questions.

DISCUSSION

A. WHO IS WITN, WHAT IS IT DOING, AND WHY?

Who Exactly Is WITN?

Mobilitie, the company that owns WITN, has decided that it is time for more transparency.² It will no longer use its various aliases across the country and now will simply be known as

¹ Some of the information provided in this update comes from meetings and conversations the author has had recently with Mobilitie representatives, including Melissa Mullarkey and Bridget A. Sheehan, who are both in Government Relations for the company.

² DeGrasse, Martha, "Mobilitie to increase transparency for jurisdictions," *RCR Wireless News* (Jan. 27, 2016), <http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4>.

Mobilitie. Mobilitie is not a wireless carrier but an infrastructure or facility builder. It builds the physical plant that is then used by wireless carriers, such as Sprint, to provide cell phone and data services to retail customers. In fact, Sprint has partnered with Mobilitie to build as many as 70,000 small cell sites across the country and that is what Mobilitie is seeking to do in communities across Wisconsin. The arrangement is simple. Mobilitie builds the small cell and transport sites and then leases the sites to Sprint. Sprint then uses the facilities Mobilitie has built and Sprint's FCC-licensed spectrum to provide cell phone and wireless data services to the public.

What Is a Small Cell Site, and Why Do Wireless Carriers Want Them?

With the advent of the iPhone in 2007, there has been a greater demand for mobile data networks with sufficient bandwidth capacity to support mobile internet browsing. Practically overnight, mobile data networks supporting the iPhone became overloaded. In response, the focus of the wireless industry has shifted from providing adequate coverage for cell phones used while travelling to expanding capacity to keep pace with the exploding use of cell phones in the home and the data requirements of the increasingly ubiquitous "smart" mobile devices. In sum, to keep up with customers' demands, wireless carriers now must address both coverage, capacity, and data network issues.

Carriers are looking to meet that exploding demand with "5G networks." According to one commentator, to prepare for 5G and to provide additional capacity for existing 3G and 4G/LTE networks, "wireless carriers are using compact, low-powered base stations called small cells to provide additional capacity for data-intensive users by offloading mobile voice, data and video traffic from the macro network."³ Small cell deployment is especially prevalent in urban areas, but is also happening in rural and some suburban areas as well, as demand for wireless data continues to rise."⁴ Small cell sites are usually made up of a number of small antennas. An increasingly popular option for providing wireless services is to mount individual antennas on street light poles, electric utility poles, or the carrier's own poles located in the ROW.

A small cell site serves a limited number of users at a time, and the carriers need more sites closer to their users. This has resulted in having more cell sites served by multiple poles, especially in residential or hard-to-serve areas. Carriers across the country are now looking at local ROW for new antenna and tower sites.

Generally, there are two different types of wireless facilities found in the ROW: (1) singular antenna sites and (2) distributed antenna systems ("DAS"). Singular antenna sites are those where a carrier sees a specific need in an area for which no other good option exists. DAS are systems installed by a carrier or a third party for a subsequent carrier to use. These facilities tend

³ A familiar example of a macro network is the water tower base station (comprised of water tower mounted antennas and radio equipment connected to an equipment shelter with additional equipment), with which most municipalities are familiar.

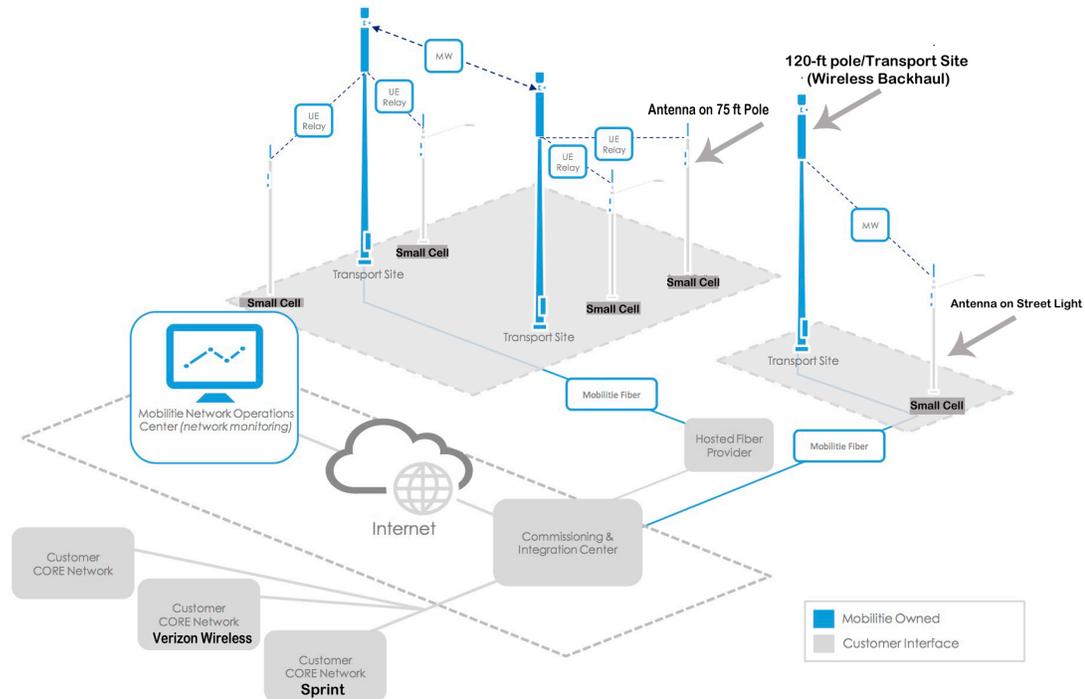
⁴ Mize, Marc, "Reader Forum: Stepping stones to 5G – small cells and fiber simplifying carrier densification efforts," *RCR Wireless News* (Sept. 5, 2016), <http://www.rcrwireless.com/20160905/opinion/reader-forum-stepping-stones-5g-small-cells-fiber-simplifying-carrier-densification-efforts-tag10>.

to string sites together by using fiber optic lines from pole to pole and are typically used to cover a wider area with a definable network of sites.

What do Mobilitie’s Sites Look Like?

The following is a diagram Mobilitie is using to illustrate its proposed network design:

Holistic network design



mobilitie (annotations added by Gallucci)

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Those communities that have been approached by Mobilitie know that the company has been seeking to place 75-foot poles and 120-foot transport poles in local ROW. The 75-foot poles are to be used to support an individual antenna (each, a small cell). The 120-foot transport poles are to be used for wireless backhaul. This design, which relies on wireless (instead of fiber) backhaul, is somewhat new and driven by the fact that Sprint found itself with an oversupply of 2.5 GHz spectrum. Note that each small cell site in the diagram (i.e., small cell site supporting one antenna) has a microwave connection to a transport (or backhaul) site. As explained in Mobilitie’s recent Petition for Declaratory Ruling, it is necessary for each small cell site to have such a connection (be it wireless or fiber) so that the carrier’s (in this case, Sprint’s) “customers can send and receive to or from everywhere.”⁵

⁵ See Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed with the FCC Nov. 15, 2016). Prompted by Mobilitie’s Petition, the Federal Communications Commission (“FCC”) has opened WT Docket No. 16-421 to accept comments on *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies* (Dec. 22, 2016).

B. DOES MOBILITIE’S CLEC CERTIFICATION GIVE IT THE RIGHT TO BE IN LOCAL ROW?

Mobilitie Management, LLC (a/k/a Mobilitie) was certified by the Public Service Commission of Wisconsin (“PSCW”) by order dated May 11, 2016 in Docket No. 3776-NC-100. Specifically, Mobilitie’s certificate authorizes the company to offer, throughout Wisconsin, “facilities-based and resold intrastate telecommunications services, access services, and all other telecommunications services available for certification.” The certificate also recognizes that the company “is a telecommunications utility per Wis. Stat. § 196.01(10), an ATU [i.e., alternative telecommunications utility) per Wis. Stat. § 196.01(1d)(f), certified per Wis. Stat. §§ 196.203(2)(a) . . .”

Mobilitie maintains that, by virtue of this certificate, it has the right to build its infrastructure in local ROW. It is not entirely clear that this is true because it is not entirely clear that Mobilitie is actually providing a “telecommunications service” “available for certification” by the PSCW under Chapter 196 of the Wisconsin Statutes. A full explanation of the argument that Mobilitie is not providing such a telecommunications service is beyond the scope of this memorandum. However, the crux of the argument is that Mobilitie is a facility builder and not a telecommunications service provider and that its facility building activities do not fall within the scope of the company’s ATU certification. This issue is one for the PSCW and the courts to decide, and it is a question that is being asked across the country.⁶

Because of the lack of clarity on this issue, one cannot say with certainty what laws apply to Mobilitie’s proposed activities in the ROW. On the federal level, it is not clear whether 47 U.S.C. § 332 relating to local siting of wireless facilities or and 47 U.S.C. § 253 relating to local ROW regulation of telecommunications service providers applies. On the state level, it is not clear whether Wis. Stat. § 196.58 or 182.017 pertaining to municipal regulation of telecommunications service providers applies. Equally unclear is whether either the state or federal “shot clock” comes into play. If the FCC shot clock applies, then a municipality would have to act on an application to erect a cell tower or modify an existing structure within either 150 days of receipt in the former case or 90 days in the latter case.⁷ If the state shot clock (Wis. Stat. § 182.017(9)) applies, then the municipality must act on an application to place facilities in the ROW within 60 days.

⁶ See, e.g., New Jersey State League of Municipalities’ White Paper: “Wireless Systems in the Right of Way - *What You Need to Know*” (Sept. 20, 2016), http://www.njslom.org/bureau/white-papers/BMI.WP_2016_1.pdf

⁷ See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013) (citations omitted):

[In establishing] time frames in which state and local governments must act on zoning requests, the FCC declared that “a reasonable period of time” for purposes of § 332(c)(7)(B)(ii) presumptively would be 90 days for personal wireless service facility siting applications requesting collocations and 150 days for all other applications. The FCC further determined that a lack of decision within these time frames would constitute a failure to act under § 332(c)(7)(B)(v). The FCC stated, however, that personal wireless service providers and state or local governments could, by mutual consent, extend the prescribed time frames. In addition, the FCC concluded that, if an applicant submits an incomplete application, the time it takes for the applicant to respond to a state or local government’s request for additional information would not count toward the 90- or 150-day time frame if the state or local government notified the applicant that the application was incomplete within 30 days of receiving the application.

Apparently, because of these legal uncertainties, Mobilitie has decided it is best to work with each community so that there can be agreement on the placement of the proposed poles in local ROW or elsewhere. This is discussed in Section C.

C. MOBILITIE’S POLICY FOR WORKING WITH MUNICIPALITIES ON SITING ISSUES.

Mobilitie wants to buildout Sprint’s small cell sites as quickly as possible. The company cannot accomplish this if it is in litigation at the PSCW or state court over the scope of its rights to access local ROW. Thus, the company is now more flexible in executing its build out plans, as reflected in its “Telecommunications Facility Siting Policy,” which provides as follows:

In general, Mobilitie strives to conform the siting of its telecommunications facilities in a municipality as follows:

- a. First, evaluate attachments to municipal-owned infrastructure or another utility company’s infrastructure, where available. Next, evaluate replacing municipal-owned streetlight poles to provide infrastructure for attachments, as needed. Finally, deploy new poles where no suitable attachment candidate is available.
- b. Unless otherwise necessitated as stated above, concentrate siting of new poles within public rights-of-way in industrial and commercial areas, where possible.
- c. Where new poles are proposed, seek to aesthetically blend facilities and equipment with the surrounding area and match adjacent material and structural standards.
- d. Agree with municipalities on the process to submit applications and the number of site locations per submission.

Mobilitie acknowledges that its current deployment is subject to the authority of the municipalities to regulate their public right-of-way. As such, Mobilitie’s proposed and constructed site locations comply with all applicable governing requirements and regulations. The siting policy above is focused on selecting site locations that are mindful of municipality concerns and sensitivities in general. Since the responsibility for regulating the public right-of-way and approving site locations rests with each municipality, acting within the authority prescribed to it under law, the requirements and policies can vary from municipality to municipality. Therefore, the siting policy framework above serves as a guide while Mobilitie researches applicable local code

As Mobilitie’s policy suggests, when asked, the company will actively work with the community to find alternative sites within the ROW for each small cell or antenna site. Alternative sites would include existing street light poles or electric or telephone poles. Typically, when using an

alternative site, Mobilitie replaces the existing street light pole or utility pole with a new pole that is tall enough and strong enough to support the antenna and any other equipment on the pole. If the city or village owns the pole, then Mobilitie will agree to pay a rental or license fee for the use of the pole. If a third party owns the pole, then Mobilitie would pay a rental or licensee fee to the third-party owner (typically, an investor-owned electric utility). These small cell sites do not necessarily need to be 75-foot tall, and Mobilitie has said that it will work with the municipality regarding the height of the pole, whether it is one that is owned by Mobilitie, the municipality, or the electric company.

Regarding the very tall transport poles, Mobilitie's policy suggests that it will work with the municipality to find a mutually agreeable location for the pole and will also make adjustments in the height of the pole where possible. Moreover, Mobilitie is also open to placing the transport poles on municipally owned property, as long as the financial terms of the lease or license agreement are "reasonable." Mobilitie has also acknowledged that neither its 75-foot nor its 120-foot poles are suitable in residential areas.

D. PROTECTING THE PUBLIC'S USE OF THE ROW.

Municipalities, like Mobilitie, generally prefer to avoid litigation, where possible. Consequently, it may be in the municipality's interest to work with Mobilitie on siting issues. At the same time, however, the municipality has unquestionable police power authority to regulate use of local ROW in furtherance of its duty to protect the public's use of local ROW. Thus, with regard to siting new poles in the ROW, the municipality may impose reasonable conditions on that use.

The April 16, 2016 memorandum listed some examples of conditions a municipality could place on the placement of very tall poles in the ROW. Those included:

- Permit and registration fees to cover the cost of regulation.
- Bonding and insurance requirements during construction in ROW.
- Fall zone and set back restrictions.
- Siting restrictions based on safety factors:
 - Line of sight restrictions (i.e., prohibit the placement of poles in places where a driver's line of sight may be obstructed).
 - Interference with the provision of municipal police or fire services (e.g., prohibit the placement of the poles within a certain distance of buildings so that the poles do not impede the work of firefighters should the building catch fire).
- Removal requirements for when a pole is no longer serving a permitted use.
- Requirements to comply with all applicable state and local building codes and electric codes.
- Proof of strength requirements (i.e., when equipment is placed on the poles, the company must ensure that the weight of the equipment will not compromise the structural integrity of the pole).
- Height restrictions.

The following conditions could be added to this list:

- Analysis of alternative existing sites in ROW.
- Performance of a roadside hazard analysis.
- Ice shedding and ice throw risk assessment and mitigation measures.
- Environmental analysis at each site.
- Requirements pertaining to tree/vegetation removal.
- Proper refuse disposal.
- Erosion control plan where excavation site or ground disturbance is not restored within 24 hours.
- Compliance with the Wisconsin Manual on Uniform Traffic Control Devices.
- Proper ROW restoration.

CONCLUSION

It is worth emphasizing that the municipality's hands are not tied when it receives a permit application to place large poles in local ROW. The municipality has clear authority to impose reasonable ROW regulations on all companies using the ROW, including Mobilitie. Because the source of Mobilitie's right to use the ROW is unclear and given the company's apparent willingness to work with each community to find mutually agreeable sites both inside and outside the ROW, the municipality may be well advised to work with the company, while at the same time taking the necessary steps to protect the public's use of local ROW.