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Senate Bill 881 (Substitute S-6 as passed by the Senate)
Sponsor: Senator Leon Stille
Committee: Technology and Energy

Date Completed: 2-25-02

CONTENT

The bill would create 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. Except to the extent necessary to maintain an element of the broadband infrastructure already acquired or financed under the bill, the Authority could not enter into new partnerships or other joint venture arrangements or provide new loans after December 31, 2008.**
- Authorize the Authority to issue tax-exempt bonds and notes to finance or refinance all or part of the development of the broadband infrastructure; make the Authority subject to the reporting requirements of the Revised Municipal Finance Act, for any bonds or notes issued under the bill; and specify that the notes or bonds would not be 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.**
- Enact legislative findings that would state the need for broadband infrastructure throughout the State, and declare that it would be a valid public purpose for the State to assist in financing private and public sector development of a statewide broadband infrastructure.**

The bill would define "broadband infrastructure" as all facilities, hardware, software, and other intellectual property necessary to provide "broadband services" in Michigan. "Broadband services" would mean 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 were offered in conjunction with other services utilizing transmission in excess of 144 kilobits per second, the voice transmission capacity could be less than 144 kilobits per second.

Authority Powers

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

The Authority could 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" would be a person selected by the Authority to acquire, construct, develop, and create any part of the broadband infrastructure; a "broadband operator" would be a person selected by the Authority to operate any part of the broadband infrastructure. A "person" would be an individual, corporation, limited or general partnership, joint venture, limited liability company, or a governmental entity, including municipalities, counties, townships, public safety organizations, judicial entities, medical entities, schools, colleges, universities, hospitals, libraries, community centers, and local economic development entities. A "person" would not include the State.)

The powers of the Authority would include all those necessary to carry out and effectuate the purposes of the bill. In particular, the Authority could 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 could 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. Except to the extent necessary to maintain an element of the broadband infrastructure already acquired or financed under the bill, the Authority could not enter into new partnerships or other joint venture arrangements, or provide new loans, or joint venture and partnership arrangements, after December 31, 2008.

The Authority also could assist broadband developers and operators with all other matters necessary for the acquisition, construction, maintenance, and operation of the broadband infrastructure; and continuously evaluate all types of technologies to encourage the widest deployment of broadband services in the State.

In addition, the Authority would have the power to do the following:

- Impose and collect charges, fees, or rentals for the services furnished by the broadband infrastructure in conjunction with financings entered into 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 qualifying nonprofit corporations in the State to maximize the interconnectivity and efficiencies of the broadband infrastructure.

Further, the Authority could 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 constituted a part of or was related to the broadband infrastructure, and secure bonds and notes by mortgage, assignment, or pledge of any of its revenues and assets. ("Development costs" would mean the costs associated with the broadband infrastructure that had been 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.)

To enforce financial, operational, warranty, and guarantee terms and conditions under loans or joint venture and partnership arrangements, the Authority could 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.

Notwithstanding any other provision, the bill would prohibit 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 would include, but not be 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 could be used to serve residential, business, or other commercial customers.

Except in connection with the financing or refinancing of the development costs, the Authority could 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 were necessary to assure availability of financing or refinancing derived from the issuance by the Authority of bonds or notes, the interest on which was exempt from taxation under the Federal Internal Revenue Code, and the financing derived from the tax-exempt bonds or notes were allocated only to those development costs relating to that portion of the broadband infrastructure that was to be used by governmental bodies or nonprofit organizations. This limitation would apply notwithstanding any other provision of the bill.

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

Authority Board; Records; Employees

The Authority would exercise its duties through a board of directors. The board would consist 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 could be employees of the State during their term on the board. Six of the eight appointed members would serve fixed terms; of those six not more than three could be members of the same political party. Board members would serve terms as provided in the bill.

The Governor would have to designate one member of the board to serve as its chairperson, who would serve at the pleasure of the Governor. The Governor also would have to 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 would serve without compensation but could receive reasonable reimbursement for necessary travel and expenses incurred in the discharge of their duties. The board would

have to establish reasonable compensation for the board president and vice president.

The Freedom of Information Act would 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 related to trade secrets, commercial, financial, or proprietary information submitted by the applicant, and that was requested in writing by the applicant and acknowledged in writing by the president of the Authority to be confidential.

The Authority could 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 would have to discharge the duties of his or her position in a nonpartisan manner, with good faith, and "with a degree of diligence, care, and skill which 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, could 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 would be 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.)

Reserve Capital Account/Funds

The Reserve Capital Account would be created under the jurisdiction and control of the Authority, and would have to be administered by the Authority to secure its notes and bonds. The Authority would have to 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 could 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 were redeemed before maturity. The Authority could 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" would mean the fund amount requirement that could be established in the resolution authorizing notes or bonds for which a fund had been established. The required amount could 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 could 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 would have to be credited toward the capital reserve fund requirement for the fund.

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

The Authority would have to 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 fell below the requirement, the Authority would have to transfer from the Reserve Capital Account to the fund an amount equal to the capital

reserve fund requirement. If a deficiency existed in more than one fund and the amount in the account were not sufficient to restore the funds fully, the money in the account would have to be allocated between the deficient funds pro rata, according to the amounts of the deficiencies. If at any time the account had been exhausted and the amount of the fund were insufficient to meet the capital reserve fund requirement, the Authority, by September 1, would have to 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 would have to include in his or her annual budget the amount certified by the Authority.

Bonds and Notes

The Authority could 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 constituted a part of or was 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 could 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 had matured. The refunding bonds would have to be sold and the proceeds applied to the purchase, redemption, or payment of the bonds to be refunded. The Authority could issue instruments separate from these obligations that established a contractual right in the holder of the instrument to require mandatory tender for purchase of the obligations to which

the instrument applied, for a period of time and subject to provisions as the Authority determined.

Except as otherwise provided by the Authority or the bill, every note or bond issue of the Authority would have to 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 were in a form or character as to be negotiable instruments, they would be negotiable instruments within the meaning of the Uniform Commercial Code. The notes and bonds of the Authority could be sold at public or private sales, at prices the Authority determined.

The notes and bonds would have to 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 could contain any of the following provisions, which would have to 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 it received from loans and interest on loans, and other money received or that would 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 it 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 could 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 could 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 could be amended or abrogated, the amount of notes or bonds whose holders would have to consent to the amendment or abrogation, and the manner in which the consent was to be given.
 - Vesting in a trustee or trustees property, rights, powers, and duties in trust as the Authority determined, which could 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 could be issued or sold by the Authority to investors.
 - Any other provision that could affect the security or protection of the notes or bonds.

A resolution authorizing notes or bonds also could contain a provision to delegate 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 as prescribed in the bill.

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

The bill provides that the State would not be liable on the Authority's notes and bonds, and the notes and bonds would not be a debt of the State. The notes and bonds would have to

contain a statement of this limitation.

The members of the Authority's board, or any person executing the notes or bonds, would not be 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 could 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 could include the statement in any agreement with the holders of notes and bonds.

Limited Obligation Bonds

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

Default

If the Authority defaulted 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 continued for 30 days, or if the Authority failed or refused to

comply with the bill, or defaulted in any agreement made with the holders of any notes or bonds, the holders of 25% in aggregate principal amount then outstanding could apply to the Circuit Court of Ingham County for the appointment of a trustee to represent the holders. A trustee appointed under the bill could (and, upon the written request of the holders of 25% in aggregate principal amount of the notes or bonds, would have to) 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 could 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 would have to give 30 days' notice in writing to the Governor, the Authority, and the Attorney General.

The trustee would 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 would have to be brought in the Circuit Court for Ingham County.

Bonds and Notes: Other Provisions

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

The Authority could 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 could 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 could be secured in the same manner as money of the Authority.

The bill provides that the notes and bonds of the Authority would be securities in which public officers and bodies of the State, municipalities, and municipal subdivisions, and other entities, could legally invest funds, including capital, in their control or belonging to them. The other entities would 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 was presently or could be authorized to invest in bonds or other obligations of the State.

Tax Exemption

The bill would exempt 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 would apply to the notes and bonds holders and all subsequent holders and transferees.

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

Report

The Authority would have to submit an annual report, by March 1 each year, relating to its activities for the preceding calendar year. The report would have to be submitted to the Governor, the Speaker of the House, and the Majority Leader of the Senate.

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

The bill would not provide funding for the administration and operation of the Authority. These costs would be absorbed by the Department of Treasury.

Fiscal Analyst: J. Runnels

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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.