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SFA BILL ANALYSIS

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Senate Bill 880 (Substitute S-4 as passed by the Senate)
Senate Bill 999 (Substitute S-2 as passed by the Senate)
Sponsor: Senator John J. H. Schwarz, M.D. (Senate Bill 880)
Senator Valde Garcia (Senate Bill 999)
Committee: Technology and Energy

Date Completed: 2-26-02

CONTENT

Senate Bill 880 (S-4) would create the "Metropolitan Extension Telecommunications Rights-of-Way Oversight Act" to do the following:

-- Create the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority, and give it the exclusive power to assess fees on telecommunication providers owning telecommunication facilities in public rights-of-way within a metropolitan area.
-- Require a provider to obtain a permit from a municipality for access to its public rights-of-way, pay the municipality a one-time $500 administrative fee, and submit route maps; and require municipalities to grant permits.
-- Require a telecommunication provider to pay to the Authority an annual maintenance fee per linear foot of public right-of-way occupied by the provider's facilities, which would be two cents per foot in the first year and five cents per foot in subsequent years, or one cent per linear foot for a provider providing cable services within a metropolitan area; and allow a cable provider to satisfy the fee requirement based on aggregate investment in Internet broadband facilities in Michigan since January 1, 1996.
-- Extend the permit and permit fee requirements to a provider asserting rights under Public Act 129 of 1883.
-- Require the maintenance fee revenue to be distributed to municipalities in metropolitan areas.
-- Require municipalities, in order to receive fee-sharing payments, to comply with the bill and modify fees to the amount permitted under the bill.
-- Allow providers to take a credit for the maintenance fee against their utility property tax (pursuant to Senate Bill 999 (S-2)).
-- Discount the maintenance fees of providers implementing a shared use arrangement.
-- Allow the Authority to waive the fee for facilities in underserved areas.
-- Make exceptions to the fee requirements for educational institutions, electric and gas utilities, counties, municipalities, and municipally owned utilities.
-- Require providers to return rights-of-way to their original condition.
-- Specify remedies and penalties the Public Service Commission (PSC) could order for violations of the bill.

Senate Bill 999 (S-2) would amend Public Act 282 of 1905, which provides for the assessment and taxation of the property of telephone, telegraph, and railroad companies, to allow a credit against the tax for expenditures for certain information-carrying equipment; and a separate credit for annual maintenance fees paid pursuant to Senate Bill 880 (S-4).

The bills are tie-barred to each other. Senate Bill 880 (S-4) also is tie-barred to Senate Bill 881, and would take effect on August 1, 2002. (Senate Bill 881 would create the "Michigan

Broadband Development Authority Act", and allow the Authority to make loans and enter into joint ventures and partnership arrangements for the development and operation of broadband infrastructure.)

Senate Bill 880 (S-4)

Definitions

"Public right-of-way" would mean the area on, below, or above a public roadway, highway, street, alley, easement, or waterway. The term would not include a Federal, State, or private right-of-way.

"Metropolitan area" would mean one or more municipalities located, in whole or in part, within a county having a population of 10,000 or more or a municipality that enacted an ordinance or resolution electing to be classified as part of a metropolitan area under the bill. "Municipality" would mean a township, city, or village.

The bill would define "telecommunications facilities" or "facilities" as the equipment or personal property, such as copper and fiber cables, lines, wires, switches, conduits, pipes, and sheaths, that are used to or can generate, receive, transmit, carry, amplify, or provide telecommunication services or signals. The term would not include antennas, supporting structures for antennas, equipment shelters or houses, or any other ancillary equipment and miscellaneous hardware used to provide Federally licensed commercial mobile service (as defined in Federal law), or service provided by any wireless, two-way communications device.

The bill would incorporate the definition of "provider" and "telecommunication provider" in the Michigan Telecommunications Act (MTA), i.e., "a person or an affiliate of the person each of which for compensation provides 1 or more telecommunication services". For purposes of the bill, "provider" also would include a cable television operator providing a telecommunication service, a person who owned telecommunication facilities located within a public right-of-way (except as otherwise provided by the bill), and a person providing broadband Internet transport access service. The terms would not include a provider or services of any Federally licensed commercial mobile radio service, as defined in Federal law, or service provided by any wireless, two-way communication device.

Authority

The bill would create the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority pursuant to Article VII, Section 27 of the State Constitution. (That section authorizes the Legislature to establish in metropolitan areas additional forms of government or authorities with powers, duties, and jurisdictions as provided by the Legislature.) The Authority would be an autonomous agency within the Department of Consumer and Industry Services (DCIS).

The Authority would have to coordinate public right-of-way matters with municipalities and assess the fees required under the bill. The Authority would have the exclusive power to assess fees on telecommunication providers owning telecommunication facilities in public rights-of-way within a metropolitan area to recover the costs of using the rights-of-way.

The Director of the Authority would have to be appointed by the Governor for a four-year term, and report directly to the Governor. The Director would be responsible for carrying out the powers and duties of the Authority. The DCIS would have to provide the Authority all budget, procurement, and management-related functions, as well as suitable offices, facilities, equipment, staff, and supplies in Lansing.

The Authority would have to file an annual report of its activities for the preceding year with the Governor and the Legislature by March 1 of each year.

Permit Requirement; Administrative Fee

A provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities would have to obtain a permit under the bill from the municipality and pay all fees required under the bill. Authorizations or permits previously obtained from a municipality under Section 251 of the MTA would satisfy this permit requirement. (Section 251, which the bill would repeal, requires local units of government to grant permits for access to and the ongoing use of all rights-of-way, easements, and public places under the local units' control and jurisdiction to providers of telecommunication services.)

Except as otherwise provided in the bill, a provider would have to file an application for a permit and pay a one-time $500 administrative fee to each municipality whose boundaries included public rights-of-way for which the provider sought access or use. An application also would have to include route maps showing the location of the provider's existing and proposed facilities, as required by the Authority. Except as otherwise provided by a mandatory protective order issued by the PSC, the Freedom of Information Act would not apply to information included in the route maps that was a trade secret, proprietary, or confidential information.

A provider asserting rights under Public Act 129 of 1883 would be subject to the proposed permit and fee requirements. (The 1883 Act provides for the incorporation of telephone companies and authorizes the construction of lines along, under, over, or across any public places, streets, and highways in the State.) Within 180 days from the bill's effective date, a provider with facilities located in a public right-of-way as of that date that had not previously obtained authorization or a permit under Section 251 of the MTA would have to submit an application for a permit to each municipality in which the provider had facilities located in a public right-of-way. The provider would not be required to pay the one-time administrative fee. For good cause, the Authority could allow a provider up to an additional 180 days to submit the required application.

Except as otherwise provided in the bill, after its effective date, a metropolitan area could not enact, maintain, or enforce an ordinance, local law, or other legal requirement applicable to telecommunication providers that was inconsistent with the bill or that assessed fees or required other consideration for access to or use of the public rights-of-way in addition to the fees required under the bill.

For applications and permits issued after the bill's effective date, the PSC would have to prescribe the form and application process to be used in applying to a municipality for a permit and the provisions of a permit issued. The initial application forms and, unless agreed to by the parties, permit provisions would have to be those approved by the PSC as of August 16, 2001.

If the parties could not agree on the requirement of additional information requested by a municipality or the use of additional or different permit terms, either the municipality or the provider would have to notify the PSC. The Commission would have to appoint a mediator to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. The PSC could order that the permit be temporarily granted pending resolution. If any of the parties were unwilling to comply with the mediator's recommendations, any party to the dispute, within 30 days of receiving the recommendations, could request the PSC for a review and determination of the dispute. Except as provided below for emergency relief, the PSC's determination would have to be issued within 60 days from the date of the request. The interested parties to the dispute could agree to extend this 60-day requirement for up to 30 days.

A request for emergency relief would have the same time requirements as under Section 203(2) of the MTA. (Under that section, a complainant may request an emergency relief order if the complaint alleges facts that warrant emergency relief. The PSC must allow five business days for filing in response to the request, and must determine whether to deny the request or conduct an initial evidentiary hearing. The hearing must be held within five business days from the date of the notice of the hearing. If the PSC finds that extraordinary circumstances warrant expedited review before it issues a final order, the Commission must schedule the issuance of a partial final order as to all or part of the issues for which emergency relief was granted within 90 days of issuing the emergency relief order.)

A municipality would have to notify the PSC when it issued a permit, and include the date on which the application was filed and the date the permit was granted. The Commission would have to maintain on its website a listing showing the length of time required by each municipality to grant an application during the preceding three years.

Maintenance Fee

Fee Requirement. A provider would have to pay an annual maintenance fee to the Authority, except as otherwise provided in the bill. The Authority would have to determine for each provider the amount of fees required.

The Authority could prescribe the annual period covered by each assessment, the due date for payment, and the schedule for the allocation and disbursement of the fees. The Authority would have to disburse the maintenance fees to each municipality as provided under the bill, by the last day of the month following the month the Authority received the fees. The Authority could authorize the Department of Treasury to collect and make the required allocations and disbursements.

Within 180 days of the bill's effective date, each provider would have to pay to the Authority an initial annual maintenance fee of two cents per linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area. If the bill's effective date resulted in less than an entire year of coverage for the initial fee, the fee would have to be prorated for that year. For each year after the initial fee was paid, a provider would have to pay an annual maintenance fee of five cents per linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area.

The fee would be based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities using the public right-of-way. The fee required for any provider could not exceed the per access line cost of the provider with the highest number of access lines in the State.

The Authority could prescribe the forms, standards, methodology, and procedures for assessing fees under the bill. Each provider and municipality would have to provide reasonably requested information regarding public rights-of-way that was required to assist the Authority in computing and issuing the maintenance fee assessments.

Estimate and True Up. If a provider asserting rights under Public Act 129 of 1883 were granted additional time to submit a permit application (beyond the 180-day requirement), the provider, within the 180 days, in consultation with Authority staff, would have to make a good faith estimate of the number of linear feet of rights-of-way in which the provider's facilities were located in a metropolitan area, and would have to pay an annual maintenance fee based upon the estimate. Within 360 days of the bill's effective date, the provider would have to true up the estimated amount of linear feet to the actual amount. If the actual amount of linear feet of rights-of-way exceeded the estimate, the provider would have to pay the difference to the Authority within 30 days of the true up. If the actual amount of linear feet were less than the estimated amount, the Authority would have to give the provider a corresponding credit against the annual maintenance fee due for payment in the following year.

Cable Provider. If a provider possessed a franchise or were operating with the consent of a municipality to provide, and were providing cable services within a metropolitan area, the provider would be subject to an annual maintenance fee of one cent per linear foot of public right-of-way occupied by the provider's facilities within the metropolitan area. An affiliate of such a provider would not have to pay any additional fees to occupy or use the same facilities in public rights-of-way as initially constructed for and used by a cable provider. This fee would be in lieu of any other maintenance fee or other fee except for fees paid by the provider under a cable franchise or consent agreement. If a cable franchise or consent agreement from a municipality allowed the municipality to seek right-of-way-related information comparable to that required by a permit under the bill, and provided insurance for right-of-way-related activities, the cable franchise or consent agreement would satisfy any requirement for the holder of the franchise or agreement or its affiliates to obtain a permit to provide information services or telecommunications services in the municipality.

A cable provider could satisfy this fee requirement by certifying to the Authority that the provider's aggregate investment in the State, since January 1, 1996, in facilities capable of providing broadband Internet transport access service, equaled or exceeded the aggregate amount of the maintenance fees assessed under the bill. ("Broadband internet transport access services" would mean the broadband transmission of data between an end-user and the end-user's Internet service provider's point of interconnection at a speed of 200 or more kilobits per second to the end-user's premises.)

The bill states that it would not affect the requirement of a cable operator to obtain a

cable franchise from cities, villages, and townships.

Underserved Areas. The Authority could grant a provider a waiver of the maintenance fee requirement for telecommunication facilities located in underserved areas as identified by the Authority, if two-thirds of the affected municipalities approved the granting of the waiver. If a waiver were granted, the amount of the waived fees would have to be deducted from the fee revenue that the affected municipalities otherwise would be entitled to under the bill. A waiver could not be for more than 10 years. ("Underserved area" would mean a municipality in which less than 50% of the households had access to a broadband Internet transport access service.)

Shared Use Discount. If two or more providers implemented a shared use arrangement and met the bill's requirements, each provider participating in the arrangement would be entitled to a discount against the maintenance fees.

To qualify for the discount, each participating provider would have to occupy and use the same vertical space on poles, trenches, conduits, ducts, or other common spaces or physical facilities jointly with another provider. Each provider also would have to coordinate the construction or installation of its facilities with the construction schedules of another provider so that any pavement cuts, excavation, construction, or other activities undertaken to construct or install facilities occurred contemporaneously and did not impair the physical condition, or interrupt the normal uses, of the public rights-of-way on more than one occasion. In addition, each participating provider would have to enter the shared use arrangement after the bill's effective date.

Two or more providers that qualified for a shared use discount would be entitled to a 40% discount of the maintenance fees for each linear foot of public right-of-ways in which the shared use occurred.

These provisions would not apply to the use or attachment to poles, trenches, conduits, ducts, or other common facilities made before the bill's effective date.

Tax Credit

A provider could apply to the PSC for a determination of the maximum amount of the maintenance fee credit available under Public Act 282 of 1905 against the provider's utility property tax (pursuant to Senate Bill 999 (S-2)). Each application would have to include sufficient documentation to permit the PSC to determine the allowable credit accurately. Unless the PSC found that it could not make a determination, it would have to issue its determination within 60 days from the date of the application. A provider would qualify for a credit equal to the costs paid under the bill and would not be subject to the bill's maximum credit limit (described below) if the provider filed, and the PSC certified, the following documentation:

-- Verification of the costs paid by the provider under the bill.
-- Verification that the provider's rates and charges for basic local exchange service, including revenues from intrastate subscriber line or end-user line charges, did not exceed the PSC's approved rates and charges for those services.

If the PSC found that it could not make a determination based on the provider's documentation, it could require the provider to file its application under Section 203 of the MTA. (Under that section, upon receiving an application or complaint filed under the MTA, or on its own motion, the PSC may conduct an investigation, hold hearings, and issue its findings and order under the contested case provisions of the Administrative Procedures Act.)

The maximum credit allowed (except as provided above) would be the lesser of 1) the costs paid under the bill, or 2) the amount that those costs, together with the provider's total service long run incremental cost of basic local exchange service, exceeded the provider's rates for basic local exchange service plus any additional charges of the provider used to recover its total service long run incremental cost for basic local exchange service. ("Total service long run incremental cost" would mean that term as defined in the MTA.)

The bill specifies that the tax credit would be the sole method of recovery for the costs required under the proposed Act. A provider could not recover the costs through rates and charges to the end-users for

telecommunication services.

Maintenance Fee Allocation; Fee Sharing

Allocation. The Authority would have to allocate the annual maintenance fees collected under the bill to fund the fee-sharing mechanism described in Section 11 of the bill, except as reduced by the amount provided for below.

To the extent that fees over $30 million in any year were from fees for linear feet of rights-of-way in which a provider constructed telecommunication facilities after the bill's effective date, the Authority would have to allocate that amount to fund the fee-sharing mechanism described in Section 12 of the bill.

Eligibility. To be eligible to receive fee-sharing payments, a municipality would have to comply with the bill. For this purpose, a municipality would be considered to be in compliance unless the Oversight Authority found to the contrary in a proceeding against the municipality affording due process, initiated by a provider, the PSC, or the Attorney General. If a municipality were found out of compliance, the Authority would have to hold fee-sharing payments in escrow until the municipality returned to compliance. A municipality would not be ineligible for fee-sharing payments for any matter found to be a good faith dispute or matters of first impression under the bill or other applicable law.

As described below, the bill proposes fee-sharing eligibility requirements, including a requirement that municipalities modify their existing fees. Municipalities that were ineligible (except as provided in eligibility requirements) would have to be excluded from the computation, allocation, and distribution of funding under Sections 11 and 12.

Use of Payments. A municipality would have to use the amount received under Sections 11 and 12 solely for purposes related to rights-of-way. These purposes would not include constructing or using telecommunication facilities to serve residential or commercial customers. Each municipality receiving fee-sharing payments would have to file an annual report with the Authority on the use and disposition of the funds.

Section 11 Fee-Sharing. The Authority would have to allocate the funding provided for fee-sharing (subject to the reduction for the Section 12 allocation) as follows:

-- 75% to cities and villages in a metropolitan area on the basis of the distribution to each city or village under Public Act 51 of 1951 (the Michigan Transportation Fund law) for the most recent year as a proportion of the total distribution to all cities and villages located in metropolitan areas under that Act for the most recent year.
-- 25% to townships on the basis of each township's proportionate share of the total linear feet of public rights-of-way occupied by providers within all townships located in metropolitan areas.

Section 12 Fee-Sharing. The fees exceeding $30 million in a year from linear feet of rights-of-way in which facilities were constructed after the bill's effective date, would have to be allocated as described below.

The amount available under this section multiplied by the percentage of weighted linear feet attributable to cities and villages, as compared with the total weighted linear feet attributable to cities, villages, and townships, would have to be disbursed to cities and villages in a metropolitan area on the basis of the distribution to each city or village under Public Act 51 of 1951, for the most recent year as a proportion of the total distribution to all cities and villages located in metropolitan areas under that Act for the most recent year.

The amount available under this section multiplied by the percentage of weighted linear feet attributable to townships, as compared with the total weighted linear feet attributable to cities, villages, and townships, would have to be disbursed to townships on the basis of each township's proportionate share of the total unweighted linear feet of public rights-of-way in or on which providers' facilities were located within all townships located in metropolitan areas.

The following would have to be used in determining the weighted linear feet in which telecommunication facilities were first placed by any telecommunication provider after the bill's effective date:

-- All underground linear feet would receive a weight of 3.0.

-- All linear feet in a city, village, or township with a population over 5,000, that were not underground linear feet, would receive a weight of 2.0.
-- All other linear feet would receive a weight of 1.0.

Fee Modification Requirement

A municipality would be eligible to receive fee-sharing payments if, by December 31, 2002, to the extent necessary, it had modified any fees charged to providers after the bill's effective date relating to access to and usage of the public rights-of-way. The modified amount could not exceed the maintenance fee amounts required under the bill. To the extent a telecommunication provider paid fees to a municipality under a contract not modified as required, both of the following would apply:

-- The provider could deduct the fees paid under that contract from the maintenance fee required to be paid for the rights-of-way covered by the contract.
-- The amounts received under the contract would be deducted from the fee-sharing amounts the municipality was eligible to receive.

The Authority could allow a municipality in violation of the fee modification requirement to become eligible for fee-sharing payments if the Authority determined that the violation occurred despite good faith efforts, and the municipality rebated to the Authority any excess fees received, including any interest as determined by the Authority.

A municipality would be considered to have modified its fees if it had adopted a resolution or ordinance, effective no later than January 1, 2004, approving the modification, so that providers with telecommunication facilities in public rights-of-way within the municipality's boundaries paid only those fees required under the bill. The municipality would have to give each affected provider a copy of the resolution or ordinance.

To be eligible for fee-sharing payments, a municipality could not hold a cable television operator in default or seek any remedy for failure to satisfy an obligation, if any, to pay after the bill's effective date a franchise fee or other similar fee on that portion of gross revenue from charges the cable operator received for cable modem services provided through broadband Internet transport access services.

Except as otherwise provided by a municipality, if the section of the bill requiring maintenance fees (Section 8) were found to be invalid or unconstitutional, a modification of fees under these provisions would be void from the date the modification was made.

Additional Eligibility Requirements

A county, a municipality, or an affiliate would have to comply with the following requirements, except as provided below for telecommunication facilities constructed and operated, or owned and operated, by a county, a municipality, or affiliate.

A county or municipality would have to conduct at least one public hearing before passing any ordinance or resolution authorizing the county or municipality either to construct telecommunication facilities or to provide a telecommunication or cable modem service provided through a broadband Internet service. Notice of the public hearing would have to be given as provided by law. At least 30 days before the hearing, the county or municipality would have to prepare reasonable projections of at least a three-year cost-benefit analysis. This analysis would have to identify and disclose the total projected direct costs of, and the revenues to be derived from, constructing the facilities and providing the service. The costs would have to be determined by use of accounting standards developed under the Uniform Budgeting and Accounting Act.

A county or municipality would have to prepare and maintain records in accordance with those accounting standards. These records would be subject to the Freedom of Information Act.

Charges for telecommunication service and cable modem services provided through a broadband Internet service would have to include costs attributable to the provision of the service that would be eliminated if it were discontinued and the proportionate share of costs identified with the provision of two or more county or municipal services including telecommunication services.

A county or municipality could not use its

status as a county or municipality to establish a rate for telecommunication service or cable modem service provided through a broadband Internet service that created undue discrimination against the rates established by another telecommunication provider for the same service. In providing the service, the municipality could not employ terms more favorable or less burdensome than those it imposed upon other providers of the same service within its jurisdiction concerning access to public rights-of-way, or access to and rates for pole attachments.

A municipality could not impose or enforce against a provider any local regulation with respect to public rights-of-way that did not also apply to the municipality in its provision of a telecommunication or cable modem service provided through a broadband service.

These additional eligibility requirements would not apply to either of the following:

-- Telecommunication facilities constructed and operated by a county or municipality, or an affiliate, to provide telecommunication services or a cable modem service through a broadband Internet service that was not provided to any residential or commercial premises.
-- Telecommunication facilities owned or operated by a county or municipality, or an affiliate for compensation, that were located within the territory served by the county or municipality or its affiliate that provided a telecommunication service or a cable modem service through broadband Internet service before December 31, 2001, or that allowed any third party to use the county's or municipality's telecommunication facilities for compensation before that date to provide such a service.

If a complaint alleging a violation of these provisions were filed under the bill, the PSC would have to allow a county or municipality to take reasonable steps to correct a violation found by the Commission before it imposed any penalties. In determining whether the charges imposed by a county or municipality were in compliance with the additional eligibility requirements, the PSC could consider the applicable Federal, State, county, and local taxes and fees paid by the complainant or providers serving that county or municipality.

Right-of-Way Permit

Upon application, a municipality would have to grant to providers a permit for access to and the ongoing use of all public rights-of-way located within its municipal boundaries, except as provided below. A municipality would have to act reasonably and promptly on all applications filed for a permit involving an easement or public place.

The bill specifies that these requirements would not limit a municipality's right to review and approve a provider's access to and ongoing use of a public right-of-way, or limit the municipality's authority to ensure and protect the health, safety, and welfare of the public.

A municipality would have to approve or deny access within 45 days from the date a provider filed an application for a permit. A municipality could not unreasonably deny a provider's access to and use of a public right-of-way. A municipality could require as a condition of the permit that a provider post a bond, which could not exceed the reasonable cost to ensure that the public right-of-way was returned to its original condition during and after the provider's access and use. Any conditions of a permit would have to be limited to the provider's access and use of any public right-of-way.

(The bill would repeal sections of the MTA that are similar to the provisions described above (MCL 484.2251-484.2254). Currently, however, a local unit must approve or deny access within 90 days after a provider files an application for a permit for access to a right-of-way, easement, or public place. Also, the MTA specifies that fees or assessments must be on a nondiscriminatory basis and may not exceed the fixed and variable costs to the local unit in granting a permit and maintaining the right-of-way, easement, or public places used by a provider.)

A provider undertaking an excavation or constructing or installing facilities within a public right-of-way or temporarily obstructing a public right-of-way, as authorized by the permit, promptly would have to repair all damage done to the street surface and all installations on, over, below, or within the right-of-way and restore it to its preexisting condition.

Exemptions

Educational Institutions. An educational institution would not be required to pay the fees and charges required by the bill for facilities that were constructed and provided under applicable provisions of Section 307 of the MTA. To the extent that an educational institution provided services beyond those allowed by Section 307, the institution would have to pay the required fees and charges for each linear foot of public right-of-way used in providing telecommunication services to residential or commercial customers. An educational institution would have to notify the PSC if it provided telecommunication services beyond those allowed by Section 307 to a residential or commercial customer for compensation.

(Section 307 authorizes educational institutions to own, construct, and operate a telecommunication system or to purchase telecommunication services or facilities. As a rule, educational institutions may sell only those telecommunication services that are required for, or useful in, the instruction and training of students and other people using the institution's educational services, the conducting of research, or the operation of the institution.)

Electric and Gas Utilities. An electric or gas utility, an affiliate of a utility, or an electric transmission provider would not be required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements under the bill for facilities located in the public rights-of-way that were used solely for electric or gas utility services, including internal utility communications and customer services such as billing or load management. The utility, affiliate, or provider would have to obtain a permit, pay the fees and charges, and fulfill the mapping requirements only for each linear foot of public right-of-way containing facilities leased or otherwise provided to an unaffiliated telecommunication provider, or used in providing telecommunication services to a person other than the utility, or its affiliate, for compensation.

An electric or gas utility, an affiliate of a utility, or an electric transmission provider would have to notify the PSC if it provided or leased telecommunication services to a person other than the utility, affiliate, or provider for compensation.

For purposes of these provisions, electric and gas utility services would include billing and metering services performed for an alternative electric supplier, alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or water utility.

Municipalities. A county, municipality, municipally owned utility, or an affiliate would not be required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements under the bill for facilities located in the public rights-of-way that were used solely for county, municipality, or governmental entity, or utility services, including internal communications and customer services such as billing or load management. The county, municipality, municipally owned utility, or affiliate would have to obtain a permit, pay the fees and charges, and fulfill the mapping requirements only for each linear foot of public right-of-way containing facilities leased or otherwise provided to an unaffiliated telecommunication provider, or used in providing telecommunication services to a person other than the county, another governmental entity, municipality, municipally owned utility, or its affiliate, for compensation.

A county, municipality, municipally owned utility, or affiliate would have to notify the PSC if it provided or leased telecommunication services to a person other than the municipality, municipally owned utility, or affiliate for compensation.

For purposes of these provisions, utility services would include billing and metering services performed for an alternative electric supplier, alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or water utility.

Complaints; Remedies & Penalties

Except as otherwise provided by the bill, the procedures governing a complaint proceeding under the bill would be the same as those under Section 203 of the MTA.

If the PSC found, after notice and hearing, that a person had violated the bill, the Commission would have to order remedies and penalties to protect and make whole persons who had suffered an economic loss as a result of the violation, including one or more of the following:

-- For failure to pay an undisputed fee assessed by the Authority, the PSC could order the provider to pay a maximum fine of 1% of the amount of the unpaid assessment for each day that it remained unpaid. For each subsequent offense, the PSC could order a maximum fine of 2% for each day the assessment remained unpaid.
-- The PSC could order a violator to pay a fine of between $200 and $20,000 per day that the person was in violation. For each subsequent offense, the PSC could impose a fine of $500 to $40,000 per day that the person was in violation.
-- If the person were a provider, the PSC could order that the provider's permit allowing access to and use of a municipality's public right-of-way be conditioned or amended.
-- The PSC could issue cease and desist orders.
-- The PSC could order a violator to pay attorney fees and actual costs of a person who was not a provider of telecommunication services to 250,000 or more end-users.

For a violation of the fee-sharing eligibility requirements (other than those pertaining to fee modification), the PSC could order the suspension or termination of all or part of the fee-sharing payments to the municipality provided for under Section 11 or 12.

Mediation

If a provider and one or more municipalities were unable to agree on arrangements for coordinating activities and minimizing the disruption of public rights-of-way, ensuring the efficient construction of facilities, restoring the public rights-of-way after construction or other activities by a provider, protecting the public health, safety, and welfare, and resolving disputes arising under the bill, the PSC would have to appoint a mediator to make recommendations for a resolution of the dispute. If any of the parties were unwilling to comply with the mediator's recommendations, any party to the dispute could, within 30 days of receiving the recommendations, request the PSC for a review and determination of a resolution of the dispute. The PSC's determination would have to be issued within 60 days from the date of the request. The interested parties could agree to extend the 60-day requirement for up to 30 days.

Invalidity; Permit Process

If the application of any provision of Section 8 (which would require maintenance fees) to a certain person were found to be invalid or unconstitutional, that provision and Sections 3 and 15 would not apply to any person. (Section 3 would establish the Oversight Authority. Section 15 would require municipalities to grant providers a permit for access to and use of public rights-of-way.)

If Section 15 did not apply due to this provision, the permit process would be as described below. Further, the bill states that if Section 15 did not apply, it would be the intent of the Legislature to return to the status quo before the bill's effective date for the granting of permits for access to and the use of all rights-of-way. The following provisions would have the same construction and interpretation as Sections 251 through 254 of the MTA had before they were repealed by the bill.

A local unit of government would have to grant a permit for access to and the ongoing use of all rights-of-way, easements, and public places under its control and jurisdiction to providers of telecommunication services. A local unit would have to approve or deny access within 90 days from the date a provider applied for a permit for access to a right-of-way, easement, or public place. A local unit could not unreasonably deny a provider's right to access to and use of a right-of-way, easement, or public place. A local unit could require the provider to post a bond as a condition of the permit to ensure that the right-of-way, easement, or public place was returned to its original condition during and after the provider's access and use.

Any fees or assessments made under these provisions would have to be on a nondiscriminatory basis and could not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-way, easements, or public places used by a provider.

A provider using the highways, streets, alleys, or other public places would have to obtain a permit as required under these provisions.

The bill specifies that this section of the proposed Act (Section 19) would not limit a

local unit's right to review and approve a provider's access to and ongoing use of a right-of-way, easement, or public place or limit the local unit's authority to ensure and protect the health, safety, and welfare of the public.

Other Provisions

Audit. The bill specifies that the fees collected under the proposed Act could be used only as provided by the Act and would be subject to a State audit by the Auditor General.

Existing Rights. The bill states that it would not affect any existing rights that a provider or municipality could have under a permit issued by a municipality or contract between the municipality and the provider related to the use of the public rights-of-way.

Route Maps. Within 90 days after the substantial completion of construction of new facilities in a municipality, a provider would have to submit route maps showing the location of the telecommunication facilities to both the PSC and the affected municipalities. After receiving input from providers and municipalities, the PSC would have to require that route maps (submitted with an application or upon substantial completion) be in a paper or electronic format as prescribed by the Commission.

Appellate Review. A decision or assessment of the Authority would be subject to a de novo (new) review by the PSC upon the request of an interested person. A decision or order of the PSC issued under the bill would be subject to review as provided in Section 26 of Public Act 300 of 1909 (which provides that orders of the PSC may be appealed to the Michigan Court of Appeals).

Use of Poles. The bill states that obtaining a permit or paying the fees required under the proposed Act would not give a provider a right to use conduit or utility poles.

Constitutionality. Pursuant to Article III, Section 8 of the State Constitution, either house of the Legislature or the Governor could request the opinion of the Michigan Supreme Court on important questions of law as to the constitutionality of the proposed Act. (Article III, Section 8 allows either house of the Legislature or the Governor to request the opinion of the Supreme Court as to the constitutionality of legislation after its enactment but before its effective date.)

Senate Bill 999 (S-2)

Equipment Credit

The bill would allow a company to claim a credit against the tax imposed under Public Act 282 of 1905, equal to 6% of "eligible expenditures" incurred in the calendar year immediately preceding the tax year for which the credit was claimed. "Eligible expenditures" would be expenditures made by a company to purchase and install "eligible equipment" after December 31, 2001. "Eligible equipment" would be property, placed into service in Michigan for the first time, with information carrying capability exceeding 200 kilobits per second in both directions.

The credit could not exceed a company's tax liability under the Act, in the tax year the credit was claimed. A company could not claim the credit in a tax year in which the company was not subject to the annual maintenance fee proposed by Senate Bill 880, or the company failed to pay the annual maintenance fees that were due and payable.

Further, the amount of the credit a company could claim would be limited in the following ways:

-- The credit could not exceed 3% of the company's liability for the tax in the 2003 tax year.
-- For the 2004 tax year, the credit could not exceed the greater of 6% of the company's liability for the tax in that tax year, or 100% of the credit the company received in the 2003 tax year.
-- For the 2005 tax year, the credit could not exceed the greater of 9% of the company's liability for the tax in that tax year, or 100% of the credit the company received in the 2004 tax year.
-- For the 2006 tax year and each subsequent tax year, the credit could not exceed the greater of 12% of the company's liability for the tax in the tax year in which the credit was claimed, or 100% of the credit the company received in the immediately preceding tax year.

Maintenance Fee Credit

After any equipment credit was determined, a company could claim a credit against any remaining tax imposed under Public Act 282 equal to the maintenance fee credit proposed by Senate Bill 880.

If the maintenance fee credit, and any unused carryforward of the credit, for the tax year exceeded a company's remaining tax liability for the tax year (after the equipment credit was determined), the excess could not be refunded but could be carried forward to offset tax liability in subsequent tax years, until used up. A company could not claim the credit in a tax year in which the company was not subject to the annual maintenance fee; or the company failed to pay the annual maintenance fees that were due and payable.

Credit Application

A company could apply for either the equipment credit or the maintenance fee credit by submitting an application to the State Board of Assessors, in a form prescribed by the board, at the time the company's annual report required under Public Act 282 was due. (Public Act 282 requires a company subject to the tax levied under the Act to file an annual report in March.)

Proposed MCL 207.13b (S.B. 999)

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FISCAL IMPACT

Senate Bill 880 (S-4)

The bill would increase State revenues by an unknown but negligible amount. (If the language of the bill were modified, however, as discussed below, the bill would likely increase revenues by $10.7 million FY 2001-02 and $26.8 million in FY 2002-03.) The bill would have an indeterminate impact on the revenues and expenses of local units of government. It would increase State revenues through a maintenance fee assessed at $0.02 per linear foot of right-of-way used by a provider in the initial year the bill was in effect, and $0.05 per linear foot in later years. Cable providers that provide telecommunication services would be eligible to pay a substitute fee of $0.01 per linear foot of right-of-way and could waive the substitute fee if the provider had made a sufficient investment in broadband since 1996. According to Federal Communications Commission (FCC) data, Michigan contains approximately 1 billion feet of wire and fiber

that likely require access to a right-of-way. Some types of wire or fiber are placed in conduits such that there is more than one foot of wire for each foot of right-of-way, and the estimate accounts for this phenomenon.

The bill would standardize the maintenance fees paid for rights-of-way and require the State to provide local units with the maintenance fee revenues. With one exception, all of the revenue collected from the maintenance fee would be distributed as follows: 25% to townships and 75% to cities and villages. Money distributed to townships would be based on the number of linear feet of right-of-way granted by the unit, while money to cities and villages would be distributed in the same manner as State Trunkline Highway funds are distributed. An alternative distribution formula would be used to distribute a particular portion of the revenue if the following two conditions were met: 1) total revenue exceeded $30 million, and 2) some revenue was received from telecommunications facilities constructed after the effective date of this proposed Act. If these two conditions were met, then the amount of revenue derived from newly constructed operations, not to exceed the amount that total revenues exceeded $30 million, would be distributed to local units using a formula based upon a weighted average of the amount of linear feet of public rights-of-way. (The language in Section 12 actually specifies "linear feet attributable to cities and villages" and "linear feet attributable to townships". The analysis assumes that this language is corrected to reflect the apparent intent of "linear feet of occupied public rights-of-way attributable to" the type of local government unit.) Local units would be prohibited from levying access fees and other fees associated with rights-of-way. The fees currently paid to local units vary significantly and some local units do not charge any fees. For those local units with low or no fees, the bill would increase revenues, while for local units with high fees, the bill would likely reduce revenues.

The bill also would standardize permit fees levied by local units. Currently, some local units charge permit fees for rights-of-way while other local units do not. The bill would limit future permits to a one-time fee of $500. For local units that charge higher fees or grant permits that require renewal, the bill would reduce local unit revenues. For local units that charge lower fees or no fees, the bill would increase local unit revenues.

Revenues in future fiscal years from the per linear foot maintenance fee would change as a result of growth in the amount of cabling for which rights-of-way are needed. No information is available on expected growth rates in rights-of-way, although the historical data suggest that the amount of rights-of-way is not as likely to change as is the type of wiring or cabling running through rights-of-way. Between 1996 and 2001, the total amount of cables and wire for which rights-of-way were needed by the two largest telecommunication providers in Michigan grew by approximately 1.0% per year. It is unknown if this 1.0% growth resulted in any increase in the linear feet of occupied rights-of-way. Some growth also may be offset by the retirement of existing rights-of-way.

Growth in revenues as a result of growth in rights-of-way would be limited if affected firms were to implement qualified shared use agreements. For example, if a telecommunication company added 100,000 feet of right-of-way, the bill would increase the maintenance fee by $5,000. However, if the company were to enter into a shared use agreement, the increase in the fee revenue could be as low as $3,000.

The impact of the bill also would differ between telecommunication providers. The bill would allow all providers to pay a fee based upon the per access line cost of the maintenance fee levied on the provider with the most access lines in Michigan. Ameritech operates approximately 5.4 million of the 6.2 million access lines in Michigan. Under the bill, Ameritech would be assessed $23.3 million in maintenance fees based on $0.05 per linear foot in FY 2002-03, or approximately $4.18 per access line. However, under the current language in the bill, Ameritech likely would pay considerably less than the $23.3 million in assessed maintenance fees. The per access line equivalent of the maintenance fee for providers other than Ameritech is expected to be in excess of $15.22 per access line. The bill attempts to mitigate this differential by limiting the impact of the fee on all providers. In Section 8(6), the bill states "the fees...for any provider shall not exceed the per access line cost" of Ameritech. Under the language as written, the bill would be estimated to

generate approximately $4.18 per provider, including the fee paid by Ameritech. Assuming there are 500 providers in Michigan (inclusive of cable providers, which are also included in this limit by the language in subsection (6)), the bill would generate approximately $2,100.

Based on discussions with parties involved in drafting the bill, Section 8(6) is apparently intended to limit the fees under the bill to the per access line cost *times* the number of access lines a provider operates. If the language in the bill were changed to reflect this new limit, based on the data available and on the expectation that Ameritech would pay $23.3 million in fees in FY 2002-03, providers other than a cable operator or Ameritech would pay $4.18 per access line rather than the $0.05 per linear foot of rights-of-way fee, generating $3.5 million in addition to the $23.3 million Ameritech would pay. Cable operators, at $0.01 to $0.00 per linear foot of right-of-way, are estimated to face lower fees under the bill than $4.18 per access line and would pay something between a negligible amount and $2.0 million (as discussed below). Consequently, if the language in Section 8(6) is corrected, the bill could generate between $26.8 million and $28.8 million in fee revenue in FY 2002-03.

In FY 2000-01, Ameritech operated cable services in at least 31 Michigan communities, including many larger metropolitan areas. Reportedly, Ameritech has sold those cable operations to a nonaffiliated entity. Under the bill, however, both Ameritech and other providers would have an incentive to acquire a small cable operation. Under Section 8(10) of the bill, cable operators would be exempt from the $0.05 maintenance fee on all rights-of-way and instead would pay a fee of $0.01 per linear foot of right-of-way occupied by the cable delivering the cable services. The $0.01 per linear foot fee would be levied only on the cable lines within the community, and the subsection would exempt the provider from all other fees (levied by the bill or not) except for local cable franchise fees. Larger providers, such as Ameritech, could easily qualify for the waiver that would reduce the $0.01 fee to $0.00 were they to operate a cable system. Because of the limit in Section 8(6), eliminating the fee for Ameritech would cause the bill not to generate any revenue. The fiscal impact assumes providers would not take advantage of this apparent loophole.

If the wording in the bill were to change such that Ameritech and other non-cable telecommunication providers would not qualify for the reduced rate offered to cable providers, or that Ameritech and other non-cable telecommunication providers would receive the cable rate only in those communities where they offered cable services, then based on FCC data, SBC/Ameritech would be expected to pay slightly less than $23.3 million of the fees under the bill (and the total revenue generated by the bill would be $26.8 million).

Under current law, Ameritech is effectively exempt from paying right-of-way fees. As a result, local units that depend primarily or exclusively upon telecommunication services from Ameritech would see increases in fees from rights-of-way under the bill, even if the standardized fee were lower than the fee the local unit currently levies.

The bill's language in Section 8(10) and (11), appears to exempt cable providers that provide telecommunication fees from the permit fees for right-of-way access. Section 8(7) would exempt the provider from paying any other fees as long as the $0.01 per foot fee levied on the cable rights-of-way was paid. The language thus appears not only to exempt a provider from paying the $0.05 per foot fee on any lines located anywhere in the State, but also to exempt the provider from the $500 permit fee, as long as the $0.01 fee was paid on just the cable lines within a metropolitan area where the cable provider offered telecommunication services.

Similarly, Section 8(11) would exempt a provider from the $0.01 per foot fee (and thus any fee) provided a certain minimum investment in broadband facilities had been made in the State. The subsection would require the provider to have made, since January 1, 1996, aggregate investments in broadband-capable access that exceed the aggregate amount of the $0.01 maintenance fees assessed under subsection 10. The exemption would not require that the provider actually offer broadband services but only that the facilities invested be broadband capable. Out of the 376 cable providers in Michigan, 96 are known to possess telecommunication-capable facilities, only 55 of those actually provide telecommunications services, and only 36 are known to offer Internet access. The subsection does not define "aggregate

investment" and appears to quantify that "investment" based on the total investment made over the period from January 1, 1996, until the fee was levied in a given year, implying that once a provider qualified for the exemption, the provider would likely continue to be exempt. To be exempt, the language also appears to require that such investment be equal to or exceed the total of all revenue raised by the $0.01 per foot fee on all providers subject to the fee (approximately $2.0 million). The estimate assumes that "aggregate investment" would include purchasing facilities already placed into service by another company. It is unclear how many cable operators would qualify for the exemption. The fiscal impact assumes most cable operators would qualify for the exemption, because relatively few corporations own the majority of cable systems in Michigan, increasing the chance that each of them may own $2.0 million of equipment that has been installed since January 1, 1996. If the language were changed such that the investment needed only to exceed the $0.01 fee levied on the individual provider, even more providers would be expected to qualify for the exemption and subsection 10 would generate even less revenue.

Providers would not be allowed to pass the fees required by the bill on to consumers, but could receive a tax credit (under Senate Bill 999) to offset the impact of the fees levied under the bill.

Senate Bill 999 (S-2)

The bill would reduce State revenues by approximately $4.7 million per year, although the potential exposure could be greater.

The equipment eligible for the first credit also would be eligible for the investment tax credit under the single business tax (SBT). However, the credit under the bill would differ from the investment tax credit in that it would be subject to several limitations: 1) it could not exceed 6% of eligible expenditures, 2) initially it could not exceed 3% of a company's utility property tax liability (rising to 12% between tax year 2003 and tax year 2006), and 3) for tax years after 2003, the credit could not exceed the prior year's credit. Another provision would require that the credit not exceed the company's total utility property tax liability. The credit also would not be refundable and could not be carried forward or backward. SBC/Ameritech and Verizon are the two largest telecommunications companies in Michigan that would be eligible for the credit.

The bill's limitations appear to reduce the impact of the credit significantly. For example, between 1996 and 2000, the FCC reports that Ameritech spent an average of $132.1 million per year on additional cable and wire. It is unknown how much of this investment was in equipment capable of transmitting data at more than 200 kilobits per second in two directions. Consequently, under the bill's limitations and Ameritech's estimated property tax liability, Ameritech would be eligible for a credit of approximately $4.0 million rather than the full $7.9 million the bill would allow without the limitations. Information is not available for the Michigan investments of other telecommunication providers in Michigan, although Verizon Midwest, which includes Michigan as well as portions of several other states, is estimated to pay approximately 15% of the utility property tax.

For those portions of eligible expenditures that occur in Michigan, taxpayers also would be eligible to claim an investment tax credit (ITC) for as much as 100% of the tax levied on the portion of their tax base equal to the cost of the equipment. Absent the limitations, or if a taxpayer did not make enough investment to meet the limitations, under the bill taxpayers would receive a larger credit on their eligible expenditures in Michigan than under the ITC. The investment tax credit allows a credit equal to a maximum of the tax rate (scheduled to be 1.8% in tax year 2003) on that portion of the tax base equal to the amount of the eligible investment occurring in Michigan, while the bill would allow a credit of up to 6%. For example, if a taxpayer made $500 million in eligible investments in Michigan, the taxpayer would pay $9.0 million on the $500 million of tax base and would receive an ITC of $9.0 million plus up to an additional $12.7 million in credit under the bill.

In some cases, a taxpayer might not be eligible for the investment tax credit because the taxpayer chose to claim the gross receipts deduction under the SBT. A taxpayer would choose to claim such a deduction only if the liability after the deduction were less than it would be if the taxpayer filed in a manner that

would allow the taxpayer to claim the ITC. The revenue lost under the bill would occur regardless of whether the taxpayer claimed the gross receipts reduction.

Under the second credit, the bill would reduce revenues by an unknown amount. This credit could not exceed the lesser of 1) costs paid under the proposed "Metropolitan Extension Telecommunications Rights-of-Way Oversight Act", or 2) the amount those costs, combined with other long-term costs, exceeded a provider's rates. The impact is uncertain because the proposed Act does not define what "costs" would be included. This credit would not be refundable, but could be carried forward indefinitely until used. Assuming that the "costs" allowed under the credit would be the maintenance fees levied under Section 8 of the proposed Act, the credit could reduce State revenues by an additional $26.7 million, although the impact likely would be less. For example, it is estimated that Ameritech would pay an estimated $23.3 million in maintenance fees that would be eligible for the credit, subject to certain limits established by the bill's other provisions. The credit would be the lesser of the costs or, essentially, the amount by which the costs of providing service exceeded revenues. In 2000, Ameritech reported $3.6 billion in revenues and $2.2 billion in operating expenses, suggesting operating profits of $1.4 billion, considerably in excess of the $23.3 million in maintenance fees eligible for the credit. Ameritech reported net income of $592.6 million, still in excess of the maintenance fees. As a result, the additional $23.3 million in maintenance fees would not likely exceed the rates Ameritech is allowed to charge for its service. As a result, the limitation would significantly restrict the credit for the largest taxpayer affected under the bill. However, the credit would be structured such that under certain circumstances it could reduce revenues by the full $26.7 million in maintenance fees levied on noncable providers under the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act.

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