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## BILL ANALYSIS

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Senate Bill 522 (as enrolled)  
Sponsor: Senator Michelle A. McManus  
Senate Committee: Transportation  
House Committee: Energy and Technology

### **PUBLIC ACT 103 of 2005**

Date Completed: 8-9-05

### **RATIONALE**

In 2000, the Wolverine Pipe Line Company submitted an application to the Public Service Commission (PSC) to replace an aging petroleum pipe line located in Meridian Township. In 2001, due to the PSC's concerns related to increased development around the pipe line, Wolverine submitted an alternate proposal for a wider, 26-mile pipe line along the I-96 right-of-way. The City of Lansing, in which several miles of the proposed route are located, moved to dismiss the application on the ground that Wolverine did not obtain the city's consent before submitting its application, as the city contended State law and PSC rules require. The PSC determined that, although the city's consent was required before construction began, it was not required to accompany the application. The PSC denied the motion and authorized the project. The city then appealed to the Court of Appeals, and, ultimately, the Supreme Court, which upheld the PSC's order authorizing the project, but emphasized that local consent was required before construction could begin. (The litigation is described below, under **BACKGROUND.**)

Some people expressed concern that the statutory requirement for local consent could interfere with the construction of necessary utility infrastructure to transport critical goods and services. It was suggested that the requirement be eliminated, in order to prevent one community from blocking utility projects that have an impact outside the community's borders.

### **CONTENT**

**The bill amended Public Act 368 of 1925, which governs highway obstructions and encroachments, as well as the use of highways by public utilities, to allow a utility to enter upon, construct, and maintain utility lines and structures under any public road, street, or other subsurface that intersects any limited access highway at a different grade, without the approval of the governing body of the local unit. The bill also allows the Michigan Department of Transportation (MDOT) to recover from a utility costs that exceed the installation permit fee established in the Act.**

Under the Act, telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers, or similar structures upon, over, across, or under any public road, bridge, street, or public place, longitudinally within limited access highway rights-of-way, and across or under any of the State's waters, with all necessary erections and fixtures for that purpose. Before any of the work begins, the company or municipality must obtain the consent of the governing body of the city, village, or township through or along which the lines and poles are to be constructed and maintained.

The Act also allows a utility to enter upon, construct, and maintain utility lines and structures longitudinally within limited

access highway rights-of-way in accordance with standards approved by the State Transportation Commission that conform to governing Federal laws and regulations.

The bill includes pipe lines among the utility lines and structures a utility may enter upon, construct, and maintain longitudinally within a limited access highway right-of-way, and allows utility lines and structures under any public road that intersects a limited access highway at a different grade. The standards must be approved by both the State Transportation Commission and the Public Service Commission. The bill specifies that the utility is not required to obtain the consent of the governing body of the city, village, or township.

Under the Act, the standards must require that the lines and structures be underground and placed in a manner that will not increase highway maintenance costs for MDOT. The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way. The imposition of a reasonable charge is a governmental function, offsetting a portion of the capital and maintenance expense of the highway, and is not a proprietary function. Under the bill, the imposition of a reasonable charge also offsets a portion of the permitting expense of the highway. The Act requires the charge to be calculated to reflect a one-time installation permit fee of up to \$1,000 per mile of longitudinal use of rights-of-way, with a minimum fee of \$5,000 per permit. Under the bill, if the one-time installation permit fee does not cover the reasonable and actual costs to MDOT in issuing the permit, MDOT may assess the utility for the remaining balance. The Act requires that all revenue received under this provision be used for capital and maintenance expenses incurred for limited access highways. The bill includes the cost of issuing the permit in the capital and maintenance expenses.

The bill took effect on July 22, 2005.

MCL 247.183

## **BACKGROUND**

The City of Lansing, its mayor, and Ingham County Commissioner Lisa Dedden appealed the PSC's order authorizing Wolverine's application to construct and operate a liquid petroleum pipe line in the I-96 right-of-way

in Lansing and Ingham County. In its opinion, published June 5, 2003, the Court of Appeals noted that the case presented an issue of first impression: whether the Act required a petroleum pipe line company to seek the consent of the affected local governments to construct a pipe line, and, if so, whether the consent had to be obtained *before* the company sought the PSC's approval (*Mayor of the City of Lansing, et al. v Public Service Commission, et al.*, 257 Mich App 1).

The city argued that the PSC improperly interpreted one of its own rules when it determined that the rule did not require Wolverine to submit the city's consent for the project with the application; that the referee improperly barred evidence of negotiations between Wolverine and PSC staff that resulted in their agreement to adopt the new pipe line route; that the PSC's order violated the equal protection clauses of both the United States and Michigan Constitutions; and that the order violated the public interest and was unsupported by substantial, material, and competent evidence.

In addition to asserting that PSC rules required local consent to be submitted with the application, the city also claimed that the doctrine of judicial economy would require the affected governments' prior consent. Since the Act explicitly required the consent of the affected governments only before a person entered upon, constructed, or maintained a project, the Court of Appeals found that the PSC had determined properly that Wolverine did not need to submit local government consent concurrently with its application for the Spartan Project.

Wolverine and the PSC staff posited that, because the statute did not specifically include pipe line companies among the entities subject to its requirements, the company did not need local approval at all in order to proceed with the project. The Court disagreed, determining that a pipe line company falls under the Federal definition of "utility" in the Code of Federal Regulations, to which the statute makes reference.

Regarding the city's claim that the referee improperly had barred evidence of negotiations between Wolverine and PSC staff that resulted in their agreement to adopt the new pipe line route, the Court

decided that the city did not demonstrate that the PSC's decision to uphold the referee's finding was unreasonable.

The city and Commissioner Dedden further asserted that the PSC's order resulted in discrimination against minorities, in violation of the equal protection clauses of both the U.S. and Michigan Constitutions. The appellants presented data from the 2000 U.S. Census showing that the minority population along the alternative proposed route was higher than the national urban average. The Court noted that, under both Constitutions, the equal protection guarantee requires that "people under similar circumstances be treated alike; equal protection does not require that persons under different circumstances be treated the same." The PSC determined that the population density near the first proposed route and the alternative proposed route were not similar, and that the people who would have been affected by the alternative route were not similarly situated to the people who would have been affected by the initial route. According to the Court, the appellants failed to demonstrate that the PSC's determination was unlawful or unreasonable, and did not meet the standard with regard to the equal protection guarantee.

Finally, the city and the county commissioner argued that the PSC's order approving the project violated the public interest and was unsupported by substantial, material, and competent evidence. Specifically, the appellants challenged the PSC's findings regarding several aspects of the proposal, including fire safety, motorist risk, environmental contamination, drinking and surface water contamination, the city's master plan, and third-party damages. Ultimately, the Court rejected the appellants' claims, noting that an extensive, detailed record of each of the issues in question had been compiled, and that "...it is for the PSC to weigh conflicting opinion testimony of the qualified and competent experts to determine how the evidence preponderated." The Court held that "...the PSC's determination that the proposed pipeline is reasonably designed and routed is supported by competent, material, and substantial evidence."

The Court of Appeals concluded that local consent was required, but not necessarily before the PSC's approval was sought, and

upheld the PSC's order. The mayor, the city, and Commissioner Dedden appealed to the Michigan Supreme Court which, in June 2004, affirmed the lower court's decision that Wolverine needed to obtain local consent, but that the consent did not need to be obtained before the application was submitted to the PSC (470 Mich 154).

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The bill will prevent one local unit of government from blocking the construction of utility infrastructure necessary to the delivery of critical goods and services throughout the State. In this case, one municipality's refusal has had a negative impact on 29 counties—roughly two-thirds of the Lower Peninsula.

A pipe line is the safest, most cost-effective way to transport petroleum. According to Wolverine, tanker trucks are over 34 times more likely to result in a fire or explosion, and over 87 times more likely to result in a fatality. In fact, positioning infrastructure adjacent to a highway will help ensure that third-party damage—the most common cause of pipe line incidents—does not occur, because development generally does not take place in interstate rights-of-way. In contrast, Meridian Township has experienced significant development since the existing pipe line was built, and today, the pipe line runs beneath two schoolyards, a retirement center lawn, streets, apartment complexes, and the parking lot of a shopping mall. A new pipe line will use technology far more advanced than what was available 38 years ago, when the original one was constructed, making it even safer. Wolverine also modified its proposal to address 21 concerns of the Lansing Board of Water and Light (BWL). Once the plan was improved, the BWL recommended that the Lansing City Council approve the pipe line. With these modifications, and other features, the project actually will exceed current State and Federal safety requirements.

A refinery in Alma, which produced and distributed 2.1 million gallons of refined petroleum product, i.e., gasoline and diesel fuel, per day, closed in 1999. Michigan's

remaining refinery, located in Detroit, is capable of producing only 14% of the gasoline needed in the State. This means that Michigan is heavily reliant on out-of-State fuel. The demand for gasoline is expected to continue to rise into the future, and a method of getting fuel to market is necessary. A new, larger pipe line will improve efficiency and provide some protection against price fluctuations when out-of-State gasoline supplies dwindle. Furthermore, fewer tanker trucks on the highway will result in less wear and tear on Michigan's roads.

In addition to hampering access to services and goods every resident needs, a local unit's ability to stop infrastructure construction along limited access highway rights-of-way stifles job creation and economic development. For example, it is estimated that 230 temporary workers will be needed to build Wolverine's proposed pipe line. In addition, new infrastructure will improve the availability and reliability of essential utilities, which will give businesses more incentive to locate in Michigan and generate employment opportunities.

The City of Lansing is the only affected community that rejected the pipe line. Although the principle of local control should be respected, in some cases the well-being of the thousands of people who live outside a municipality's boundaries should take precedence.

**Response:** To date, hundreds of miles of pipe line have been constructed throughout the State under the law. This means that, although local units had the ability to exercise veto power over a project, they often consented because the projects were in the best interest of the State and did not present an undue threat to public health and safety. The law had struck the appropriate balance between the State's needs and local control, and should not have been changed simply because one local unit did not approve the project in this particular situation.

### **Opposing Argument**

The bill will have ramifications far beyond the specific situation to which it responded, by eliminating language that served the important function of preserving local control. Under the bill, any utility may build any type of infrastructure along the highway in any community, regardless of that community's desires. Certainly, goods such

as petroleum, natural gas, and electricity must be able to reach citizens all over the State; however, local governments often have good reasons for rejecting utility conduits, such as concern for health, safety, and property values. Utilities should not be given unbridled authority to build infrastructure wherever they please at the risk of public safety and well-being. In the case of the Wolverine pipe line, Lansing's water supply may be threatened. Additionally, an incident along the pipe line itself could result in evacuations, highway closures, and traffic jams, as well as an increased strain on already stretched local emergency response resources. While adverse events occur less frequently when petroleum is transported via pipe line than when it is moved by tanker, the accidents are more severe when they do happen.

Rather than completely eliminating a municipality's voice, the bill should have contained some sort of arbitration process for situations in which utilities and local units could not come to an agreement, or included a provision prohibiting a local unit from withholding consent for a reason that was arbitrary or capricious. Additionally, the bill's scope should have been limited to the issue at hand in this case: petroleum pipe lines.

**Response:** A new arbitration panel would duplicate the PSC's functions. Even without the local approval requirement or an arbitration process, there still will be ample opportunity for local input through the application process. A utility still must obtain required permits from the Department of Environmental Quality, which has jurisdiction over wetland and stream crossings, and MDOT, as well as meet other extensive State and Federal safety and environmental standards. Moreover, although the bill was introduced in response to a situation involving a petroleum pipe line, the comprehensive solution provided by the bill defines clearly the extent of local influence over an infrastructure project, which will help to avoid costly litigation and ensure that the Legislature does not have to revisit the issue each time a utility wishes to build new infrastructure along a limited access highway.

Additionally, it is erroneous to assume that utilities always will build infrastructure directly adjacent to highways. In deciding where to site a pipe line, a utility must take into account numerous factors, such as

other utilities' rights-of-way. In many cases, the highway will not follow the most direct route, or might not be ideal for other reasons.

The problem the bill addresses is not specific to the situation involving Lansing and Wolverine; under the law, any municipality had unchecked veto power over critical infrastructure projects along limited access highways. Although all residents arguably expect essential goods and services to be readily available, it is feasible that no community would ever desire to have utility structures built within its boundaries due to perceived risks to aesthetics, property values, health, and safety. The bill addresses not only the conflict between Wolverine and the City of Lansing, but similar situations in the future as well.

### **Opposing Argument**

The bill violates Article 7, Section 29 of the State Constitution, which states, "No person, partnership, association, or corporation, public or private, operating as a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other public utility facilities, without the consent of the duly constituted authority of the county, township, city or village..."

**Response:** As the Supreme Court pointed out in a footnote to its opinion, interstate highways are Federal highways, and thus are not highways "of" any county, township, city, or village. Therefore, Article 7, Section 29 is not relevant to the issue of utility use of limited access highway rights-of-way.

### **Opposing Argument**

The PSC supports discontinuing use of the current pipe line because it traverses developed areas of Meridian Township, causing some to question why a larger pipe line should be built within a more densely populated part of Lansing. Some opponents of the Wolverine project claimed that placement of the pipe line in south Lansing will amount to economic and racial discrimination because it will run through lower income and more racially diverse neighborhoods. Eliminating the local consent provision may increase the likelihood that communities that appear to have less affluent or influential residents will be the default sites for the future

construction of aesthetically unpleasing or potentially dangerous infrastructure.

**Response:** The current pipe line has existed and been operational for nearly 40 years with no allegations of racial or economic injustice from those who live near it; in fact, development in the area has increased, demonstrating that the presence of a pipe line does not, in itself, render a location an undesirable place to live or establish a business. It has been demonstrated that simply building a new pipe line will be safer and more economical than expanding the existing one would be, and the proposed route will be the most practical.

Legislative Analyst: Julie Koval

### **FISCAL IMPACT**

The bill may result in increased State revenue and administrative costs associated with the construction and maintenance of utility lines and structures under any public road, street, or subsurface that intersects any limited access highway. A one-time installation permit fee is required before the longitudinal use of limited access highway rights-of-way. The fee is \$1,000 per mile of longitudinal use of highway rights-of-way, with a minimum permit fee of \$5,000 (five miles). The fee is paid to the Michigan Department of Transportation and credited to the State Trunkline Fund for capital, maintenance, and permitting expenses of limited access highways. If the permit fee does not cover the Department's permitting costs, the Department may assess the utility for the balance. This provision will cover any possible increased State administrative costs resulting from the bill.

The bill may result in decreased local government revenue if it leads to the construction of more utility lines and structures along limited access highway rights-of-way instead of along easements to local government property (e.g., a road, bridge, or street). There are no data available to suggest what the actual fiscal impact on local government will be.

Fiscal Analyst: Craig Thiel

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