

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA**BILL ANALYSIS**

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 881 (as enrolled)
Sponsor: Senator Leon Stille
Senate Committee: Technology and Energy
House Committee: Energy and Technology

PUBLIC ACT 49 of 2002

Date Completed: 9-12-02

CONTENT

The bill created the "Michigan Broadband Development Authority Act" to do the following:

- Create the Michigan Broadband Development Authority, and establish its board of directors.
- Prescribe the Authority's powers, including making loans to, and entering into joint venture and partnership arrangements with, broadband developers and operators.
- Provide that the Authority may not enter into new partnerships or other joint venture arrangements or provide new loans after December 31, 2008, except to the extent necessary to maintain, improve, complete, or expand within a defined service area an element of the broadband infrastructure already acquired or financed under the bill.
- Authorize the Authority to issue tax-exempt bonds and notes to finance or refinance all or part of the development of the broadband infrastructure; and specify that the notes or bonds are not a debt of the State.
- Prohibit the Authority from making loans to, or entering into joint ventures or partnership arrangements with, any governmental entity or nonprofit organization except in connection with financing development costs for the portion of broadband infrastructure used or to be used exclusively by governmental entities or nonprofit agencies.
- Limit the Authority's ability to acquire real and personal property.
- Create a Reserve Capital Account under the Authority's control to secure

its bonds and notes.

- Require the Authority to establish a seed capitol loan program for loans to certain persons who apply to the Authority for broadband infrastructure financing.
- Enact legislative findings that state the need for broadband infrastructure throughout the State, and declare that it is a valid public purpose for the State to assist in financing private and public sector development of a statewide broadband infrastructure.

The bill defines "broadband infrastructure" as all facilities, hardware, software, and other intellectual property necessary to provide "broadband services" in Michigan. "Broadband services" are those services, including but not limited to voice, video, and data, that provide capacity for transmission in excess of 144 kilobits per second in at least one direction regardless of the technology or medium used, including wireless, copper wire, fiber optic cable, or coaxial cable. If voice transmission capacity is offered in conjunction with other services utilizing transmission in excess of 144 kilobits per second, the voice transmission capacity may be less than 144 kilobits per second.

Authority Powers

The Michigan Broadband Development Authority is created as a "public body corporate and politic" within the Department of Treasury.

The Authority may assist through financing and refinancing the expansion of broadband infrastructure services to residential, commercial, public, and nonprofit customers in Michigan; authorize the issuance of bonds

and notes to finance or refinance the private and public sectors' development of the broadband infrastructure; and authorize the making of loans and joint venture and partnership arrangements (as provided in the bill) to broadband developers and broadband operators. (A "broadband developer" is a person selected by the Authority to acquire, construct, develop, and create any part of the broadband infrastructure; a "broadband operator" is a person selected by the Authority to operate any part of the broadband infrastructure. A "person" is an individual, corporation, limited or general partnership, joint venture, limited liability company, or a governmental entity, including State authorities, municipalities, counties, townships, police, fire and other public safety organizations, judicial entities, medical entities, schools, colleges, universities, hospitals, libraries, community centers, and local economic development entities. A "person" does not include the State.)

The powers of the Authority include all those necessary to carry out and effectuate the purposes of the bill. In particular, the Authority may enter into joint venture and partnership arrangements with persons to acquire, construct, develop, maintain, and operate all or portions of the broadband infrastructure. The Authority also may make loans and enter into any joint venture and partnership arrangements with broadband developers and broadband operators to acquire, construct, maintain, and operate all or portions of the broadband infrastructure.

The Authority also may assist broadband developers and operators with all other matters necessary for the acquisition, construction, maintenance, and operation of the broadband infrastructure; continuously evaluate all types of technologies to encourage the widest deployment of broadband services in the State; ensure that the financing and refinancing of the development of broadband services include provisions that small businesses, and each region of the State, have an equal opportunity to receive financing and refinancing; and make broadband services to schools and libraries a priority under Authority financing programs.

In addition, the Authority may do the following:

- Impose and collect rents, charges, and fees for the services furnished by the broadband infrastructure financed by the Authority.
- Provide operating assistance to make broadband services more affordable to broadband developers, operators, and customers, in conjunction with broadband infrastructure financed by the Authority.
- Acquire interest in real or personal property from any person necessary for the operation of the Authority.
- Be designated the State program manager for Federal telecommunications assistance, represent the State in negotiations with the Federal government regarding telecommunications assistance, and receive and distribute Federal funding and assistance on the State's behalf.
- Set construction, operation, and financing standards for the broadband infrastructure in connection with Authority financing, and provide for inspections to determine compliance with those standards.
- Investigate, evaluate, and assess the current broadband infrastructure and the future broadband infrastructure needs of the State, and encourage and participate in aggregation strategies for the broadband services of all public entities and nonprofit corporations in the State to maximize the interconnectivity and efficiencies of the broadband infrastructure.
- Receive and distribute State or local funding including grants, loans, general appropriations, or appropriations made for a seed capital loan program.

Further, the Authority may borrow money and issue bonds and notes to fund Authority operations, finance or refinance part or all of the "development costs" of the broadband infrastructure, refinance existing debt for technology that constitutes a part of or is related to the broadband infrastructure, and secure bonds and notes by mortgage, assignment, or pledge of any of its revenues and assets. ("Development costs" are the costs associated with the broadband infrastructure approved by the Authority, including the following:

- The costs for planning, acquiring, leasing, constructing, maintaining, and operating the broadband infrastructure.
- Payments for options to purchase, deposits on contracts of purchase, and payments for the purchases of properties for the broadband infrastructure.

- Financing, refinancing, acquisition, demolition, construction, rehabilitation, and site development of new and existing buildings.
- Carrying charges during construction.
- Purchases of hardware, software, facilities, or other expenses related to the broadband infrastructure.
- Legal, organizational, and marketing expenses, project manager and clerical staff salaries, office rent, and other incidental expenses.
- Payment of fees for preliminary feasibility studies and advances for planning, engineering, and architectural work.
- Any other costs and expenses necessary for the acquisition, construction, maintenance, and operation of all or portions of the broadband infrastructure.)

Notwithstanding any other provision, the bill prohibits the Authority from making loans to, or entering into any joint venture and partnership arrangements with, any governmental entity or nonprofit organization except in connection with the financing or refinancing of development costs for that allocable portion of the broadband infrastructure used or to be used exclusively by governmental entities or nonprofit organizations. The entities or organizations include, but are not limited to, universities, colleges, hospitals, school districts, public safety agencies, judicial organizations, libraries, cities, townships, and counties. No allocable portion of the broadband infrastructure financed by a loan to a governmental entity or a nonprofit organization may be used to serve residential, business, or other commercial customers.

The Authority may enforce financial, operational, security, lease, warranty, and guarantee terms and conditions established under financings by the Authority, and may acquire, construct, develop, lease, create, and maintain all or portions of the broadband infrastructure and acquire from any person interest in real and personal property.

Except in connection with the financing or refinancing of the development costs, or regarding enforcement, the Authority may acquire real or personal property constituting portions of the broadband infrastructure only in connection with the participation of persons other than governmental entities or nonprofit organizations through joint ventures and partnership arrangements, or other co-

ownership arrangements and only if the participation is necessary to assure availability of financing or refinancing derived from the issuance by the Authority of bonds or notes, the interest on which is exempt from taxation under the Federal Internal Revenue Code, and the financing derived from the tax-exempt bonds or notes is allocated only to those development costs relating to that portion of the broadband infrastructure that is to be used by governmental bodies or nonprofit organizations. This limitation applies notwithstanding any other provision of the bill.

The Authority may exercise its duties independently of the State Treasurer. The Authority's budgeting, procurement, and related administrative functions must be performed under the direction and supervision of the State Treasurer.

Authority Board; Records; Employees

The Authority must exercise its duties through a board of directors consisting of the president and CEO of the Michigan Economic Development Corporation; the State Treasurer; the executive director of the Michigan State Housing Development Authority; and eight members with knowledge, skill, or experience in the academic, business, technology, or financial fields, appointed by the Governor with the advice and consent of the Senate. Not more than two of the eight appointed members may be employees of the State during their term on the board. Six of the eight appointed members are to serve fixed terms; of those six not more than three may be members of the same political party. Board members are to serve terms as provided in the bill. The CEO of the Michigan Economic Development Corporation, the State Treasurer, and the director of the Michigan State Housing Development Authority each may appoint a representative to serve in his or her absence.

The Governor must designate one member of the board to serve as its chairperson, at the pleasure of the Governor. The Governor also must designate, from the eight appointed members, one member to serve as the board's president and CEO, and another to serve as its vice president. Except for the board president and vice president, members must serve without compensation but may receive reasonable reimbursement for necessary travel and expenses incurred in the discharge of their duties. The board must

establish reasonable compensation for the board president and vice president.

A majority of the serving members of the board constitutes a quorum for the transaction of business. The business of the board must be conducted in compliance with the Open Meetings Act; however, the Freedom of Information Act does not apply to a record or portion of a record, material, information, or other data received, prepared, used, or retained by the Authority, in connection with an application to or project related to the broadband infrastructure assisted by the Authority, that relates to trade secrets, commercial, financial, or proprietary information submitted by the applicant, and that is requested in writing by the applicant and acknowledged in writing by the president of the Authority to be confidential.

The Authority may employ or contract for legal, financial, and technical experts, and other officers, agents, and employees. A board member or an officer, employee, or agent of the Authority must discharge the duties of his or her position in a nonpartisan manner, with good faith, and with a "degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in a like position". In discharging his or her duties, a board member or an officer, employee, or agent of the Authority, when acting in good faith, may rely on the opinion of the Authority's counsel, the Authority's financial statements, a report of an independent appraiser selected by the board, or a written report by a certified public accountant reflecting the Authority's financial condition.

Board members and officers and employees of the Authority are subject to Public Act 317 or 318 of 1968. (Public Act 317 prohibits a person serving the State or a State agency (except legislators and certain State officers) from being a party to, directly or indirectly, any contract between himself or herself and the State or a State agency. Public Act 318 prohibits members of the Legislature and State officers from having a direct or indirect interest in any contract with the State or a political subdivision that causes a substantial conflict of interest.)

Seed Capital Loan Program

The bill requires the Authority to establish a seed capital loan program to make capital

loans to persons planning to apply to the Authority for financing of broadband infrastructure. Priority for the seed capital loan program must be given for developments targeted to underserved areas. During the initial two years of operations, the Authority must designate a minimum of \$500,000 to be targeted to rural underserved areas and a minimum of \$500,000 targeted to urban underserved areas. Community economic development programs and small providers must be given a preference to receive the loans. The terms and conditions for the seed capital loans must be established by the Authority. ("Underserved areas" means geographical areas of the State identified by the Authority as having the greatest need for broadband development. In identifying underserved areas, the Authority must consider the area's economic conditions, including family income, affordability of access, lack of options available, low percentage of residents subscribing, and any other criteria considered important by the Authority in determining whether an area is underserved.)

As part of an application for financing, a broadband developer and broadband operator must file with the Authority a participation plan for small and minority-owned businesses, and a community-wide outreach plan to educate the public about the availability of broadband services. The Authority may not approve an application unless a plan is submitted.

Reserve Capital Account/Funds

The Reserve Capital Account is created under the jurisdiction and control of the Authority, and must be administered by the Authority to secure its notes and bonds. The Authority must credit to the account the proceeds of the sale of notes or bonds to the extent provided for in the authorizing resolution of the Authority, and any other money made available to the Authority for the purpose of the account.

In the resolution authorizing the issuance of notes or bonds, the Authority may establish a capital reserve fund for the payment of the principal and interest of notes or bonds, for the purchase or redemption of the notes or bonds, or for the payment of a redemption premium required to be paid when the notes or bonds are redeemed before maturity. The Authority may not use a capital reserve fund

for an optional purchase or optional redemption of notes or bonds if the use would reduce the total of the money in the fund to less than the "capital reserve fund requirement" established for the fund. ("Capital reserve fund requirement" means the fund amount requirement that may be established in the resolution authorizing notes or bonds for which a fund is established. The required amount may not exceed the maximum amount of principal and interest maturing and becoming due in a succeeding calendar year on the notes or bonds secured, in whole or in part, by the fund.)

In addition to, or instead of, depositing money in the account or in a fund, the Authority may obtain or pledge letters of credit, insurance policies, surety bonds, guarantees, or other security arrangements approved by the State Treasurer. The money available from these sources must be credited toward the capital reserve fund requirement for the fund.

The Authority may transfer income or interest earned by the Reserve Capital Account to other Authority funds or accounts. The Authority also may transfer income or interest earned by a fund to other Authority funds or accounts, to the extent that the transfer does not reduce the total of the amount of money and security arrangements in the fund below the capital reserve fund requirement for it.

The Authority must accumulate in a capital reserve fund an amount equal to the capital reserve fund requirement for it. If at any time the amount of a fund falls below the requirement, the Authority must transfer from the Reserve Capital Account to the fund an amount equal to the capital reserve fund requirement. If a deficiency exists in more than one fund and the amount in the account is not sufficient to restore the funds fully, the money in the account must be allocated between the deficient funds pro rata, according to the amounts of the deficiencies. If at any time the account is exhausted and the amount of the fund is insufficient to meet the capital reserve fund requirement, the Authority, by September 1, must certify to the Governor the amount necessary to restore the fund to an amount equal to the capital reserve fund requirement for it. The Governor must include in his or her annual budget the amount certified by the Authority.

Bonds and Notes

The Authority may issue notes and bonds to do all of the following:

- Pay the development costs associated with acquiring, leasing, constructing, maintaining, and operating the broadband infrastructure.
- Make loans to persons for development costs.
- Make loans to persons to make purchases related to the broadband infrastructure.
- Make loans to persons to refinance existing debt of the Authority or debt other persons incurred in connection with the acquisition or development of technology that constitutes a part of or is related to the broadband infrastructure.
- Pay the interest on bonds and notes of the Authority and establish reserves to secure the bonds and notes.
- Make other expenditures of the Authority necessary to carry out its duties under the bill, including the payment of operating expenses.

The Authority also may issue renewal notes, issue bonds to pay notes, and refund bonds by the issuance of new bonds, whether or not the bonds to be refunded have matured. The refunding bonds must be sold and the proceeds applied to the purchase, redemption, or payment of the bonds to be refunded. The Authority may issue instruments separate from these obligations that establish a contractual right in the holder of the instrument to require mandatory tender for purchase of the obligations to which the instrument applies, for a period of time and subject to provisions as the Authority determines.

Except as otherwise provided by the Authority or the bill, every note or bond issue of the Authority must be a general obligation of the Authority, payable out of its revenues or money, subject only to agreements with the holders of particular notes or bonds pledging any particular receipts or revenues.

The bill specifies that whether or not the notes or bonds are in a form or character as to be negotiable instruments, they are negotiable instruments within the meaning of the Uniform Commercial Code. The notes and bonds of the Authority may be sold at public or private sales, at prices the Authority determines.

The notes and bonds must be authorized by resolution of the Authority and mature at the time provided in the resolution; and be in a form, bear interest at a rate or rates, be in the denominations, carry registration privileges, be payable, and be subject to the terms of redemption as provided in the resolution.

A resolution relating to authorizing notes or bonds may contain any of the following provisions, which must be a part of the contract with the holders of the notes or bonds:

- Pledging all or any part of the revenues of the Authority, and all or any part of the money received in payment of loans and interest on loans, and other money received or to be received to secure the payment of the notes or bonds.
- Pledging all or any part of the Authority's assets, including mortgages and obligations obtained in connection with its programs, to secure the payment of the notes or bonds.
- Pledging any loan, grant, or contribution from a government entity.
- The use and disposition of the gross income from the Authority's contracts and leases.
- The setting aside of reserves or sinking funds, and their regulation and disposition.
- Limitations on the purpose to which the proceeds of the sale of notes or bonds may be applied, and pledging proceeds to secure the payment of the notes or bonds.
- Limitations on the issuance of additional notes or bonds, the terms upon which additional notes or bonds may be issued and secured, and the refunding of outstanding or other notes or bonds.
- The procedure, if any, by which the terms of any contract with noteholders or bondholders may be amended or abrogated, the amount of notes or bonds whose holders must consent to the amendment or abrogation, and the manner in which the consent is to be given.
- Vesting in a trustee or trustees property, rights, powers, and duties in trust as the Authority determines, which may include any of the rights, powers, and duties of the trustee appointed by the bondholders, and limiting or abrogating the right of the bondholders to appoint a trustee or limiting the rights, powers, and duties of the trustee.
- Establishing a contractual right to require mandatory tender for purchase of the notes

or bonds in an instrument separate from them, which may be issued or sold by the Authority to investors.

- Any other provision that may affect the security or protection of the notes or bonds.

A resolution authorizing notes or bonds also may contain a provision delegating to an officer, agent, or employee of the Authority the power to cause the issue, sale, and delivery of notes or bonds, within certain limits prescribed in the bill.

The bill provides that any pledge made by the Authority is valid and binding from the date it is made. The money or property pledged and received by the Authority immediately is subject to the lien of the pledge without any physical delivery or further act, and the lien is valid and binding against all parties having claims in tort, contract or otherwise against the Authority, irrespective of whether the parties have notice of the lien. The resolution or any other instrument that creates a pledge does not have to be recorded.

The bill provides that the State is not liable on the Authority's notes and bonds, and the notes and bonds are not a debt of the State. The notes and bonds must contain a statement of this limitation.

A member of the Authority's board or any person executing the notes or bonds is not liable personally or subject to any personal liability or accountability by reason of the issuance of the notes or bonds.

Subject to any agreements with noteholders or bondholders, the Authority may use any funds available to purchase its notes or bonds, at a price determined by the Authority.

The bill contains the following statement:

This state pledges and agrees with the holders of any notes or bonds issued under this act, that this state will not limit or alter the rights vested in the authority to fulfill the terms of any agreements made with the holders, or in any way impair the rights and remedies of the holders until the notes or bonds, together with earned interest, with interest on any unpaid installments of interest, and all costs and expenses in

connection with any action or proceeding by or on behalf of the holders, are fully met and discharged.

The Authority may include the statement in any agreement with the holders of notes and bonds.

Limited Obligation Bonds

The Authority may issue notes or bonds that are expressly stated not to be general obligations of the Authority, but that constitute limited obligations payable solely from and secured solely by the revenues, money, and property as the Authority specifies. The notes or bonds designated as limited obligations are not payable from or secured by the Reserve Capital Account, and any reserve fund established for the limited obligation notes or bonds does not constitute a capital reserve fund.

Default

If the Authority defaults in the payment of principal or interest of any notes or bonds when due, whether at maturity or upon call for redemption, and the default continues for 30 days, or if the Authority fails or refuses to comply with the bill, or defaults in any agreement made with the holders of any notes or bonds, the holders of 25% in aggregate principal amount then outstanding may apply to the Circuit Court of Ingham County for the appointment of a trustee to represent the holders. A trustee appointed under the bill may (and, upon the written request of the holders of 25% in aggregate principal amount of the notes or bonds, must) do any of the following:

- Enforce all rights of the noteholders or bondholders, including the right to require the Authority to perform its duties.
- Bring suit upon the notes or bonds.
- Require the Authority to account as if it were the trustee of an express trust for the holders of the notes or bonds.
- Enjoin any acts or things that may be unlawful or in violation of the holders' rights.
- Declare all the notes or bonds due and payable.

Before declaring the principal of notes or bonds payable and due, the trustee must give

30 days' notice in writing to the Governor, the Authority, and the Attorney General.

The trustee will have all of the powers necessary or appropriate for the general representation of bondholders or noteholders in the enforcement and protection of their rights.

An action under these provisions must be brought in the Circuit Court for Ingham County.

Bonds and Notes: Other Provisions

At its discretion, the Authority may recommend to the Legislature, for a vote of the electors, an issuance of faith and credit bonds.

The Authority may enter into an interest rate exchange or swap, hedge, or similar agreement or agreements in connection with the issuance of notes or bonds, or in connection with its then outstanding notes or bonds.

Subject to the approval of the State Treasurer, the Authority may contract with the holders of any of its notes or bonds as to the custody, collection, security, investment, and payment of the Authority's money, of any money held in trust or otherwise for the payment of notes or bonds, and to carry out the contract. Money held in trust or otherwise for the payment of notes or bonds or in any way to secure notes or bonds and deposits of money may be secured in the same manner as money of the Authority.

The bill provides that the notes and bonds of the Authority are securities in which public officers and bodies of the State, municipalities, and municipal subdivisions, and other entities, may legally invest funds, including capital, in their control or belonging to them. The other entities include insurance companies and associations and other persons carrying on an insurance business, banks, trust companies, savings banks and savings associations, savings and loan associations, investment companies, administrators, guardians, executors, trustees and other fiduciaries, and any other person who is or may be authorized to invest in bonds or other obligations of the State.

Tax Exemption

The bill exempts from all State, city, county, or other taxation provided by State law, except for estate and gift taxes and taxes on transfers, the notes and bonds of the Authority and the income from the notes and bonds, and all its fees, charges, gifts, grants, revenues, receipts, and other money received or to be received, pledged to pay or secure the payment of the notes or bonds. The exemption applies to the purchasers and all subsequent holders and transferees of notes and bonds issued by the Authority.

The Authority's property, income, and operation are exempt from all taxation by the State or a political subdivision.

Report

The Authority must submit an annual report, by March 1 each year, relating to its activities for the preceding calendar year. The report must be submitted to the Governor, the Speaker of the House, the Majority Leader of the Senate, and each member of the Senate and House committees with oversight over utility and energy issues.

Legislative Findings

The bill contains the following statement:

"The legislature finds that certain areas of this state are not being adequately served with broadband services and that, for the benefit of the people of this state and the improvement of their health, welfare, and living conditions, the improvement of the economic and educational welfare of this state, and the improvement of its public safety and security, it is essential that broadband infrastructure be expanded to provide broadband services throughout this state and that the private sector should be encouraged to invest in the deployment of broadband services and networks and that financing by this authority will encourage broadband investment. This act shall provide a method to assure that economic, technological, and logistical integrated broadband services are provided throughout this state on a nondiscriminatory basis. The provision of affordable broadband services and networks will assure the long-term growth of and the enhancement and delivery of services by the educational, medical, commercial, and governmental entities within this state, including, but not limited to, municipalities and counties, public safety facilities, judicial and criminal facilities,

telemedical facilities, schools, colleges, universities, hospitals, libraries, community centers, businesses, nonprofit organizations, and residential properties. To increase the speed and availability at which affordable broadband services become available in this state, it is declared to be a valid public purpose to assist in the financing and refinancing of the private and public sectors' development of a statewide broadband infrastructure. It is further declared to be a valid public purpose for the authority created under this act to issue bonds and notes to provide for financing or refinancing to broadband developers and broadband operators, to make loans and provide joint venture and partnership arrangements...to broadband developers and broadband operators, to enter into contracts for the lease or management of all or portions of the broadband infrastructure, and to enter into joint venture and partnership arrangements and partnerships with persons which will acquire, construct, develop, create, maintain, own, and operate all or portions of the broadband infrastructure. The legislature finds that the authority created and powers conferred by this act constitute a necessary program and serve a necessary public purpose."

Legislative Analyst: George Towne

FISCAL IMPACT

The bill established a Reserve Capital Account that will be administrated by the Broadband Authority for the purpose of securing notes and bonds. If at any time the Reserve Capital Account has insufficient funds to make a transfer to the capital reserve funds and fulfill the fund levels required, the Broadband Authority is required to certify to the Governor the amount necessary to restore the capital reserve funds to the fund level requirement. The Governor is required to include the difference in the annual proposed budget. The actual appropriation will depend on the legislative appropriations process and any amount appropriated would be from the General Fund. The bill also provides that the State is not liable for debt obligations entered into by the Broadband Authority.

The bill does not provide funding for the administration and operation of the Authority. These costs will be paid from fees applied to loans made by the Authority.

Fiscal Analyst: Jessica Runnels

S0102\sb881es

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.