

**COMMENT SOUGHT ON STREAMLINING DEPLOYMENT OF SMALL CELL
INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES;
MOBILITIE, LLC PETITION FOR DECLARATORY RULING**

WT Docket No. 16-421

**COMMENTS OF THE STATE OF MARYLAND
DEPARTMENT OF TRANSPORTATION - STATE HIGHWAY ADMINISTRATION
MARCH 8, 2017**

Introduction and Summary

On behalf of the Maryland Department of Transportation's ("MDOT") State Highway Administration ("SHA"), we appreciate the opportunity to provide comments for the Federal Communications Commission ("FCC") and the Wireless Telecommunications Bureau ("Bureau") in the matter of WT Docket 16-421 and the request of Mobilitie, LCC, for Declaratory Ruling on certain matters as identified in the Mobilitie Petition. SHA believes that the general requests of Mobilitie merit the review of the FCC and through these comments, SHA hopes to provide information for the consideration of the Bureau that clarifies issues from the perspective of a statewide governmental agency that works with utility companies and other telecommunications providers in matters related to highway right-of-way ("ROW") access, shared use of infrastructure, and related fee structures. SHA has adopted practices consistent with Section 253(c) of the Communications Act of 1934 and believe that the charges assessed to any utility for ROW access or re-use of infrastructure are fair and non-discriminatory. Use fees are based upon the real costs associated with the management of ROW access, impact to infrastructure, and maintenance. With respect to open access and disclosure of records as identified by Mobilitie in their Petition, information on use of the ROW and SHA infrastructure is considered to be public information and subject to disclosure in a manner consistent with the

laws of the State of Maryland. Fees charged by SHA have been approved by the State's Board of Public Works ("BPW") and apply uniformly throughout Maryland.

Response to Mobilitie Petition for Declaratory Ruling

In the Petition, Mobilitie asserts three general areas where it seeks assistance from the FCC and Bureau through a Declaratory Petition. The requested areas for which the Petition seeks the Bureau's help include:

1. Fair and reasonable compensation
2. Competitively neutral and non-discriminatory practices
3. Disclosure of information

SHA discusses each issue below and provides information for the Bureau to contribute to the record in this proceeding.

Fair and Reasonable Compensation

SHA has adopted a statewide table of charges ("Table") related to ROW access for controlled access highways and re-use of SHA infrastructure as well as property. The Table was developed independently by the State's Department of Budget and Management ("DBM"). Pursuant to State direction and as reflected within the Table, a portion of every SHA communications tower constructed since 2000 is designed for "shared use" by utility providers in recognition of the important role that wireless carriers provide in support of public safety. SHA supports this State requirement as wireless carriers now deliver many 9-1-1 calls to public safety answering points ("PSAP") throughout Maryland and this potentially lifesaving service is considered to be in the public interest.

The Table is based upon many factors and does vary rates based upon the geographical area of the state in which infrastructure will be used by an applicant. The Table associates rates based upon factors including the cost of land acquisition by the SHA; e.g. purchasing land in an urban or suburban area may be more expensive than rural property. In a state like Maryland where property values vary by population and scenic factors, SHA believes that the Table appropriately associates infrastructure costs with real acquisition and operating costs to government. Stated another way, land costs in our densely populated areas proximate to the Interstate 95 corridor, Chesapeake Bay, and Atlantic Ocean areas are significantly more expensive to acquire than rural parcels and as such, merit a higher use fee. As such, SHA believes that it is inappropriate to assess a single charge for infrastructure throughout a state as costs of acquisition and maintenance vary based upon real world factors. In this regard, Maryland is similar to many other states where land acquisition and operational costs may change dramatically based upon population, traffic density, or geographical attractions.

In addition to land acquisition costs, the State's budget to maintain highways and other infrastructure is based upon traffic volume and use by travelers. In supporting the access to ROW by a utility, highway safety programs must be consistent with Federal Highway Administration regulations and may be administratively more time consuming as coordination may be required with the Maryland State Police and other entities that provide direct traffic safety support for highway workers. Simply stated, it costs more to perform work tasks in a congested and well-traveled area than in rural parts of Maryland. There is a direct correlation between traffic volume and the costs to SHA to maintain, staff, and manage ROW access and infrastructure use. Environment factors, such as salt water spray, may require additional treatment to ensure structural integrity. The complexities of highway maintenance are also

heightened in populated areas when weather events may require the instant mobilization of highway crews. Highway treatments during winter storms not only affect roadways, but ROW issues as well and must be considered in the identification of costs. All of these factors have a direct or indirect impact on ROW management and maintenance which impacts the costs of the SHA in support of safety programs that benefit the travelling public.

Through the Table, every applicant is charged the same rates for ROW access. The Table attempts to capture the real costs associated with the delivery of services and not to generate profits. Notwithstanding the factors that have influenced development of the Table, the State is now in the process of conducting a thorough audit of infrastructure and shared use with wireless providers and others. Through this audit, the Table may be revised in the future; however, compliance with the provisions of Section 253(c) will be maintained. As noted earlier in the Summary, all shared resource guidelines have been approved by the State's BPW. This is a unique body comprised of the State's Governor, Comptroller, and Treasurer. Every major contract or administrative requirement affecting the public passes through the BPW process to ensure compliance with all laws as well as a check to ensure that State funds are being expended appropriately. The resource sharing Table now in effect was approved by the BPW prior to adoption by State agencies.

As a part of the application process, Mobilite also seeks the prompt and efficient resolution of siting and ROW permits. SHA desires to ensure that the record reflects that states and local governments often must comply with numerous federal and other laws or ordinances promulgated by other governmental organizations or authorities. Some regulations, such as those contained in the National Environmental Policy Act¹ ("NEPA") or the National Historical

¹ See 42 USC §55 et seq. <https://www.epa.gov/nepa/what-national-environmental-policy-act>

Preservation Act² (“NHPA”) may impose significant compliance issues on governmental bodies acting on the applications of utility and other companies. In the compliance with laws and regulations affecting ROW and shared use of infrastructure, the application approval timeline may be affected by the mandatory review requirements of other bodies. Issues related to NEPA and the NHPA may require lengthy periods of review that affect the timely processing of applications. To issue a permit, the SHA and other governmental bodies may have compliance issues which result in the expenditure of agency funds to facilitate the process of complying with relevant statutes and regulations.

In recognition that there are facts and circumstances that may not permit SHA to meet mandatory timeframes, we encourage the FCC and the Bureau to not impose strict timeframes upon governments other than a generally implied requirement to use “best efforts” to process applications as quickly as practical. In the alternative, if a strict time limit is to be placed on an entity such as SHA and the processing timeline is affected by a mandatory review from another governmental body, Maryland urges the FCC and Bureau to adopt a process that clearly identifies the time requirements for those matters over which it has control. As an example, if there is an adjunct requirement necessitating that the application processing timeline include review by a federal agency, the time required by that federal agency to review the relevant factors of the application, should not be included within the time constraints for which a state or local government is required to meet. In short, agencies can only be responsible for administrative processing timeframes over which it has control. If an application requires review by another governmental body, the requirement of SHA should be to review the application

² See Public Law 89-665; 54 U.S.C. 300101 et seq.

promptly and then distribute it to agencies having the adjunct responsibility to participate in the review in a timely manner.

SHA believes that the real cost of staffing and related administrative overhead are appropriately borne by applicants as a reasonable expense. Staffing may extend beyond internal administrative resources within central facilitates and District offices. Field resources are often required to conduct visual inspections of areas affected by requested permits. Additionally, future initiatives, such as the “Five Year Highway Plans” typically required by the Federal Highway Administration must be reviewed to minimize issues affecting the immediate plans of an applicant relative to future highway and transportation projects. This is why Maryland suggests that there may be a broad number of issues associated with an application that affects processing time as well as the cost of issuing permits.

SHA believes that it is very important for the FCC and Bureau to understand that while general tables or schedules of fees can be developed and are in fact helpful, they may not incorporate every appropriate cost. What we believe is important is that every applicant be treated fairly, consistently, and in a businesslike as well as non-discriminatory manner while maintaining compliance with all government federal and State policies. What we fear is that utility providers, such as Mobilitie, may be unaware of the total scope of compliance issues affecting organizations such as SHA as well as other problems typical of any organization; e.g. personnel shortages, weather emergencies, and related matters beyond our control.

Finally, in the Petition, Mobilitie seeks that governmental agencies only incorporate into fee structures real and actual costs without what some might call a profit margin. Generally speaking, SHA concurs with this philosophy and makes every attempt to assess fees commensurate with the actual costs of maintaining staff and agency infrastructure necessary to

issue such permits. However, through the use of a standardized table of fees, there may be variations in the amount of time and effort that goes into the review process. To process applications strictly on what one might identify as a “time and material” process obviates the standardization and predictability of the fee Table as established by Maryland. As such, Mobilitie’s call to charge only the fees actually associated with an application may result in the opposite of what they desire; rate standardization and predictability. It is this latter process that ensures the kind of non-discrimination required under Section 253(c).

Competitively Neutral and Non-discriminatory

Another issue of concern to Mobilitie relates to the provisions of Section 253(c) that require competitively neutral and non-discriminatory business practices. SHA does not disagree with the goal advocated by Mobilitie and as previously stated, Maryland recognizes the importance of supporting the development of wireless broadband and other communications services that are becoming increasingly important to the country and operate in the public interest. Throughout Maryland, SHA operates using standard procedures that have been developed from the recommendations of the American Association of State Highway and Transportation Officials (“AASHTO”) and the Federal Highway Administration. The recommendations and requirements of these bodies typically are the basis for SHA operating practices. Statewide procedures are developed within SHA Headquarters and disseminated to District Offices to ensure compliance with policy.

To obtain a utility permit in Maryland, there are certain steps that must be followed by any applicant to comply with State law. These requirements apply to all applicants and as such are non-discriminatory. Mobilitie, as an example, has complied with Maryland law and is

considered to be an eligible utility provider which may apply for ROW access and the shared use of resources. In the event that an applicant is denied eligibility status, there are multiple appeal routes within SHA. As stated by Governor Larry Hogan, Maryland is “open for business” and SHA will work with an applicant to ensure that they meet all statutory requirements to become eligible as a recognized provider of utility services and as such, are eligible to apply for ROW operating permits and potential resource sharing. It is in the public interest for SHA and utility providers to have a large body of qualified contractors which may provide services for carriers and our citizens at competitive rates.

SHA is unaware of any policies or practices that have a discriminatory effect on applicants to become eligible as a utility or in the issuance of permits or for the shared use of resources. As stated in this response, our fee structure is defined based upon the services requested, the area in which services are needed, and the impact to SHA operations. The fee structure is standardized on a statewide basis and does not vary absent some unusual circumstances unique to an applicant’s request. The fees assessed by SHA have been developed by a neutral State organization, DBM and approved by the BPW which meets in public. Ample sunshine and transparency are involved in these processes.

Disclosure of Information

SHA has reviewed the filing of Mobilitie and does not support practices that exclude relevant information from public access. Our State’s Freedom of Information Act (“FOIA”) provides access to virtually all information associated with a ROW request or related Resource Sharing Agreement. Only proprietary or other information excluded from disclosure consistent with FOIA would be kept from an applicant. SHA believes that any excluded information would

represent an extremely small amount of information and fall more into the “never say never” category that recognizes unanticipated and unique circumstances may arise in the process of issuing permits or entering into Resource Sharing Agreements. The vast majority of information associated with rates charged is consistent with the fee table developed independently by DBM and approved by the BPW.

In terms of further disclosure, utility applicants may access information on all State highways through the SHA web site. This site identifies the classification of highways, such as controlled or secondary, through every part of Maryland. The classification system is also a factor in the establishment of access fees. This public information is the first step in a utility’s quest for knowledge relative to the costs associated with a potential application.

For SHA communications towers found throughout Maryland and subject to resource sharing, almost every structure is above 200’ in height and as such, is publically available to anyone through the FCC’s ASR database. Towers are easily identifiable from public highways and a potential user would not be challenged to visit the structure and conduct an initial assessment of load and potentially available space. Once a potential tower is identified for which an applicant may wish to install antenna(s), there is a committee of State agency personnel who review applications and make every effort to support carriers. The Committee, which opens meetings to applicants, assesses standard factors such as space availability, impact to structural capacity, interference to other users, and related matters that affect the soundness of the structure and integrity of other electronics operating from the tower. All members of the Committee understand the importance of shared access as a matter of State policy and applicants are encouraged to investigate the use of these resources.

Although comparatively rare, SHA will consider the request of an applicant, such as Mobilitie, to construct a tower on State property. Again, this is a matter that would be facilitated through the development of a shared resource Agreement and require review by the BPW before an application could be approved. In addition to SHA, other State agencies have entered into Agreements to permit the construction of towers on real estate owned by Maryland.

Again, SHA understands the importance of supporting commercial carriers, including those advocating 5G and “small cell” technologies. Existing, as well as new and emerging technologies, benefit our citizens and SHA desires to support their operations while maintaining our responsibility to the State public safety users for which the towers were originally constructed and most importantly, our citizens.

Conclusion

SHA believes that operating practices regarding the issuance of ROW access and shared use of infrastructure are consistent with Section 253(c) of the Communications Act and we believe that entities emulating our statewide processes would obviate many of the concerns expressed by Mobilitie in their Petition. Maryland employs a standard Table of fees that was independently developed and approved by our BPW. Operating practices are consistently applied on a statewide basis and encourage the participation of all utility companies and contractors. Finally, the records maintained by SHA relative to the issuance of ROW and shared resource access are subject to FOIA and available to interested parties.