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SFA BILL ANALYSIS

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Senate Bills 880 and 999 (as enrolled) **PUBLIC ACTS 48 & 50 of 2002**
Sponsor: Senator John J. H. Schwarz, M.D. (Senate Bill 880)
Senator Valde Garcia (Senate Bill 999)
Senate Committee: Technology and Energy
House Committee: Energy and Technology

Date Completed: 8-14-02

CONTENT

Senate Bill 880 creates 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: 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 Act and modify fees to the amount permitted under it.**
- **Allow providers to take a credit for the maintenance fee against their utility property tax (pursuant to Senate Bill 999).**
- **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, states, 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) may order for violations of the Act.**

Senate Bill 999 amended 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.

Senate Bill 999 took effect on March 14, 2002, and Senate Bill 880 will take effect on November 1, 2002. The bills were tie-barred to each other. Senate Bill 880 also was tie-barred to Senate Bill 881. (Senate Bill 881 created the "Michigan Broadband Development Authority Act" to establish the Authority and allow it to make loans and enter into joint ventures and partnership arrangements for the development and operation of broadband infrastructure.)

Senate Bill 880

Definitions

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

"Metropolitan area" means 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 enacts an ordinance or resolution electing to be classified as part of a metropolitan area under the Act. "Municipality" means a township, city, or village.

The bill defines "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 does 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 incorporates 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 includes a cable television operator providing a telecommunication service, a person who owns 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 do not include a person or an affiliate of a person when providing 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 creates the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority pursuant to Article VII, Section 27 of the State Constitution and any other applicable law. (Article VII, Section 27 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 will be an autonomous agency within the Department of Consumer and Industry Services (DCIS).

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

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

By March 1 of each year, the Authority must file an annual report of its activities for the preceding year with the Governor and members of the legislative committees dealing with energy, technology, and telecommunications issues.

Permit Requirement; Administrative Fee

A provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities must obtain a permit 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 will satisfy this permit requirement. (Section 251, which the bill repeals, 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 must file an application for a permit and pay a one-time $500 application fee to each municipality whose boundaries include public rights-of-way for which the provider seeks access or use. An application also must include route maps showing the location of the provider's existing and proposed facilities in the format required by the Authority. Except as otherwise provided by a mandatory protective order issued by the PSC, the Freedom of Information Act will not apply to information included in the route maps that is a trade secret, proprietary, or confidential information.

A provider asserting rights under Public Act 129 of 1883 is subject to the 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 has not previously obtained authorization or a permit under Section 251 of the MTA will have to submit an application for a permit to each municipality in which the provider has facilities located in a public right-of-way. The provider will not have to pay the one-time $500 fee. For good cause, the Authority may 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 municipality in a metropolitan area may not enact, maintain, or enforce an ordinance, local law, or other legal requirement applicable to telecommunication providers that is inconsistent with the bill or that assesses 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 must 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 must be those approved by the PSC as of August 16, 2001.

If the parties cannot 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 must notify the PSC. Within seven days from the date of the notice, the Commission will 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 may order that the permit be temporarily granted pending resolution. If any of the parties is unwilling to comply with the mediator's recommendations, any party to the dispute, within 30 days of receiving the recommendations, may request the PSC for a review and determination of the dispute. Except as provided below for emergency relief, the PSC's determination must be issued within 60 days from the date of the request. The interested parties to the dispute may agree to extend this 60-day requirement for up to 30 days.

A request for emergency relief will have the same time requirements as under Section 203 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 must notify the PSC when it grants or denies a permit, and include the date on which the application was filed and the date the permit was granted or denied. The Commission must 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 must pay an annual maintenance fee to the Authority, except as otherwise provided in the bill. The Authority must determine for each provider the amount of fees required. The annual period covered by each assessment will be

April 1 to March 31, and the due date for payment will be April 29. The Authority must prescribe the schedule for the allocation and disbursement of the fees. The Authority must disburse the maintenance fees to each municipality as provided under the bill, by the last day of the month following the month the Authority receives the fees. The Authority may authorize the Department of Treasury to collect and make the required allocations and disbursements. Any interest accrued on the revenue collected under the Act may be used only as provided by the bill.

Except as provided below, for the period of November 1, 2002, to March 31, 2002, a provider must pay an initial annual maintenance fee to the Authority on April 29, 2003, of two cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area, prorated for the that period. For each subsequent year, a provider must pay an annual maintenance fee of five cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area. The fee is to 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 or whether the facilities are leased to another provider.

The maintenance fee must be the lesser of the amounts prescribed above or one of the following:

-- For a provider that was an "incumbent local exchange carrier" in Michigan on January 1, 2002, the fees within the exchange in which the provider was providing basic local exchange service on that date, when restated by the Authority on a "per access line per year basis", must not exceed the statewide per access line per year fee of the provider with the highest number of lines in the State. Each year the Authority must determine that statewide fee by dividing the amount of the total annual fees the provider is required to pay under the above provisions by the provider's total number of access lines in the State.
-- For all other providers in an exchange, the fee per linear foot for the provider's facilities located in the public rights-of-way in that exchange must be the same as that of the incumbent local exchange carrier.

If the provider with the highest number of access lines in Michigan is unable to provide the exact number of linear feet for this determination, the provider, by February 1, 2003, in consultation with Authority staff, must make a good faith estimate of the number of linear feet of rights-of-way in which facilities owned by the provider are located in a metropolitan area and pay an annual maintenance fee to the Authority based upon the estimate. If an estimate is made, the Authority must determine the statewide per access line year cost based on that provider's good faith estimate. Upon the true up of the estimated linear feet (described below), the Authority must adjust the fees of all providers affected by these provisions.

("Incumbent local exchange carrier" means that term as defined in the Federal Communications Act of 1934 (47 USC 251). "Exchange" means that term as defined in the MTA, i.e., one or more contiguous central offices and all associated facilities within a geographical area in which local exchange telecommunication services are offered by a provider.)

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

<u>True Up</u>. Within 360 days of the bill's effective date, the provider making an estimate described above must true up the estimated amount of linear feet of the provider's facilities in rights-of-way in a metropolitan area to the actual amount. If the actual amount exceeds the estimate, the provider must pay the difference to the Authority within 30 days of the true up. If the actual amount of linear feet is less than the estimated amount, the Authority must give the provider a corresponding credit against the annual maintenance fee due for payment in the following year.

<u>Cable Provider</u>. If a provider possesses a franchise or is operating with the consent of a municipality to provide, and is providing cable services within a metropolitan area, the provider will 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 will 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 will 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 allows the municipality to seek right-of-way-related information comparable to that required by a permit under the bill, and provides insurance for right-of-way-related activities, the cable franchise or consent agreement will 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 may 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, exceeds the aggregate amount of the maintenance fees assessed under the Act. ("Broadband internet transport access services" means 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 does not affect the requirement of a cable operator to obtain a cable franchise from a municipality.

Underserved Areas. The Authority may 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" means that term as defined in Senate Bill 881, i.e., geographical areas of the State identified by the Boardband Development Authority as having the greatest need for broadband development.)

Shared Use Discount. If two or more providers implement a shared use arrangement and meet the requirements of Senate Bill 880, each provider participating in the arrangement will be entitled to a discount against the maintenance fees.

To qualify for the discount, each participating provider must occupy and use the same poles, trenches, conduits, ducts, or other common spaces or physical facilities jointly with another provider, to the extent permitted by the safety provisions of the applicable electrical code. Each provider also must 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 occur contemporaneously and do 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 must enter the shared use arrangement after the bill's effective date.

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

These provisions do not apply to the use or attachment to poles, trenches, conduits, ducts, or other common facilities placed in the public rights-of-way before the bill's effective date.

Tax Credit

A provider may 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). Each application must include sufficient documentation to permit the PSC to determine the allowable credit accurately. Unless the PSC finds that it cannot make a determination, it must issue its determination within 45 days from the date of the application. A provider will qualify for a credit equal to the costs paid under Senate Bill 880, less the amount of any equipment credit (under Senate Bill 999), and will not be subject to the maximum credit limit described below, if the provider files, and the PSC certifies, 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, do not exceed the PSC's approved rates and charges for those services.

If the PSC finds that it cannot make a determination based on the provider's documentation, it may 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 will be the lesser of 1) the costs paid under the bill, less the amount of any equipment credit; or 2) the amount that the costs paid under the bill, together with the provider's total service long run incremental cost of basic local exchange service, exceed 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" means that term as defined in the MTA.)

The bill specifies that the tax credit is the sole method of recovery for the costs required under the new Act. A provider may not recover the costs through rates and charges to the end-users for telecommunication services.

Maintenance Fee Allocation; Fee Sharing

Allocation. The Authority must 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 exceed $30 million in any year and are from fees for linear feet of rights-of-way in which a provider constructs telecommunication facilities after the bill's effective date, the Authority must 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 must comply with the new Act. For the purpose of the distribution under Sections 11 and 12, a municipality will be considered to be in compliance unless the Authority finds 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 is found out of compliance, the Authority must hold fee-sharing payments in escrow until the municipality returns to compliance. A municipality will 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 prescribes fee-sharing eligibility requirements, including a requirement that municipalities modify their existing fees. Municipalities that are ineligible (except as provided in the eligibility requirements) must be excluded from the computation, allocation, and distribution of funding under Sections 11 and 12.

Use of Payments. A municipality must use the amount received under Sections 11 and 12 solely for purposes related to rights-of-way. These purposes do not include constructing or using telecommunication facilities to serve residential or commercial customers.

A municipality with a population of 10,000 or more receiving fee-sharing payments must file an annual report with the Authority on the use and disposition of the funds. A municipality with a population under 10,000 receiving fees may file an annual report. The Authority must prescribe the form of the report, which must be in a simplified format.

Section 11 Fee-Sharing. The Authority must 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 Section 13 of 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 Section 13 for the most recent year. (Section 13 provides for distributions to cities and villages from the Michigan Transportation Fund).
-- 25% to townships in a metropolitan area

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 are constructed after the bill's effective date, must 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, must be disbursed to cities and villages in a metropolitan area on the basis of the distribution to each city or village under Section 13 of 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 Section 13 of Public Act 51 for the most recent year.

The amount available under this section of the bill 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, must 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 are located within all townships located in metropolitan areas.

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

-- All underground linear feet will receive a weight of 3.0.
-- All linear feet in a city, village, or township with a population over 5,000, that are not underground linear feet, will receive a weight of 2.0.
-- All other linear feet will receive a weight of 1.0.

Fee Modification Requirement

A municipality will not be eligible to receive fee-sharing payments unless, by December 31, 2002, to the extent necessary, it has modified any fees charged to providers after the Act's effective date relating to access to and usage of the public rights-of-way. The modified amount may not exceed the amounts of fees and charges required under the bill. To the extent a telecommunication provider pays fees that have not been modified, both of the following will apply:

-- The provider may deduct the fees paid from the maintenance fee required to be paid for the rights-of-way.
-- The amounts received must be deducted from the fee-sharing amounts the municipality is eligible to receive.

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

A municipality will be considered to have modified its fees if it has 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 pay only those fees required under the Act. The municipality must give each affected provider a copy of the resolution or ordinance.

To be eligible for fee-sharing payments, a municipality may 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) is found to be invalid or unconstitutional, a modification of fees under these provisions will be void from the date the modification was made.

Additional Eligibility Requirements

A county, a municipality, or an affiliate must 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 must 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 must be given as provided by law. At least 30 days before the hearing, the county or municipality must prepare reasonable projections of at least a three-year cost-benefit analysis. This analysis must 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 must be determined by use of accounting standards developed under the Uniform Budgeting and Accounting Act.

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

Charges for telecommunication service and cable modem services provided through a broadband Internet service must include all of the following:

-- All capital costs attributable to the provision of the service.
-- All costs attributable to the provision of the service that would be eliminated if it were discontinued.
-- The proportionate share of costs identified with the provision of two or more county or municipal services including telecommunication services.

A county or municipality that provides a telecommunication service or cable modem service through a broadband Internet service may not adopt an ordinance or a policy that unduly discriminates against another person providing the same service. Subject to other requirements of this section of the bill, this provision may not be construed as precluding a county or municipality from establishing rates different from those of another person providing the same service.

In providing a telecommunication or cable modem service through a broadband Internet service, a municipality may not employ terms more favorable or less burdensome than those the municipality imposes upon other providers of the same service within its jurisdiction concerning access to public rights-of-way, and concerning access to and rates for pole attachments.

A municipality may not impose or enforce against a provider any local regulation with respect to public rights-of-way that does 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 do not apply to either of the following:

-- Telecommunication facilities constructed and operated by a county, municipality, or an affiliate, to provide telecommunication service or a cable modem service through a broadband Internet service that is not provided to any residential or commercial premises.
-- Telecommunication facilities owned or operated by a county, municipality, or an affiliate for compensation, that are 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 is filed, the PSC must allow the county or municipality to take reasonable steps to correct a violation found by the Commission before it imposes any penalties. In determining whether the charges imposed by a county or municipality are in compliance with the additional eligibility requirements, the PSC must 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 must 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 must act reasonably and promptly on all applications filed for a permit involving an easement or public place.

The bill specifies that this section does 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 must approve or deny access within 45 days from the date a provider files an application for a permit. A municipality may not unreasonably deny a provider's access to and use of a public right-of-way. A municipality may require as a condition of the permit that a provider post a bond, which may not exceed the reasonable cost to ensure that the public right-of-way is returned to its original condition during and after the provider's access and use. Any conditions of a permit must be limited to the provider's access and use of any public right-of-way.

(The bill repeals sections of the MTA that are similar to the provisions described above (MCL 484.2251-484.2254). Under those sections, 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, must promptly 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. The Authority will have the jurisdiction to require the repair and restoration of any right-of-way, including a State right-of-way, that has not been repaired or restored after installation.

Exemptions

Educational Institutions. An educational institution is not required to pay the fees and charges or fulfill the mapping requirements of the bill for facilities that are constructed and used as provided under applicable provisions of Section 307 of the MTA. To the extent that an educational institution provides services beyond those allowed by Section 307, the institution must pay the required fees and charges, and fulfill the mapping requirements, for each linear foot of public right-of-way used in providing telecommunication services to residential or commercial customers. An educational institution must notify the PSC if it provides 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 is not required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements for facilities located in the public rights-of-way that are 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 must 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 must notify the PSC if it provides or leases telecommunication services to a person other than the utility, affiliate, or provider for compensation.

For purposes of these provisions, electric and gas utility services 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.

States & Municipalities. A state, county, municipality, municipally owned utility, or an affiliate is not required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements for facilities located in the public rights-of-way that are used solely for state, county, municipality, or governmental entity, or utility services, including internal communications and customer services such as billing or load management. The state, county, municipality, municipally owned utility, or affiliate must 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 state, county, another governmental entity, municipality, municipally owned utility, or its affiliate, for compensation.

A state, county, municipality, municipally owned utility, or affiliate must notify the PSC if it provides or leases telecommunication services to a person other than the state, county, municipality, another governmental entity, municipally owned utility, or affiliate for compensation.

For purposes of these provisions, utility services 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 time requirements and procedures governing a complaint proceeding under the bill will be the same as those under Section 203 of the MTA.

If the PSC finds, after notice and hearing, that a person has violated the bill, the Commission must order remedies and penalties to protect and make whole persons who have 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 may order the provider to pay a maximum fine of 1% of the amount of the unpaid assessment for each day that it remains unpaid. For each subsequent offense, the PSC may order a maximum fine of 2% for each day the assessment remains unpaid.
-- The PSC may order a violator to pay a fine of at least $200 but not more than $20,000 per day that the person is in violation. For each subsequent offense, the PSC may impose a fine of at least $500 but not more than $40,000 per day that the person is in violation.
-- If the person is a provider, the PSC may 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 may issue cease and desist orders.
-- The PSC may order a violator to pay attorney fees and actual costs of a person who is 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 may 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 are 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 must appoint a mediator within seven days of the notice, to make recommendations for a resolution of the dispute within 30 days of the appointment. If any of the parties is unwilling to comply with the mediator's recommendations, any party to the dispute may, 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 must be issued within 60 days from the date of the request. The Commission must issue its determination within 15 days from the date of the request if a municipality demonstrates that the public health, safety, and welfare require a determination before the 60-day deadline. The interested parties may 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 requires maintenance fees) to a certain person is found to be invalid or unconstitutional, that provision and Sections 3 and 15 will not apply to any person. (Section 3 establishes the Authority. Section 15 requires municipalities to grant providers a permit for access to and use of public rights-of-way.)

If Section 15 does not apply due to this provision, the permit process is to be as described below. Further, the bill states that if Section 15 does not apply, it is 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 will have the same construction and interpretation as Sections 251 through 254 of the MTA had before their repeal by the bill.

A local unit of government must 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 must approve or deny access within 90 days from the date a provider applies for a permit for access to a right-of-way, easement, or public place. A local unit may not unreasonably deny a provider's right to access to and use of a right-of-way, easement, or public place. A local unit may require the provider to post a bond as a condition of the permit to ensure that the right-of-way, easement, or public place is returned to its original condition during and after the provider's access and use.

Any fees or assessments made under these provisions must be on a nondiscriminatory basis and may 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 must obtain a permit as required under these provisions.

The Act specifies that this section (Section 19) does 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 fees collected under the bill may be used only as provided by it and will be subject to a State audit by the Auditor General.

Existing Rights. The bill states that it does not affect any existing rights that a provider or municipality might 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 must 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 must 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 will 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 Act will 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 it will 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 may request the opinion of the Michigan Supreme Court on important questions of law as to the constitutionality of the new 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

Equipment Credit

The bill allows 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 is claimed. The bill defines "eligible expenditures" as expenditures made by a company to purchase and install "eligible equipment" after December 31, 2001. "Eligible equipment" means property, placed into service in Michigan for the first time, with information carrying capability exceeding 200 kilobits per second in both directions.

The credit may not exceed a company's tax liability under the Act, in the tax year the credit is claimed. A company may not claim the credit in a tax year in which the company is not subject to the annual maintenance fee under Senate Bill 880, or the company has failed to pay the annual maintenance fees that are due and payable as of May 1 in that year.

The amount of the credit a company may claim is limited as follows:

-- The credit may not exceed 3% of the company's liability for the tax in the 2003 tax year.
-- For the 2004 tax year, the credit may 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 may 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 may not exceed the greater of 12% of the company's liability for the tax in the tax year in which the credit is claimed, or 100% of the credit the company received in the immediately preceding tax year.

Maintenance Fee Credit

After any equipment credit is determined, a company may claim a credit against any remaining tax imposed under Public Act 282 equal to the maintenance fee credit imposed by Senate Bill 880, less the amount of any equipment credit.

If the maintenance fee credit and any unused carryforward of the credit for the tax year exceed a company's remaining tax liability for the tax year (after the equipment credit is determined), the excess may not be refunded but may be carried forward to offset tax liability in subsequent tax years, until used up. A company may not claim the credit in a tax year in which the company is not subject to the annual maintenance fee, or the company has failed to pay the annual maintenance fees that were due and payable as of May 1 of that year.

Credit Application

A company may 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. An application for the equipment credit must be submitted at the time the company's annual report required under Public Act 282 is due. (Public Act 282 requires a company subject to the tax levied under the Act to file an annual report in March.) An application for the maintenance fee credit must be submitted before May 1.

MCL 484.3103-484.3120 (S.B. 880)
MCL 207.13b (S.B. 999)

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bill 880

The bill will increase both State revenues and expenses by an equal and indeterminate amount that may be as much as $10.7 million in FY 2002-03 and $27.0 million in FY 2003-04, and will have an indeterminate effect on the revenues and expenses of local units of government. The bill will 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 is in effect and $0.05 per linear foot in later years. A cable provider who provides telecommunications services will be eligible to pay a substitute fee of $0.01 per linear foot of right-of-way and may waive the substitute fee as long as the provider has 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 fiscal estimate accounts for this phenomenon.

The bill will standardize the fees paid for rights-of-way and require the State to provide local units with the maintenance fee revenues. The method of distribution will depend upon the total amount of revenue generated. Of the first $30.0 million in fee revenue, townships will receive 25% of the money distributed to local units and cities and villages will receive the remaining 75%. Money distributed to townships will be based on the number of linear feet of rights-of-way granted by the unit, while money to cities and villages will be distributed in the same manner as State Trunkline Highway funds are distributed. For revenues in excess of $30.0 million, fees from telecommunications facilities in existence as of November 1, 2002, will be distributed in the same manner as the first $30.0 million in fee revenue is distributed, while fees on facilities constructed after that date will be redistributed to local units according to 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 interpreted to reflect the apparent intent of "linear feet of occupied public rights-of-way attributable to...".) Under the current estimate, no money is likely to be distributed under the distribution mechanism in Section 12, using the weighted linear feet of rights-of-way, in the near future. Local units will be prohibited from levying access fees and other fees associated with public 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 will increase revenues, while for local units with high fees, the bill will likely reduce revenues.

The bill also will 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 limits future permits to a one-time fee of $500. For local units that charge higher fees or grant permits that require renewal, the bill will reduce local unit revenues. For local units that charge lower fees or no fees, the bill will increase local unit revenues.

Revenues from the per linear foot maintenance fee in future fiscal years, as well as their distribution pattern, will 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 under the bill, 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

telecommunications 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 in revenue also may be offset by the retirement of existing rights-of-way, although such growth may alter the manner in which fee revenue will be distributed.

Growth in revenues as a result of growth in rights-of-way will be limited if affected firms implement qualified shared use agreements. For example, if a telecommunications company adds 100,000 feet of rights-of-way, the bill will increase the maintenance fee by $5,000. However, if the company enters into a shared use agreement, the increase in the fee revenue may be as little as $3,000.

The effect of the bill also will differ between telecommunication providers. Section 8(6) of the bill allows 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. Were the bill fully effective in FY 2000-01, Ameritech would have paid $22.6 million in maintenance fees in FY 2000-01, or approximately $4.18 per access line. The per access line equivalent of the maintenance fee for providers other than Ameritech is expected to be more than $15 per access line. The bill attempts to mitigate this differential by limiting the impact of the fee on all providers to the lesser of the per access line fee on Ameritech times the number of access lines owned by a provider or the fees assessed under the $0.05 per linear foot maintenance fee.

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. However, under the bill, both Ameritech and other providers have an incentive to acquire a small cable operation. Under Section 8(11) of the bill, cable operators will be exempt from the $0.05 maintenance fee on all rights-of-way and instead will 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 is levied only on the cable lines within the community and the subsection exempts 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 reduces 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 will cause the bill not to generate any revenue. The fiscal analysis assumes that providers, particularly Ameritech, do not take advantage of this apparent loophole.

If the wording in the bill were to change such that Ameritech would not qualify for the reduced rate offered to cable providers, or that Ameritech would receive the cable rate only in those communities where it offered cable services, then based on FCC data, SBC/Ameritech would be expected to pay slightly less than $23.5 million of the FY 2003-04 fees under the bill (and the total revenue generated by the bill would be $27.0 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 telecommunications services from Ameritech will see increases in fees from rights-of-way under the bill, even if the standardized fee is lower than the fee the local unit currently levies.

The bill's language in Section 8, Subsections 11 and 12, appears to exempt cable providers who provide telecommunications services from the permit fees for right-of-way access. As mentioned above, Subsection 11 exempts the provider from paying any other fees as long as the $0.01 per foot fee levied on the cable rights-of-way is 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 paying the $500 permit fee, as long as the $0.01 fee is paid on just the cable lines within a metropolitan area where the cable provider offers telecommunications services.

Similarly, Subsection 12 exempts a provider from paying the $0.01 per foot fee (and thus any fee) provided that a certain minimum aggregate investment in broadband facilities has been made in the State. 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 is levied in a given year. 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 (i.e., about $2.0

million). The estimate assumes that "aggregate investment" includes the purchase of facilities already placed into service by another company. It is unclear how many cable operators will qualify for the exemption. The fiscal analysis assumes that essentially all cable operators will 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. The estimate also assumes that each cable provider has spent at least $2.0 million, including acquisition costs, on equipment that has been installed since January 1, 1996.

The State will receive no net increase in revenue from the maintenance fees because all of the fee revenue that is received will be redistributed to local units. The bill prohibits providers from passing the fees required by the bill on to consumers, but allows providers to receive a tax credit to offset the impact of the fees levied under the bill. The credit is related to provisions in Senate Bill 999. The impact of the credit, combined with the other credit in Senate Bill 999, will reduce General Fund revenues approximately $10.7 million in FY 2002-03 and $27.0 million FY 2003-04.

Senate Bill 999

The bill will reduce State General Fund revenues by approximately $10.7 million in FY 2002-03 and $27.0 million in FY 2003-04, although the potential exposure under the bill may be greater. The bill creates two new credits against the utility property tax: 1) for new investments in property that can carry information at a rate of more than 200 kilobits per second in two directions, and 2) for maintenance fees paid under Senate Bill 880. The second credit will be reduced by any amount received under the first credit.

In regard to the first credit, broadband investments also will be eligible for the investment tax credit under the single business tax (SBT). The credit under the bill differs from the investment tax credit in that the bill's credit is subject to several limitations: 1) it may not exceed 6% of eligible expenditures, 2) initially it may 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 may not exceed the prior year's credit. Another provision also requires that the credit not exceed the company's total utility property tax liability, although the estimated liabilities of affected taxpayers suggest that this language is largely irrelevant to the bill's fiscal impact. The credit also is not refundable and may not be carried forward or carried backward. SBC/Ameritech and Verizon are the two largest telecommunications companies in Michigan that will be eligible for the credit.

The bill's limitations appear to reduce the impact of the credit significantly. For example, the FCC reports that Ameritech spent an average of $132.1 million per year between 1996 and 2000 on additional cable and wire, increasing total cable and wire by approximately 4.0% per year. 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 limitations imposed by the bill and Ameritech's estimated utility property tax liability assuming that the new cable and wire are broadband capable, Ameritech will be limited in FY 2002-03 to a credit of approximately $4.0 million rather than the full $7.9 million the bill would allow without the second set of limitations (although in FY 2003-04 and later years, Ameritech may receive the full $7.9 million). Information is not available for the Michigan investments of other telecommunications providers in this State, 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 will be eligible to claim an investment tax credit 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 trigger the limitations, taxpayers would receive a larger credit on their eligible expenditures in Michigan under the bill than under the investment tax credit. The investment tax credit allows a credit equal to a maximum of the SBT 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 allows 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 investment tax credit of between $3.3 million and $9.0 million plus an additional $30.0 million in credits

under the bill.

In some cases, a taxpayer might not be eligible for the investment tax credit because the taxpayer chooses to claim the gross receipts deduction under the SBT. A taxpayer would choose to claim this deduction only if the liability after the deduction were less than it would be if the taxpayer filed in a manner that would allow it to claim the investment tax credit. The revenue lost under the bill will occur regardless of whether the taxpayer claims the gross receipts deduction.

In regard to the second credit, it essentially ensures that taxpayers receive at least all of the maintenance fees paid under Senate Bill 880 back in tax credits. The maintenance fee in Senate Bill 880 is expected to generate $10.7 million in revenue in FY 2002-03 and $27.0 million in FY 2003-04. If the first credit under Senate Bill 999 exceeds the maintenance fee, a taxpayer will not be eligible for the second credit. In the above examples for Ameritech, Ameritech is estimated to pay $23.5 million in maintenance fees in FY 2003-04 and receive a $7.9 million credit under the first credit. As a result, Ameritech will be eligible for the second credit, for approximately $15.6 million. Under this example, the combined effect on the State of both bills will be an increase in maintenance fee revenue of $23.5 million, an increase in State expenditures of $23.5 million (to distribute the maintenance fee revenue to local units), plus $23.5 million in credits to reduce the General Fund through the telephone and telegraph property tax.

In aggregate, the combined effect of both bills will be to reduce State General Fund revenues by approximately $10.7 million in FY 2002-03 and $27.0 million in FY 2003-04. If taxpayers invest more in equipment eligible for the credit under Senate Bill 999 than forecasted in this fiscal analysis, revenues may be lowered by a greater amount. On the other hand, because of the second credit, it is unlikely that revenues will be lowered by a smaller amount if investment is less than forecasted.

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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.