

Minnesota Public Utilities Commission

Staff Briefing Papers

Meeting Date: November 3, 2016.....**Agenda Item # 4

Company: Mobilitie Management, LLC

Docket No. **P6966/NA-16-607**

In the Matter of the Application of Mobilitie Management LLC for a
Certificate of Authority to Provide Local Niche Services

Issue(s): Should the Commission Grant Mobilitie's Request for a Certificate of Authority
to Provide Local Niche Services?

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Relevant Documents

Initial Filing – Mobilitie Management, LLC,
Application to Provide Local Niche Service July 22, 2016

Letter Minnesota Department of Commerce (DOC) August 4, 2016

Mobilitie Response to DOC Letter. August 18, 2016

DOC Comments..... September 20, 2016

Comments Suburban Rate Authority September 23, 2016

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I. Statement of the Issue

Should the Commission Grant Mobilitie's Request for a Certificate of Authority to Provide Local Niche Services?

II. Background

On July 22, 2016, Mobilitie Management LLC file a request for a Certificate of Authority to provide local niche services.

The applicant, Mobilitie Management, LLC is an affiliate of another carrier, Mobilitie, LLC, which currently holds a certificate of authority to provide local niche services in Minnesota. Mobilitie LLC received its authority in Docket P6636/NA-07-470. In response to numerous calls from Minnesota municipalities, the Department recently sent a letter to Mobilitie, LLC informing the Company that, irrespective of its certification as a local niche carrier, the Company is still subject to municipality ordinances and requirements concerning rights of way. Following the receipt of that letter by Mobilitie, LCC, on August 10, 2016, the DOC and Commission staff met with Company representatives to discuss the Company's position on compliance with municipal right-of-way ordinances. The DOC continues to work with Mobilitie, LLC to reduce confusion on the authority of a municipality to enforce its right-of-way ordinances for a carrier certified by the Commission to operate in Minnesota.

Excerpts from the DOC's August 4th, 2016 letter are provided below:

The Minnesota Department of Commerce (Department) and Minnesota Public Utilities Commission (PUC) have received numerous communications from Minnesota municipalities concerning Mobilitie. The municipalities are indicating that representatives of Mobilitie are claiming that Mobilitie is not subject to right-of-way regulation by the Minnesota municipalities since Mobilitie holds a certificate of authority issued by the Minnesota Public Utilities Commission to provide telecommunications service.

The DOC has consulted with PUC staff and we are aware of nothing in Minnesota statutes or rules that exempts a PUC certificated carrier from the requirements of a local government units concerning rights-of-way. While Mobilitie, LLC holds a certificate of authority to provide local niche service, and the application of Mobilitie Management, LLC is currently pending, this does not give Mobilitie an exemption from the requirements of the local government units. See Minnesota Statute 237.163.

The DOC requests that Mobilitie cease from asserting that PUC authority has exempted it from the regulatory requirements of local government units. If such

communications continue, the DOC will pursue whatever remedies it may have available to it under Minnesota law.

II. Parties' Comments

1. Should the Commission Grant Mobilitie's Request for a Certificate of Authority to Provide Local Niche Services?

DOC: After sending out the August 4th letter and receiving some additional responses from the application, the DOC filed comments on September 20, 2016. The DOC's analysis finds that the Application for Certification complies with the Commission's requirements as indicated on the DOC's checklist. The DOC recommends that the Commission approve the request of Mobilitie Management, LLC to provide local niche services on a statewide basis. Approve the proposed tariff as filed on July 22, 2016 and revised on August 9, 2016. The DOC checklist for the application for certification is attached to the DOC's September 20, 2016 letter.

The DOC is recommending that the Commission approve the Application for Certification. The DOC did acknowledge in its cover letter to its comments that it continues to work with Mobilitie, LLC to reduce confusion on the authority of a municipality to enforce its rights-of-way ordinances with respect to Commission-certificated carriers.

SRA: This application was brought to the SRA's attention due the actions of the applicant's parent or affiliated entity, Mobilitie, LLC ("Mobilitie"). As a company with local niche certification from the Commission, Mobilitie has applied to SRA and other Minnesota cities for right of way ("ROW") placement of poles, towers and other equipment within the ROW. Its representations to certain cities about Mobilitie's rights to the ROW have drawn the attention of the Department. In an August 4, 2016 letter from the Department to Mobilitie, filed in this docket, the Department opined that Mobilitie has no exemption from local government ROW management authority granted under Minn. Stat. § 237.163.

The SRA supports the Department position that Mobilitie has no exemption from municipal authority to manage its ROW. The SRA also has questions about this local niche certification application by Mobilitie Management ("MM"), and the type of entity MM is under Minnesota Statutes chapter 237.

The SRA is aware of no federal preemption under the Telecommunication Act of 1996 or Minnesota law that precludes the ROW management authority granted by the Legislature to Minnesota local government units (cities, counties, townships) ("LGUs") over the various ROW users that seek to provide telecommunication services to end users in an LGU. See, 47 U.S.C. § 253 (c) (7), (e); Minn. Stat. §§ 237.162 and 237.163; Minn. R. ch. 7819. Nor is the SRA aware of any state or federal law that expressly grants ROW access authority to wireless communication providers. Further, the SRA questions what type of chapter 237 telecommunication entities are created by virtue of certification as a "local niche" provider. "Local niche" is not defined or

referenced in Minnesota Statutes, chapter 237, the statute defining all telecommunications entities under the jurisdiction of the Commission.

MM has not specifically defined itself in the context of chapter 237. In its August 18, 2016 letter responding to a DOC inquiry about MM's intent to become a local niche provider, its parent, Mobilitie, explained that MM seeks to provide:

... transport, backhaul, and broadband data and other voice and data services as well as other infrastructure to potential customers including not only wireless carriers, but emergency responders, public safety agencies, backhaul providers, and other telecommunications services providers with the technical capabilities necessary to expand their networks.

Since a local niche service provider means "a telecommunications carrier that provides local niche service" is MM also seeking a certificate to be a telecommunications carrier? Or has MM already been certified as a telecommunications carrier? A "telecommunications carrier" is defined in Minn. Stat. § 237.01, subd. 6 as a company authorized to furnish interexchange telephone service or local telephone service, and no other service. Yet local niche service is defined by Minnesota Rule as "point to point" telecommunications services under Commission jurisdiction that are not local service or interexchange service. Minn. R. 7811.0100, subp. 31. It is unclear to the SRA from these definitions how a local niche provider and telecommunications carrier fit together, given these definitions.

In any case, to come under the jurisdiction of the Commission, a local niche provider must provide telecommunications services to end users and not be merely an equipment provider. Does the applicant need to show that it has end-user commitments to be a provider of local niche telecommunications services to end users, or that it merely hopes to someday? Does MM become a telecommunications carrier by virtue of a local niche certification, or must it show the Commission that MM is such a carrier or other PUC regulated entity before receiving the local niche certification?

While Mobilitie is not the applicant here, the SRA is concerned with the overlap of intended local niche business and apparent ROW access sought by both Mobilitie and MM. Minnesota cities would appreciate clarification regarding the type of entities Mobilitie and MM are under chapter 237 and the basis for that status. This will assist in identifying what rights, if any, they have to place facilities in the public ROW.

Mobilitie: Mobilitie has created Mobilitie Management as a separate venture in order to provide transport, backhaul, and broadband data and other voice and data services as well as other infrastructure to potential customers including not only wireless carriers, but emergency responders, public safety agencies, backhaul providers, and other telecommunications service providers with the technical capabilities necessary to expand their networks. Unlike Mobilitie, Mobilitie Management intends to focus on a broader range of customers in the provision of its services.

In contrast, Mobilitie, LLC (“Mobilitie”) was established to provide small cell, distributed antenna systems, RF transport, and other infrastructure to expand wireless providers’ data networks. In doing so, Mobilitie has established business relationships with several wireless carriers across all fifty states and the District of Columbia in providing such services.

Given the established relationships that Mobilitie currently maintains with its wireless carrier customers, and the expanded portfolio of service offerings to be provided to potential customers through Mobilitie Management, the company’s management determined that it would be able to more effectively deliver its services to its current and potential customers through separate entities. Accordingly, as management established multiple entities to address different business opportunities for the company, having two affiliated entities with local niche authority in Minnesota will provide management with more flexibility in offering its services to customers in the state.

III. Staff Discussion

Technical, Managerial, and Financial Capability to Receive Certification

It is unusual for Commission staff to receive inquiries from cities regarding certificated telecommunications carriers’ use of cities’ rights of way. In this instance, multiple staff, including telecommunications analysts, the telecommunications supervisor, and staff in the Consumer Affairs Office at the Commission have received calls from different cities all stating the same thing: that Mobilitie intends to use a particular city’s rights of way and its Certificate of Authority granted by this Commission somehow alters or impacts the cities’ ability to use its normal application and/or permitting process. In one instance, the supervisor of the telecommunications unit received a call from a city stating that Mobilitie would file a “grievance” with this Commission if the city did not allow the company to use its rights of way in the manner the company chose.

Staff further observes that while the vast majority of applicants for a Certificate of Authority do receive approval by the Commission, applicants are the entities that bear the burden of proof of demonstrating that they possess the managerial, technical, and financial qualifications to operate in the state. Minnesota Rules 7812.0300, subpt. 3B and 3H in particular specifies that the Commission should use the following criteria in deciding whether to grant a certificate of authority:

3B.

the applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service requirements, service quality, customer service, engineering, accounting, and other relevant areas;

3H.

any other factors relevant to determining the applicant's technical, managerial, and financial capability to provide the reasonably adequate services, as described in its petition, consistent with the public interest, including the requirements of this chapter, Minnesota Statutes, section 237.16, and all other applicable laws, rules, and commission orders.

In a 2004 Order, the Commission denied a certificate of authority to an applicant that had not met its burden of proof because the company had not demonstrated it would comply with all applicable state statutes, Commission Rules, and Commission Orders through its filings.¹ At this time in the current docket, the Suburban Rate Authority has filed comments requesting additional clarification; the SRA's comments were filed on September 23, 2016, and the applicant has filed no comments in reply.

In the previous 2004 rejection order, the Commission stated:

A key ingredient of establishing the requisite "management capability" is an applicant's ability to establish credibility and confidence in the accuracy of its filings.²

Whether the applicant has filed a credible and accurate application here is for the Commission to decide. The Commission has several options here. First, if the company appears at the hearing and provides sufficient explanation to the concerns raised, the Commission could approve the application. Second, the Commission could attribute the problems with the cities to the currently certificated Mobilitie affiliate and approve the application here but open a Commission Investigation on the currently certificated affiliate. Third, the Commission could simply find that the applicant has not met its burden of proof and deny the certificate of authority, but without prejudice, so that the applicant could re-apply with a more complete application.

Local Niche Authority

As part of the record in this proceeding, the SRA raised questions and concerns regarding the local niche category of certification. Below is some background to address those concerns.

Minnesota Rule 7812 Telecommunications; Large Local Providers provides for local niche service. Below are the references made to the local niche certification category made in Minn. Rule 7812.

¹ ORDER DENYING APPLICATIONS FOR AUTHORITY, WITHOUT PREJUDICE, Docket Nos. P5957/NA-03-1018, P5957/NA-01-884, Issued January 28, 2004.

² Id at 7.

Minn. Rule 7812.0100 Definitions:

Subp. 31. Local niche service.

"Local niche service" refers to point-to-point connections between end-user locations within a service area and any telecommunications services under the commission's jurisdiction that do not fall within the definition of local service or the definition of interexchange service.

Subp. 32. Local niche service provider.

"Local niche service provider" means a telecommunications carrier that provides local niche service pursuant to a certificate of authority granted by the commission.

Subp. 33. Local Service.

"Local service" means dial tone, access to the public switched network, and any related services provided in conjunction with dial tone and access, including services that may be required under part 7812.0600. Local service does not include local niche service.

Minn. Rule 7812.0200 GENERAL CERTIFICATION REQUIREMENTS:

Subpart 1. Scope.

No person may provide telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota without first obtaining a certificate under this part and parts 7812.0300 to 7812.0600, except to the extent the person is providing telephone service under a certificate issued by the commission before July 28, 1997.

Subp. 2. Certification categories.

A person may seek certification in any of the following four categories:

- A. local facilities-based service;
- B. local resale service;
- C. interexchange service; or
- D. local niche service.

A certificate to provide local facilities-based service authorizes the provision of all forms of local service, interexchange service, and local niche service in Minnesota. A certificate to provide local resale service only authorizes the provision of local resale service. A certificate to provide interexchange service only authorizes the provision of interexchange service. A certificate to provide local niche service only authorizes the provision of local niche service. An applicant may request certification in multiple categories in a single petition.

Minn Rule 7812.0500 LOCAL NICHE SERVICE CERTIFICATION:

80

Subpart 1. Filing requirements.

A petition to provide local niche service, but not local service or interexchange service, must include a description of the petitioner's business organization, experience, and expertise in providing telephone or telecommunications services, including local niche service. The petitioner must also submit a balance sheet indicating its current financial status.

Subp. 2. Decision criteria.

The commission shall apply the criteria identified in part 7812.0300 or 7812.0350 to the extent those criteria are relevant to providing the local niche services the petitioner intends to provide.

With respect to the certification and provision of local niche services, the Commission provided the following analysis in its January 27, 1997 Statement of Need and Reasonableness (SONAR) at pages 18 and 19:

These rules reflect the differences among service offerings by establishing four categories of certification: 1. Local facilities-based service; 2. Local resale service; 3. Interexchange service; and 4. Local niche service. These rules use local niche service as the “catch all” for providers under the Commission’s jurisdiction whose service offerings do not include any of the previous three types of service.

This subpart defines local niche service as point-to-point connection between end-user locations and any telecommunications services under the Commission’s jurisdiction that do not fall within the definitions of local service or interexchange service. Essentially, local niche services are services that are local in character, but do not include the provision of access to the public switched network.

Access to the public switched network is the defining feature of what is commonly understood as local telephone or local exchange service. It allows each subscriber to call all other subscribers by dialing their assigned telephone number. It also permits subscribers to complete 911 emergency calls and obtain directory assistance. Clearly, public switched access carries with it substantial public interest implications. This definition of local niche service provides a category for services that do not implicate the public interest to the same degree as the provision of local service.

The phrase “point-to-point” refers to the provision of “private line service”. The Commission cannot currently identify any other specific service that would fall within the local niche category; however, the rapid evolution of telecommunications technology in an emergingly competitive environment may bring new forms of local niche services to the marketplace. This

definition will allow the Commission to identify and certify appropriately those providers who offer service other than the combination of dial tone and public switched access inherent in traditional local service.

The Department of Public Service (Department) expressed concerns in written comments that this term might be used to expand the Commission's jurisdiction beyond its statutory authority. The Commission does not share this concern. First, the Commission cannot, by rule, expand its own jurisdiction beyond the limits set in statute. Second, this definition expressly limits local niche services to those "under the Commission's jurisdiction.....".

IV. Commission Options

- A. Should the Commission Grant Mobilitie's Request for a Certificate of Authority to Provide Local Niche Services?
 - 1. Approve Mobilitie Management, LLC's Application for a Certificate of Authority.
 - 2. Approve Mobilitie Management, LLC's Application for a Certificate of Authority but direct staff to open an investigation on Mobilitie LLC, which received a Certificate of Authority in Docket P6636/NA-07-470.
 - 3. Reject Mobilitie Management LLC's application without prejudice. The applicant may re-file a new application which includes, but is not limited to, answering the questions raised by the Suburban Rate Authority.