STATE OF MICHIGAN

SUPREME COURT

IN RE 2002 PA 48
HOUSE OF REPRESENTATIVES'
REQUEST FOR AN ADVISORY OPINION

Supreme Court No. 121394

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF THE CONSTITUTIONALITY OF 2002 PA 48

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Jurisdiction is based on Article III, Section 8 of the 1963 Michigan Constitution, and on MCR 7.301(A)(4).

STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT AUTHORITY MAY CONSTITUTIONALLY REQUIRE A PERMIT, UNDER SECTION 5 OF 2002 PA 48, AND ASSESS AN ANNUAL MAINTENANCE FEE, UNDER SECTION 8 OF 2002 PA 48, ON ALL TELECOMMUNICATIONS PROVIDERS IN MICHIGAN, INCLUDING THOSE PROVIDERS THAT ASSERT PRE-EXISTING FRANCHISE RIGHTS UNDER 1883 PA 129.

The Michigan Municipal League and the Michigan Townships Association answer "Yes."

2. WHETHER THE METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT AUTHORITY, AS ESTABLISHED AND EMPOWERED UNDER SECTION 3 OF 2002 PA 48, IS DULY CONSTITUTED AS A METROPOLITAN AUTHORITY UNDER ARTICLE VII, SECTION 27 OF THE MICHIGAN CONSTITUTION OF 1963.

The Michigan Municipal League and the Michigan Townships Association answer "Yes."

3. WHETHER THE CREATION OF AN AUTHORITY UNDER ARTICLE VII, SECTION 27 OF THE MICHIGAN CONSTITUTION OF 1963 POSSESSING THE POWERS AND DUTIES PROVIDED FOR IN 2002 PA 48 IS A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S POWERS CONSISTENT WITH ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

The Michigan Municipal League and the Michigan Townships Association answer "Yes."

4. WHETHER THE ANNUAL MAINTENANCE FEE REQUIRED TO BE PAID BY TELECOMMUNICATIONS PROVIDERS UNDER THE PROVISIONS OF 2002 PA 48 TO RECOVER THE COSTS AND IN CONSIDERATION OF THE RIGHT TO USE PUBLIC RIGHTS-OF-WAY CONSTITUTES A VALID FEE THAT IS NOT PROHIBITED FROM BEING IMPOSED WITHOUT VOTER APPROVAL BY ARTICLE IX, SECTION 31 OF THE MICHIGAN CONSTITUTION OF 1963.

The Michigan Municipal League and the Michigan Townships Association answer "Yes."

STATEMENT OF FACTS

Amici Parties and Their Interest

The Michigan Municipal League the ("Municipal League") is a non-profit corporation created in 1899 to represent and advance the interests of cities and villages in the State of Michigan. Its membership is comprised of over 500 Michigan cities and villages statewide. The Municipal League's participation in this matter was authorized by the Board of Directors of the Michigan Municipal League Legal Defense Fund, whose purpose is to represent the interests of member cities and villages in lawsuits and similar matters of statewide importance.

The Michigan Townships Association the ("Townships Association") is a non-profit corporation formed in 1953. It provides educational services, information exchange and guidance to and among township officials in the State of Michigan. The Association's membership consists of virtually all of Michigan's 1,242 townships and 6,526 locally elected township officials. Its participation in this matter was authorized by vote of its Board of Directors. Collectively, the Municipal League and the Townships Association represent essentially all of the cities, villages and townships in Michigan.

One of the principal focuses of 2002 PA 48[1] involves the powers and duties of cities, villages and townships (collectively defined as "municipalities" in Section 2(g) of the Act) regarding permits for telecommunications providers who install facilities in the public rights-of-way. The Act thus affects literally all of the members of both organizations on important matters relating to the rights-of-way. For this reason, both the Municipal League and the Townships Association were heavily involved in the drafting and passage of the Act and strongly supported the Act in the legislature. As the spokespersons for municipalities statewide, the Municipal League and the Townships Association have an important and unique voice and viewpoint to bring to the four constitutional issues before this Court in this proceeding.

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[1] The statute is codified at MCL 484.3101, *et. seq*. Throughout this brief, the statute will be referred to variously as either "Public Act 48," "2002 PA 48," "Act 48," or simply as "the Act." (A complete copy of the statute is attached as Exhibit N to this brief).

Prelude to the Act

Public Act 48 was adopted to facilitate the development of high-speed telecommunications services in Michigan. Governor Engler and the Michigan Economic Development Corporation in its *LinkMichigan* Report (May 2002)[2] identified the need for high-speed telecommunications as a critical element to our state's future economic development. For example, manufacturers need to share data, files, drawings and other materials electronically with their suppliers and customers, just as they can in other states. Distance learning through internet linked schools, which help provide quality education and create a highly trained work force, also requires high-speed broadband connections. Electronic government at both the state and local levels requires state-of-the-art "connectivity" as well.[3] Rothwell Testimony, *Supra*, at p 4.

But Michigan is dead last—51st out of the 50 states (plus District of Columbia)—in new investment per phone line and ranked poorly on several other measures of broadband deployment as well.

The three bill "broadband package"[4] (Public Acts 48, 49 and 50 of 2002) encourages the deployment of broadband telecommunications in Michigan by addressing right-of-way matters, providing a financing authority to assist on broadband development, and providing certain property tax credits for such facilities.

Municipalities strongly support the goals (economic development, distance learning and governmental connectivity) which motivated the Governor and legislature to promptly enact these bills. A key additional concern for municipalities was the public rights-of-way in which the

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[2] A copy of the *LinkMichigan* report is attached as Exhibit C.

[3] For a summary of the *LinkMichigan* report, these factors and detailed statistics, *see* Testimony of Doug Rothwell, President and Chief Executive Officer, Michigan Economic Development Corporation, before the Senate Technology and Energy Committee on SB 880, 881 and 999, January 9, 2002 ("Rothwell Testimony"). SBs 880, 881 and 999 became, respectively, Public Acts 48, 49 and 50 of 2002. Exhibit E.

[4] "Broadband" is a common shorthand for high-speed telecommunications, whether delivered by telephone, cable or satellite. The Act defines "broadband internet access transport services" as "the broadband transmissoin 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."

telecommunications lines must be placed. Municipalities manage these public rights-of-way to balance the competing needs of vehicular traffic, pedestrian traffic, a wide range of utilities (electric, water, sewer, cable, gas, telephone, steam) and the public at large. To help ensure the proper management of the rights-of-way, every telecommunications provider is required (under current law) to obtain a permit under Section 253 and 254 of the Michigan Telecommunications Act ("MTA")[5] before using the public rights-of-way (and in some instances may be required to obtain a franchise under Article VII, Section 29 of the Michigan Constitution as well).

A major challenge for municipalities is recovering the costs relative to telecommunications providers installing and maintaining lines in the public rights-of-way. Telecommunications providers, like others who use public property, should compensate municipalities for the costs caused by their use of those rights-of-way. Those costs include the increased costs of monitoring and management of the rights-of-way to ensure that all users are able to use common rights-of-way safely and equitably. Added costs also include street "degradation," an engineering term that reflects the significantly reduced useful life of a street caused by repeated pavement cuts by providers using the rights-of-way. Municipal construction projects also became more complicated, and more costly, due to the increased congestion of facilities in the rights-of-way. As indicated elsewhere in this brief, the uncontroverted testimony before the legislature was that these costs were in excess of $86 million per year.[6] One powerful impetus behind the legislation, then, was the desire on the part of the legislature and municipalities to recover at least some of these costs.

Prior to the enactment of Act 48, municipalities faced two major hurdles in attempting to recover these costs. The first hurdle arose out of the fact that certain providers, sometimes referred to as incumbent local exchange carriers, or "ILECs," claimed that they could not be required by municipalities

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[5] MCLA §484.2251, 2254, repealed by Act 48.

[6] *See* Singh & Nader, "Right-of-Way Costs Incurred by Local Governments in Michigan for Providing Access to Telecommunications Providers," January 16, 2002 (hereinafter the "Singh Report") (a copy of the report is attached as Exhibit D to this brief).

to obtain a permit, or pay fees, for use of the rights-of-way. These incumbent providers (the largest of which is Ameritech Michigan) claimed that they had certain "grandfathered" franchise rights which allowed them to use the public rights-of-way *in perpetuity* without the need for local consent or the payment of franchise fees. These rights, they asserted, arose from an 1883 Michigan statute which predated the adoption of the 1908 Michigan Constitution where, in Article VIII, Section 28, "public utilities" are expressly required to obtain the "consent" of local units of government to use the local public rights-of-way. The net result was that new providers paid fees to municipalities for use of the rights-of-way, while others (principally the ILECs) did not. This situation discouraged potential new telecommunications providers – sometimes referred to as competitive local exchange carriers or "CLECs" – from entering the market and providing the public benefits that competition brings. This situation also meant, of course, that municipalities were not recovering the costs caused by such ILECs by their use of the local rights-of-way.

The second hurdle faced by municipalities involved language in a 1995 amendment to the MTA which limited municipalities to recovering the "fixed and variable costs" of providers' usage of the public rights-of-way. MCLA §484.2253. The MTA, however, did not define this critical phrase, nor did it approve of any particular methodology for determining those costs. The result was a significant degree of litigation[7] and uncertainty—both by municipalities as to the fees that they could charge, and by providers, as to the fees which they could be legally required to pay. The situation demanded a legislative resolution.

Public Act 48

In the early summer of 2001, the Michigan Economic Development Corporation ("MDEC") issued its *LinkMichigan* report. This report identified both the critical need for broadband deployment as

[7] *See, e.g., Coast to Coast Telecommunictions, Inc v City of Birmingham*, unpublished Opinion and Order of the Michigan Public Service Commission, decided October 24, 2002 (Case No. U-92354); and *TGG Detroit v City of Dearborn*, unpublished opinion of the Wayne County Circuit Court, decided March 8, 1999 (Case No. 98-803937-CK) (now on appeal to the Court of Appeals). Copies of each of these cases are attached as Exhibits L and M, respectively.

part of the state's future economic development and many of the problems described above. With this as the impetus, the Engler administration began, in the fall of 2001, to bring together all of the parties with a potential interest in the matter – including the ILECs, the CLECs, the municipalities, and the Michigan Chamber of Commerce – to develop an appropriate legislative response. The result was Public Act 48.[8]

At its core, Public Act 48 makes a simple yet profound change in Michigan's telecommunications law: it establishes a uniform statewide right-of-way fee. Under current law (the 1995 amendments to the MTA), the statutory language requires each telecommunications provider to pay fees to a municipality in an amount no greater than the "fixed and variable" costs of maintaining the public rights-of-way in each municipality where the provider has lines.[9] Thus there was a different fee for each municipality due to the different right-of-way costs incurred by each.[10] Some believed the differing fees among municipalities deterred and/or delayed broadband investment. A frequently cited example involved a hypothetical fiber optic telecommunications network that would encircle the Detroit metropolitan area. Such a network would traverse approximately 100 communities, each of which would have a different fee, some with multiple levels of fees depending upon the exact street being used. Adding to the perceived difficulty was the lack of a common—and agreed upon—methodology to determine the costs and thereby compute the applicable fees.

Public Act 48 resolves this problem by setting a uniform statewide fee (generally 5 cents per foot of right-of-way used by each telecommunications provider) as partial compensation for the costs the provider's usage causes. In addition, providers claiming grandfathered franchises are expressly made

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[8] As indicated in the preamble to the House of Representatives' Request for Advisory Opinion, the bill which became Act 48 was universally supported by virtually all of the key parties with any interest in the matter, including Ameritech, Michigan Cable Telecommunication Association, AT&T Broadband, the Education Alliance of Michigan, Michigan Manufacturers' Association, Small Business Association of Michigan and, of course, the Municipal League and the Townships Association.

[9] *See* MCLA484.253 (. . . "fixed and variable costs to the local unit of government in granting a permit and maintaining the rights-of-way, easements, or public places used by a provider").

[10] And in some cases the costs would vary by the streets used by the provider, such as one fee for major streets (e.g., major downtown streets), a lesser fee for minor streets, and a third fee for alleys.

"subject to the permit and fee requirements of this act." Act 48, Section 5(2). Because the fee is paid by all providers, including the ILECs, and because the amount of the fee is fixed, the cost/fee uncertainty is resolved. At the same time, the Act directs the new Oversight Authority (to which the fees are paid) to distribute the funds to participating municipalities using a statutory formula which generally reflects the amount, cost and complexity of the rights-of-way within each municipality.[11]

To make this approach work, the new Oversight Authority created by the Act is given the "exclusive power to assess fees on telecommunications providers . . . to recover the costs of using the rights-of-way." Act 48, Section 3(3). Once per year the Oversight Authority is required to distribute the fees it receives (100 percent) to municipalities. Section 8(2) and (3). Municipalities are required to use the funds they receive "solely for rights-of-way related purposes." Section 10(4). Providers may in many cases recover the cost of their fees through a credit against the utility property tax they would otherwise pay. Section 8(14)-(17).

Right-of-Way Costs

The Act, from a fees and financial standpoint, is a "cost recovery" statute requiring telecommunications providers to compensate municipalities for the costs attributable to their use of the public rights-of-way.[12] As previously noted, there are at least three major components of costs municipalities incur due to telecommunications lines in public rights-of-way.

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[11] *See* Public Act 48, Sections 11 and 12, where 75 percent of the funds received by the Authority are distributed to cities pursuant to Section 13 of 1950 PA 51, MCL 247.663 ("Act 51"). Act 48, Section 11(1). Section 13 of Act 51 reflects a complicated formula developed for gas tax distribution purposes which basically takes into account the amount, cost and complexity of the rights-of-way within cities and villages. The remaining 25 percent of fees collected by the authority are distributed to townships based on the number of linear feet of rights-of-way within a township occupied by a telecommunications provider. *Id.* Townships do not receive funds under Act 51, hence the use of a different allocation method for them. However, as a generalization there is less variation among townships than there is among cities in the costs and complexity of rights-of-way, so distributing funds to townships based on miles of rights-of-way used achieves a result analogous to that which the Act 51 formula does for cities and villages.

If annual fees exceed $30 million per year (which at this point seems relatively unlikely), the distribution of the excess is by weighted linear foot taking into account the size of the community and whether lines are aerial or underground.

[12] *See* footnote 26, *infra*, re significance of the change, over time, from a monopoly regime to the current competitive environment.

First, there are degradation costs—the shortened useful life of a street (*i.e.*, more frequent repaving costs) which occurs each time the surface is breached for a trench or other excavation for a telecommunications line. As this Court and the residents of Michigan are well aware, the annual spring "freeze-thaw cycle" wreaks havoc with our roads, most notably creating potholes. It is impossible to completely seal the street to keep out moisture once a street is "patched" due to a pavement cut for a telecommunications line. Thus every time the pavement is cut, potholes or similar deterioration almost inevitably result.[13]

Professor Hari Singh, Ph.D, Chair of the Economics Department at Grand Valley State University, recently conducted a study entitled "Right-of-Way Costs Incurred by Local Governments in Michigan for Providing Access to Telecommunications Providers." He presented the report and testified about it to the Michigan Senate Technology and Energy Committee on January 16 and to the House Energy and Technology Committee on March 12, 2002. His uncontroverted testimony was that the "annual pavement degradation costs due to telecommunications providers are estimated to be $33 million for local governments in Michigan."[14]

Second, telecommunications lines in the public rights-of-way increase the monitoring and management costs incurred by municipalities. These costs relate to construction permit procedures, inspecting work that is done, monitoring work done by telecommunications providers in the rights-of-way for compliance with permits, codes and applicable law, barricading expenses, engineering costs, legal expenses, and mapping activities. These activities attempt to ensure that the rights-of-way can be used properly, efficiently and safely by *all* users (cars, trucks, pedestrian traffic, utility type providers and others) and that each complies with their respective obligations (for example, provider A does not

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[13] The degradation is compounded whenever an excavation is made into the street because the soil that is replaced is inevitably different from the adjacent undisturbed soil. The result is that the "vertical column" of soil in the excavated and unexcavated areas are different and expand and contract differently with temperature changes and the freeze-thaw cycle. Thus even if a pavement cut is perfectly patched in July, by next March the street will be uneven, will admit moisture, and the area will rapidly deteriorate.

[14] Testimony of Dr. Hari Singh before the committees in question on the dates indicated; "Singh Report", *supra,* at pp 2-3. Exhibit D.

inadvertently cut provider B's lines). These costs increase with the increasing number of users of the rights-of-way. In his report and testimony, Professor Singh stated that his "estimate of annual monitoring/management costs due to telecommunications providers incurred by local governments in Michigan is $53.3 million." *Id.* Professor Singh stated that this was for underground lines only and was a conservatively low figure because "we have not included monitoring/management costs for aerial lines." *Id.*

Third, municipal costs increase due to the delays and higher costs municipalities incur due to delaying sewer, water, road and similar municipal right-of-way construction projects in order to coordinate installation, construction and maintenance with multiple new or existing telecommunication providers. In his report and testimony Professor Singh noted this element of cost and stated that it was not included in either of the figures set forth above. *Id* at p 3.

The Municipal League and the Townships Association appreciate the fact that Act 48 ultimately will result in telecommunication providers paying some $24 to $36 million per year towards the more than $86 million in costs which their lines in the rights-of-way annually cause.[15] The Municipal League and the Townships Association support the statutory requirement that such funds be spent solely on right-of-way related matters. This is appropriate because the funds partially reimburse municipalities for increased right-of-way related costs.

This amicus curiae brief, then, is filed by the Municipal League and the Townships Association in support of the constitutionality of Act 48. It will address, in turn, each of the four constitutional questions posed by the House of Representatives in its request for an advisory opinion on the statute.

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[15] The payment figures of $24 and $36 million were supplied by the House Legislative Analysis, SB 880, as enrolled, Second Analysis, July 12, 2002, at p 8 (a copy of the entire report is attached as Exhibit E). The $86 million figure for right-of-way costs is the conclusion of Dr. Singh's report, a copy of which is attached as Exhibit D.

SUMMARY OF ARGUMENT

The answer to the first question posed is "yes." The Oversight Authority may impose the permit and fee requirements of Act 48 on all telecommunications providers in Michigan, including those providers that assert pre-existing franchise rights. This Court need not decide whether these incumbent providers do, as a matter of law, enjoy franchise rights under Act 129, the statute which purportedly created their claimed rights, since any such rights could not be successfully asserted by an incumbent provider against the provisions of Act 48. There are two principal reasons for this. The first is that Act 129 itself allows for incumbent providers to be regulated under Act 48: Act 129 expressly makes any incumbent rights created under that statute subject to the condition that their right to construct and maintain lines in the public rights-of-way shall "not injuriously interfere" with other public uses of the rights-of-way. Act 48 falls within this exception because its fee provisions are limited to compensating municipalities for the damages done to their public rights-of-way by the providers and other costs caused by the providers' use of the rights-of-way. The damages and costs providers cause with regard to the rights-of-way injuriously interferes with others' public uses of the rights-of-way. Therefore, it is appropriate that municipalities, which are charged with the burden of maintaining the rights-of-way, be compensated to ameliorate this injurious interference.

The second reason the state has the authority to impose the permit and maintenance fee requirements under Act 48 despite any claim under Act 129 is part of its inherent police powers. The state's power to regulate pursuant to the police powers includes the authority to charge a fee for permits. Moreover, this Court has already held that the state may specifically regulate alleged grandfathered franchise claims under Act 129 under the police power and this Court has also recognized the power of a municipality to exercise its police powers with regard to an incumbent provider despite Act 129. Thus, the state had the authority to exercise its police powers for the common good of the public in passing Act 48, and the existence of an existing franchise right would not abrogate that power.

Finally, the permit and maintenance fee requirements of Act 48 do not impermissibly impair the contract rights claimed by incumbent providers under Act 129. Under the modern interpretation of the Contract Clause, which has been adopted by this Court, the incumbent providers (ILEC's) cannot successfully claim that Act 48 unconstitutionally impairs an alleged contract right they received under Act 129. This is so initially because Act 48 would not operate as a substantial impairment to the alleged contract relationship. The telecommunications industry also has been, and continues to be, heavily regulated. Moreover, the economic development goals of Act 48 evince a significant and legitimate public purpose. Act 48, which creates a uniform state-wide fee system which applies to all telecommunications providers, is further directly related to this public purpose.

The answer to the second question posed is "yes." The Oversight Authority, as established in Act 48, is duly constituted as a metropolitan authority under Article VII, Section 27 of the Michigan Constitution. The creation of the Oversight Authority satisfies the technical requirements of Section 27 since it applies to a metropolitan area and performs multipurpose functions. Moreover, the Oversight Authority is consistent with the intent of Section 27, which was to recognize the state legislature's ability to create customized forms of government as necessary to address problems that could not be addressed through existing units of government, such as the unique situation addressed by the Act.

The answer to the third question posed is "yes." The Oversight Authority, possessing the powers and duties provided for in Act 48, is a constitutional exercise of the legislature's powers consistent with Article VII, Section 29 of the Michigan Constitution. Act 48 is not inconsistent with any of the express provisions of Section 29, and it also preserves municipal control of the local rights-of-way through its permitting procedures. Moreover, the requirement under Act 48 that permits for use of rights-of-way not be unreasonably denied is consistent with Section 29 because that section expressly requires that municipalities' control of rights-of-way be reasonable. This Court has also specifically held that municipalities' right to consent to the use of the rights-of-way must be exercised in a reasonable manner.

The answer to the fourth question posed is "yes." The annual maintenance fee required to be paid by telecommunications providers under Act 48 constitutes a valid fee which does not require voter

approval under Article IX, Section 31 of the Michigan Constitution. Act 48 does not implicate the Headlee Amendment because it is a user fee and not a tax. The maintenance fee in Act 48 is a user fee and not a tax because the Act serves a regulatory rather than a revenue raising purpose. The maintenance fee cannot be characterized as raising revenue since it is limited to partial recovery of the costs associated with the providers' use of the rights-of-way. The purpose of Act 48 is also regulatory because the Act's primary purpose is to regulate use of the public rights-of-way by telecommunications providers. The maintenance fees are further not a tax, but a user fee, because they are proportionate to the cost of the service used. Providers are charged proportionately based upon the length of the rights-of-way which they use. Finally, the maintenance fees are not a tax because they are voluntary. It is ultimately the providers' decision whether they wish to place or leave their telecommunications lines in the public rights-of-way or put them elsewhere. The providers also have the option of choosing to provide their service by other means, such as cell phones, which do not use public right-of-way.

ARGUMENT

In deciding whether Act 48 passes constitutional muster, this Court should consider the four questions presented in the context that state statutes come clothed with a presumption of constitutionality. *Grocers Dairy Co v McIntyre*, 377 Mich 71, 76; 138 NW2d 767 (1966). As such, this Court has historically avoided invalidating legislation on constitutional grounds, and instead has attempted to reconcile legislation with the constitutional standards whenever possible. *See Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997). Applying the applicable law within this context should persuade this Court to issue an advisory opinion in which it answers each of the four questions in the affirmative.

I. THE OVERSIGHT AUTHORITY MAY IMPOSE THE PERMIT AND FEE REQUIREMENTS OF ACT 48 ON ALL TELECOMMUNICATIONS PROVIDERS IN MICHIGAN, INCLUDING THOSE PROVIDERS THAT ASSERT PREEXISTING FRANCHISE RIGHTS.

The first question raised by the House of Representatives is as follows:

> Whether the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority may constitutionally require a permit, under Section 5 of 2002 PA 48, and assess an annual maintenance fee, under Section 8 of 2002 PA 48, on all telecommunications providers in Michigan, including those providers that assert pre-existing franchise rights under PA 129.

The centerpiece of Act 48 is the establishment of a governmental entity known as the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority (the "Oversight Authority"). The Act empowers this Oversight Authority, among other things, to assess an annual maintenance fee on all telecommunications providers in the State of Michigan. Act 48, Section 3(3). The Act also requires telecommunications providers to obtain a permit from each municipality in which the provider seeks to use the public rights-of-way. Section 5(1). The Act imposes two types of fees. One type of fee is an initial, one time application fee of $500. Section 6(4).[16] The other type of fee is the

[16] Note that the Act does not require an application fee to be paid by those providers who already have a pre-existing permit from the municipality. Section 5(1).

annual maintenance fee described in Section 8 of the Act. It is this latter fee, *i.e.,* the annual maintenance fee, that is the subject of this constitutional inquiry.

The first of the four constitutional questions raised by the House of Representatives arises out of a concern that several of the major traditional telecommunications providers may contend, now or in the future, that the Act's imposition of a permit requirement and/or an annual maintenance fee, as applied to those providers, is an unconstitutional exercise of the legislative power. Those providers who have made this claim,[17] (hereinafter referred to as ILECs), have placed principal reliance upon an earlier Michigan statute, 1883 PA 129, MCL 484.4 ("Act 129"). That statute provides, in relevant part, as follows:

> Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and highways, and across or under any of the waters in this state, with all necessary erections and fixtures therefor: Provided, That the same shall not injuriously interfere with other public uses of the said places, streets and highways.

Providers who incorporated under Act 129 and who commenced construction of telephone lines in the state pursuant to that statute claimed that they enjoyed a constitutionally protected and statewide right to place their telecommunications facilities in the public rights-of-way. Such ILEC providers sometimes referred to these as "grandfathered" rights, *i.e.,* as rights that could not be abrogated or abridged by subsequent legislation since they arose prior to the effective date of the 1908 Michigan Constitution (from which relevant provisions of the current Michigan Constitution are substantially derived).[18] As a variation on this theme, such ILECs also often asserted that these Act 129 rights are in the nature of a

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[17] The principal advocate of this position, at least historically, has been Ameritech Michigan. Whether Ameritech will continue to advance this position is highly questionable, however, as it was extensively involved in the legislative process leading up to the adoption of Act 48, and has been one of its principal supporters. *See, e.g.,* the Preamble to the House of Representatives' Request for Advisory Opinion, where Ameritech is listed as supporting the Act.

[18] No Michigan case interpreting current law has specifically addressed whether an incumbent provider in fact has a grandfathered franchise claim. However, in *TCG Detroit v City of Dearborn,* 206 F3d 618 (CA 6, 2000), a case that dealt with an alleged violation of the 1996 Federal Telecommunications Act, the federal court recognized Ameritech's claim that it had such a right. The federal court, however, did not appear to consider the many factual challenges which can be made to Ameritech's (as well as the other incumbent providers') claimed rights under Act 129. Moreover, that federal decision is not binding upon Michigan state courts. *See, e.g. Continental Motors Corp v Muskegon Twp,* 365 Mich 191, 194; 112 NW2d 429 (1961) ("But when a Federal Court, even the Supreme Court, construes a State statute, the courts of that state are not bound to follow the Federal Court's construction").

contract between the State of Michigan and the provider. The contention was that any form of a permit requirement would be a legal impairment of those contract rights, in violation of the Article III, Section 8 prohibition (in both the Michigan and U.S. Constitutions) against impairment of contracts. The legislature was aware of these arguments, and to ensure there was no misunderstanding, expressly made these incumbent providers expressly subject to the permit and fee requirements of Act 48. *See* Section 5(2).

This Court need not and cannot decide here whether these ILECs do, as a matter of law, enjoy franchise rights under Act 129.[19] Indeed, that question is not directly before this Court under the question presented. Instead, the Municipal League and the Townships Association respectfully urge this Court to decide this question based upon the "injuriously interfere" exception to Act 129, which is contained within the text of Act 129 itself. This would allow the question to be decided on state law grounds, thus precluding subsequent federal court "contract impairment" challenges by providers claiming grandfathered franchises. Although the ILECs supported Act 48 in the legislative process to date (and did not file briefs in opposition in this proceeding), these providers historically have firmly stated to cities,

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[19] Suffice it to say that there are a number of potential bases on which such claims could be challenged. Most of the current ILECs, for example, were not incorporated under Act 129, but instead claim some sort of derivative right by virtue of being the alleged successor or assignee of a corporation incorporated under that act. One of the largest of these providers, Ameritech Michigan, claims to have succeeded to these rights by virtue of its acquisition in bankruptcy of some of the assets of its predecessor corporation, the Michigan Telephone Company, even though court records do not list the claimed "franchise" as an asset of the Michigan Telephone Company. There are also other factual questions as to whether these providers (or their predecessors) fully complied with all the incorporation requirements of Act 129, including the statutory requirement that they file their articles of incorporation in *each* county in which they planned to do business. Finally, some providers, although claiming to be incorporated under Act 129, did so after Section 28 of the 1908 Constitution which constitutionally required utilities to obtain franchises and consents from each city, village and township in which they transacted a local business. Such after-incorporated providers obviously would have no claim to be "grandfathered" from the application of the Constitution in effect on the date of their incorporation. Due to the potential importance of the *date* of incorporation, that fact itself is sometimes disputed, with providers claiming forms of de facto or constructive incorporation prior to 1908, even though actual incorporation papers were filed later (sometimes years later).

For reasons such as these, this Court cannot determine the existence, nature or extent of any such alleged grandfathered rights. Such questions are beyond the scope of the question posed by the House, and beyond the scope of this brief as well. Nevertheless, to answer the question posed by the House, it is sufficient for this Court to assume, for purposes of argument, that such rights exist, because as is shown next, *even if* such rights exist for certain providers, there is more than sufficient authority for upholding the constitutionality of the permit and fee requirements of Act 48 as applied to them.

townships and villages statewide that they hold a grandfathered franchise, that they cannot be required to obtain local permits or pay fees, and that any requirement to do so would be an unconstitutional impairment of rights granted them in 1883 under Act 129.

The Municipal League and the Townships Association are concerned that at some point in the future the ILECs or similar entities could, for whatever reason, elect to file a Federal contract clause claim case challenging Act 48 in Federal court. Any such challenge would be very harmful to one of the principal purposes of this Act—and one of the reasons for seeking this advisory opinion—which is to achieve certainty on the rules and requirements for use of the rights-of-way so as to promote the statewide deployment of broadband. Although the Municipal League and the Townships Association believe that any such federal court challenge would be unsuccessful, the threat or presence of such a suit would create uncertainty and inhibit broadband deployment (and might deter new providers from providing competitive services, which alone might motivate such a suit). Thus, the Municipal League and the Townships Association urge this Court to answer this question in the affirmative based on the "injuriously interfere" exception, as demonstrated below. The other legal bases set forth below further supplement the "injuriously interfere" exception.

A. Act 129, the Statute Which Purportedly Created Grandfathered Rights for Certain Telecommunications Providers, Expressly Allows for Those Providers to be Regulated Under Act 48 Because Act 48 Partially Ameliorates the Injurious Interference Caused by Those Providers to Other Public Uses of the Rights-of-Way.

Assuming *arguendo* that ILECs have "grandfathered" franchise rights under Act 129, the ILECs would have no ability to assert those rights against Act 48. This is so because Act 129, the statute which purportedly created the ILEC's rights, itself allowed for an exception to those rights which Act 48 would fall within. The end of Act 129 states: "Provided, That the same [the right to construct and maintain lines through the public rights-of-way granted by Act 129] shall not *injuriously interfere with other public uses of the said places, streets and highways.*" MCL 484.4 (emphasis added). Because Act 48 falls within this "injuriously interfere" reservation, Act 48 does not deprive any provider of rights claimed under Act 129.

This Court has already held that the rights accorded a provider which incorporated under Act 129 are limited in nature and defined by the statute: "The telephone company has such rights in the highway as the statutes of the State have given it, and it possesses no other rights therein." *Bolender v Southern Michigan Telephone Co*, 182 Mich 646, 652; 148 NW 697 (1914) (holding that grandfathered provider's right to build telephone lines in the right-of-way did not give it immunity from action for damages done to plaintiff's trees in the right-of-way). Because Act 129 provides limited rights, providers whose actions fall within the exception to the statute are not immune from liability for the damages they cause: "As the rights of the company are limited by the statute, when it goes outside of the limitations imposed by the statute, it becomes liable in damages." *Id.*

This Court has also held that, under the injuriously interfere exception, the rights accorded providers who incorporated under Act 129 do not insulate those providers from municipal and state regulation. In *Michigan Telephone Co v Benton Harbor*, 121 Mich 512, 516-17; 80 NW 386 (1899), this Court held that under the injuriously interfere reservation, municipalities retained their authority under the police power "to protect the public from unnecessary obstructions, inconveniences and dangers. . . ." Moreover, the Court also found that the state legislature had authority to impose additional conditions. *Id* at 517. *See also Village of Jonesville v Southern Michigan Telephone Co*, 155 Mich 86, 88-90; 118 NW 736 (1908) (citing *Michigan Telephone Co v Benton Harbor* and holding that "[w]here a municipality, in the exercise of its inherent police power adopts an ordinance reasonably regulating the manner, character, or place of construction of a contemplated line, the telephone company must comply with such regulations and exercise its right of entry under the general powers conferred by the State subject to them.")

In light of this Court's holdings that ILECs are not immune from either damages or regulation when their actions fall within the injuriously interfere reservation of Act 129, this Court should hold that the permit and fee provisions of Act 48 fit within the exception. This is because Act 48 is appropriately characterized as legislation which partially compensates municipalities for the substantial degradation to the rights-of-way and other costs caused by the providers' use of it. Damaged and degraded rights-of-

way injuriously interfere with other public uses of the rights-of-way. Therefore, Act 129 does not insulate grandfathered providers from payment for the damages and costs (injurious interference) their use of the rights-of-way causes. Because municipalities bear the burden of repairing and replacing the damaged rights-of-way, it is appropriate that they receive the compensation for these damages and costs which Act 48 provides to be used to help maintain the rights-of-way.

This Court should take judicial notice of the fact that telecommunications providers today cause significant damage to the rights-of-way which, if uncompensated and unrepaired, would injuriously interfere with other public uses of the rights-of-way. This is because today's rights-of-way bear little resemblance to those which existed in 1883 when Act 129 was enacted. At that time, Michigan was a state of largely unpaved (dirt) streets which were used in a limited fashion. Michigan and its rights-of-way are vastly different today. The vast majority of streets are now paved and host a labyrinth of tunnels, pipes, conduit, cables, fibers, wires, poles and lines. This complex network of services traveling under and over the rights-of-way includes cable, gas, electric, sewer, stream and water, all of which compete for usage of the rights-of-way. Thousands upon thousands of commercial and consumer vehicles continuously traverse the surface, every day, at all hours.

The pressure to provide new services and new lines in the rights-of-way is also unceasing and is particularly acute in the telecommunications industry, where (according to the MPSC) some 211 companies now have permission to provide telephone service in Michigan, in addition to cellular and unregulated providers. Partly in response to the threat from such competition, as well as due to technological changes in the industry, ILECs have been laying thousands of miles of new fiber optic cable in the rights-of-way.

Each time a provider installs new lines underground, or repairs existing underground lines, it needs to excavate the rights-of-way.[20] Michigan residents have all experienced first-hand the damage to

[20]Either for a trench or for the holes used to bore beneath the streets. Even where lines are installed in conduit the problem persists because the streets have to be torn up to install, repair and expand the conduit.

the streets caused by repeated excavations. Roads are dug up, patched over, and then dug up again only weeks or months later. The result is streets that have been patched and repatched to the extent that a smooth, unpatched stretch can be relatively unusual. The damage and resulting interference caused by these excavations is readily evident in the rough and sometimes dangerous condition of many of our public roads. The legislative history to Act 48 acknowledges a number of fairly well known scientific and empirical studies which demonstrated the damages and degradation caused by these repeated excavations. *See e.g.,* Singh & Nader, *Supra*, (Exhibit D) Especially because of the annual spring "freeze thaw cycle" in Michigan, the useful life of the right-of-way is reduced every time a street is cut for a telecommunications line.

If the degradation caused by the incumbent providers goes uncompensated, the costs for repairing and replacing the degraded rights-of-way, which was caused in part by these providers, are unfairly borne by municipalities. Unfunded repairs will result in unrepaired roadways and roadways being used beyond their useful life. This inevitably leads to increased traffic congestions, back-ups, delays and dangerous road conditions. Moreover, the municipalities incur further administrative burdens and costs in ensuring that underground lines are installed correctly, that they comply with applicable codes, and that they are properly marked and identified. These costs, which are also occasioned in part by the incumbent providers' use of the rights-of-way, further strain municipal budgets and limit their ability to repair and replace damaged roadways. Incumbent providers are not immune from liability for such injurious interferences under the reservation within Act 129. *Bolender*, *supra,*182 Mich at 652; *Michigan Telephone Co*, *supra,*121 Mich at 516-17.

By virtue of the injurious interference caused to the rights-of-way by the incumbent providers' use of them, Act 48 is a measured regulatory response to ameliorate the injury. Act 48 provides for partial cost recovery to the local units of government for the harm caused by the providers' injurious interference. Under the Act, the "annual maintenance fees" paid by providers under Section 8 of the Act are distributed to municipalities under a formula that approximates the costs caused by telecommunications providers' use of the rights-of-way. Those funds, once received, are dedicated

"solely" by the municipalities to rights-of-way related purposes. *See* Act 48, Section 10(4) of Act 48. As such, the Act helps ensure that the maintenance fees required under the Act specifically address – and serve to ameliorate or mitigate – the harm or damage caused by providers' injurious interference. In short, the Act's maintenance fees serve as a form of partial cost recovery for local units of government for the costs, damage and degradation caused by providers. Moreover, there was uncontroverted testimony in support of the passage of Act 48 that the damages caused by the providers' use of the rights-of-way far exceed the amount which municipalities will receive in compensation for those costs. *See* Singh Report, *supra*, at pp 2-3 (estimating municipal costs at $86 million per year) and House Legislative Analysis, SB 880, as enrolled, Second Analysis, July 12, 2002, at p 8 (estimating that the annual maintenance fees will generate between $24 and $36 million in subsequent years). A copy of the Singh Report is attached as Exhibit D, and a copy of the House Legislative Analyses is attached as Exhibit E.[21] Thus, Act 48 falls squarely within the injuriously interfere exception of Act 129 and its passage does not violate any grandfathered rights which were purportedly created under that statute. [22]

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[21] It would be particularly troubling if the incumbent providers were permitted to engage in uncontrolled and unrecompensed impairment of the state's transportation infrastructure when Michigan is in the midst of a multi-billion dollar, multi-year effort to rebuild the public transportation infrastructure. The state and the electorate have clearly placed improvement of local and state roads as a very high public policy goal.

[22] An additional "injuriously interfere" argument can be made in support of Act 48 since giving grandfathered providers a free ride with regard to the costs they cause would have a detrimental effect upon other providers' use of the rights-of-way. New, competitive telecommunication providers have repeatedly contended that their entry into the local telecommunications market is competitively made more difficult by the refusal of incumbent providers to obtain permits or pay permit fees. If incumbent providers did not have to pay their share of the costs under Act 48, the incumbent providers would hold a competitive advantage over providers who would have to pay such costs. Therefore, the grandfathered providers' continued use of the public rights-of-way under such circumstances would "injuriously interfere" with non-grandfathered providers' "public use" of the rights-of-way. In that regard, it has long been established that the use of the public rights-of-way by telephone providers is a "public use" which would fall within the injuriously interference reservation of Act 129. *See, e.g,. Kibbie Telephone Co v Landphere*, 151 Mich 309-313; 115 NW 244 (1908). The Sixth Circuit in *TCG Detroit*, *supra*, acknowledged the potential validity of this argument in dicta. *See* 206 F3d at 625 ("Possibly, if Ameritech thus enjoys a state-mandated freedom from such fees, its competitive position is strengthened, and it might be able, in theory, to undercut its competition; if it did so, the result might be a barrier to entry by newcomers.") Moreover, not only would the competitive advantage of the grandfathered providers injuriously interfere with other providers' public use of the rights-of-way, but it would also inhibit telecommunications competition and the access to high speed telecommunication service ("broadband access") in the state – two goals which the State of Michigan views as essential for continued economic growth.

B. The State Has the Authority to Impose the Permit and Maintenance Fee Requirements Under Act 48 as Part of its Inherent Police Powers.

The authority of the state to impose permit and fee requirements also arises out of its inherent police powers. The state's police power "includes the protection of the safety, health, prosperity, morals, comfort, convenience, and welfare of the public or any substantial part of the public." *Tower Realty, Inc v City of East Detroit*, 196 F2d 710, 723 (CA 6, 1952). Such power is inherent in the original sovereignty of the state. *Cady v Detroit*, 289 Mich 499, 504-505; 286 NW 805 (1939); *People v Litvin*, 312 Mich 57, 63; 19 NW2d 485 (1945).[23]

Not only is the police power an inherent power of the state, it is an extremely general and broad power. Because of the fundamental importance of the power, the courts have been loath to define its exact perimeters or circumscribe it any more than necessary. One authoritative source has described the expansive nature of the power in this manner:

> The police power is not susceptible of exact definition; indeed, there should be no specific definition of it, and, in truth, the extent of the power has never been defined with precision. The power knows no definite limitations, and includes all legislation and almost every function of civil government . . . . Without doubt, while a precise definition of police power may be impossible, the existence of that police power is essential to every well-ordered government and, indeed, is implicit in the concept of orderly government of any polity. It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.

6A McQuillin, Municipal Corporations (3d ed , 1997), §24.03, at pp 14-15 (extensive supporting citations omitted); *see also People v Raub*, 9 Mich App 114, 119; 155 NW2d 878 (1967) *citing People v Brazee*, 183 Mich 259, 262; 149 NW 1053 (1914) (noting that the courts "have consistently and wisely declined to set any fixed limitations" on the police power, preferring it to be "elastic" and "exercised from

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[23] The expansive legislative power of the state is inherent in its historic sovereignty. Unlike the federal government, which enjoys its powers by way of delegation from the states, the states themselves were declared to be "free and independent States" by the Declaration of Independence. *In Brewster Street Housing Site*, 291 Mich 313, 332-333; 289 NW 493 (1939). The Michigan Constitution acts, not as a grant of power to the State legislature, but at most, as a limitation upon its powers. *Id.* As a result, the state's legislative power has been described in very expansive terms. *See, e.g., Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) (The state legislative power "is as broad, comprehensive, absolute and unlimited as that of the Parliament of England . . . ."); *Hudson Motor Car Co v City of Detroit*, 282 Mich 69, 79; 275 NW 770 (1937) ("The power of the legislature of this state is as omnipotent as that of the parliament of England . . . . "). The power has been described as "general or unlimited" except as circumscribed by the State Constitution. *Sears v Cottrell*, 5 Mich 251, 257 (1858), cited by *Young, supra*, 267 Mich at 244.

time to time as varying social conditions demand correction.") This police power, moreover, is not limited by narrow connotations assigned to the phrase "the protection of the health, safety, and morals of the people," but has been extended to the promotion of fair, competitive conditions and the equalization of economic advantages. *See Indianapolis Brewing Co v Liquor Control Commission of Michigan*, 21 F Supp 969, 971 (D Mich 1938), *aff'd* 305 US 391; 34 L Ed 243 (1939). This Court has even said, at one point, that *all* rights are subject to the police power. *Kelley v Boyne*, 239 Mich 204, 214; 214 NW 316 (1927), *citing Crowley v Christensen*, 137 US 86; 11 S Ct 13; 34 L Ed 620 (1890) and *Gundling v City of Chicago*, 177 US 183; 20 S Ct 633; 44 L Ed 725 (1900).

The power to regulate pursuant to the police powers includes the authority to charge a fee for permits. *Fletcher Oil Co v City of Bay City*, 247 Mich 572, 576; 226 NW 248 (1929), *citing Vernor v Sec'y of State*, 179 Mich 157; 146 NW 338 (1914). This power to impose permit fees was recognized in Michigan as early as 1863. In *Ash v People*, 11 Mich 347 (1863), the Court affirmed the right of the City of Detroit to assess a fee for meat vending licenses sufficient to recover the city's expense of inspection, regulation and supervision of the trade. *See also People v Grant*, 157 Mich 24, 27; 121 NW 300 (1909) (fees may cover the necessary or probable expense of issuing the license and of inspecting and regulating the business covered by it). More recent judicial iterations have expanded the list of appropriate costs to include expenses associated with "control of the business," *City of Ann Arbor v Riksen*, 284 Mich 282, 288; 279 NW 513 (1938); the cost of "administration," *Westen v City of Allen Park*, 37 Mich App 121, 123; 194 NW2d 542 (1971); "managing" and "operational" costs, *Saginaw County v John Sexton Corp of Michigan*, 232 Mich App 202, 211; 591 NW2d 52 (1998); construction costs, *Graham v Township of Kochville*, 236 Mich App 141, 151; 599 NW2d 793 (1999); and all incidental and consequential expenses, *Van Baalen v People*, 40 Mich 258, 259 (1879); *Bowers v City of Muskegon*, 305 Mich 676, 683; 9 NW2d 889 (1943); and *Retail Druggist Assoc v City of Detroit*, 267 Mich 405, 407; 255 NW 217 (1934). Thus the range of expenses which can be covered by such permit fees is an extensive one and includes the cost reimbursement maintenance fee prescribed by the Act.

The broad scope of the state to specifically regulate alleged grandfathered franchise claims under Act 129 under the police power, as well as municipal governments' rights to exercise their own police powers with regard to these incumbent providers, was demonstrated very early in the case of *Michigan Telephone Co v City of Benton Harbor*, 121 Mich 512; 80 NW 386 (1899). This Court there addressed the question of whether legislation which empowered municipal governments to regulate the placing of telephone poles and wires over public rights-of-way had the effect of depriving the telephone company of its claimed right under Act 129 to construct such poles and lines. Although this Court ruled that the city did not have the authority to *prevent* telegraph and telephone companies from extending their business along the public rights-of-way in general, the city did have the power to exercise its ordinary police powers "to protect the public from unnecessary obstructions, inconveniences, and dangers. . . ." 21 Mich at 516-17. The Court went on to state further that the state also had the power under its police power to impose other conditions on the incumbent provider under Act 129. *Id.*

More recently in *Michigan Bell Telephone Co v City of Detroit*, 106 Mich App 690; 308 NW2d 608 (1981) *lv den*, 414 Mich 869 (1982), the Michigan Court of Appeals acknowledged the power of a municipality to exercise its police powers with regard to an incumbent provider despite Act 129. In *Michigan Bell*, the City of Detroit had ordered the plaintiff, Michigan Bell Telephone Company, to vacate certain of its easements (located in the public rights-of-way) so that the city could construct a sewage treatment facility. Michigan Bell sought compensation for the condemnation of those easements. The lower court ruled in favor of Michigan Bell, based not only on the property rights represented by those easements, but also on the contractual rights under Act 129 which it deemed Michigan Bell held by virtue of its franchise with the city. The Court of Appeals reversed, concluding that regardless of Act 129 claims, a local municipality retains the power to regulate a public utility as long as it involves the proper exercise of the police powers. The appellate court stated:

> Thus, even though a utility has a valid franchise from the local municipality, it may be subject to all regulation by that governmental unit which is reasonably necessary to protect public welfare. *Consumers Power Co, supra, Detroit v The Fort Wayne & ER Co,* 90 Mich 646; 51 NW 688 (1892). Further, even where the public utility is possessed of a franchise from the state, local units of government are not thereby divested of power

> to regulate the utility in such ways as are necessary to reasonably protect the general welfare of the community. *Consumers Power Co, supra.*

106 Mich App at 693-694. Obviously, if local units of government have the authority to regulate providers under Act 129, then so does the state legislature.

This fundamental principle, *i.e.*, that the state always retains its authority to regulate pursuant to the police powers, is also illustrated in *City of Marshall v Consumers Power Co,* 206 Mich App 666; 523 NW2d 483 (1994), *app den,* 449 Mich 861; 535 NW2d 793 (1995). In that case, the City of Marshall sought to enjoin Consumers Power Company, the defendant, from extending its electric service to a customer of the city's own electric utility company, unless Consumers Power first obtained a certificate of public convenience and necessity from the Michigan Public Service Commission. This was required under the electric "Certificate of Convenience and Necessity" statute, 1929 PA 69, MCL §460.501, *et seq.*, a statute designed to prevent the unnecessary duplication of electric facilities. Consumers Power refused to obtain such a certificate, however, contending that it was exempt from that requirement because of its preexisting, state-granted franchise (pursuant to the so-called "Foote Act," 1905 PA 264, a statute analogous in some ways to Act 129).[24]

The Michigan Court of Appeals nevertheless expressly rejected Consumers' argument. The appellate Court noted that the requirement for a certificate was not inherently inconsistent with the defendant's preexisting franchise and, as here, that the cases cited by Consumers Power simply did not address (and, therefore, did not preclude) the power of the State to impose subsequent regulation pursuant to its police powers. 206 Mich App at 678. The *Traverse City* case reaffirmed the inherent right of the state to exercise its police powers for the common good of the public, and that the existence of an existing franchise does not abrogate that power.[25]

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[24] *Unlike* telecommunications providers, there is a long line of Michigan Supreme Court cases ruling that Consumers Power *did* have a grandfathered state franchise. *See Traverse City v Consumers Power Co,* 340 Mich 85; 64 NW2d 894 (1954) and the many cases cited therein.

[25]The state's interest in a permit fee system is further indicated by the historical shift from a monopoly telecommunications environment to a competitive environment. In the monopoly environment that existed for most of the 20th Century, an argument could be made that if a monopoly provider were to be charged the cost of using the

C. The Permit and Maintenance Fee Requirements of Act 48 Do Not Impermissibly Impair the Contract Rights of Those Providers Claiming Grandfathered Contract Rights.[26]

In the past, providers claiming rights under Act 129 have claimed that their alleged statewide franchise gave them certain contract rights which, under Article I, Section 10 of both the United States and the Michigan Constitutions, could not be "impaired." To the extent such an argument is still made, it is not supported by the law. While such arguments might have had validity early in our country's history, *see, e.g., Trustees of Dartmouth College v Woodward*, 17 US 518 (4 Wheat) 518; 4 L Ed 629 (1819), this broad application of the Contract Clause was long ago rejected by the courts. For example, in 1914, the United States Supreme Court stated:

> For it is settled that neither the "contract" clause nor the "due process" clause [of the Constitution] has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

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public rights-of-way (and assuming it would pass those costs on in terms of higher rates), it would merely shift the costs from the taxpayers to the rate payers. But because (in a monopoly environment) the taxpayers and the provider's rate payers were essentially one and the same, there would be no net change in financial burden. In a monopoly environment, the distinction between taxpayers and rate payers is somewhat irrelevant.

In contrast, in today's competitive environment, with many new telecommunications providers, taxpayers and rate payers are *not* one and the same. A resident whose property tax bill is reduced because a provider pays part of the cost of maintaining the rights-of-way it uses may or may not see those same costs appear on his or her telephone bill, depending upon whether the resident receives service from an incumbent provider (if that provider should be excused from paying fees) or from one of its competitors. A permit fee structure thus represents a logical and equitably fair shift to a "user pay" model. Such a model—i.e., one which shifts those costs directly to all the providers—also ensures a more efficient use of the public rights-of-way, as providers will have a competitive incentive to use appropriate route layouts and other means to keep such costs to a minimum.

[26] It should be noted that the contract impairment argument cannot be made by other telecommunications providers. The Act does not force any municipality to abrogate an existing permit or franchise with a telecommunications provider. Rather, it incentivizes municipalities to voluntarily reduce the fees charged under any existing permit or franchise to an amount equal to the maintenance fee imposed under the Act, permitting those municipalities who do so to participate in the annual distribution of funds collected by the Oversight Authority. But municipalities are not required to so modify their permits or franchises and, in fact, if they do nothing at all, the existing permits and franchises continue in full force and effect until their eventual expiration. The Act also expressly provides that any authorizations or permits previously issued by a municipality under the MTA are sufficient to satisfy the Act's permit requirements, i.e., providers are not required to obtain any new or additional permits. See Section 5(1). Act 48 does nothing to abrogate these existing franchise or permit rights.

Atlantic Coast Line Railroad Co v City of Goldsboro, 232 US 548, 558; 34 S Ct 364; 58 L Ed 721 (1914). The United States Supreme Court reiterated this conclusion in *Home Building & Loan Ass'n v Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934). The Court noted that the legislature cannot, by contract, "bargain away the public health or the public morals." 290 US at 436. Thus, states "retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts," *id*, and even "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id* at 437. The Court then went on to state:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. . . . One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.

Blaisdell, 290 US at 437-438 (emphasis added).

The United States Supreme Court's *Blaisdell* opinion has been cited with approval and applied by this Court. In *Blue Cross and Blue Shield of Michigan v Governor Milliken of Michigan*, 422 Mich 1; 367 NW2d 1 (1985) *app dis* 106 S Ct 40; 88 L Ed 2d 33; 474 US 805 (1985), this Court rejected a similar "contract impairment" argument advanced by Blue Cross and Blue Shield of Michigan ("BCBSM"). BCBSM was relying upon a 1939 statute which, it argued, constituted a "public contract" between it and the State of Michigan. BCBSM contended that then-recently enacted legislation, which proposed to give the State Insurance Commissioner the power to regulate BCBSM's rates (among other things), constituted an unconstitutional impairment of its preexisting contract with the State.

This Court flatly rejected BCBSM's argument, including its reliance on *Dartmouth College, supra*. The Court stated:

> We find BCBSM's reliance to be misplaced. *Dartmouth College* reflects an earlier era of Contract Clause analysis. *Allied Structural Steel Co v Spannaus*, 438 US 234, 241; 98 S

> Ct 2716; 57 L Ed 2d 727 (1978). Beginning with the landmark case of *Home Building & Loan Ass'n v Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934), the modern United States Supreme Court has construed the Contract Clause as not prohibiting a state from exercising its police power to abrogate private or public contracts if reasonably related to remedying a social or economic need of the community. Under modern Contract Clause analysis, a balancing approach has been adopted by the courts, weighing the degree of the impairment of the contractual rights and obligations of the parties against the justification for the impairment as an act of the state's police power to implement legislation for a legitimate public purpose. Michigan courts have followed this lead. *See Van Slooten v Larsen*, 410 Mich 21; 299 NW2d 704 (1980) (*see* in particular Justice Levin's dissenting opinion); *Metropolitan Funeral System Ass'n v Ins Comm'r*, 331 Mich 185, 194; 39 NW2d 131 (1951), and federal cases cited therein.

422 Mich at 19-20; *see generally*, 6A *McQuillin, Municipal Corporations* (3d ed, 1997), §24.21, at pp 64-65 ("Thus, franchises granted by the state are subject to a proper exercise of its police power . . . . [and] [t]he effect of an exercise of police power upon a public contract or franchise is not an unconstitutional impairment of its obligation.").

The *BCBSM* court went on to describe the balancing approach under which Contract Clause claims are to be reviewed:

> 1 – The first inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.
>
> 2 – A critical factor to be considered in determining the extent of the impairment is whether the industry the complaining party has entered has been regulated in the past.
>
> 3 – If the impairment is minimal, then there is no unconstitutional impairment of contract and our inquiry may end at this step.
>
> 4 – If, however, the impairment is severe, then there are two further inquiries, both of which must be affirmatively shown to justify the legislative impairment:
>
> a) Is there a significant and legitimate public purpose behind the regulation, *and*
>
> b) If there is a legitimate public purpose, are the means adopted to implement the legislation reasonably related to the public purpose?

422 Mich at 23.

Reviewing the first two factors, it is well known that the telephone industry has been and continues to be heavily regulated compared to other industries. Local municipalities have for years regulated the excavation of, and the placement of lines in their respective rights-of-way. The state and federal governments have also regulated the telecommunications industry, the state through its enactment

of the Michigan Telecommunications Act (the "MTA"), MCL 484.2101, *et seq* (and predecessor statutes dating back nearly 100 years), and the federal government through the Communications Act of 1934, 42 USC §151, *et seq*.

The real issue is not the requirement of a permit *per se*, since the Act provides that the permit itself cannot be unreasonably denied. *See* Act 48, Section 15(3). The real issue is whether the permit *fee* represents a substantial impairment. In that regard, there certainly can be no assertion that the fees will preclude an incumbent provider from continuing to provide telecommunications service (particularly since other non-incumbent providers seem capable of paying fees and providing the service). It might add to a provider's costs, but in most cases the providers can fully recover that added cost through the tax credit provisions of Section (8)(14)-(17) of Act 48.[27] These provisions were expressly designed to ensure that providers would not experience any adverse impact to their cash flows. Indeed, telecommunications providers were among the strongest supporters of the Act 48 legislation. Beyond that, the imposition of fees is less onerous than other potential forms of regulation, including rate regulation, which are not challenged as an "impairment of contract." This is an industry accustomed to government regulation, and the added regulatory burden imposed by Act 48 does not so substantially add to that regulatory burden as to constitute a substantial impairment of contract.

Nonetheless, *even if* the impairment were severe, it is readily apparent that there is a "significant and legitimate public purpose behind the regulation." As discussed at the outset of this brief, the primary purpose of the Act is to promote and facilitate the development of broadband infrastructure throughout the state. To do that, the Act seeks to encourage competition in the industry, encourage the introduction of new services, the development of new technologies, and increased investment in telecommunication infrastructure. *See generally* Act 48, Section 1(2)(a), (b). The development of this infrastructure was deemed critical to the future economic development and prosperity of this State. *See, LinkMichigan*

[27] *See also* Act 48, Section 1(2)(h), identifying as one of the purposes of the Act to "[a]llow for a tax credit as a sole means by which providers can recover the costs under this Act and ensure that the providers do not pass these costs on to the end-users of this state through rates and charges for telecommunications services."

report, *supra* (attached as Exhibit C); *see also* Act 48, Section 1(2)(c), (i). At the same time, and as discussed previously, the Act also seeks to provide at least partial cost reimbursement to municipalities for the costs associated with their maintenance of the public rights-of-way.

The means adopted to implement the legislation, moreover, are directly related to these public purposes. The Act seeks uniform state-wide treatment of all telecommunications providers, such as by a uniform state-wide fee system that applies to *all* providers, including those claiming preexisting rights under Act 129. Those fees, in turn, are allocated and distributed to municipalities in accordance with a formula that closely correlates with the relative right-of-way costs borne by each municipality. In addition, the Act implements a uniform permit and permit application process across the state. These provisions are expected to greatly facilitate broadband development in the state by ensuring a level paying field which would be more attractive to potential new entrants to the market. The process for obtaining new permits is simplified and streamlined, and thus presumptively encourages new competition. Moreover, the certainty and predictability of the system all directly contribute to the public purposes behind the Act.

Thus, there is no substance to the impairment of contract argument advanced by incumbent providers under Act 129. Act 48 readily satisfies the *BCBSM* standards.

II. THE OVERSIGHT AUTHORITY, AS ESTABLISHED AND EMPOWERED UNDER SECTION 3 OF ACT 48, IS DULY CONSTITUTED AS A METROPOLITAN AUTHORITY UNDER ARTICLE VII, SECTION 27 OF THE MICHIGAN CONSTITUTION OF 1963.

The second of the four constitutional questions reads as follows:

> Whether the Metropolitan Extension Communications Rights-of-Way Oversight Authority, as established and empowered under Section 3 of Act 47, is duly constituted as a metropolitan authority under Article VII, Section 27 of the Michigan Constitution of 1963.

Section 3 of Act 48 is the section of the Act that establishes and empowers the Oversight Authority. As indicated in Subsection 3(1), the Authority is expressly created pursuant to Article VII, Section 27 of the 1963 Michigan Constitution. That section reads as follows:

> Notwithstanding any other provision of this Constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function.

The question before this Court is whether the legislature's creation and empowerment of the Oversight Authority, as provided in Act 48, is consistent with this constitutional provision.

The Oversight Authority is duly constituted as a metropolitan authority under Article VII, Section 27 of the Michigan Constitution for two primary reasons. First, the establishment and empowerment of the Oversight Authority meets all of the technical requirements of the Constitution. Second, the creation of the Oversight Authority is consistent with the intent of Section 27. Each of these points is discussed further below.

A. The Creation of the Oversight Authority Satisfies the Technical Requirements of Article VII, Section 27.

As indicated, the Oversight Authority is, first and foremost, duly constituted as a metropolitan authority because it meets all of the requirements of Section 27. The Oversight Authority under Act 48 is a one person, appointed position. Significantly, Section 27 says nothing about the necessity of a multi-person board, or that the members of the authority board be elected rather than appointed. Those elements may be characteristic of prior legislatively created authorities, but they are not constitutional requirements.

Similarly, Section 27 does not define "metropolitan areas" as being only local or regional in nature. In this case, the legislature has identified those "metropolitan areas" as cities, townships and villages in counties with populations in excess of 10,000 people. Section 2(f). Jurisdiction of the Oversight Authority is thus not statewide. True, the size of that "jurisdiction" may be larger than is typically the case, but as discussed below, that is largely dictated by the subject matter of the jurisdiction. The very nature of telecommunications requires a broad geographic scope, since the service cannot be limited to a single metropolitan center, but must instead have the capability of transmitting communications *between* urban centers. The legislature simply determined that a relatively expansive

jurisdiction was necessary for the Oversight Authority to achieve the objectives which the legislature had established for it in the Act.

Some might contend, however, that the Oversight Authority does not perform multipurpose functions, as evidently contemplated by Section 27. In one sense that may be true, since the Authority's responsibilities are generally the collection, administration and distribution of the permit fees. However, the Oversight Authority arguably performs a number of other functions as well. It establishes rules and procedures. Act 48, Section 3(5). It prescribes "forms, standards, methodology, and procedures for assessing fees under this act." Section 8(10). It may grant waivers of fee requirements in underserved areas. Section 8(21). It may require the repair and restoration of any rights-of-way. Section 15(5). It provides "consultation" to providers in making good faith estimates of the number of linear feet of right-of-way occupied by providers' facilities. Section 8(7). It collects reports from municipalities, Section 10(5), and prepares its own reports for submission to the legislature. Section 3(4). These arguably represent multipurpose functions.

But beyond that, it is important to remember that the "multipurpose function" requirement is not an absolute one in Section 27. It is a *qualified* standard, to be satisfied only "wherever possible." In Act 48, the unique nature of the Oversight Authority's functions, as a practical matter, precludes its use for other purposes, although nothing precludes the legislature from later adding to the functions of the Authority.

B. The Establishment of the Oversight Authority is Consistent With the Intent of Article VII, Section 27.

The legislature's action in creating the Oversight Authority is also consistent with the intent of Section 27. The entire purpose of Section 27 was to recognize, and to underscore, the state legislature's ability to create customized forms of government as necessary to address problems that could not be addressed through existing units of government. Section 27 represents a substantial rewrite of its predecessor, Article VIII, Section 31, of the 1908 Michigan Constitution. That Section — reprinted in the

footnote below — was unnecessarily wordy, overly complex, and of not much utility.[28] This was acknowledged in the 1963 Convention Comment to the new Article VII, Section 27 of the 1963 Constitution, which noted that the new language was added to provide the legislature with some degree of flexibility to create needed metropolitan government. Thus, the Oversight Authority of Act 48 is a metropolitan authority which is consistent with the flexible nature of Section 27.

As an element of caution, the Municipal League and the Township Association note that whatever "metropolitan areas" may mean—barring exceptional circumstances such as are presented here—it cannot and should not mean most or all of the state. For if it should be so interpreted, the first clause of Section 27 ("Notwithstanding any other provision of this constitution") places at risk all other constitutionally created bodies, their authority and powers, including those of this Court.

The Municipal League and the Townships Association believe that in this situation there is a unique set of circumstances justifying the size of the "metropolitan area" in Public Act 48. These circumstances include the need for a network of telecommunications systems connecting customers located *throughout* much of the state *plus* the installation of *actual physical lines and facilities* throughout much of the state by multiple competing telecommunication providers. Such factors in this limited

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[28] Article VII, Section 31 of the 1908 Constitution provided as follows:

Metropolitan District; incorporation; purposes; powers.

Section 31. The legislature shall by general law provide for the incorporation by any two or more cities, villages or townships, or any combination or parts of same of metropolitan districts, comprising territory within their limits, the purpose of acquiring, owning and operating, either within or without their limits as may be prescribed by law, parks or public utilities for supplying sewage disposal, drainage, water, light, power or transportation, or any combination thereof, and any such district may sell or purchase, either within or without its limits as may be prescribed by law, sewage disposal or drainage rights, water, light, power or transportation facilities. Any such district may have power to acquire and succeed to any and all of the rights, obligations and property of such cities, villages and townships respecting or connected with such functions or public utilities: Provided, That, no city, village or township shall surrender any said rights, obligations or property without the approval thereof of a majority vote of the electors thereof voting on such questions. Such general law shall limit the rate of taxation of such districts for their municipal purposes and restrict their powers of borrowing money and contracting debts. Under such general law, the electors of each district shall have power and authority to frame, adopt and amend upon the approval thereof of a majority vote of the electors of each city, village and township, voting on such question, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.

instance justify the term "metropolitan areas" in the Act encompassing some 76 out of the 83 of this state's counties.

Thus, the Municipal League and the Townships Association believe that in this instance the Oversight Authority is duly established and empowered under Article VII, Section 27 of the Constitution. But the Municipal League and the Townships Association respectfully suggest that this Court, being cognizant of the expedited nature of this case and the potential risks to all constitutionally created bodies if the "notwithstanding" and "metropolitan area" concepts in Section 27 are read too broadly, should carefully and specifically limit its approval of the Oversight Authority to the unique circumstances described above related to telecommunications.

The preceding approach is consistent with this Court's longstanding principle that all provisions of the Constitution are to be read concurrently so as to give each its full meaning. The suggested approach achieves this by ensuring that Section 27 of the Constitution does not improperly infringe on or override all others. With this caution, the Oversight Authority is, thus, duly constituted as a metropolitan authority under Article VII, Section 27 of the Michigan Constitution of 1963.

Finally, this Court should be aware that the Municipal League and the Townships Association view one benefit of a "metropolitan authority" is that the funds collected by it (here, to recover the costs caused by providers using the public rights-of-way) have to be disbursed to municipalities and are not subject to state appropriation. This is because the Oversight Authority is an entity separate from the state, governed only by Act 48. Stated otherwise, as the Act provides, the fees the Oversight Authority receives are for cost reimbursement, are dedicated specifically to municipalities for right-of-way related purposes and cannot be taken by the state legislature for other purposes as part of the annual appropriations process.

Consistent with the Act and the preceding principle, in the unlikely event that this Court should conclude that the Oversight Authority is not appropriately established, the Municipal League and the Townships Association respectfully suggest that this Court hold that the Oversight Authority and/or the state hold all funds received under the Act in trust for municipalities to be disbursed pursuant to the

statutory formula and provisions in Act 48. This would achieve the statutory intent of the fees for cost reimbursement being dedicated to municipalities for right-of-way purposes and not subject to annual appropriation or diversion by the legislature.

III. THE OVERSIGHT AUTHORITY, POSSESSING THE POWERS AND DUTIES PROVIDED FOR IN ACT 48, IS A CONSTITUTIONAL EXERCISE OF THE LEGISLATURE'S POWERS CONSISTENT WITH ARTICLE VII, SECTION 29 OF THE MICHIGAN CONSTITUTION OF 1963.

The third of the four questions raised by the House of Representatives is framed as follows:

> Whether the creation of an authority under Article VII, Section 27 of the Michigan Constitution of 1963 possessing the powers and duties provided for in Act 48 is a constitutional exercise of the legislature's powers consistent with Article VII, Section 29 of the Michigan Constitution of 1963.

Article VII, Section 29 of the Constitution, in turn, addresses the rights of local municipalities to control their rights-of-way. That section provides:

> No person, partnership, association or corporation, public or private, operating 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 utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

The constitutional question before this Court essentially turns on the issue of whether the powers accorded the Oversight Authority are consistent with the powers reserved to local units of government in Article VII, Section 29.

This Court should avoid the temptation to determine that the provisions of Article VII, Section 29 are simply irrelevant since they could arguably be preempted by the introductory phrase of Section 27, "[n]otwithstanding any other provision of this Constitution. . . ." The Municipal League and the Michigan Townships Association respectfully submit that it would be imprudent and contrary to law to needlessly empower Section 27 so expansively. Such a holding could result in drastic and destabilizing shifts in the distribution of powers between local and centralized authority. For instance, it is doubtful that the Court would wish to empower Section 27 to such an extent that the section could be used to preempt any and all

local government. For that matter, as noted above, such an expansive reading of the section could arguably preempt any other provision of the Constitution. The future effect of such a broad reading of Section 27 by this Court would be unpredictable at best. Thus, while it may be tempting to read Article VII, Section 27 in a way that could render the question posed regarding Section 29 as moot, this Court need not and should not construe Section 27 so broadly when it can decide the issues before it on a narrower basis. In particular, and as demonstrated below, this Court can answer this question in the affirmative since the creation of the Oversight Authority is indeed *consistent with* Section 29. Moreover, such a finding is more in keeping with the historic standard for review of constitutional provisions, which is that they should not be read in conflict but *in pari materia*. *Kelley v Riley*, 417 Mich 119, 145-146; 332 NW2d 353 (1983).

A reading of the text of Article VII, Section 29, an analysis of the Section's legislative history, and an analysis of the manner in which Michigan courts have interpreted that section all lead to the conclusion that the Oversight Authority (as well as Act 48 in general) is consistent with the powers reserved to local units of government in Article VII, Section 29. As demonstrated below in subsection A, there is nothing in the text or operation of Act 48 which is inconsistent with the text of Section 29. Additionally, Act 48 preserves municipal control of the local rights-of-way, which is what Article VII, Section 29 of the Constitution reserves to municipalities. As subsection B below demonstrates, Act 48's requirement that municipalities consent to use the rights-of-way by providers cannot be unreasonably withheld does not restrict municipalities' rights under Section 29. Section 29 and the common law have always required that municipalities in general act reasonably in controlling the rights-of-way and particularly with regard to the granting of consent to use such rights-of-way.

A. Act 48 is Not Inconsistent With Article VII, Section 29, and it Preserves Municipal Control of the Local Rights-of-Way.

There is nothing in the powers accorded the Oversight Authority that, on its face, are inconsistent with Article VII, Section 29. The Oversight Authority's primary powers and duties involve the collection and disbursement of the annual maintenance fees.[29] Article VII, Section 29, in contrast, talks about municipal "consent" and local control of the public rights-of-way. It says nothing about *fees*, much less anything that would seemingly be prohibitive of the collection of fees by some other government agency. On its face, the creation of an Oversight Authority under Article VII, Section 27 is fully consistent with the reserved powers of municipalities under Article VII, Section 29.[30]

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[29] Section 3(3) of the Act, for example, provides that "[t]he authority shall coordinate public right-of-way matters with municipalities, assess the fees required under this act, and have the exclusive power to assess fees on telecommunication providers owning telecommunication facilities in public rights-of-way. . . to recover the costs of using the rights-of-way by the provider." In similar fashion, Section 8(2) provides that "[t]he authority shall determine for each provider the amount of fees required under this section." That subsection goes on to provide that the Oversight Authority "shall prescribe the schedule for the allocation and disbursement of the fees under this act," and that the disbursement of those funds shall be as provided in Sections 10 through 12 of the Act. Section 8(10) gives the Authority the power to "prescribe the forms, standards, methodology, and procedures for assessing fees under this act." Sections 10, 11 and 12, as previously indicated, all specify the manner in which the Oversight Authority is to allocate the fees collected under the Act.

[30] Nevertheless, there may be concern that the collection of maintenance fees and the issuance of right-of-way permits are linked, such that the Oversight Authority's control of maintenance fees somehow implicates the right-of-way powers reserved to local municipalities in Section 29. A municipality might contend, for example, that its ability to set fees is essential to its control of the rights-of-way. The argument would be that the consent for use of the local rights-of-way means nothing without the concurrent power to charge a fee for that right.

It should be noted that the Act — at least initially — technically does not completely remove the power of a local municipality to charge fees. Rather, Section 13(1) simply provides that a municipality "is not eligible to receive funds" under the Oversight Authority's distributions *unless* it modifies the fees under its existing agreements to an amount not greater than that charged under the Act. So if it chooses, a municipality may elect to receive fees from telecommunications providers under existing permits and franchises, but it thereby permanently waives its right to receive distributions from the Authority. *Id.* In other words, the restriction on a municipality's ability to assess fees is (1) voluntary, in that it applies only if the municipality affirmatively elects to participate in the Oversight Authority's distributions by making the indicated modification, and (2) even if it makes that election, the municipality may continue to collect fees, subject only to the limit or ceiling specified by the statute, *i.e.*, that the fees not exceed those that would otherwise be collected by the Oversight Authority.

Of course, once any existing agreements expire, or are terminated, the Act precludes municipalities from entering into new agreements to recover costs by virtue of the "exclusive" authority to assess such fees given to the Oversight Authority in Section 3(3). However, the fee provisions of Act 48 were arrived at after considerable debate and legislative compromise. Consistent with the arguments set forth in subsection B, *infra*, any fee imposed by a municipality would also have to be reasonable. Accordingly, fees provided for in Act 48 are the legislature's

Act 48 is also fundamentally consistent with Article VII, Section 29 because it preserves municipal control of the local rights-of-way, which is the power reserved to municipalities by Section 29.

First, under the Act, the permitting process remains the province of local municipalities. Thus, Section 5(1) provides (in part) that "[a] provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities shall obtain a permit under Section 15 *from the municipality* . . . ." (emphasis added). The application for the permit is submitted *to the municipality*, not to the Oversight Authority. Section 5(3). The municipality can "approve" or "deny" the permit. *Id.* It must do so within 45 days. Section 15(3). The permit cannot be unreasonably denied. *Id.* But a municipality can, if it is acting reasonably, also *condition* the permit for public health, safety and welfare reasons — see Section 15(4) — or even *deny* that permit. Section 5(3). Indeed, Section 6(6) contemplates that denials may, from time to time, occur, since it obligates the municipality to notify the MPSC "when it grants *or denies* a permit . . . ." (Emphasis added). The Act also allows municipalities to require additional information of the provider in connection with its review of an application for a permit. Section 6(2). If the granting of a permit were a mere formality, a request for additional information would be an irrelevant exercise. Municipalities may also require that providers post a bond as a condition to the issuance of a permit. Section 15(3). Indeed, the Act goes so far as to expressly acknowledge a municipality's continuing right to regulate its rights-of-way as necessary to "ensure and protect the health, safety, and welfare of the public." Section 15(2); *see also* Section 1(2)(e) (identifying, as one of the purposes of the Act, to "[e]nsure the reasonable control and management of public rights-of-way *by municipalities* within this state") (emphasis added). The fundamental fact remains that the permit can *only* be issued by and with the consent of the local unit of government, can be conditioned to meet appropriate needs, and in appropriate circumstances, can be denied by local units.

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best effort to determine a reasonable fee structure while weighing the various and often competing interests of municipalities, providers and the desire for rapid and competitive deployment of broadband.

The Act thus preserves the right of municipalities to deny a permit, to act reasonably and to protect the public health, safety and welfare. The Act does not infringe on the health, safety, welfare or home rule authority of municipalities.

The powers of local municipalities in this respect are sharply contrasted against those of the Oversight Authority. Significantly, the Oversight Authority itself cannot issue a permit. Furthermore, the Oversight Authority is not empowered to *mandate* the issuance of the permit by local municipalities. The Oversight Authority is directed to "*coordinate*," not *control*, "public right-of-way matters within municipalities." Section 1(2)(j); *see also* Section 3(3). Local municipalities remain free to deny the permit where such action is reasonable or necessary to protect the public heath, safety and welfare. They also remain free to impose reasonable "police power" type conditions on the issuance of the permit. See Section 15(2), (4).

Second, municipalities do not lose the right to fees under Act 48 since the statute requires providers to pay fees. Although the right to a fee is not even expressly included in Section 29, it should be noted that generally municipalities in the state will receive more in the way of funds from Act 48 than they are currently receiving from their own prior permits and agreements (largely, although not exclusively, because of the inclusion of the so-called "grandfathered" providers). Not only is the funding larger in amount, but it is also more consistent and predictable. Local units of government are no longer required to separately negotiate the terms of permit or franchise agreements, and risk that any given provider may elect not to enter a particular local market, or to not renew an expired franchise in an existing municipal market. The funds collected under Act 48 are, moreover, redistributed to municipalities in accordance with a formula that is designed to reflect the costs and complexity of local rights-of-way management.[31] Thus, municipalities – particularly urban locales – with proportionately

[31] As noted above, Section 27 provides the additional clear benefit of making the funds collected by the Oversight Authority as reimbursement for costs caused by telecommunications providers' use of the rights-of-way dedicated solely for municipalities and not subject to annual appropriation by the legislature. Again, as noted above, should the Court find in the adverse on Question 2 (establishment of the Oversight Authority), the Municipal League and the Townships Association respectfully suggest that this Court should still uphold the Oversight Authority and Act as being consistent with Section 29 of the Constitution, but the Court should rule that the Oversight Authority or

more miles of rights-of-way and with rights-of-way in which the usage is more intense, will receive proportionately more of the fee distributions. More funding, and more consistent funding, will enable local units of government to more effectively manage their rights-of-way than is currently the case. In short, then, the powers and duties accorded the Oversight Authority are consistent with Article VII, Section 29 because Act 48 preserves the municipal prerogatives protected under Article VII, Section 29. A major element of the Act being reasonable and consistent with Section 29 is the amount and security of the fees which are provided for in the Act. As described above, municipalities are currently themselves bearing many of the substantial costs created by telecommunication providers' use of the public rights-of-way. Incumbent providers, in particular, are not recompensing municipalities for the costs which they cause. The Act significantly improves this situation, without the need for costly or litigation by municipalities, by providing for a fee to be paid by *all* providers to reimburse such costs.

Key provisions of the Act on fees, which cause both the Municipal League and the Townships Association to support the Act as being consistent with Section 29, are thus the amount of the fee, the provision that incumbent providers are required to pay it, and the absolute assurance that all of the fees collected will go to municipalities without the risk of annual diversion or appropriation by the legislature. These fee related provisions, in combination with the other items discussed above, are what cause the Municipal League and the Townships Association to contend that the Act exceeds that minimal level necessary to assure municipalities continued reasonable control of their rights-of-way and make the Act consistent with Section 29 of the Constitution.

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state hold the funds collected in trust for municipalities as outlined above. This would achieve the purposes of the statute, including assuring that such funds are used by municipalities for right-of-way purposes and are not subject to annual appropriation by the legislature.

B. The Requirement Under Act 48 That Permits to Use the Rights-of-Way Not Be Unreasonably Denied is Consistent With Article VII, Section 29 Because That Section Expressly Requires, and the Law Supports, That Municipalties' Control of Rights-of-Way, Including Their Right to Consent to the Use of the Rights-of-Way, Be Reasonable.[32]

The second sentence of Article VII, Section 29 addresses municipal prerogatives with respect to control of their local rights-of-way. That sentence provides:

> Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

As stated in this sentence, Section 29 is limited by the insertion of the word "reasonable" as a modifier to the word "control." To appreciate the significance of this insertion, it is necessary to review the history of the constitutional convention debates which eventually led to the adoption of this qualifying adjective.

The second sentence of Article VII, Section 29 is a virtual carryover of Article VIII, Section 28 of the 1908 Michigan Constitution. In early drafts of Section 28, the word "reasonable" was not included. It was added by way of a compromise amendment designed to address concerns, raised by a number of delegates, that the constitutional language might otherwise completely preclude *any* state regulation of "highways, streets, alleys and public places." Some of the delegates were concerned that this might even exclude state regulation of *state* highways that ran through local municipal areas.

Very early on in the 1908 Constitutional Convention debates, Delegate Stewart raised the concern that the original (unmodified) language of Section 28 would effectively give small municipalities the right to completely preclude intrastate telephone communications by prohibiting the running of lines through

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[32] It is also noteworthy that the second sentence of Section 29 begins with the prepositional phrase "[e]xcept as otherwise provided in this Constitution.. . ." This introductory language appears to anticipate that the powers reserved to the municipalities under Section 29 are potentially subject to some limitations found elsewhere within the Constitution. While the Municipal League and the Townships Association urge this Court, for the reasons previously stated, not to give an expansive reading to the precatory phrase in Section 27, this phrase in Section 29 at least anticipates that Section 29 could be subject to regulation such as Act 48 which is otherwise well-founded under the Constitution.

their local municipal areas. Official Record, Constitutional Convention, 1907, at p 1051.[33] Although the issue was not resolved on that day of the debates, the matter arose again approximately three weeks later, when delegate Wixon made a motion to strike out Section 28 in its entirety. *Id* at 1405. In considering the motion, two of the delegates spoke to the issue of the relationship between state and local authority, highlighting the potential for tension between the two. Delegate Thew stated the following while emphasizing that control of the rights-of-way by local government would be limited by a condition of reasonableness:

> Mr. President, the question in this provision is not a question between the opponents and advocates of it; it is not a question of whether some regulation relative to the use of the streets by telephone and other companies, and transportation as well, is proper, but whether it is proper for this Convention to take that power which now lies in the government at large and take it away from the government of the state of Michigan, and lodge it in these particular municipalities and local governments. . . I think that this amendment or rather the motion to strike out entirely is not proper, but I think it should be so amended as to reserve to the local governments reasonable regulation of the streets and the highways and the use thereof, but that the primary control of those highways will remain where it is now.

Id at 1405 (emphasis added).

The matter was finally resolved when Delegate Hemans moved a substitute amendment which added the word "reasonable" into the second sentence of that section, where it is currently found (the language having been carried over from Article VIII, Section 28 of the 1908 Constitution into Article VII, Section 29 of the 1963 Constitution). *Id* at 1408. The proposed amendment was adopted by a vote of the convention delegates. *Id* at 1408-1409. The final commentary of the various provisions of the 1908 Constitution reflected that the word "reasonable" was intended to apply in general to municipal authority created by the section:

> This is a new section and its purpose is to prevent the use of streets, alleys, highways and public places without the consent the local authorities first had and obtained. The word "reasonable" was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways and public places within their corporate limits. And it was pointed out in the debates that without the word "reasonable" or a similar qualification the section would practically deprive the state itself of authority over its highways and public places.

[33] Copies of all cited pages from the 1907 Official Record are attached as Exhibit B to this brief.

Id at 1433.

Subsequent judicial decisions have been called upon to construe Article VII, Section 29 (or its predecessor, Article VIII, Section 28), and in doing so have provided further clarification to the meaning and significance of the word "reasonable" as a qualifier upon a municipal control of rights-of-way.

One of the earliest cases construing Article VIII, Section 28 was *People v McGraw*, 184 Mich 233; 150 NW 836 (1915). The case concerned the right of the City of Detroit to enact a local vehicle ordinance (requiring vehicles to have both front and rear lights) in the face of a State statute prohibiting local ordinances restricting the free use of public highways. The city contended that the prohibitory language of the state statute was unconstitutional in light of Article VIII, Section 28. The court ultimately affirmed the right of local municipalities to control the rights-of-way, *provided that* such control was within reason and not inconsistent with state law that was itself constitutionally valid. 184 Mich at 238.

Shortly thereafter, this Court rendered another decision which again underscored the requirement that municipalities, in the granting or withholding of consent to use of the rights-of-way by public utilities, are required to act reasonably. In *City of Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146; 166 NW 998 (1918), the City of Kalamazoo had enacted an ordinance that fixed the rate for gas provided within the city by its gas utility at 75¢ per thousand cubic feet and imposing penalties for its violation. The utility, Michigan Light Company, nevertheless continued to collect rates from consumers which were higher than the ordinance rate. The city brought suit for recovery of the prescribed penalties. The trial court held that the ordinance was invalid and dismissed the suit. On appeal, the city asserted that Article VIII, Section 28 of the 1908 State Constitution conferred upon it the right to fix rates as a condition of the use of its streets by public utilities. In affirming the trial court's invalidation of the ordinance, this Court acknowledged the right of the city to establish conditions for its consent, but insisted that such conditions be "reasonable" and that the municipality may not act "arbitrarily or capriciously" in that regard.

> It seems, therefore, clearly admissible, under the language of the Constitution hereunder consideration, that the municipalities of the State having "reasonable control of their streets," may affix reasonable conditions for their use by public utilities, and that, among such reasonable conditions, is the fixing of a reasonable rate. That such conditions must

> be reasonable, the language of the Constitution clearly demonstrates, *People v McGraw*, 184 Mich 233, and that the courts may determine the question of whether conditions imposed are reasonable or not, this court has determined. *Michigan Telephone Co v City of St. Joseph*, 121 Mich at 502. Municipalities may not act arbitrarily or captiously, but when a reasonable condition upon the use of the street is imposed the public utility is at liberty to accept or reject it. If it rejects, it may not occupy the streets, and if already in possession under an unexpired franchise it may be ousted.

200 Mich at 154-155.

Finally, in *Allen v State Highway Commissioner*, 338 Mich 407; 61 NW2d 625 (1953), various plaintiffs sought to enjoin the state highway commissioner from prohibiting the parking of vehicles along a portion of a state trunk line road, and from maintaining "no parking" signs along that road. One of the questions raised was whether the City of East Lansing had the constitutional authority, under Article VIII, Section 28, to control the portion of the state trunk line that ran through the city. In addressing that issue, this Court again directed its attention to the meaning of "reasonable" control and found that—just like the procedure established in Act 48—the state in some instances and, ultimately, the court may review whether a municipality's decisions with regard to control of the rights-of-way was reasonable. This Court there stated:

> The reasonable control of streets reserved to cities under the Constitution (Article VIII, Section 28) does not give them exclusive control, preventing the State from assuming any control over State trunk line highways running through cities. *Allen v Rogers* (syllabus 5), 246 Mich 501.
>
> The right to reasonable control of their streets is not a gift of an arbitrary prerogative to the cities, villages and townships. The reasonableness of the city's control of its streets is not to be within the final determination by the city in all cases, for that in practical effect could erase the word "reasonable" from the constitutional provision. The reasonableness may be determined in accordance with the State legislature's interpretation in some instances provided that such interpretation can be approved by the court. Interpretation can give rise to justiciable question.

338 Mich at 415-416 (emphasis added). This court went on to say that it "would not ordinarily substitute its judgment for that of the city as to the control of streets," but that where there was a conflict with state law, deference must be given to its interpretation of the constitutional requirement that local control be "reasonable." 338 Mich at 416. By the preceding statements this Court was reconciling state and local interests by ruling that a legislative interpretation of "reasonableness" would be given deference

(approved "in some instances") but would be reviewed by this Court ("provided such interpretation can be approved by the court") so as to ensure there was no undue legislative infringement on the rights, powers and duties of local governments.

Therefore, since municipal control of the rights-of-way is required to be reasonable under Section 29, and the courts have applied the "reasonable standard" as a limitation on municipal authority, there is nothing inconsistent with the limitations on municipal authority set out in Act 48 which, at most, incorporate these same "reasonable" conditions.

The establishment of the Oversight Authority is also consistent with the *first* sentence of Article VII, Section 29. That sentence requires public utilities to (1) obtain the consent of local municipalities to use the public rights-of-way, and (2) obtain a local franchise to conduct local business.[34] Both of these elements are satisfied through the permitting process of Act 48. Section 5(1).[35] By itself, there is nothing

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[34] Some telecommunication providers question whether telecommunication services fall within the definition in a "public utility" and therefore claim that the first sentence of Section 29 does not even apply to them. They note that in other places in the Constitution, the definition of a "public utility" excludes any reference to telecommunications even though the debates on Section 28, such as those quoted above, clearly reference it). *See, e.g.*, convention Official Record, Constitutional Convention 1907, at p 1051 (comments of Delegate Stewart specifically discussing telephone lines). Article VII, Section 25 of the Michigan Constitution, for example, expressly limits the term "public utility" to "light, heat, or power" providers. *See also Holland v Clerk of Garden City*, 299 Mich 465, 472; 300 NW 777 (1941) (restricting Section 25 "public utilities" to the "enumerated" entities); *White v City of Ann Arbor*, 406 Mich 554, 570; 281 NW2d 283 (1979) (to same effect). They note particularly the state legislature's express declaration, in the 1995 Michigan Telecommunications Act, that telecommunications providers were *not* public utilities. MCL 484.2102(dd) (". . . telecommunication services is not a public utility service"). Municipalities have uniformly stated that it is *this Court*, not the legislature, which defines terms used in the Constitution, otherwise what limit is the Constitution on acts of the legislature? For the purposes of Question 3, the Court need not decide this issue, and the following discussion simply assumes, *arguendo*, that telecommunications providers are "public utilities."

[35] Although the focus of the discussion is on the concept of municipal "consent," the Act 48 permit is intended to satisfy both the "consent" and the "franchise" requirements of Article VII, Section 29. The permit gives the recipient the right to occupy and use the rights-of-way *and* the right to transact a telecommunications business within the municipality's boundaries. For all practical purposes, a telecommunications provider "uses" the public rights-of-way for the purpose of transacting its telecommunications "business." The two functions ("use" and "conducting business") are almost inextricably intertwined, and the permit issued under the Act gives the provider the permission to do both.

The Municipal League and the Townships Association recognize, of course, that terms such as "permit" and "franchise" can have different meanings depending upon the context in which they are used. The term "permit," for example, is more frequently used to indicate approval to perform some act of relatively short duration, e.g., a permit for a local parade. A "franchise" in contrast, is usually associated with some longer term authorization and, probably because of that longer term, tends to be more complex in the terms and conditions that regulate that authorization. It typically includes elements of both consent and compensation. At the same time, though, the

controversial about this. The only controversy concerns the Act's requirement that a municipality approve or deny a permit request within 45 days of application, and that permits not be unreasonably denied. Section 15(3). At the heart of the issue is the question of whether the state legislature has the authority—through the imposition of these types of requirements — to force municipalities to exercise their "power of consent" in a reasonable manner. To put it another way, the constitutional question is whether a reasonableness standard such as that in the second sentence of Article VII, Section 29 *also* applies to the *first* sentence of Section 29. There are at least three reasons to believe that this is the case and that, as a result, Act 48 is also consistent with that first sentence of Section 29.

First, the Court has already held that a reasonableness standard applies to the first sentence of Section 29. The most significant case to this effect is *Union Township v City of Mount Pleasant*, 381 Mich 82; 158 NW2d 905 (1968). In *Union Township*, the Court held that the City of Mt. Pleasant was required to obtain the consent of *both* the county and plaintiff Union Township for the use of their respective rights-of-way by the city's water utility. The city in that case had sought to run a water line from a well located *outside* the city limits back to the city water utility system located *within* the city. To reach the city, the line ran through both county and township rights-of-way. The township sued the city because the city had built the line without obtaining the township's consent. This Court agreed with the township, and held that the city was required to obtain the consent of other units of government even though such consent might, in some cases, be difficult to obtain. This Court stated that such difficulties were mitigated, however, by the fact that the county and township were required to act reasonably. This Court there stated:

> That on occasion there may be conflict between the county and township when the consent of both is sought, we do not doubt. However, consent of neither can be refused

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distinction between a "permit" and a "franchise" is often nothing more than one of semantics, and in some communities and jurisdictions a "franchise" is called a "permit." *See* 12 McQuillin, *Law of Municipal Corporations* (3d ed, 1995), § 34.01, p 7 ("Such a grant is termed, in this chapter, a franchise, although in some jurisdictions it is held to be, and is termed, a license. It is also sometimes called a "permit." (Emphasis added.) In short, the Act 48 permit satisfies both the "consent" and the "franchise" requirements of Section 29.

> arbitrarily and unreasonably and we are not inclined to believe that such refusal need be anticipated.

381 Mich at 90 (emphasis added). The consent of municipalities for public utilities to use the streets under the first sentence of Section 29 is thus subject to a reasonableness standard — the same standard as that required under Act 48. *See also City of Detroit v Michigan Public Utilities Commission*, 288 Mich 267, 277; 286 NW 368 (1939) (under the Constitution, a city has the power to fix *reasonable* rates as a condition to the use of its streets by a public utility); *City of Kalamazoo v Kalamazoo Circuit Judge*, *supra,* 200 Mich 146 at 154-155 ("It seems, therefore, clearly admissible, under the language of the Constitution here under consideration, that the municipalities of the State having "reasonable control of their streets," may affix *reasonable* conditions for their use by public utilities, and that, among such *reasonable* conditions, is the fixing of a reasonable rate. That such conditions must be *reasonable*, the language of the Constitution clearly demonstrates.") (Emphasis added.)

Second, a reasonableness standard can also be implied from the nature of the municipality's interest in its rights-of-way. While it can be asserted that some municipalities maintain that they enjoy certain proprietary rights in the real property under their control (at least with regard to public rights-of-way), those rights and property interests are held *in trust* for the benefit and general welfare of the public at large. *City of Detroit v Detroit City Railway Co*, 76 Mich 421, 425; 43 NW 447 (1889). *See also* Official Record, *spra,* at pp 1406-1407 ("The courts have uniformly decided that the word 'public,' as considered in relation to the highways, means the right of the *entire public*, not that of a particular community or that of a particular municipality, *but that of the entire State.*") (comments of Delegate Wixon, emphasis added). Their property interest in the public rights-of-way is not specifically equivalent to that of a private property owner in fee simple. *Id*; *see also County of Wayne v Miller*, 31 Mich 447, 448-449 (1875) (the municipal interest is not "in the nature of a private ownership"). This is also reflected in the fact that, in many cases, the municipal interest in the rights-of-way is via a *dedicated* plat, again indicating the uniquely public nature of the interest. That trust-like characteristic carries with it an implied reasonableness standard. It is implicit in the very nature of the municipal interest. A municipal

decision to grant or deny consent to use of the rights-of-way, thus, cannot be exercised in an arbitrary or capricious manner, but only in a *reasonable* manner, taking into account the larger interests of the *entire public*.

Third, and finally, the decision whether to grant or deny the "consent" required in the first sentence is simply a subpart of the general control of rights-of-way set forth in the second sentence of Article VII, Section 29. The first sentence requires public utilities to obtain local consent, *i.e.*, a permit to use the local rights-of-way. The second sentence speaks of control of the rights-of-way *in general*, of which the issuance of consents for public utilities would naturally be included. In a very real sense, then, the decision of the municipality in whether to grant or withhold a permit, i.e., "consent" to use the rights-of-way, is a *subset* of the municipality's control of its public rights-of-way. That control, as is expressly stated in the second sentence of Section 29, must be exercised in a reasonable manner.

In summary, it is clear that Act 48 preserves municipalities' right to condition the granting of "consent" to use local rights-of-way. However, it is also clear that such conditions must be "reasonable," under the plain language of Section 29 and this Court's interpretation of that section. Because Act 48 does not deprive municipalities of the power to impose reasonable conditions to their consent (i.e., the granting of the permit) to use local rights-of-way, the state legislature's creation of the Oversight Authority is fully consistent with the prerogatives reserved to local municipalities under Article VII, Section 29.

IV. THE ANNUAL MAINTENANCE FEE REQUIRED TO BE PAID BY TELECOMMUNICATIONS PROVIDERS UNDER ACT 48 CONSTITUTES A VALID FEE THAT DOES NOT REQUIRE VOTER APPROVAL UNDER ARTICLE IX, SECTION 31 OF THE MICHIGAN CONSTITUTION OF 1963.

The fourth constitutional question raised by the House of Representatives' Request for an Advisory Opinion is:

> Whether the annual maintenance fee required to be paid by telecommunications providers under the provisions of Act 48 to recover the costs and in consideration the right to use public rights-of-way constitutes a valid fee that is not prohibited from being imposed without voter approval by Article IX, Section 31 of the Michigan Constitution of 1963.

The reference to Article IX, Section 31 of the Constitution is a part of the Headlee Amendment ratified by general election in 1978.[36] In very general terms, the Headlee Amendment was designed to limit state taxes to the *proportion* of taxes to state personal income present in 1978, and to prohibit *any* new or increased local taxes beyond those existing in 1978. These constitutional limitations can be exceeded, but require voter approval to do so. In the present case, the critical question is whether the annual maintenance fee specified by Act 48 is a "tax" or a "fee." Indeed, the annual maintenance fee is a "fee" for Headlee purposes principally because it simply recovers from telecommunications providers some of the costs their use of the public rights-of-way causes. Thus, the maintenance fee is not a tax and voter approval is not required.

Under Michigan common law, the distinction between a fee and a tax has involved a consideration of a number of factors, and has been described in this manner:

> Generally, a "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Saginaw Co, supra*, at 210; *Vernor v Secretary of State*, 179 Mich 157, 164, 167-169; 146 NW 338 (1914). A "tax" on the other hand, is designed to raise revenue. *Bray v Dep of State*, 418 Mich 149, 162; 341 NW2d 92 (1983).

Bolt v City of Lansing, 459 Mich 152, 161; 587 NW2d 264 (1998). In an attempt to distill these general principles into a more useful framework, this Court in *Bolt* articulated three primary criteria to consider

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[36] Article IX, Section 31 states:

> Units of local government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of a qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property is finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

when distinguishing between a fee and a tax. To qualify as a user fee rather than a tax, the fee should (1) serve a regulatory purpose rather than a revenue-raising purpose; (2) be proportionate to the cost of the service provided; and (3) be voluntary. *Id* at 161-162. Each of these three factors is considered, in turn, below.

A. The Act Serves A Regulatory Rather Than Revenue Raising Purpose.

As an initial matter, it should not be overlooked that the legislature in passing Act 48 was obviously cognizant of the *Bolt* decision when it defined the annual maintenance fee in Act 48 as a fee rather than a tax. At a minimum, this can be inferred directly from the legislature's decision to label the payments from providers to the Oversight Authority as a "maintenance *fee*." However, an analysis of the fee described and created by Act 48 shows that the legislature had every intention of creating a fee and not a tax in that under *Bolt* there is no credible basis for finding the fee in Act 48 to be a tax.

As the quote above from the *Bolt* case implies, the fees required under Act 48 are essentially *per se* regulatory in nature since the fee is limited to cost recovery. Therefore, there is no "revenue" purpose of the fees contemplated by Act 48 since their purpose is compensatory at most, and even then, only partially compensatory. 459 Mich at 161. The Act itself states that the purpose of the fee assessed by the Oversight Authority is "to recover the costs of using the rights-of-way by the provider." Act 48, Section 3(3). That the purpose of the fee is cost recovery is also evident from the fact that all funds disbursed by the Oversight Authority must be used by municipalities solely for right-of-way related purposes. Act 48, Section 10(4). By definition, the cost recovery contemplated by Act 48 does not generate "revenue."

It is also determinative that the maintenance fees are true user fees in that the costs the fees seek to compensate far exceed the amount of the compensation. *Gorney v City of Madison Heights,* 211 Mich App 265, 268; 535 NW2d 263 (1995)("Where revenue generated by a regulatory 'fee' exceeds the cost of regulation 'fee' is actually a tax in disguise.") The legislative history of Act 48 indicates that the legislature received uncontroverted testimony that the annual costs to municipalities caused by telecommunications providers' use of the rights-of-way exceeded $86 million per year. *See* "Singh Report," *supra*, attached as Exhibit D. These costs are described at length earlier in this brief and will

not be repeated here. This Court should conclude that "some reasonable relationship exists between the amount of the fee and the value of the service or benefit" since there was also uncontroverted testimony at the legislative hearings that the maintenance fees to be collected under Act 48 are estimated at only $24 to $36 million.[37] *See* House Legislative Analysis,*supra*, at p 8 (attached as Exhibit E to this brief). Accordingly, there is no risk that the fees contemplated under Act 48 are a source of "revenue" for municipalities since they do not compensate municipalities for the full costs which the providers have caused.

The regulatory, as opposed to a revenue-raising nature of the Act, is further shown by the fact that the annual maintenance fee is charged *only* to those providers who seek to use the public rights-of-way. A true "fee," our courts have said, "is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed." *Bolt, supra*, Mich at 271. Here, the benefit of the permit flows only to those who place facilities in the public rights-of-way. Phrased another way, it is only those telecommunications providers who benefit from the use of the public rights-of-way for their facilities who pay the annual maintenance fee. Providers do not pay for rights-of-way they do not use. This is in contrast to the "fee" imposed in the *Bolt* case, which this Court concluded was a "tax" based, at least in part, on the fact it was imposed on *all* of the property owners within the City of Lansing, and was not limited to those who benefited by the improvement paid for with the fee. In the case of Act 48, the annual maintenance fee is a true "user pay" model.

That the maintenance fee charged under Act 48 is a fee rather than a tax is shown by the strong regulatory component of the Act. The Act's primary purpose is to regulate use of the public rights-of-way by telecommunications providers. Its very title, "The Metropolitan Extension Telecommunications Rights-of-Way Oversight Act," underscores the "oversight," i.e., the "regulatory" nature of the statute.

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[37] Moreover, since in order to receive any fee distributions from the Oversight Authority, municipalities are required to cancel any other franchises or cost recovery contracts they may have with providers. For all practical purposes, Act 48 is the sole source of cost recovery for municipalities.

The very first section of the statute, which articulates the purpose of the Act, further emphasizes this regulatory character. Section 1(2) provides, in part:

> "The purpose this Act is to do all of the following. . .
>
> (d) Streamline the process for authorizing access to and use of public rights-of-way by telecommunication providers.
>
> (e) Ensure the reasonable control and management of public rights-of-way by municipalities within this state. . .
>
> (g) Ensure effective review and disposition of disputes under this Act. . .
>
> (i) Promote the public health, safety, welfare, convenience, and prosperity of this state."

The Act implements these purposes by addressing very practical regulatory concerns. For instance, one of the principal purposes of the Act is regulating (while expediting and making more uniform) the procedures applicable to how providers obtain permits to use the public rights-of-way. There is an obvious regulatory purpose in requiring providers to obtain local approval prior to their construction of facilities in the public rights-of-way. The regulatory purpose is exemplified by the permit forms which the Act specifically approves. *See* Section 6(1)("The initial application forms and, unless otherwise agreed to by the parties, permit provisions shall be those approved by the commission [MPSC] as of August 16, 2002").

In this regard, the application form contains information on who the applicant is, what streets lines will be built on, when construction is proposed, who will actually do the construction (which contractor), financial information on the applicant (unless the MPSC has previously approved its finances), who will actually own and maintain the lines, the location of local business and engineering offices and insurance information. See MPSC approved application form, Exhibit H. The actual permit grants permission to construct facilities on specific rights-of-way, provides for expanding the authority to additional rights-of-way so as to protect all users of it, requires the provision of as-built maps, has insurance and indemnity provisions and provides for a performance bond not to exceed the cost of removing the providers' facilities. See MPSC approved bilateral permit form, Exhibit I. Depending on

the specific project, the permit may be subject to other reasonable conditions, and conditions necessary to protect the public health, safety and welfare. Act 48, Section 15. These provisions enable municipalities to better monitor and regulate the use of rights-of-way within their municipal boundaries, so as to ensure the effective utilization of those ways. Municipalities obviously need this information in order to ensure that the applicant's facilities do not interfere with or disrupt other users of the rights-of-way or, by the same token, that other providers do not disrupt the applicant's facilities once they are installed. The permit and application form and Act also reflect municipalities' concern with traffic flow on the surface of the rights-of-way, because any installation or repair of telecommunications facilities in the rights-of-way obviously affects traffic management, which also must be regulated by the municipality. Accordingly, there is a very strong regulatory component to Act 48.

B. The Maintenance Fees Required Under Act 48 Are Proportionate to the Cost of Service.

The second of the three tests articulated by *Bolt* requires that any user fees be proportionate to the cost of service. *Bolt, supra*, 459 Mich at 161-162; *Bray, supra*, 418 Mich at 160. This standard is readily met by Act 48. The maintenance fee, with certain limited exceptions, is determined by the number of feet of public right-of-way occupied by the provider's facilities. *See* generally Sections 8(3), (4) and (5). For the most part, providers will pay 5 cents per linear foot for use of the public right-of-way under Act 48. Consequently, the fee paid by a provider is mathematically proportionate to the provider's use of the rights-of-way. This is an obvious relationship since the more roads in a municipality (which are being used by providers), the more costs the municipality is going to incur. Thus, from any perspective, the maintenance fee requirement of Act 48 easily meets the second part of the three part *Bolt* test.

C. The Maintenance Fee Required Under Act 48 Is Voluntary.

The maintenance fees of Act 48 also meet the third of the three-part *Bolt* criteria, i.e., that of "voluntariness." *Bolt, supra*, 459 Mich at 162. This third test essentially requires an element of *volition*, or choice. *Id.* In contrast to a tax, true user fees "are only compensatory on those who use the service,

have the ability to choose how much of the service to use, and whether to use it at all." *Id, citing* Headlee Blue Ribbon Commission Report, §5, p 29.

The maintenance fee in Act 48 is purely voluntary because only those providers who desire to use the public rights-of-way are required to pay the fee and, even then, pay only to the extent of their usage. It cannot be disputed that telecommunications providers can voluntarily choose from a host of options by which to provide their service which do not involve the use of the public rights-of-way.

First, the most prominent of these is use of the private easements, especially the utility easements present in most subdivisions and plats. For example, in older subdivisions and plats, private easements (or private alleys which serve the same purpose) are commonly present along rear lot lines. Utilities placed there serve houses on two parallel streets. Providers can use these private easements or alleys for their lines instead of using the public streets to serve the premises, thus avoiding Act 48 fees. Newer subdivisions and plats similarly contain private easements for utilities which providers can use, although not always on rear lot lines.

Second, providers have historically used microwave towers to transmit their signals from point to point or building to building. Microwave towers are present throughout the state. Telephone company offices are often easily identified by the signature microwave antennas located on their roofs. Providers can expand their use so as not to use public rights-of-way.

Third, providers can provide service via cellular telephone technologies. Many currently do—for example such ILEC's as Ameritech, Verizon and Century all currently provide cellular telephone service in parts of Michigan, in addition to providing conventional phone service.

Fourth, providers can use various "fixed wireless" technologies to provide service without using public rights-of-way. These technologies beam radio signals at high frequencies from a central antenna to and from individual buildings or users. They have been used by companies such as AT&T to provide telephone service without using lines in the streets, and were noted in the *LinkMichigan* as a way to

provide Internet services without wires in the streets.[38] The FCC governs the use of such frequencies and the small "dishes" necessary to obtain such service are generally exempt from local zoning restrictions. *See* 47 CFR 1.4000.

Fifth, lasers are used to transmit telecommunications to and from customers without use of the streets. For example, such laser telecommunications capabilities were used in New York City to restore telephone service to some buildings after the September 11, 2001 attacks. *See,* Blair, Jayson, "A Nation Challenged: Phone Providers Near Ground Zero Are Still Financially Scrambling to Catch Up," New York Times, October 8, 2001 (Late Edition), Section B, Page 13, Column 1 (a copy of which is attached as Exhibit K). And similar laser technology is now becoming available for general use to provide high speed connections to businesses and homes. *See, e.g.*, Acampora, Anthony, "Last Mile by Laser: Short-Range Infrared Lasers Could Beam Advanced Broadband Multimedia Services Directly Into Homes And Offices," Scientific American (July, 2002), at pp 49-53 (a copy of this article is attached to this brief as Exhibit J). The article calls such technology "fiber-optic communications without the fiber." *Id* at 49.

Moreover, providers who currently have lines in the rights-of-way cannot credibly claim that the maintenance fees under Act 48 are involuntary simply because their presence in the rights-of-way predated the Act. Such a simplistic argument would eviscerate the legislature's ability to impose user fees pursuant to regulation where the use predated the regulation. In almost all instances where there is a need for regulation and user fees, it was the very existence of the users which necessitated the regulation. There were obviously fishermen before the state regulated fishing and imposed fishing license fees. As with all regulation after it is passed, telecommunication providers will need to make the "voluntary decision" whether it will continue to provide its services through use of the public rights-of-way or by using other options such as those described above. As this Court noted in *Ripperger v Grand Rapids*, 338

[38] "[In Marietta, Ohio] Sequelle will offer broadband fixed wireless "last mile" access to the Internet and other high-speed applications. While other telecommunications offerings can provide high-speed connections or broadband capacity, Sequelle can deploy its access solutions in areas that are inaccessible to conventional wire line connections." *LinkMichigan* at p 23. (Copy attached as Exhibit C to this brief).

Mich 682, 686-87; 62 NW2d 585 (1954), the water rates paid by consumers were voluntary since "[n]o one can be compelled to take water unless he chooses." In that case, in which this Court articulated the voluntariness element, the Court stated no concern over the fact that the water users who would pay the fee presumably were already connected to the municipalities' water supply. Similarly, providers who are already in the municipal rights-of-way can now decide whether they will continue to use those lines to provide its service, or look elsewhere.[39] [40]

D. Other Factors Also Indicate that the Maintenance Fee Collected Under Act 48 is a True User Fee Rather Than a Tax.

Even though they are not technically part of the three-part *Bolt* test, two other factors militate in favor of finding that the maintenance fee is a true user fee rather than a tax.

First, unlike the situation in *Bolt*, the maintenance fee in Act 48 is not intended to expand the municipal infrastructure. It is termed a *maintenance* fee, and for good reason, since the total amount of fees anticipated from the Act will cover only a fraction of the ongoing costs of servicing and maintaining the existing rights-of-way. In *Bolt*, the proceeds from the "fee" were used, in large measure, to fund a

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[39] Probably the largest single provider in the State of Michigan that is currently not paying fees to municipalities for use of the rights-of-way is Ameritech Michigan. Of any provider, it would presumably have the strongest "standing" for challenging the voluntariness of the maintenance fee. Nevertheless, Ameritech Michigan was extensively involved throughout the entire legislative process in the drafting of the Act, and is cited as a prominent supporter of the statute. *See* the preamble to the House of Representatives' Request for Advisory Opinion.

[40] Should the Court disagree with this analysis and conclude that the maintenance fee is not voluntary with respect to all providers, this Court nevertheless should uphold the legislation as against a Headlee challenge. This Court has itself acknowledged that all three tests must be considered "in their totality," and that no single leg of the test should be determinative. *Bolt, supra*, at 168, n 16; *see also Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999) ("We note that the Supreme Court cautioned that these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee.") This should be especially true with respect to the voluntariness element which, as has been noted, is a relatively new standard that was only recently adopted as part of the *Bolt* analysis. *See* Dissenting Opinion of Justice Boyle, 459 Mich at 180-181 (*citing Cincinnati v United States*, 153 F2d 1375, 1378 (CA Fed, 1998) as an example of where a true user fee was, nevertheless, compulsory).

In this regard, the Court should take into account the decision by the state legislature to assist municipalities to begin recovering costs caused by providers for the use of the rights-of-way which many providers had not paid for until now. It would be an unfair application of the law for providers to use the free ride they have had in the past as a successful argument to allow them to continue the free ride in the future. In fact, such a holding would unnecessarily impede the legislature from rectifying situations where parties were not paying for the harm and costs their use of property or a service causes.

new storm water facility in the city. This Court found that the amortized life of the new facility was expected to significantly exceed the term of the service charge or "fee." In other words, it represented an expenditure for infrastructure that was designed to serve the city, and benefit its residents, long after the fee had paid for it. That, said the *Bolt* court, is more characteristic of a tax than of a user fee. In the case of Act 48, however, the costs caused by providers recur each year. Similarly, the maintenance fees are due on an annual basis to compensate for the costs caused in that year. The fees are not for capital expenditures which will outlast the fee structure.

Second, the annual maintenance fee in Act 48, unlike the service charge in *Bolt*, is not imposed or collected by the local tax assessor's office. Rather, it is imposed and collected by the Oversight Authority, a legislatively-created body. It is the Oversight Authority that determines for each provider the amount of fees required under the Act. Act 48, Section 8(2). It is the Oversight Authority that prescribes the "forms, standards, methodology, and procedures for assessing fees" under the Act. Act 48, Section 8(10). And it is the Oversight Authority that prescribes "the schedule for the allocation and disbursement of the fees," and which actually makes the disbursements to the municipalities in accordance with the Act. Section 8(2). Even after the funds are disbursed to municipalities, they are not in the nature of unrestricted funds, as one would expect of general tax revenue. Rather, they are expressly and exclusively dedicated to right-of-way purposes. Section 10(4). Thus, tax-like characteristics — so important to the analysis in *Bolt* — are not to be found in Act 48.

CONCLUSION

For the reasons cited in this brief, the Michigan Municipal League and the Michigan Townships Association respectfully request that the Court answer "yes" to each of the four questions posed by the House of Representatives' Request for an Advisory Opinion, and that the constitutionality of Act 48 be upheld.

Respectfully submitted,

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INDEX OF EXHIBITS

Exhibit	Description of Exhibit
A	Official Record, Constitutional Convention 1961.
B	Official Record, Constitutional Convention 1907.
C.	Michigan Economic Development Compensation, *LinkMichigan* Report, May 14, 2001.
D	Singh & Nader, "Right-of-Way Costs Incurred by Local Governments in Michigan for Providing Access to Telecommunications Providers," January 16, 2002.
E	House Legislative Analysis, SB880, as enrolled, Second Analysis, July 12, 2002.
F	Rothwell, Doug, President and Chief Executive Officer, Michigan Economic Development Corporation, Official Testimony Before the Senate Technology and Energy Committee, January 9, 2002.
G	Michigan Municipal League, "Questions and Answers About Telecommunications Right-of-Way Fees and SB 880.
H	MTA Permit Application Form (MPSC approved).
I	MTA Permit Bilateral Form (MPSC approved).
J	Acampera, Anthony, "Last Mile by Laser," Scientific American, July, 2002.
K	Blair, Jayson, "A Nation Challenged: Phone Providers Near Ground Zero Are Still Financially Scrambling to Catch Up," New York Times, October 8, 2001 (Late Edition), Section B, Page 13, Column 1.
L	*Coast to Coast Telecommunications, Inc v City of Birmingham*, unpublished Opinion and Order of the Michigan Public Service Commission, decided October 24, 2000 (Case No. U-92354).
M	*TCG Detroit v City of Dearborn*, unpublished opinion of the Wayne County Circuit Court, decided March 8, 1999 (Case No. 98-803937-CK).
N	Text of 2002 PA 48, MCL 484.3101 *et seq.*

EXHIBIT A

State of Michigan

CONSTITUTIONAL CONVENTION

1961

OFFICIAL RECORD

FRED I. CHASE
Secretary of the Convention

AUSTIN C. KNAPP
Editor

LYNN M. NETHAWAY
Associate Editor

CHAIRMAN DeVRIES: Are there any amendments to Committee Proposal 86? If not, it will pass.

Committee Proposal 86 is passed.

The secretary will read Committee Proposal 87.

SECRETARY CHASE: Item 5 on the calendar, from the committee on local government, by Mr. Arthur Elliott, chairman, Committee Proposal 87, A proposal relating to ports and port districts. Retains section 30 of article VIII unchanged.

The following is Committee Proposal 87 as read by the secretary, and the reasons submitted in support thereof:

The committee recommends that the following be included in the constitution:

Sec. a. The legislature may provide for the incorporation of ports and port districts, and confer power and authority upon them to engage in work of internal improvements in connection therewith.

Mr. Arthur Elliott, chairman of the committee on local government, submits the following reasons in support of Committee Proposal 87:

Sec. a. The committee recommends that article VIII, section 30, be retained as it is in the present constitution. A suggestion is made, however, to the committee on style and drafting that it consider whether this section should not be made a subsection of article X, section 14.

CHAIRMAN DeVRIES: The Chair recognizes the chairman of the committee, Delegate Elliott.

MR. A. G. Elliott: Mr. Chairman, I would like to yield to Mr. Batchelor.

CHAIRMAN DeVRIES: Delegate Elliott yields to Delegate Batchelor.

MR. BATCHELOR: Mr. Chairman, fellow delegates, I have 2 ears, 2 eyes, but only 1 mouth so this should be short. This will be found in Journal 71, on page 461, and is known as article VIII, section 30.

The legislature did not provide for this — the constitution did not provide for this. It did not appear in the 1835 or 1850 constitution, but was added by an amendment as a new section at the April, 1923 election. There have been no significant court decisions. The provision itself does not appear to have created any problems which may have been encountered by port districts in Michigan. The constitutional grant of authority to the legislature is comprehensive.

[The supporting reasons were read by Mr. Batchelor. For text, see above.]

CHAIRMAN DeVRIES: Are there any amendments to section a of Committee Proposal 87? Are there any amendments to the body of Committee Proposal 87? If not, it will pass.

Committee Proposal 87 is passed.

The secretary will read Committee Proposal 88.

SECRETARY CHASE: From the committee on local government, by Mr. Arthur Elliott, chairman, Committee Proposal 88, A proposal pertaining to metropolitan areas. Amends article VIII.

The following is Committee Proposal 88 as read by the secretary, and the reasons submitted in support thereof:

The committee recommends that the following be included in the constitution:

Sec. a. THE LEGISLATURE SHALL HAVE POWER TO ESTABLISH IN METROPOLITAN AREAS SUCH ADDITIONAL FORMS OF GOVERMENT OR AUTHORITIES WITH SUCH POWERS, DUTIES AND JURISDICTIONS AS THE LEGISLATURE SHALL DEEM NECESSARY.

WHEREVER POSSIBLE, SAID ADDITIONAL FORMS OF GOVERNMENT OR AUTHORITIES SHALL BE DESIGNED TO PERFORM MULTIPURPOSE FUNCTIONS RATHER THAN A SINGLE FUNCTION.

Sec. b. THE LEGISLATURE SHALL PROVIDE BY GENERAL LAW FOR THE EXERCISE OF LOCAL GOVERNMENT BY 2 OR MORE COUNTIES, CITIES, VILLAGES, TOWNSHIPS OR DISTRICTS, OR ANY COMBINATION OF 2 OR MORE OF SUCH UNITS OF LOCAL GOVERNMENT. UNDER SUCH GENERAL LAW SUCH UNITS OF LOCAL GOVERNMENT SHALL HAVE POWER:

(1) TO ENTER INTO CONTRACTUAL UNDERTAKINGS OR AGREEMENTS WITH ONE ANOTHER OR WITH THE STATE OR WITH ANY COMBINATION THEREOF FOR THE JOINT ADMINISTRATION OF ANY OF THE FUNCTIONS OR POWERS WHICH EACH LOCAL UNIT OF GOVERNMENT WOULD HAVE THE POWER TO PERFORM SEPARATELY;

(2) TO SHARE THE COSTS AND RESPONSIBILITIES OF FUNCTIONS AND SERVICES WITH ONE ANOTHER OR WITH THE STATE OR WITH ANY COMBINATION THEREOF WHICH EACH LOCAL UNIT OF GOVERNMENT WOULD HAVE THE POWER TO PERFORM SEPARATELY;

(3) TO TRANSFER TO EACH LOCAL UNIT OF GOVERNMENT OR COMBINATION THEREOF FUNCTIONS AND RESPONSIBILITIES OR BOTH UPON THE CONSENT OF EACH UNIT OF GOVERNMENT INVOLVED;

(4) JOINTLY TO COOPERATE WITH ONE ANOTHER AND WITH STATE GOVERNMENT AND INTERGOVERNMENTAL AGENCIES;

(5) TO LEND THEIR CREDIT IN A MANNER PRESCRIBED BY LAW IN CONNECTION WITH ANY PUBLICLY OWNED UNDERTAKING AUTHORIZED HEREIN.

ANY OTHER PROVISION OF THIS CONSTITUTION NOTWITHSTANDING, AN OFFICER OR EMPLOYEE OF ANY OF SAID UNITS OF GOVERNMENT OR SUBDIVISION OR AGENCY THEREOF MAY SERVE ON OR WITH ANY GOVERNMENTAL BODY ESTABLISHED FOR THE ABOVE PURPOSES AND SHALL NOT BE REQUIRED TO RELINQUISH HIS OFFICE OR EMPLOYMENT BY REASON OF SUCH SERVICE.

Mr. Arthur Elliott, chairman of the committee on local government, submits the following reasons in support of Committee Proposal 88:

Sec. a. This section is designed to replace existing section 31 which has been deleted. Section 31 has rarely been used, omits the county, is too complicated, and serves very little purpose. A number of specific forms for metropolitan government were proposed to the committee but each suffered the defect of being too specific. Rather than attempt to write into the constitution a definite plan for metropolitan government, the committee believed this section should be left broad and flexible. Therefore, the committee recommends that the legislature be permitted from time to time to establish such form or forms of metropolitan government as would best serve the purpose then existing. This committee was impressed with the fact that while there has been considerable discussion about metropolitan governmental problems, opinion has not yet jelled as to their solution. The committee recommends against the solution of each problem of government through the creation of a separate new governmental body. Therefore, the last sentence advises that when the legislature establishes a new unit of government for the solution of metropolitan problems, it should be established with sufficient jurisdiction and power to handle multipurpose functions rather than for single purpose. It is intended that this will prevent the creation of a number of separate governmental units, each serving one purpose only. While no specific mention is made of the fact, the committee was of the opinion that the county with its all inclusive jurisdiction was probably the most effective instrument through which to establish any new metropolitan form of government.

Explanation—Matter within [ ] is stricken, matter in capitals is new.

Sec. b. This section is designed to encourage the solution of metropolitan problems through existing units of government rather than creating a fourth layer of local government. Any combination of townships, cities, villages or counties are permitted under general law to join together through (a) contractual agreements to perform any function which each could separately perform, (b) share costs with one another or with the state, (c) transfer functions, (d) cooperate, and (e) lend credit in connection with any publicly owned undertaking. All of the powers given are by mutual agreement and consent of the local units of government involved and no local unit is forced or compelled to enter into any agreement without its consent. The powers granted are not self executing but require an act of the legislature which from time to time may add additional authority or may limit the same to prevent abuses. Thus flexibility and control is maintained. The last sentence of the section permits elected officials of counties, cities or townships of the state to serve on any board or governmental body without being forced to resign his elected position or being in conflict with the prohibitions of section 6 of article V of the present constitution.

Whether such arrangements can meet the needs of metropolitan districts will depend upon the powers and strength of each and every unit within the district.

CHAIRMAN DeVRIES: The Chair recognizes the chairman of the committee, Delegate Elliott.

MR. A. G. ELLIOTT: Mr. Chairman, I would like to yield to the subcommittee chairman of metropolitan government and intergovernmental relations, Mr. Allen.

CHAIRMAN DeVRIES: Delegate Elliott yields to the gentleman from Kalamazoo, Delegate Allen.

MR. ALLEN: Mr. Chairman and members of the committee, this proposal and its comments will be found on pages 461 and 462 of the journal. Your subcommittee was composed of Mr. Brake, Mr. Sharpe, Mrs. Cushman and myself. Just very briefly before I turn the first section over to Mrs. Cushman for further explanation: metropolitan government, briefly, is a government which exists in densely populated areas, where there are many political subdivisions. We have about 10 areas classified in Michigan as being metropolitan areas.

Now, there is no one solution to the metropolitan governmental problem. There are many solutions, and some of them we have already gone through. For example, one solution is to strengthen your local units of government, and this in preceding sections your full committee has attempted to do. Another solution is to strengthen and free up your large unit of government, which is your county, and this will come later when we hit the problem of so called county home rule. Another solution is to permit freedom of action between the various political subdivisions in the state — that is the long part of this proposal, which will be explained in more detail — so as to allow them to freely work with one another rather than to be restricted. Another solution is to free up the state so as to take out anything that clutters up the power of the state to move in if state moving in appears to be necessary.

This is the reason why we are suggesting that the old section, section 31, be taken out. It all boils down to this: that metropolitan government is not what so many people think it is only, and that is a super government or a fourth layer of government which exists in addition to the city-township-county level of government which we have today. It may be necessary for the legislature to authorize such types of special corporations or districts, but it is a lot more than that. And with these comments, because I think that what we have already done, plus what we have here, is a genuine attempt to handle this problem of government in densely populated areas where there are many governmental units, I think collectively taken we have gone a long way to free up the legislature and the local units so that the problem can be better handled than it is under the 1908 constitution. I will call on Mrs. Cushman for an explanation of section a.

CHAIRMAN DeVRIES: Before the Chair calls on Mrs. Cushman, may the Chair request that you give the Chair time to recognize you and state your name? This is absolutely necessary for the accurate transcription of the verbatim debates of this convention. Delegate Allen yields to Delegate Cushman.

MRS. CUSHMAN: This first section is designed to replace section 31 of the present constitution, and that is covered by an exclusion report that we will get to later on. But when we looked into this question, we were impressed by the fact that section 31, which was added as an amendment to the constitution in 1927, hasn't been used. In fact, after 35 years there were only something like 5 metropolitan authorities operating under it. These are small in area and in population. It just proved too difficult to operate under this particular section. It is too complicated as to procedure. It doesn't include the counties at all, and it lists purposes very specifically so as to exclude others. The result has been that almost all the metropolitan authorities that we have had have been formed under a general law that was written in, I think '29, and also under special acts. One of these special acts was the one that was responsible for the Huron-Clinton metropolitan authority, which is one of the biggest we have and covers 5 counties in our part of the state for the purpose of providing park facilities for us all.

When it came to the question of what to put in place of this provision 31, we had several possible alternatives. There are several states that have provisions in this area that we might have sort of adapted to our use, but we felt that we — really, when we looked into it, we were impressed with the fact that there isn't enough experience, really, to know which type of a metropolitan authority would be the best for Michigan, if one were needed. Furthermore, we were impressed with the fact that every metropolitan authority should be adapted to the particular area in which it is to be used. Therefore we felt that we wanted to put something in here that was extremely broad and extremely flexible.

As Mr. Allen has said, he is going to cover other arrangements. This is just a sort of provision that allows the legislature to establish in metropolitan areas these additional forms of government or authorities with such powers and duties and jurisdictions as the legislature may deem necessary. I don't know whether there are any particular questions.

Oh, I want to say one thing. We do direct that whenever possible any authorities formed should be multipurpose; that is, we want to discourage as much as possible a lot of districts or a lot of authorities, each with a specific purpose in mind. We would like to encourage when possible districts or authorities which have more than one purpose, thus avoiding the duplication of units of government. If there are any questions, I am sure that I will do my best, or Mr. Allen will answer them.

CHAIRMAN DeVRIES: Delegate Cushman yields to the gentleman from Ann Arbor, Delegate Pollock.

MR. POLLOCK: Mr. Chairman, I would like to ask Mrs. Cushman these 2 questions: Mr. Allen referred to covering intergovernmental relations including the state. Now it happens to be in the local government section, and it seems to me that it has adequately covered relations within an area, a local government area, but do I understand that the state's interest in this matter is limited merely to the legislature's providing by law for this? It seems to me not to consider, maybe, the possible interest of the stake of the state itself in the metropolitan area, in addition to the interests of all its local units. The state at no place is mentioned except you say the legislature, which is obviously the organ of the state.

CHAIRMAN DeVRIES: Delegate Cushman.

MRS. CUSHMAN: I am sorry, I don't quite get what you mean. You aren't referring to section b? You are referring to section a?

MR. POLLOCK: Yes, I am referring to section a. In other words, intergovernmental relations, as you are well aware, is a broad subject. It involves not merely units of local govern-

To transfer to each local unit of government or combination thereof functions and responsibilities or both upon the consent of each unit of government involved.

And here I ask can they transfer their taxing powers to this cooperative effort? And, of course, (4) raises the same question. Now, under (5), you did specifically say that they could lend their credit. Now I ask what about taxing powers? What do you have in mind there?

CHAIRMAN DeVRIES: Delegate Allen.

MR. ALLEN: Mr. Austin, I think what you are doing is, you are getting section a tossed over into section b. Section b, where we have gone into the enumerations, refers to existing units of government and their existing powers. It doesn't call for any new unit of government — say a special district set up for a sewage disposal, to finance sewage disposal. Now, under a, this would be a separate district. Under a the legislature would say, what is its jurisdiction and what is its taxing power; what power does it have? That stands alone. This unit standing alone doesn't come into section b. The powers listed under section b are for existing units of government, things which they now are authorized to do.

So I think the answer to your first question is yes, on any new unit of government created by the legislature the legislature says what taxing power it has. But on whether or not these units may pool their taxing power, the answer is no. These are existing units of government. Unless, I suppose, the legislature should some day pass a law saying they could, and I would doubt it.

CHAIRMAN DeVRIES: Delegate Austin.

MR. AUSTIN: Mr. Chairman, Mr. Allen, am I to understand that under a, the legislature can give this metropolitan complex unlimited taxing power? You don't have any type of limit in mind?

MR. ALLEN: Whatever the legislature wishes to give, the way this is written.

MR. AUSTIN: I wish you were as kind to the cities as they are now set up. In other words, you are willing to give this metropolitan area that would be established under this section unlimited power, and yet we do have municipalities and other units of government with which we have had experience, and we are inclined to restrict them. Somehow there is a little inconsistency. I don't know whether you had in mind giving this unit unlimited taxing power. Did you?

MR. ALLEN: The committee had in mind giving it the power that the legislature wanted to give it, and trusting the legislature. I have a hunch you are making an argument not so much against the power for the new unit as for more power for the existing units.

MR. AUSTIN: No, I didn't really mean it that way. I am sorry if it sounded that way. I meant it just as I said it, that we do have experience with other local units of government, and we have seen fit on the basis of experience to limit their powers, but here we have got a unit that we have had no experience with, and yet we are inclined to give this unit unlimited power. That's what I had in mind.

MR. ALLEN: It's no different than what has been done from time to time. For example, the Clinton-Huron water authority, that is a special district. It isn't set up under section 31. The legislature has the power to do this unless it is restricted in the constitution. When it set up the ground rules for the Clinton-Huron water authority, it defined the taxing power. Now, we would envision that on any new authority set up, the legislature will do the same thing.

Put it another way: supposing we said, to get maximum flexibility — and your committee thought of this — let's just not have anything in the constitution. Just let's scrap everything. Now, if we did that, the legislature has all of its reserve power, and may do anything that is not prohibited. It could, if we had nothing in the constitution, come up with any form which it wished and set its taxing power. So, when you say give it unlimited authority, I think you tend to scare people, because they don't realize that is what the legislature can do under today's constitution.

CHAIRMAN DeVRIES: Delegate Austin.

MR. AUSTIN: Under section b, of course, my question was whether there was the right for these local units of government to cooperate on a tax levy. Did you envision that bility? For example, could 2 or 3 units down in Wayne or across county lines, for that matter, cooperate on a tax levy, assuming they did not want to levy it in alone?

MR. ALLEN: Well, we never thought about it. So about it now, I would say probably the answer is may only get together for such purposes as each alone. Each alone may tax its own residents. So that they could go together unless the legislature law, which it could do, saying that they might. do this if the legislature would authorize it.

MR. AUSTIN: Mr. Chairman, I would just like to the chairman on this after the session is over. I I want to take any more of the time on the floor. this new section should be a little more explicit one way or the other. Either it should prohibit it and in some way specify how it permits it.

CHAIRMAN DeVRIES: Will the gentleman from mazoo yield to the gentleman from Birmingham, Van Dusen?

MR. ALLEN: I will.

MR. VAN DUSEN: Mr. Chairman and members committee, I would just like to emphasize the negative which Mr. Allen gave to Mr. Austin on the question of taxing powers. I think the proposal which this committee sidered and adopted last week, to the effect that the taxation shall never be surrendered, suspended or away, very clearly precludes a combination of municipal powers. That provision applies not only to the state, but to every political subdivision of the state, and I think kind of thing Mr. Austin is talking about would clearly stitute either a surrender or a contracting away of the power of the combining units.

CHAIRMAN DeVRIES: Will Delegate Allen yield to gentleman from St. Clair Shores, Delegate Snyder?

MR. SNYDER: Thank you, Mr. Chairman. I am to agree with Mr. Hutchinson. We are getting into some here which requires a little bit more scrutiny than would cut the section off the first paragraph.

I don't know whether my problem would pertain section b or the second part of a, but again we get into question of multiunits of government participation for purpose functions. We do have a situation that there statutory provision that does provide for the combination the police and the fire protection. This is a statutory at the present time, and I feel that this should remain a tutory matter.

However, I have some real serious reservations whether type of service should be included in the constitution, and it almost mandatory that the legislature would provide this particular type of combination of services. If this is intent of the committee, or a provision that would be mitted under the proposed language here, I would feel clined to speak against it. But until there is a clarification of any one member of the committee, I would reserve further comment.

CHAIRMAN DeVRIES: Will Delegate Allen yield to Delegate Elliott for the purpose of making a preferential motion Delegate Elliott.

MR. A. G. ELLIOTT: Mr. Chairman, I learned from secretary there now is an amendment on the desk. This more debate, and because of that, I now move that the committee rise.

CHAIRMAN DeVRIES: Delegate Elliott moves that committee of the whole do now rise. All those in favor aye. Opposed, no.

The committee will rise.

[Whereupon, the committee of the whole having risen, President Downs assumed the Chair.]

VICE PRESIDENT DOWNS: The convention will be order. Delegate DeVries.

EXHIBIT B

PROCEEDINGS AND DEBATES

OF THE

CONSTITUTIONAL CONVENTION

OF THE

STATE OF MICHIGAN

Convened in the City of Lansing, Tuesday, October 22, 1907

OFFICIAL REPORT

By JOSEPH H. BREWER

CHAS. H. BENDER

CHAS. H. McGURRIN

Official Stenographers of the Convention

LANSING, MICHIGAN
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THE CHAIRMAN: File No. 175 was never voted upon. There was a substitute for the file that was before the Committee of the Whole.

MR. ACKER: Yes, but I wish to reconsider the action taken on it.

MR. SHARPE: Mr. Chairman, I rise to a point of order. Notice would have to be given to the Convention and not to the Committee of the Whole.

THE CHAIRMAN: The point of order is well taken.

TELEPHONE COMPANIES.

The Committee of the Whole Convention then proceeded to the consideration of File No. 202, being proposal No. 39, reported by the Committee on Public Service Corporations.

The secretary then read File No. 202 as follows:

FILE NO. 202.

A proposal to regulate the business of telephone companies.

It is hereby proposed:

Section 1. That the following section be incorporated in the revised Constitution:

Sec. —. No telephone company, having the right under the laws of this state to extend its lines into or through any city or village, shall, by reason thereof, have the right to transact a local business and lease or sell telephones to subscribers and connect them with a local exchange without first obtaining a franchise therefor from such city or village. The right of all cities, villages or townships to arrange and control their streets, alleys and highways, and to designate the place at which and the manner in which all wires of such associations, corporations, lessees, managers or individuals as aforesaid shall be arranged or laid within the limits of such city, village or township is hereby reserved to said cities, villages and townships.

The secretary then read clause one as follows:

No telephone company, having the right under the laws of this state to extend its lines into or through any city or village, shall by reason thereof, have the right to transact a local business and lease or sell telephones to subscribers and connect them with a local exchange without first obtaining a franchise therefor from such city or village.

THE CHAIRMAN: Are there any amendments to clause one? If not it will be passed. (After a pause.) It is passed.

The secretary then read clause two as follows:

The right of all cities, villages or townships to arrange and control their streets, alleys, and highways, and to designate the place at which and the manner in which all wires of such associations, corporations, lessees, managers or individuals as aforesaid shall be arranged or laid within the limits of such city, village or township, is hereby reserved to said cities, villages and townships.

THE CHAIRMAN: Are there any amendments to clause two? If not, it will be passed. (After a pause.) It is passed.

THE CHAIRMAN: Are there any amendments to the proposal as a whole?

MR. FLANNIGAN: Mr. Chairman, I am not quite satisfied with clause two. I would like to ask the Chairman of the Committee on Public Service Corporations if it is intended by this proposal to limit the right of individuals or corporations to stretch wires in cities and villages elsewhere than on the public streets?

MR. SHARPE: The idea or the intention of the proposal was to reserve the right to cities and villages to regulate the places where such wires should be placed within the cities or villages; that is, it was to give them the right to compel them to be put any place where the city or village desired to have them; underground if necesary.

MR. FLANNIGAN: I move to strike out clause two.

THE CHAIRMAN: The question is on the motion of Mr. FLANNIGAN.

MR. FLANNIGAN: That clause, Mr. Chairman, reserves to villages, cities and townships the right to say where the individual or corporation may lay wires upon his or its own private premises, and is not confined to the wires laid in public streets or alleys.

MR. TAYLOR: Mr. Chairman, I think the purpose of this clause was merely to regulate the laying of wires in public places. If a telephone company wished to arrange to put up a pole in some one's back yard and extend wires from that pole, that would be a matter of contract. I do not believe it was the intention to extend it further than public places.

MR. SAWYER: Mr. Chairman, I will agree that the wording of this clause two is not as lucid as it should be. I am not in favor of striking it out. I firmly believe that the place where telephone wires or telegraph wires should be placed in the city ought to be under the control of the council, so that the council may force them to go to the alleys instead of in the public streets. But the wording of this clause it seems to me is ambiguous, and of all places under the sun where ambiguous language ought not to be used is in a state Constitution. I am therefore of the opinion that this proposal ought to be referred back to the committee to make this language plain; therefore I move as an amendment to the motion to strike out that when the committee rises it recommend that this proposal be re-referred to the committee for the purpose of redrafting this clause.

THE CHAIRMAN: The question is on the motion of Mr. SAWYER to re-refer the proposal to the Committee on Public Service Corporations.

MR. FLANNIGAN: With the consent of Mr. SAWYER I will withdraw my amendment, and move to amend by inserting after the word "laid" in line twelve the words "streets, alleys and highways." That

be more likely to do it, and it seems to me that there should be some regulation in this Constitution controlling these matters. I certainly am opposed to the motion as it now stands.

MR. HEALD: Mr. Chairman and gentlemen of the Convention: I want to call Judge HECKERT's attention to the fact that in a case in the 121 Mich. in which the cities of Benton Harbor and St. Joe were involved, the supreme court says specifically that the cities had the authority and the right to provide reasonable regulations as to where the wires of telephone companies should be placed in the streets of their cities, and how they should be erected. I do not think this proposal along that line gives any added right to any city.

MR. ROCKWELL: Mr. Chairman, I sincerely trust that this proposal will prevail. It occurs to me that it is one of the most meritorious proposals that has come before the Convention. The proposal does not seek to prohibit the construction of telephone lines, as has been said, but simply seeks to regulate them. Some of the municipalities have not had the opportunity or advantage in the past of holding telephone companies to proper regulations. The result is we have had this condition that where a telephone company, like the Bell Company, has come in competition with another company, it has sought to reduce its rate to such an extent as to crush out all competition entirely. I have known it to reduce its telephone rental to business places to six dollars and in addition to that to furnish a phone in the residence free, while in another part of the state I am informed the same company, without an additional dollar's investment in that locality have raised the price of their telephone rate and rental. This proposal simply gives the cities and villages the right to fix the rate and say how far and whether or not they shall include farm lines. It occurs to me that this is a very meritorious proposal and ought to prevail, in order that the people may have a little say as to what rates or tax they should pay for telephone service.

MR. BURT: Mr. Chairman, I cannot understand how any man in this Convention can be in favor of a telephone or telegraph company coming into a city and saying "we have got full rights here and can go where we have a mind to." It seems to me that the people of the city ought to have enough control to say where these companies shall go. At the present time it is quite a disadvantage in many cities where this condition prevails. For instance a telephone company comes in and puts its poles up on a street wherever it pleases; I cannot conceive, with all the home rule we have been talking about, why a city should be deprived of having control over it. I do not care so much about the townships, it is not of so much consequence there, but I can see that there is some force in what Mr. STEWART says. So far as cities are concerned these poles can be put up just as well not to disfigure a street, and not to discommode the people, and certainly the common council or the people of that city should have the right to say where those poles should be put, and control them as they do other things.

MR. STEWART: Mr. Chairman, the proposition that Mr. BURT presents is not the proposition presented by this proposal. The cities now have the right to control; the supreme court of this state has said so, and the legislature has the power to regulate them. It has the power to do all those things; the state owns the highways, and this proposes to take away from the state the power to control those highways in relation to telephone and telegraph companies, and put it in each municipality. That is the objection I make. The people of Saginaw may want a telephone in their city, but they do not want a local 'phone altogether; they may want to talk with Bay City; that occasion might arise, and what would be the result? Some little township between Bay City and Saginaw will say "you cannot cross here," and you wouldn't have any opportunity of communicating between the two cities. The objection I make is that it gives to each locality the power to say whether or not a telephone line shall go upon its highways, and say where they shall go, so that one township could absolutely stop them, because they will say, "You cannot connect with a township that goes across this other township upon our highway, you have got to go two miles to the north of that," and how will they get there? There is the difficulty of this proposal, and it is pure legislation. The legislature has the power to do all that, and you will have to say the legislature will not do it, and therefore you propose to put it in the Constitution and keep it there forever, for the sole reason that you cannot get a law from the legislature that you ought to have. I insist that this is all wrong and ought not to exist.

MR. BURT: If they have all the power now, what do they want it in here at all for?

MR. STEWART: Well, that is what I say, and we move to strike it out.

MR. BURT: Certainly, if you have the power. But I do not understand it the way Mr. STEWART does, that they have the power; I understand the city may say where they shall go, but so far as the townships are concerned I do not care so much about that, but when you come into the city if they have not the power the citizens of that city should have the power to say where the poles should be set.

MR. STEWART: The supreme court of this state, Mr. BURT, has said they have the absolute right to say where they shall go, and to regulate them and say whether they shall go in conduits or how.

MR. ROCKWELL: Mr. Chairman, I should like to ask the gentleman from St. Joseph whether or not the cities under the present arrangement have anything to say whatever with reference to fixing the rates, or how far they shall reach out into a community and embrace farm lands?

MR. STEWART: No. they have not, and on this franchise question the proposition of getting a franchise, Mr. ROCKWELL, is that under the city system that we are going to have in this Constitution, complete home rule will prevail there, and they can regulate a telephone company by their own laws; they can make their own laws and regulate them.

MR. ROCKWELL: The statute does not give them that right, as I understand it, Mr. STEWART, at the present time. The statute at the present time gives the telephone companies, as I understand it, the absolute right.

THE CHAIRMAN: Mr. ROCKWELL, Mr. TAYLOR has the floor.

patrick, Knowles, Lillie, Louisell, Mead, Merrell, Moore, A. L., Nichols, Oberdorffer, Osmun, Post, Powell, Pratt, Robertson, Rockwell, Salliotte, Sharpe, Smith, O. H., Snow, Sutherland, Thomas, Thompson, Tossy, VanKleeck, Wicksall, Wykes—52.

THE PRESIDENT: The question is on the passage of the complete revision as a whole.

MR. WIXSON: Mr. President, I desire to inquire if I can move to strike out Section 28 of Article VIII?

THE PRESIDENT: That is the section we have just been considering the amendment to?

MR. WIXSON: Yes.

MR. A. L. MOORE: Mr. President, I rise to a point of order.

THE PRESIDENT: The gentleman will state the point of order.

MR. A. L. MOORE: The motion, as I understand it, is a motion to strike out the section.

THE PRESIDENT: He has not made that motion; he inquired if it could be made. The Chair is of the opinion that the motion would be competent to be made.

MR. WIXSON: I desire to make the motion to strike out Section 28 of Article VIII.

THE PRESIDENT: The gentleman from Tuscola, Mr. WIXSON, moves to strike out Section 28 of Article VIII.

MR. A. L. MOORE: Mr. President, I rise to a point of order.

THE PRESIDENT: The gentleman will state his point of order.

MR. A. L. MOORE: That a motion to strike out Section 28 could only be made at the time Article VIII was on its passage, that it could not be made at this time without reconsidering the vote by which Article VIII was adopted.

MR. WIXSON: Mr. President, it occurs to me that if a motion to amend was in order that a motion to strike out would certainly be.

THE PRESIDENT: The Chair will hold that on the passage of the complete revision, any article is subject to amendment, the same as it would be on second reading after being considered by the Committee of the Whole, and the Chair will take that view, and hold the point of order is not well taken.

The question is on the motion to strike out Section 28.

MR. MILNES: Mr. President, I hardly think it is necessary to take up the time of this Convention with this proposition, but it strikes me it would be a ridiculous proposition to strike it out. You would be saying by that action to the cities, villages and townships of the state you shall not control your own roads, streets, alleys and so on. I do not believe there is anyone in this Convention who would give corporations the right to use the streets, alleys and roads without the authority of those different municipalities. That is all I care to say about it. I do not think it is necessary to spend any time on it at all.

MR. THEW: Mr. President, the question in this provision is not a question between the opponents and the advocates of it; it is not a question of whether some regulation relative to the use of the streets by telephone and other companies, and transportation as well, is proper, but whether it is proper for this Convention to take that power which now lies in the government at large, and take it away from the government of the state of Michigan, and lodge it in these particular municipalities and local governments. Heretofore it has been considered essential that the primary control of all the highways of this state should be lodged in the government of the state of Michigan, and should be exercised by the legislature. That has been delegated by the legislature for local purposes, allowing them to impose local regulations but the last clause of this section at least not only gives to the advocates of this clause their right to regulate the use of the highways, but takes the control and the power to control those highways primarily away from the state, and delegates it to the local authorities. I think this would be a dangerous proposition to put into this Constitution. The word "control," if it is given its natural interpretation, goes to the full extent, and would take away from the legislature and the state government powers which no one in this Convention would desire to have taken away from them. I think that this amendment, or rather the motion to strike out entirely is not proper, but I think it should be so amended as to reserve to the local governments reasonable regulation of the streets and the highways and the use thereof, but that the primary control of those highways will remain where it is now.

MR. BARNETT: Mr. President, I agree with the gentleman from Allegan (Mr. THEW). This is a subject over which there should be some control by the central authority of the state. It is going a little too far in granting home rule, and I do not think it is wise. I move to amend the clause by adding at the end "to regulate by general law."

THE PRESIDENT: The motion to strike out is pending.

MR. BARNETT: I thought that had been withdrawn.

THE PRESIDENT: It was not.

MR. WIXSON: I can add but very little to what has been said by the delegate from St. Joseph (Mr. STEWART) and from Allegan (Mr. THEW), but it occurs to me that this provision is the one provision in this Constitution that absolutely imperils its ratification. I do not believe the delegates here assembled have carefully considered how sweeping it is in its scope. For example, giving an absolute control to the townships and municipalities it carries with it the right to absolutely prohibit, not to say the right to traverse the streets but in addition the right to cross the street, and I submit, Mr. President and gentlemen, that it is a dangerous power to place in the hands of a municipality, board, or a township board if you please, the right to obstruct a state-wide improvement or a trunk line of railway for example. In addition to that we have at the present time upon our statute books regulations that provide that municipalities may regulate the use of the streets where a public utility has a right of way, but to absolutely prohibit them is going far beyond the present statutory regulations. In addition to that we have upon our statutes today a wise provision that provides for what is known as good roads districts. For the purposes of illustration I want to call your attention to this. We will suppose that a good roads district is organized comprising the township in which the city of Ann Arbor and the city of Ypsilanti are situated, together with the intervening

townships. Under the law as it now stands a vote of the electors of the entire district may provide for the establishment of a good roads district, but as always happens in cases of that kind where cities are located at the termini of such a district, intervening townships are invariably adverse to being assessed for the equipment of good roads in the space intervening between the termini. This provision absolutely puts it within the power of the intervening township to obstruct and nullify that statutory provision. I maintain, gentlemen, that this provision is unwise, and I believe that those who read it and thoroughly consider its full scope and the context of it will agree with me.

MR. FLEISCHHAUER: Mr. President, on this question I demand the yeas and nays.

THE PRESIDENT: The gentleman from Osceola, Mr. FLEISCHHAUER, demands the yeas and nays.

The yeas and nays were ordered.

MR. BURT: Mr. President, take for instance an interstate railroad, a railroad coming from another state, it is coming through here and they get a charter from the state of Michigan; can a township hold up that work? Now, as I understand it, both electric lines and steam roads have the right to go through under proper conditions. It seems to me we are on the wrong track and should correct it. To illustrate: Here is a railroad being built through, and here is a town off to one side, they could insist that you go there or else you cannot go through and leave them out. That puts it in the hands of the townships for the railroads, both steam and electric, and it seems as if it should be corrected.

MR. J. M. C. SMITH: Mr. President, I am in favor of this motion for this reason: If there is any section in this Constitution that is legislative it is this section, and it does not seem to me we should put into this Constitution any rigid rules or regulations which is purely and simply a function of the legislature to perform. For that reason I think it should be left to the legislature.

MR. THEW: Mr. President, if I may be permitted just one word on the genesis of this section. Formerly the statute set down the general rule delegating the power of the reasonable regulation of the use of highways to the different localities, townships, cities and villages, but there are perhaps a hundred or more statutes directed to the regulating of the use of these streets for particluar purposes, for instance, the automobile statute. In 1905 the legislature, in passing a telephone law provided for the use by those telephone companies of the highways, and went away beyond what was reasonable. I know not whether there has been an effort to have that amended or revised, but it is a misuse of the rule by that particular statute that has called forth the efforts of the gentlemen here to incorporate in this Constitution this particular provision. I maintain that it may be proper to reserve to townships and the cities and villages reasonable regulation of these highways, but I maintain further that it is entirely improper for us to go to the extent of taking away from the state the primary control of these highways, which they need for numerous governmental purposes and make them absolute in these local governments. It will infringe upon hundreds of our laws which are absolutely necessary to the administering of a general government. Now, if the parties want to reach their remedy, let them reach it, but what is the use of going beyond that and reaching down into the fundamental principles of our government and taking away rights which have always been considered necessary for the general government to have, and give it to these local governments, governments which really, notwithstanding all of our talk about home-rule, are primarily established to aid and facilitate the general government of the state.

MR. HALLY: Mr. President, last night we spent about two hours telling one another what we thought of one another and how much we thought of the revised Constitution. Nobody here can say how many of the people when they were speaking had in mind this particular section that is now sought to be stricken out of the Constitution. This particular section means as much to the cities and villages as any clause or phrase in the new Constitution. It means a great deal to them. Home rule is of little consequence to the cities if you strike this language out. I am not prepared to say now publicly what my attitude would be, if that amounts to anything, upon the revised Constitution with this section stricken from it.

MR. WIXSON: Mr. President, I think I can reconcile the divergent views of the Convention by an amendment that will suit their peculiar notions in regard to the subject matter by withdrawing the motion and proposing an amendment. I ask to withdraw the motion.

THE PRESIDENT: The gentleman withdraws the motion to strike out Section 28.

MR. WIXSON: Mr. President, I desire to move to amend by striking out the words "without the consent of the" and that the following words, following the word "conduits" in the fourth line of the reported submission, "except under such reasonable regulations as shall be ordered by the" inserted in the place and stead thereof. So that the whole section will read in this way:

"No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits except under such reasonable regulations as shall be ordered by the duly constituted authorities of such city, village or township."

THE PRESIDENT: Now, the question is on the amendment.

MR. WIXSON: Mr. President, it seems to me that in the provision as set forth in the printed copy that we have let the idea of home rule run mad to a certain extent. The courts have uniformly decided that the word "public," as considered in relation to the highways, means the right of the entire public, not that of a particular community or that of a particular municipality, but that of the entire state. Now, to take away absolutely from the state any possible direction or regulation of the highways is in effect as I view it to provide that the state instead of being an integer, shall be made up of a confederation of municipalities, as you may say. Now, I quite agree with the views of a great many here that the local municipalities ought to have the right to reasonably regulate it, but I submit, Mr. Chairman and gentle-

men, that they ought not to have the right to absolutely prohibit what may be a state-wide improvement, a trunk line for instance, or some utility that may extend from Michigan to Europe. I hope this amendment may be acceptable to my friend from Wayne (Mr. HALLY), who objects to the striking out of the entire provision, as well as to the balance of the delegates. I hope it may prevail.

MR. J. G. BROWN: Mr. President, on this question I demand the yeas and nays.

THE PRESIDENT: The gentleman from St. Clair, Mr. BROWN, demands the yeas and nays on this amendment.

The yeas and nays were ordered.

MR. A. L. MOORE: Mr. President, I desire to call the attention of the Convention to one thing, if that amendment carries every franchise and every right that is granted by any municipality to any such institution will be a subject of litigation, because if a question is afforded in the slightest the public utility can go into the courts, if a franchise is offered that is not acceptable to them, and insist that the conditions of the franchise are not reasonable, and I say to you gentlemen, if you want to cut the throat of home rule and plunge every municipality into endless and needless litigation adopt that amendment; if you do not want to do it, vote it down.

MR. STEWART: Mr. President, I would like to ask the gentleman from Oakland (Mr. MOORE) one question. With the provision as it now stands does it lie within the power of the municipality, township, city or village to absolutely prohibit any public utility company going into its territory?

MR. A. L. MOORE: That may be true that it does prohibit, under such reasonable regulations as the court may impose, but this is a different proposition entirely.

MR. HEMANS: Mr. President and gentlemen of the Convention: It seems to me it would be a very dangerous proposition to accept the amendment that is offered to this section, but there seems to me to be much reason for the contention of Mr. STEWART on the amendment which was lost. I should like myself to be more clear on the proposition. I do not believe that this Convention should pass a proposition here which absolutely debars the state legislature from any and all control over the streets and highways of the state. The first part of the proposition, and that which is sought to be amended, provided as you can see by reading it, that "no person, partnership, association or corporation operating a public utility shall have the right" to do certain things, and those are to use the highways, streets, alleys and public places for wires, poles, pipes, tracks and conduits, without the consent of the duly constituted authority of the city. Now, that should remain. They should never have the right upon the streets to do those things without the consent of the duly constituted authority. They are obliged under the statutes of this state to get that consent now, and it is well to be made constitutional. "Nor to transact a local business without first obtaining a franchise." And that is right. They are compelled under the statute to obtain that now. It is well to make that constitutional, but this last sentence occasions me some uneasiness, "The right of all cities, villages and townships to the control of their streets, alleys and public places is hereby reserved to such cities and villages." Does that mean we are going to debar the state of Michigan from allowing a steam railway to be constructed within the state unless it obtains consent from every one of the various political units of the state? If that is true, I do not believe it is wise. I should like the opinion of some one who has studied the question, as to whether that would be the result of this last sentence, and if it would not be the result, to have our attention called to some power that still rests in the legislature to take care of those matters.

MR. NICHOLS: Mr. President, I have been wondering, sir, whether it would not be at least in the direction of a solution of the vexed question, which has thus somewhat unexpectedly arisen, if all of the first part of Section 28 were to stand, and the three last lines be stricken out, and the word "townships" above. I merely ask that someone more familiar with the parliamentary situation may inform me whether such a proposition or motion would be in order.

MR. HEALD: Mr. President, I would like to move to amend the amendment offered by Mr. WIXSON, by taking the words that this Convention has already put in Section 21 of this same article, where they provide for home rule, and add those words, "subject to the Constitution and general laws of this state," at the end of Section 28. It seems to me that is consistent with the work that the Convention has done previously, and that it gives to the various districts the right of control over the streets subject only to this Constitution and such general laws as the legislature may pass.

MR. HAWKINS: Mr. HEALD, do you move that as an amendment?

MR. HEALD: Yes.

MR. WIXSON: Mr. President, I withdraw my amendment and accept the amendment of the gentleman from Kent (Mr. HEALD).

THE PRESIDENT: The gentleman from Tuscola (Mr. WIXSON) withdraws his motion.

MR. HAWKINS: Mr. President, I trust the amendment offered by the gentleman from Kent will not prevail. It opens the door to the same damnable iniquity that we are struggling to get away from, and that is the statute of 1895. At the present time the villages of this state and the cities have the general right to the control of their streets, but this statute of 1895 as passed by the state legislature is maintained to rob them of every particle of control that they have. I therefore am most strenuously opposed to introducing this particular clause. I believe that there is a proper solution of this matter, but it does not lie in providing that the rights of the villages and cities shall be subject to legislative enactment. That is what we wish to escape, and that is the very idea of putting this proposal in the shape it is. I believe that it should be modified, and I think I know how it can be, so that it will do justice to the people of the state at large, and the corporations desiring rights of way, but it is not by emasculating the entire proposition and interjecting legislative control under this last sentence.

MR. HEALD: May I ask the gentleman from Hillsdale a question?

THE PRESIDENT: Does the gentleman desire to answer a question?

MR. HAWKINS: I often desire to answer things I cannot.

MR. HEALD: Mr. HAWKINS, would not the first part of this proposition give the city, village or township the control that you seek to give them over a public utility, and the amendment that I have proposed applies merely to the last clause, they still retain the right of control and the right of giving franchises to any public utility that passes through it?

MR. HAWKINS: Your last clause absolutely renders void the clause in the preceding section, that is the reason of my opposition. If you provide that it shall not be done without their consent, and then make that consent subject to legislative action they are deprived of the right they would have under the first clause.

MR. HEALD: My amendment applies only to the second clause.

THE PRESIDENT: The question is on the amendment offered by the gentleman from Kent(Mr HEALD).

MR. HEMANS: May I hear the amendment?

THE PRESIDENT: Will the gentleman state his amendment again?

MR. HEALD: Mr. President, at the request of some of the delegates here I will withdraw the amendment.

THE PRESIDENT: The amendment is withdrawn.

MR. HEMANS: Mr. President, after talking with some of the delegates I believe that my view of the matter can be made clear by adding before the word "control" the word "reasonable" in the last sentence, so that it will be "the right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved."

THE PRESIDENT: Does the gentleman move that as an amendment?

MR. HEMANS: I move that as an amendment.

THE PRESIDENT: The question is on the amendment offered by the gentleman from Ingham (Mr. HEMANS).

MR. HEMANS: Now, I made that amendment, gentlemen, because it is stated this last clause may be considered as prohibitive. Now, it seems to me if we put the word "reasonable" in, that it cannot be said that the rights of the cities and villages to prohibit is given by this section, and it seems to me that it meets the whole difficulty.

MR. ADAMS: Mr. President, this matter is exceedingly important, and I realize what it may seem to be to take a little time to carefully go over this matter now. It is impossible to do it in Committee of the Whole or in Convention. We have the address submitted by the committee here to go over; that will take some time. We can do that while a committee is going over this Section 28 carefully, and covering the points necessary to do justice by the people of this state. Therefore, Mr. President, I move that this Section 28 be referred to a committee composed of Messrs. WIXSON, HAWKINS, STEWART, BALDWIN and HEMANS, to be reported back to this Convention as early as possible. While they are doing that we can go over this address submitted by the Committee on Submission and Address and will lose no time, and yet give us a clean draft for this section.

THE PRESIDENT: The gentleman from Kent (Mr. ADAMS) moves that the further consideration of the complete revision be postponed, and that a sub-committee be appointed to take into consideration the changes in Section 28. The question is on the motion.

MR. A. L. MOORE: I certainly hope that motion will not prevail. I think if the Convention will spend just a moment longer in the consideration of this proposition that it can be adjusted now.

The question was taken, and the motion was not agreed to.

MR. A. L. MOORE: Mr. President, I desire to ask the gentleman from Ingham a question.

THE PRESIDENT: Does the gentleman desire to answer a question?

MR. HEMANS: I will try to answer it.

MR. A. L. MOORE: The amendment offered by the gentleman from Ingham (Mr. HEMANS) as I understand it, is the elimination of the amendment offered by the gentleman from Kent, and substituting in place of that amendment the word "reasonable" after the word "the" in line 190; am I correct?

THE PRESIDENT: Let the Chair suggest to you that the amendment offered by the gentleman from Kent (Mr. HEALD) has been withdrawn. The only question now before the Convention is the amendment offered by Mr. HEMANS, which provides that the word "reasonable" be inserted before the word "control" in next to the last line of the section.

MR. A. L. MOORE: Now, Mr. President and gentlemen of the Convention, I ask this question that it may go on the record. The word "reasonable" inserted in line 190 before the word "control"—would that relate in any manner to the rights granted in that portion of Section 28 contained in lines 182, to and including 188?

MR. HEMANS: It would not seem to me that it could.

MR. A. L. MOORE: I think it desirable that I read those lines so there may be no question as to the record. Lines 182 to 188 read as follows: "No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits without the consent of the duly constituted authorities of such city, village or township, nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township."

I understand the answer of the gentleman who makes the motion to be that he does not think the insertion of the word "reasonable" would be a restriction upon the obligation of the public utility to obtain such franchise before it could do business. Am I correct?

MR. HEMANS: That is my position.

MR. A. L. MOORE: Then I have no objection, Mr. President, to the adoption of the amendment.

MR. LOUISELL: Mr. President, I take the same position in this matter that has been taken by Mr. MOORE, and I have no objection to the insertion of the word "reasonable" in this connection. I believe that the construction to be given to the section would be as stated by Mr. HEMANS, and for these reasons I am in favor of the amendment.

THE PRESIDENT: The question is on the amendment offered by the gentleman from Ingham,

HEMANS, to insert the word "reasonable" before the word "control."

The question was taken, and the amendment was agreed to.

THE PRESIDENT: The question now is on the adoption of the complete revision.

MR. ADAMS: Mr. President, there is one question still remaining in this section that seems to be important, and that is the question whether or not public utilities now using the streets, alleys and public places with their poles, wires and so forth, must to continue that use go to the authorities in each township, city and village and obtain consent? That ought not to be left in doubt. I am aware that many lawyers say that the vested rights now enjoyed by those public utilities cannot be disturbed by this provision. On the contrary, many lawyers have a doubt upon it, and it ought not to be left in doubt; it ought to be clear. To avoid any possible doubt I offer this amendment to be inserted after the word "township" in the fifth line, "Provided, however, That public utilities now using such highways, streets, alleys or public places shall not be required to obtain consent from local authorities where they now have permission for such use from some lawful authority." That covers only one point and disposes of any doubt.

THE PRESIDENT: The question is on the amendment offered by the gentleman from Kent, Mr. ADAMS.

MR. ROCKWELL: Mr. President, I trust that motion made by Mr. ADAMS will not prevail. It may be that in some instances unreasonable franchises now may have been granted, or franchises, the terms of which are unreasonable, and if we place this amendment in the Constitution as suggested by Mr. ADAMS, it legalizes an unreasonable condition. If they have any rights that are reasonable it occurs to me that the Schedule takes care of them.

MR. THEW: Mr. President, I do not want to take up too much of the time of the Convention, but one thing I certainly hold, that a franchise of a private corporation is a contract, under the United States Constitution, and it will stand, no matter what we put into this Constitution. But, I believe that reasonable control of the streets if it is good for a new corporation extending its lines though the streets, should be also proper and a good measure to apply to old corporations that are now extending lines through the streets that are not protected by a particular franchise as to just where or the place or height and so forth, those lines should be placed, and I am not in favor of the amendment offered by the gentleman from Kent (Mr. ADAMS) for that reason.

MR. SIMONS: Mr. President, I would like to ask to have the amendment read.

THE PRESIDENT: The secretary will read the amendment.

The secretary read the amendment.

MR. SIMONS: Mr. President, I wonder if the gentleman realizes that the proposition will in effect mean that those corporations which now have the right to the use of the highways will have a perpetual franchise?

MR. ADAMS: Mr. President, I do not understand any such thing. It does not mean that. It simply says this, gentlemen, under the language of Section 28, it would make it compulsory for every steam railroad in this state that crosses a highway in your townships, to go to the local authorities in that township to obtain express permission to do so. While their track is there today the use of that track must be had tomorrow; the same is true of your telephone lines, your telegraph lines, your interurban lines and all other public utilities. Now that is too drastic, I do not think the members of this Convention desire to do so. On the one hand, my friend from Oakland (Mr. ROCKWELL) tells us these are vested rights and cannot be disturbed, and in the next breath he tells us that if they have some right that he says is vested and cannot be disturbed because it is unreasonable, it ought to be regulated by this Section 28. He first stands on one foot and then on the other. Now, gentlemen, if it is true that all of these public utilities owning a license granted by some general law or some local franchise are vested rights to continue according to the terms of their grant, then there is absolutely no force in the amendment I have offered. But men disagree with the view, and men of this Convention on this floor evidently disagree with it. Do you want to drive all of those public utilities to the local authorities, and there submit them to a merry war of competition between the two lines? If you do, what will become of the systems of telephones in this state? You know, as I know, that the independent lines are struggling on one side, the Michigan State Telephone upon the other; they are sharp competitors. They have wires in almost every township of this state, and if you are going to drive them both to the local authorities to get consent to use those wires tomorrow and every day following the ratification of this Constitution, what is the result? The authorities of one of these corporations, in a township will seek to bar the other, their competitor, and if they can shut them out, you have destroyed the system of the competitor. Now, that is the condition that we do not want in this state. Mark the language of this amendment, it does not give any right to the public utility that is occupying the streets without authority, it compels them to get it, to go to the local authority and get the consent according to this section, and that ought to be so. But where they have built up their business under franchises granted by local authorities and under the laws of this state, you ought not to upset and disturb it, and destroy it, by saying to them for the establishing of your property tomorrow you must go to the local authority and get consent. I want to say to you that the language of Section 28 is too strong. It is stronger than the men in this Convention even want it to be. It should be modified; at the same time you should reserve the right in the local authorities to supervise and control the use of their streets so that those public utilities will not trample upon the rights of the citizens of those municipalities, but carefully observe the rights of the people within each of those municipalities. This provision only grants this to public utilities now operating by right of authority granted, as they have operated in the past, and to avoid the necessity of their going to the local authorities all over the state to get the permission that this section requires.

MR. FLEISCHHAUER: Mr. President, I move the previous question.

THE PRESIDENT: The gentleman from Osceola

trict road system to the electors of the counties or proposed districts, and such road system shall not go into operation in any county or district until approved by a majority of the electors thereof voting on such question. The tax raised for road purposes shall not exceed in any one year three dollars upon each one thousand dollars of assessed valuation for the preceding year.

The foregoing section makes some important changes in Sec. 49, Art. IV of the present Constitution. The provision for submitting the question of adopting a county road system to the electors may be applied to districts not governed by county lines. It is believed to be greatly in the interest of the state at large, as well as the respective counties, to improve the public highways. The foregoing section leaves it with the people of each county to say whether they desire to adopt a county or district road system and places a reasonable restriction upon the amount of money that each county can expend therefor in any one year. The debates indicate that wherever the system has been adopted the results have proven most gratifying. In order that the work may be carried on in the localities adopting it without too many limitations, this section increases the limit of taxation for road purposes from two dollars a year to three dollars on each one thousand dollars valuation, and authorizes the legislature to change and abolish the powers and duties of township commissioners and overseers of highways. The three per cent limit on county indebtedness contained in the old section remains unchanged except to place it in a new section (Sec. 12 of this article) and make the restriction more positive.

Section 27. The legislature shall not vacate nor alter any road laid out by commissioners of highways, or any street, *alley or public ground* in any city or village or in any recorded town plat.

This is a revision of part of Sec. 23, Art. IV of the present Constitution, and makes no change except to extend its provision to alleys or public ground.

Section 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

This is a new section and its purpose is to prevent the use of streets, alleys, highways and public places without the consent of the local authorities first had and obtained. The word "reasonable" was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways and public places within their corporate limits. And it was pointed out in the debates that without the word "reasonable" or a similar qualification the section would practically deprive the state itself of authority over its highways and public places.

Section 29. No franchise or license shall be granted by any municipality of this state for a longer period than thirty years.

This provision is inserted in the revised Constitution in order to fix a definite limit upon the term of a franchise or license. The debates developed the fact that in portions of the state, corporations have obtained franchises in one municipality for a term of fifty years, and in an adjacent municipality for a longer or shorter time, and in a third municipality a perpetual franchise. In controlling a number of franchises for an indefinite time granted by contiguous municipalities, a public utility corporation is placed in practical command of the situation. If the franchise expires in one municipality that portion of the franchise is frequently of little value except to the corporation holding the unexpired franchise in the adjoining township or city. This provision compels a termination of all franchises granted by any municipality within thirty years. The city of Detroit and neighboring townships are principally affected.

ARTICLE IX.

IMPEACHMENTS AND REMOVALS FROM OFFICE.

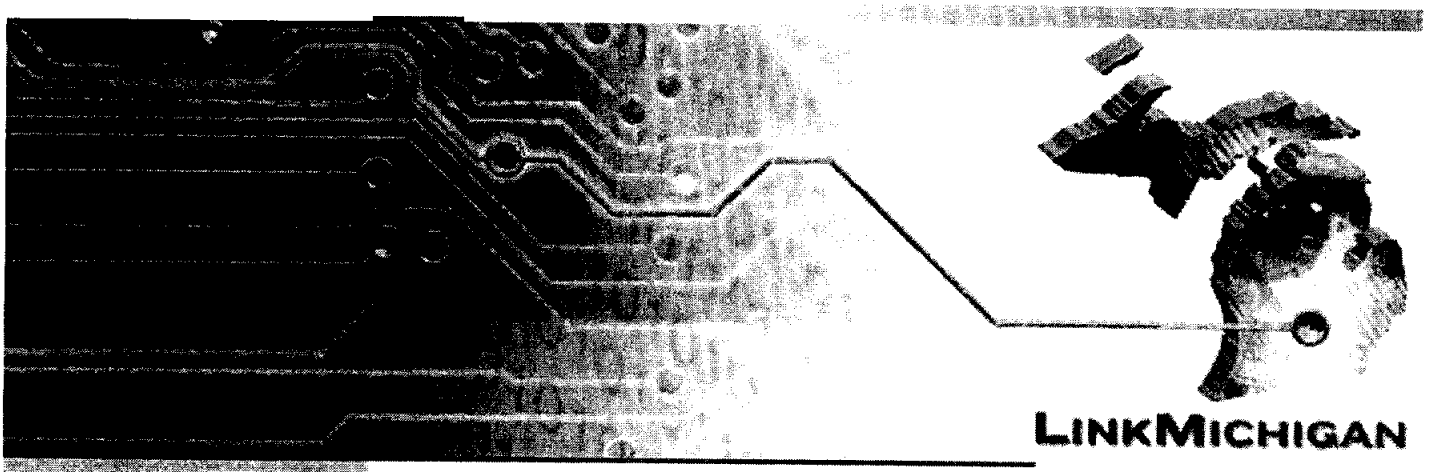
Section 1. The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office, or for crimes or misdemeanors; but a majority of the members elected shall be necessary to direct an impeachment.

Section 2. When an impeachment is directed, the house of representatives shall elect from its own body three members, whose duty it shall be to prosecute such impeachment. No impeachment shall be tried until the final adjournment of the legislature, when the senate shall proceed to try the same.

Section 3. Every impeachment shall be tried by the senate. When the governor or lieutenant governor is tried, the chief justice of the supreme court shall preside. When an impeachment is directed, the senate shall take an oath or affirmation truly and impartially to try and determine the same according to the evidence. No person shall be convicted without the concurrence of two-thirds of the members elected. Judgment in case of impeachment shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law.

Section 4. No judicial officer shall exercise his office after an impeachment is directed until he is acquitted.

EXHIBIT C



LINKMICHIGAN

MAY 14, 2001

MICHIGAN
ECONOMIC
DEVELOPMENT
CORPORATION

LinkMichigan Table Of Contents

Foreword

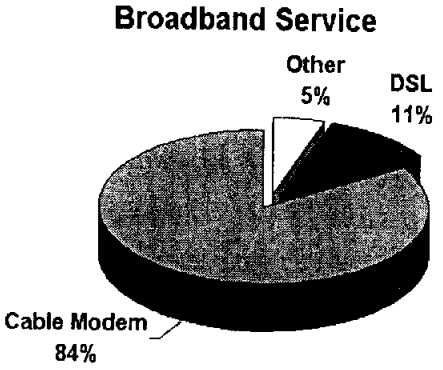
One of the major goals of the Michigan Economic Development Corporation (MEDC) is to sustain, on a long-term basis, efforts that are needed to strengthen our state's economic base. While a number of strategic policy initiatives and programs have been enacted to meet this charge, none is more important for Michigan's growth in the new century than acting upon the recommendations contained in this policy paper. Improving access to high-speed telecommunication services is the most important state economic infrastructure issue for the new century. Whether for business, government, healthcare, or educational purposes, higher speed "broadband" access is increasingly becoming a necessity—not a luxury.

Michigan is a recognized leader in competing for new business growth and attracting and retaining a world-class workforce, but unless greater telecommunications access becomes available to all parts of the state, Michigan stands to lose its prominence. Facilitating the development of the most advanced and robust telecommunications infrastructure in the country is the goal of the LinkMichigan initiative.

> ***LinkMichigan is about building an environment where every child, regardless of location, can access the best education resources in the world; where every police officer has an immediate electronic ability to ascertain criminal information about potential suspects; where every citizen can seek government information or services on-line; where every employee can gain access to the best training and learning resources while continuing to live and work in the state as his or her career unfolds—a Michigan that provides its citizens with the best of all worlds—a great place to live, work, and play no matter where they are located in our great state.***

It is abundantly clear that action should be taken at local and state levels to achieve this goal. Effective implementation of these policy recommendations will depend upon the concerted effort and support of numerous stakeholders throughout Michigan. While government, at all levels, must act as a facilitator to make LinkMichigan a reality, ***the aggregation concepts and activities outlined below are all premised by the assumption that the private sector will step forward to own, operate, and manage needed infrastructure*** by responding to more sophisticated purchasing programs and investment policies throughout the state.

The LinkMichigan plan is not an attempt to re-regulate Michigan's telecommunications industry. To the contrary, it is intended to leverage free market principles more effectively. It should also be understood that the focus of this report is on broadband access—whether provided through existing telecommunications lines, cable, new fiber, or emerging wireless mechanisms. Fiber optic cables do not necessarily equate to fast service capability. In fact, today the most widely used "broadband" service is cable modem service accessed through the cable television industry's network infrastructure.



Source: Federal Communications Commission
Broadband Survey (1999) released August 3, 2000

This past fall its Executive Committee asked the MEDC to work with appropriate state agencies to develop a statewide plan that would expedite the emergence of advanced infrastructure in all parts of the state. In partnership with the Michigan Department of Management and Budget (DMB), the MEDC began researching and analyzing how such a goal could be achieved. It brought aboard Federal Engineering, a nationally recognized telecommunications consulting firm out of Fairfax, Virginia, and MiCTA (higher education's non-profit aggregator for telecommunications purchases) to aid in this effort. A research paper outlining a series of options for Michigan was developed and distributed to dozens of organizations around the state. Two surveys were completed: one targeted at the broadband use habits of the general business community and one at residential Internet users.

A number of additional meetings were also used to solicit feedback and ideas (see list below). The list below identifies those that interacted with the MEDC. While aiding the development of our recommendations, they may have not yet had an opportunity to review or endorse this paper.

ORGANIZATIONS/GROUPS	
City of Coldwater	MI Information Network
CLEC Association	MI Manufacturers Association
Compuware	MI Municipal League
Cornerstone Alliance	MI Non-Profit Association
Council of MI Foundations	MI Public Health Institute
Cyberstate.org	MI Public Service Commission
DaimlerChrysler	MI Retailers Association
Detroit Edison	MI State University
Detroit Free Press	MI Virtual High School
Detroit News	MI Virtual University
Detroit Chamber of Commerce	MiCTA
Detroit Renaissance	Muskegon Area First
Developers Group	Natl. Fed./ Independent Business
ERIM International	Northern Michigan University
Ferris State University	NW Michigan Council of Government
Flint-Genesee Economic Alliance	Oakland County Economic Development
Frankenmuth Chamber of Commerce	Plante & Moran
Grand Rapids Chamber of Commerce	PROTEC
Grand Rapids Community Media Center	Public Sector Consultants
Henry Ford Museum	Quello Institute-MSU
Huron County Econ. Development Corp.	SEMCOG
Information Technology Advisory Group	Sloan Ventures
Jackson Enterprise Group	Small Business Association of MI
Lansing Regional Chamber	St. John Health System
Merit, Inc.	Steelcase
MI Alliance for Community Technology	Syntel
MI Attorney General	Telecommunications Association of MI
MI Cable Telecommunications Association	The Right Place Program
MI Chamber of Commerce	United Way Community Services
MI Community College Association	Univ. of Corp./Advanced Internet Dev.
MI Dept of Career Development	University of Michigan
MI Dept. of Management and Budget	University Presidents Council
MI Education Association	Urban Core Mayors
MI Governors Office	Washtenaw Development Council
MI Grocers Association	

Executive Summary

Access to high-speed telecommunication services is the most important state infrastructure issue for the new century. Whether for business, government, healthcare, or educational purposes, higher-speed access is increasingly becoming a necessity—not a luxury. Michigan is a recognized leader in competing for new business growth and attracting and retaining a world-class workforce, but unless greater telecommunications access becomes available to all parts of the state, Michigan stands to lose its prominence.

Recognizing the importance of telecommunications access to Michigan's business climate and quality of life, the Board of Directors of the Michigan Economic Development Corporation (MEDC) has established, as a key element of its 2001 operating plan, the development of an initiative to expedite an advanced telecommunications infrastructure to all parts of the state. Facilitating the development of this infrastructure is the goal of the LinkMichigan initiative.

Issues

Efforts to bring government and educational resources to citizens, educators, and learners throughout the state will not be fully realized without greater broadband deployment. Given the fast-speed connections needed for many courses and programs, the reality is that many families and children do not and will not have access to resources that others in connected areas have unless action is taken. Based on complaints filed with the MEDC and the PSC, dissatisfaction with broadband or "bandwidth" availability in the state is clearly increasing. Similar to problems being experienced in other areas around the country, Michigan businesses have found it difficult to access the type of high-speed service needed to conduct complex electronic transactions. Problems may not appear until the need for broadband is discovered and access is unavailable—or not available in a timely manner.

Just like traditional roadways, as more and more roads or "on-ramps" are built onto the information highway, larger "backbone" roads are needed to carry such traffic in a quick and efficient manner. Many regions of the state currently lack adequate backbone infrastructure to carry fast-speed broadband traffic.

Information about what capabilities exist throughout the state is critical. Developers and others planning for their telecommunications needs must have access to information that lets them know what is available, where it is available, and specific information on timing expectations for service installation. Another concern stems from the large amount of unregulated infrastructure being installed across the state. Utilities, railroads, and others have installed fiber and advanced switching capabilities across the state with little or no knowledge of government officials.

Recommendations

Addressing these issues and planning now, rather than later, will help ensure that a state-of-the-art telecommunications infrastructure will emerge in all parts of Michigan. While other actions may be needed in the future, four fundamental steps should be taken immediately.

1. *Statewide Public User Aggregation & Request for Proposals (RFP)*

- Aggregate collective purchasing demand of the state, higher education users, K-12 users, local government users, and any other public partners and ask (through an RFP) private-sector bidders interested in serving the state to provide advanced telecommunication services to each.
- Require by contract that providers build and maintain a high-speed backbone infrastructure that extends to most regions of the state to serve these customers.
- Require by contract that winning vendor (s) resell excess network capacity on a non-discriminatory wholesale basis to increase competition and encourage investment in regions that might not otherwise attract new service providers.

Implementation Responsibility: Michigan Department of Management and Budget

2. *Tax and Permitting Fairness*

- Establish level regulatory playing field for all telecommunications and information carriers.
- Enact one-stop right-of-way permitting system to create common rules for all carriers.
- Establish one common tax and fee system to replace differing systems in place around the state today.

Implementation Responsibility: Michigan Public Service Commission

3. *Access to information*

- Enact laws and/or rules requiring all telecommunications and information carriers to provide specific network location and capability information.
- Develop and enforce quality-of-service standards so that businesses and other purchasers of advanced telecommunication services are able to plan and not have business operations disrupted because of continual installation delays.
- Link reporting to the approval of right-of-way permits.

Implementation Responsibility: MEDC, local economic development agencies and providers to develop recommended solution.

4. *Community Assistance*

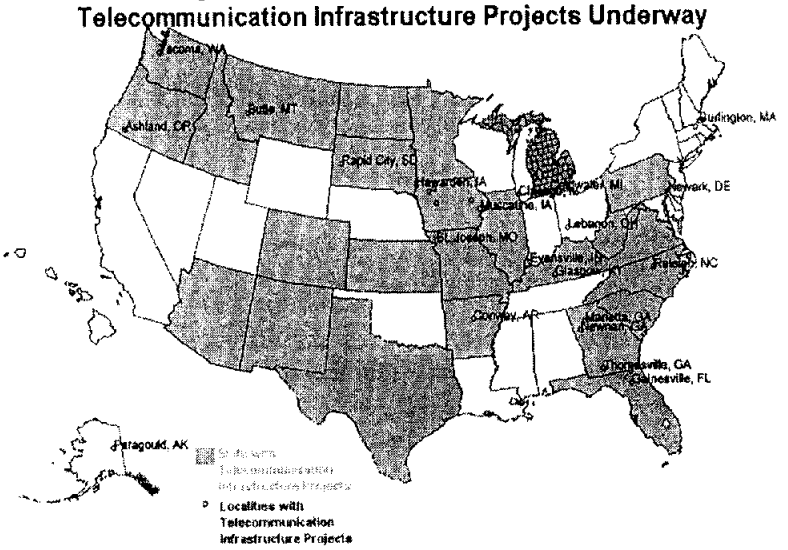
- Provide local community planning grants so that local officials can develop their own last mile solutions for their communities.
- Encourage communities to link or leverage their local strategies to the statewide backbone initiative.
- Assistance should not be given to communities that have established barriers to new telecommunications investment.

Implementation Responsibility: MEDC

Introduction

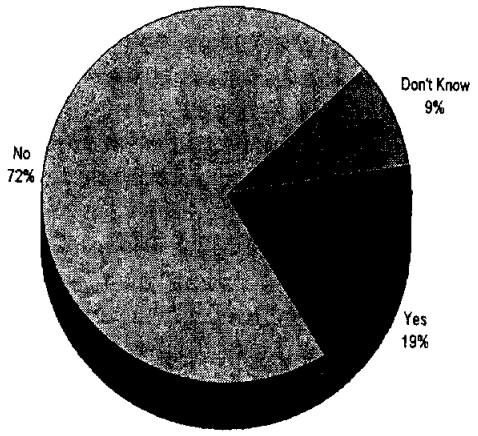
The deployment of high-speed "information highways" across the country today is a phenomenon that is in many ways analogous and perhaps more important than the road and interstate highway infrastructure developed in the U.S. during the 1950's and 1960's. Unlike the Eisenhower-led federal roads initiative, however, today's 21st Century highways are being built in an ad hoc fashion, often with little public involvement or understanding. Complex factors involving everything from deflated capital markets that have retracted the investment of many new providers; to the difficult implementation of statutes intended to speed competition; to a confusing mix of taxes, fees and local rights-of-way policies; to limited awareness of forthcoming industry and consumer needs; influence investment decisions by telecommunications vendors in ways that do not always favor improved infrastructure development around the state. Yet, access (or lack thereof) to advanced telecommunications infrastructure will increasingly impact the lives of families, businesses, educators, and governments. Whether simultaneously designing the next new automobile part on-line with several suppliers across the globe, taking an on-line learning course, transmitting x-rays to an expert physician across the country, filling out state regulatory forms, or simply downloading a movie or a photograph, "broadband" access allowing citizens to quickly and routinely do these things will become as essential of an infrastructure service as water, phone, electric, or natural gas service is today. In the year 2001, very few Michiganders have access to this type of high-speed infrastructure.

Recently Publicized States and Localities with Telecommunication Infrastructure Projects Underway



In the global economy, Michigan is not only in competition for new business growth, it is in competition to retain and attract a skilled workforce that can continue to support the state's diversifying economy. In both cases, ***not having readily available broadband access will increasingly be seen as unacceptable***—whether at businesses, schools, hospitals, or homes. Michigan is in danger of falling behind in the availability of advanced telecommunications services. Michigan faces problems similar to those being experienced in other parts of the U.S. At the same time, site consultants and others advising companies on expansion locations are increasingly using telecommunications infrastructure as a key factor in narrowing their recommendations of potential communities for companies to consider. Often times, communities are excluded from

Intentions of Expanding Internet Capabilities within the Next Six Months



Source: MEDC Survey of Business Attitudes, Glengariff Group, Inc.

consideration without ever knowing it. States like Illinois, Virginia, Texas, Georgia, and others have undertaken or are beginning to undertake various types of efforts to improve infrastructure in their states. While an important education and public infrastructure policy matter, this is also a critical forward-thinking business climate issue. As more and more of our traditional industry sectors move to utilize the Internet as a business tool, our infrastructure will be strained if we don't plan ahead. By taking action now, Michigan can leapfrog many leading states and further sustain its reputation and standing as one of the best places in the world to live and work.

Michigan Issues: Broadband/Speed

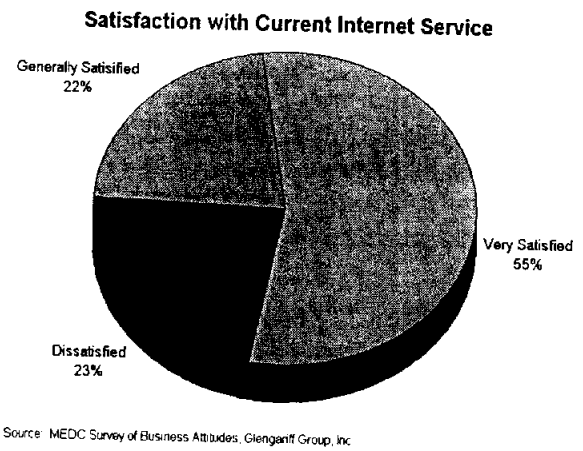
The MEDC currently visits more than 4,000 Michigan companies a year to help ensure their growth in the state and has direct contact with an additional 25,000 businesses via telephone, e-mail, and mail contacts. There have been more than two-dozen cases in the past few months where broadband or "bandwidth" problems were brought to the MEDC's attention. The PSC has also received a number of complaints of this nature. Most incidents dealt with the inability to gain the type of high-speed service needed to conduct more complex electronic transactions. Others involved delays in getting the type of service companies needed in a timely manner. All pointed to a growing level of frustration with the inadequate infrastructure and lack of competition in the state. The Michigan Public Service Commission also keeps track of telecommunications service complaints they receive from businesses.

Time required to download a 24 megabyte file of X-ray images

Speed	Time
56 kbps (Dial-Up)	58 minutes
128 kbps (ISDN)	24 minutes
1.54 mbps (Cable)	< 3 minutes
8 mbps (DSL)	< 40 seconds

Source: The Main Street Economist, August 2000

By "bandwidth" and "broadband" we mean the speed with which information/data travels from one point to another. For example, an engineering and design firm in a remote area of the state may run into problems transferring electronic documents with their customers across the globe—or even across the county—if they have inadequate bandwidth available. With a typical phone line connection using a 56-K modem, electronic transfers of complex documents could take several days or even weeks. If this firm had access to Digital Subscriber Line (DSL) service or even cable modem service, it would improve this document transfer speed to minutes and hours. But, if their customer wanted to do certain simultaneous design work on these documents, for example, even DSL would be inadequate. Applications such as this and things like real time video will require speeds hundreds of times faster than DSL. See Appendix A for description of DSL and other bandwidth terms.



Source: MEDC Survey of Business Attitudes, Glengariff Group, Inc

There have been a growing number of service complaints as more businesses go on-line.Of the 20,000 complaints registered by customers last year with the PSC, approximately 2,000 came from Michigan businesses.

Businesses' use of advanced telecommunications services has grown exponentially across the state. Earlier this year, 90% of businesses reported that they have Internet access. More importantly, 60% said they use the Internet, in some fashion, to conduct their business on a daily basis.

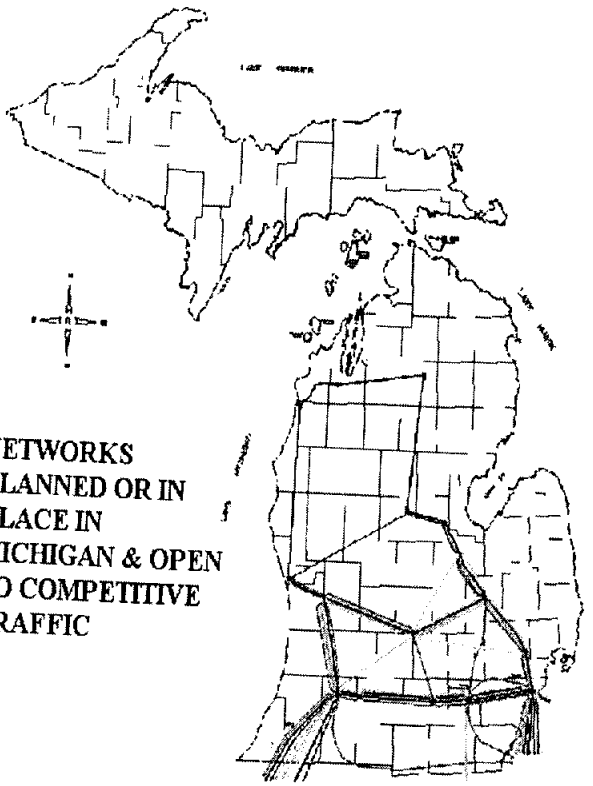
Satisfaction levels were surprisingly high concerning their service provider (rating at an average of 8 on a 1 to 10 scale). However, there was a great deal of polarization on this issue. Respondents were either very pleased or very upset about their service. It appeared as if satisfaction was linked closely to the type of use.

If a company was using the Internet for e-mail and basic (slower speed) information gathering, they were generally pleased. If companies needed higher speeds to transmit design documents and large data files, their satisfaction levels appeared to decline rapidly. It is clear that problems are lurking around the corner for Michigan businesses—problems that don't appear until sudden new bandwidth needs are discovered and access is unavailable or not available in a timely fashion.

Michigan Issues: Backbone Highways

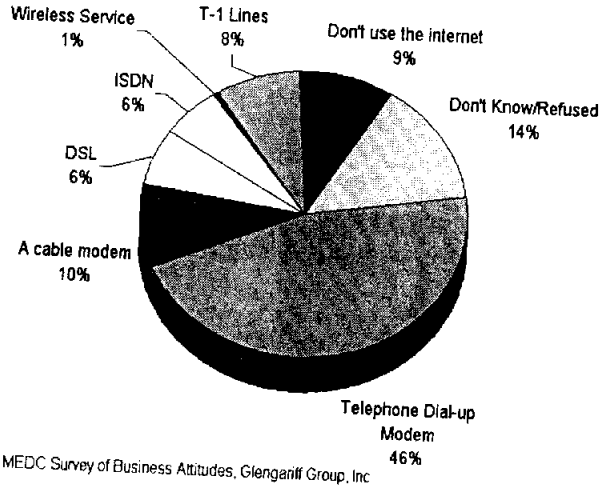
As more and more users seek faster and faster service, the need for a backbone infrastructure to support such use is critical. To use a roadway analogy, as more and more on-ramps and traffic are added to a highway, congestion builds and speed of travel slows. Information highways are the same. While missing some proprietary information,

the state's primary network map illustrates the geographic locations of Michigan's backbone infrastructure that supports advanced telecommunication services in the state. From a benchmarking standpoint, these highways are not large enough and do not extend to all regions of the state. Private carriers will note that they build the necessary backbone and supporting infrastructure as demand increases. While this approach is understandable, it leaves tremendous gaps in areas of the state. It also does little to support new competitive entrants in the marketplace. If incumbent carriers only build enough capacity to carry their traffic, resellers and others have a limited ability to enter the marketplace.



NETWORKS PLANNED OR IN PLACE IN MICHIGAN & OPEN TO COMPETITIVE TRAFFIC

Types of Internet Services Used by Michigan Businesses



Source: MEDC Survey of Business Attitudes, Glengariff Group, Inc

The fact that no Michigan city is listed in the top 25 metropolitan areas in terms of the total number of competitive carriers doing business is indicative of the problem the state has. It is a chicken and egg problem and given the retraction in available capital for many new entrants in the marketplace, the problem will persist in Michigan without some type of intervention. Inconsistent right-of-way permitting policies, fees, and tax structures also exacerbate this problem. Sections 251 and 254 of the

Michigan Telecommunications Act have also resulted in legal battles over the fees communities can assess providers. While courts continue to limit the types of fees that can be assessed, the dialogue on this subject has kept the focus away from the most important issue—the needs of users. As a result, few communities, if any, are aggressively pursuing new telecommunications investment.

This past year, the Department of Management and Budget (DMB) completed an inventory of the broadband telecommunications infrastructure in the state. The report cited limited availability of services for anything higher than a T-1 connection. It also showed great price disparities for T-1 services throughout the state where such service was available. It showed very limited access to any type of higher speed connections. However, it should be noted that incumbent carriers did not participate in this inventory and have since indicated that high-speed connections are available in their territories. At the same time, most high-speed backbone connections for these carriers are proprietary (i.e., generally used to support their own network traffic). Availability of wholesale backbone architecture is concentrated along the major corridors south of Mt. Pleasant. Admittedly, the market demand for some services in remote areas of the state are not sufficient to attract private investment. To change this, aggregation and other concepts are needed to encourage such investment.

Twenty (Actually, 25) Markets with Most CLEC Fiber Networks, Year-End 2000

Fiber Networks Rank	PMSAs	Fiber Networks, Year-End 2000
1	New York, NY PMSA	17
2	Los Angeles-Long Beach, CA PMSA Los Angeles County	15
3	Houston, TX PMSA	14
3T	Atlanta, GA MSA	14
5	Dallas, TX PMSA	13
6	Chicago, IL PMSA	12
7	Philadelphia, PA-NJ PMSA	11
7T	San Francisco, CA PMSA	11
9	Washington, DC-MD-VA-WV PMSA	10
9T	Tampa-St. Petersburg-Clearwater, FL MSA	10
9T	Miami, FL PMSA Dade County	10
9T	San Jose, CA PMSA Santa Clara County	10
13	San Diego, CA MSA San Diego County	9
13T	Orange County, CA PMSA Orange County	9
15	Boston, MA-NH PMSA	8
15T	Seattle-Bellevue-Everett, WA PMSA	8
15T	Portland-Vancouver, OR-WA PMSA	8
15T	Orlando, FL MSA	8
15T	Austin-San Marcos, TX MSA	8
20	St. Louis, MO-IL MSA	7
20T	Denver, CO PMSA	7
20T	San Antonio, TX MSA	7
20T	Charlotte-Gastonia-Rock Hill, NC-SC MSA	7
20T	Salt Lake City-Ogden, UT MSA	7
20T	Jacksonville, FL MSA	7

Source: KMI Corporation; U.S. Census Bureau for population Data

Michigan Issues: Service Availability Information

Access to information is fundamental. When dealing with other traditional economic development infrastructure, maps are commonplace. *Economic developers are able to tell prospective companies where rail lines, electric lines, gas lines, and roadways exist. Advanced telecommunications information is far more difficult to gather.* Vendors claim

Michigan Markets with CLEC Fiber Networks, Year-End 2000

Fiber Networks Rank	PMSAs	Fiber Networks, Year-End 2000
38T*	Detroit, MI PMSA	5
N/A**	Grand Rapids-Muskegon-Holland, MI MSA	1
N/A**	Ann Arbor, MI PMSA	1
N/A**	Lansing-East Lansing, MI MSA	1
N/A**	Flint, MI PMSA Genesee County	1
N/A**	Saginaw-Bay City-Midland, MI MSA	1
N/A**	Kalamazoo-Battle Creek, MI MSA	0
N/A**	Benton Harbor, MI MSA Berrien County	0
N/A**	Jackson, MI MSA Jackson County	0

Source: KMI Corporation; U.S. Census Bureau for population Data
* 12 PMSAs are tied for 38th
** KMI only ranked the Top 50 PMSAs

that their proprietary information ought not be shared too broadly for fear of providing competitors with too much information. As this chart indicates, however, there are so few competitive carriers in the marketplace it is a curious argument. Instead, Michigan vendors often indicate that they can provide any service anywhere in the state. In reality, the cost and time necessary to install a particular service can vary greatly depending on location. Developers and others planning for their telecommunications needs must have access to information that lets them know what is available where, with specific information on timing expectations for service installation. Another concern stems from the large amount of uncoordinated infrastructure being installed across the state. Utilities, railroads and others have installed fiber and advanced switching capabilities across the state with little or no knowledge of government officials. If unregulated, there are currently no requirements to report such investment, even if such infrastructure is leased to a retail carrier. With similar concerns, the states of Oregon, Pennsylvania, and Tennessee have implemented laws compelling telecommunication and information vendors to provide information about their network capabilities and the locations where advanced services are available.

Michigan Issues: Needs of Education and e-Government

While K-12 schools across the state have dramatically increased their level of access to advanced telecommunication services in recent years, higher bandwidth applications will necessitate improved access. Universities and community colleges working with the Michigan Virtual University and the Virtual High School have and will continue to provide more and more on-line courses that require higher speed services to fully utilize. Every school and institution of higher education in the state ought to have access to these resources. Likewise, the Governor's e-Michigan effort and many local efforts to improve on-line access to government information and services will result in applications requiring improved speed for certain users. Public safety is also an area of e-government growth in terms of demand for broadband services.

Benchmarks and Best Practices

As noted above, ***state and local efforts to improve telecommunications infrastructure across the country are expanding rapidly.*** Whether in states like Virginia, Minnesota, and Arizona, or in communities like Norfolk, Nebraska, or Berkshire County, Massachusetts, all of these efforts have a core idea that they have customized for their state or region—that idea being aggregation of demand. Some are using their aggregated buying leverage and other incentives to solicit greater private sector investment. Others are using their collective demand to build publicly owned infrastructure. Some states are providing planning grants to communities to help them become smarter and more sophisticated purchasers of telecommunications services. ***Summaries of several efforts are found in Appendix B.***

In terms of statewide backbone network benchmarks, initial research suggests that most leading edge states have networks with minimum speeds of OC-12, with this faster backbone infrastructure coming within a short number of miles of all major population centers. Arizona, for example, is requiring its network to come within ten miles of 90% of its population. Minnesota is requiring its high-speed network to pass within ten miles of 80% of its population. In these two cases, the state simply issued a Request-For-Proposal (RFP) asking for competitive bids to provide such infrastructure. While the state is reserving a portion of the network for its own use, the remainder of the infrastructure is required to be made available on a wholesale resale basis to all telecommunications providers. While no state was identified with considerably higher speeds than OC-12, many high-tech regions across the country have capabilities that near or exceed OC-192 speeds.

Michigan Issues: Summary

No state plan to improve infrastructure will be able to completely address all of the service problems and issues outlined above. However, there are basic fundamental issues that must be addressed in order to make progress on all fronts. These "basics" can be classified as follows: 1) lack of available bandwidth (no advanced telecommunications services available); 2) lack of bandwidth at affordable prices and with quality service (inadequate market economics); and 3) lack of information on where broadband services are available (specific site location and installation timing information). In this context, we believe the following four recommendations should be acted upon immediately.

Recommendations for Michigan

1. Statewide Public User Aggregation

The state should immediately join forces with higher education users, K-12 users, local government users, and any other public partners willing to aggregate their collective purchasing demand and ask (through an RFP) private-sector bidders interested in serving the state to provide advanced telecommunication services to each. In addition to negotiating lower costs, providers should be required to build and maintain a high-speed backbone infrastructure that extends to most regions of the state. This infrastructure could be provided by one or multiple vendors in collaboration and would undoubtedly include both fiber and wireless solutions. The winning vendor(s) should be required to make the excess capacity of such a network available to other retail carriers on a non-discriminatory wholesale basis.

This RFP and wholesale infrastructure concept should be utilized to further spur competition around the state. By contract, the winning vendor(s) should be asked to provide resale connections under specific terms and timelines that will encourage new carrier investment throughout the state. For example, throughout the MEDC's and DMB's research work, many pointed to wireless solutions. Costly satellite service notwithstanding, wireless broadband service must plug into points of presence (POPs) on a backbone system. Assuming the state backbone created through this initiative extends within 10-20 miles of most major population centers, wireless capability could "plug in" and give access to virtually every region of the state.

It is also important to note here that several years ago, in response to the Governor's Michigan Information Network (MIN) plan, the state implemented a simple purchasing concept to leverage the aggregated buying power of the state with universities and schools to lower telecommunications prices and improve access across the state for the education sector. By joining together with an organization called MiCTA (higher education's non-profit aggregator for telecommunications purchases) in seeking out the best prices in exchange for their collective business, today schools and universities save in excess of $140 million per year off tariff rates for Internet and long distance telecommunication services. To this day, DMB works with MiCTA and K-12 schools to leverage these lower prices.

This existing structure needs to be leveraged and MiCTA, with the state and others as partners, should issue the necessary RFP(s) to implement this recommendation.

2. *Tax and Permitting Fairness*

Currently, "licensed" telecommunications carriers pay into a central property tax fund managed by the State. Cable carriers, even if providing similar broadband services as their counterparts, pay local property taxes and franchise fees. Unregulated wholesale broadband carriers pay local property taxes, if and when communities are aware that such infrastructure passes through their towns. Incumbent local telecommunication companies sometimes seek right-of-way permits and/or pay local right-of-way fees, but only when right-of-way access is needed to upgrade their networks. New competitors entering local markets are required to pay such fees in all instances. These differing rules discourage investment. From a basic fundamental business climate standpoint, why should different carriers have to play by different rules? A level playing field for ALL (regulated and non-regulated) broadband carriers should be established—including, but not limited to, competitive local exchange carriers, incumbent local exchange carriers, long distance/long haul carriers, resellers, wholesale (dark fiber) carriers, wireless carriers and cable modem or "advanced" telecommunication cable service providers (excluding traditional cable television service).

The PSC has been developing a uniform application and permit for right-of-way access across the state. This is a good start, but the effort to create a level playing field must go further. We recommend that the differing property tax issues, local fee and local right-of-way issues be solved in one comprehensive restructuring package. In other words, we recommend establishing one common tax and fee system to replace all of the differing systems in place around the state today. We believe such a package could be developed with minimal tax revenue impact, placing ALL carriers under one common system. Following the lead of a handful of other states, we also believe such a system should be linked to a central one-stop right-of-way application and permitting system administered by the state.

3. *Access to Information*

The legislature should enact laws requiring all telecommunications and information carriers (both those currently regulated and unregulated) to provide specific network location and capability information. In addition, quality of service standards should be developed and enforced so that businesses and other purchasers of advanced telecommunication services are able to plan and not have business operations disrupted because of continual installation delays. This latter issue is key. Everyone would like to have a "map" of what exists. In reality, however, such a map will change on a daily basis if kept accurate. Knowing how long it will take to have certain broadband services

installed, by zip code and city block, is the type of practical planning information developers around the state need. To ensure compliance, we suggest that this recommendation ultimately be linked to the approval of any right-of-way permit issued.

4. Community Assistance

The MEDC should immediately move to provide resources (on a match basis) to communities for local telecommunications infrastructure planning purposes.

As is noted in Appendix B, many communities across the country have developed local solutions to improve broadband availability in their regions. In one fashion or another, most have built upon the aggregation of demand concept discussed above. Rather than dictate a one-size fits all solution for all communities and to build local leadership and visioning on this topic, the MEDC should provide local community planning grants so that local officials can develop their own last mile solutions for their communities. It is a model that has had some clear success in other parts of the country. It has empowered communities to seek federal assistance and even private sector resources to implement their strategies. Communities should be required to plan their strategies in conjunction with the statewide aggregation plan outlined in recommendation #1. Assistance should not be given to communities that have established barriers to new telecommunications investment. Further, we strongly encourage plans to rely on private rather than public solutions, unless private options prove unmarketable.

Appendix A

Type of Connection	*Typical Speed*	*Remarks*	*Estimated Download times (1,500 KB File, equivalent to a 2 minute video clip)* *
Dial-up Modem	56 kbps	Common Internet Access often referred to as "Snail Speed"	20-30 minutes
ISDN (integrated services digital network)	128 kbps	Offered by telephone companies, international communications standard for sending voice, video, and data over digital telephone lines or normal telephone wires	10-15 minutes
T-1	1.544 mbps	Point to point connection, dedicated phone connection, popular leased line option for businesses connecting to the Internet and for Internet Service Provider (ISP) connecting to the Internet backbone	1-3 minutes
Cable Modem	1.5 mbps	Designed to operate over cable TV lines. Provided by cable companies	5-10 minutes
DSL (Digital Subscriber Line)	8 mbps (downstream)	Constant Internet connection, offered by telephone companies, low upload speed	< 5 minutes
Frame Relay	25 mbps (upward)	Used for connecting Local and Wide Area Networks. Frame Relay networks in the U.S. can support data transfer rates at T-1 and T-3 speeds	< 1 minute
T-3	44.7 mbps	Dedicated phone connection, used mainly by Internet Service Provider (ISP) connecting to the Internet Backbone and for the backbone itself. Supports real time video	< 1 minute
OC-3	155.5 mbps	Typical backbone speed	< 1 minute
OC-9	466.56 mbps	Used for both LANs and WANs	< 1 minute
OC-12	622.08 mbps	Used for both LANs and WANs	< 1 minute
OC-18	933.12 mbps	Used for both LANs and WANs	< 1 minute
OC-24		Used for both LANs and WANs	< 1 minute
OC-36	1.866 Gbps	Used for both LANs and WANs	< 1 minute
OC-48	2.488 Gbps	Used for both LANs and WANs	< 1 minute
OC-96	4.976 Gbps	Used for both LANs and WANs	< 1 minute
OC-192	10 Gbps	Highest speed backbone presently available	< 1 minute
OC-255	13.21 Gbps	No telecom vendor presently uses this for their backbone	< 1 minute

* Actual download times depend on many different factors, including line condition and network traffic congestion.
Source: Webopedia.com, CNET.com

bps=bits per second
Kbps=kilobits per second=1000 bits per second
Mbps=Millions bits per second=1,000,000 bits per second
Gbps=Gigabits per second=1,000,000,000 (one billion) bits per second
Tbps=Terabits per second=1,000,000,000,000 (one trillion) bits per second

Appendix B
Select State and Local Efforts

State Efforts

Colorado

Colorado's Multiuse Network (MNT) initiative is designed to pool the purchasing power of the state's telecommunications contracts for the betterment of statewide infrastructure. As part of this effort, US West has been awarded a $37 million contract that will create a high-speed, fiber-optic network connecting all state offices.

The Colorado legislature also passed a "Beanpole Bill" to extend the geographical reach of the MNT initiative to the local level to include all public facilities (schools, colleges, libraries, and health care, municipal and county facilities), not just state agency offices. The bill provides $4.6 million for matching funds to communities as an incentive to pool their demand. Each self-defined community will issue its own RFP to private providers to connect these facilities to the nearest point of presence of the MNT. Communities then will apply to the state for funding to cover part of the overall cost. Local match will vary depending on need.

Iowa

Several years ago, the State of Iowa created the Iowa Communications Network (ICN). ICN is a statewide, state administered, fiber optics network. The capacity of the Network enables hospitals, state and federal governments, public defense armories, libraries, schools, and higher education authorized users to communicate via high quality, full-motion video, high-speed Internet connections, and telephones. The ICN is a statewide network with more than 3,000 miles of fiber optic cable reaching into all 99 counties, putting every citizen within 15 miles of a video site.

In order to construct the network, Iowa allowed vendors to submit proposals to either construct the fiber optic cable lines or lease capacity on existing fiber. Only two bids were received and both were for construction of the fiber optic cable, which meant the state had to become the owner and administrator of the network. In recent years, the state has unsuccessfully tried to sell the network.

Minnesota

Connecting Minnesota is a statewide fiber optic network project. The network will consist of 2,000 miles of fiber optic cable that will be laid in the interstate highway right-of-ways (land adjacent to the highway). The network will reach within ten miles of about 80% of the state's population, including rural areas and small towns throughout Greater Minnesota. Connecting Minnesota's fiber optic network will consist of a fiber optic

"backbone" that consists of northern and southern Minnesota loops connected to a central network in the Minneapolis/St. Paul metro area.

The network project is being completely financed by ICS/UCN, a Denver-based utility developer. ICS/UCN, with support from Boston-based LMAC Construction, will finance, build, maintain, and manage the network for both public and private sector use. ICS/UCN was selected in a competitive process from respondents to a Minnesota Department of Transportation "Request for Proposal." The estimated cost of the project is $195 million.

In exchange for access to the right-of-way, ICS/UCN will provide telecommunications capacity to meet the Minnesota Department of Transportation's need to connect district offices and wayside rest areas, to support new technologies used to manage road surfaces, and protect the public. ICS/UCN also will provide 20% of the network capacity for public use, which includes K-12 schools, universities, libraries, and state and local governments. The remaining 80% will be leased to the private sector, such as long-distance, Internet, and other telecommunications providers. *Note: This past month ICS/UCN announced its withdrawal from this project, citing financial difficulties resulting from ongoing legal battles with U.S. West. Even though ICS/UCN had been winning the court challenges posed by U.S. West, the company fell victim to retracting capital markets. The state has indicated they will seek another contractor to takeover this initiative.*

Montana

In 2000, the State of Montana instituted a tax credit program to accelerate the growth of a high-speed telecommunications infrastructure throughout the state. Administered by the Department of Commerce, one or more providers may receive the credit. In any one year, the maximum amount of the credit available to all providers is $2,000,000.

Eligible companies may claim no more than 20% of their investments as credits. The credit is applied against the telecommunications excise tax of 3.75% on the sales price of retail telecommunications services.

North Dakota

North Dakota will build a statewide, broadband telecommunications network connecting 552 locations in 194 cities throughout the state. The state's broadband infrastructure project has three primary goals: 1) to deploy an integrated network to meet current and future needs for government and education; 2) to reduce telecommunications rates by aggregating public demand and negotiating a lower price for bulk service; and 3) to promote economic development by making broadband services available in every county and in communities throughout the state.

The state awarded three separate contracts to complete its new network. Dakota Carrier Network (DCN) was selected to provide the transport services, which essentially involves

building and managing the network. Sprint was awarded the contract to provide Internet services to all government and education entities. Corporate Technologies of Fargo won the bid for customer premises equipment, which involves routers and other equipment to connect endpoints to the broadband network. The State of North Dakota believes once the network is complete, it will provide North Dakota residents the greatest universal access to high-speed telecommunications services of any rural state in the nation.

Virginia

Advanced Communications Assistance Fund— Virginia has created a program called the Advanced Communications Assistance Fund, which provides up to $50,000 per award to communities working to improve local telecommunications infrastructure. This is a relatively new program to boost connectivity in smaller communities.

VirginiaLink— Through VirginiaLink, contracted service providers will offer businesses throughout Virginia "one-stop-shopping" access to unbundled, high-capacity telecommunications services. Businesses access the communications services by joining the VirginiaLink Consortium buyers' group. The VirginiaLink Consortium is administered by the Virginia's Center for Innovative Technology (CIT), a state-charted, nonprofit organization dedicated to the growth of technology and business in Virginia.

In order to acquire the discount services obtained by VirginiaLink, a consumer must purchase a one-year membership, which will cost end users $100 per business location, with a maximum fee per firm of $1,000. Service resellers and Internet service providers (ISPs) also will be able to join for a $500 fee per location, with a maximum cost of $2,500.

Washington

"Washington Light Lanes" is a public-private partnership, which will install a new $100 million fiber optic backbone network across the State of Washington. The project is a joint effort of the Washington State Department of Transportation (WSDOT) and UCN of Denver, Colorado. Light Lanes will connect the intelligent transportation systems (ITS) on state highways from cities across the state.

The project starts with construction of a "backbone" system that will have more than 600 fibers in some locations. That backbone will consist of a series of small conduits placed along the highway with fiber bundles inside the conduits. In addition to that core backbone, WSDOT is to receive 48 fibers dedicated for highway uses. The remaining capacity will be leased to private sector telecommunications service providers.

This project will be constructed by ICS/UCN, the Denver-based utility developer that also is constructing the Connecting Minnesota Network.

Local Efforts

Chicago, Illinois

The City of Chicago has just initiated the "CivicNet" project that upon completion will create a fast-speed fiber network reaching every neighborhood in the city. Similar to what has been done in other areas of the country on a statewide basis, the city is aggregating the demand of all public users. Participating entities spend more than $25 million per year on telecommunications services. In exchange for a long-term contract with these entities, CivicNet is asking vendors to create a state-of-the-art backbone network throughout the whole city. The network will be owned, operated and managed by the winning private sector bidder (s). Excess capacity on this network will have to be sold on a non-discriminatory wholesale basis to any retail carrier wanting to utilize the infrastructure.

Tacoma, Washington

Since the inception of its Click! Network three years ago, the City of Tacoma claims that more than 100 new high-tech companies have set up shop in their city. Most specifically cite the availability of high-speed infrastructure and the quality of life as reason why. The Click! Network initiative was created by the City of Tacoma and its municipally owned utility, Tacoma Power. Tacoma's high-speed network is accessible to all of its 187,000 residents and businesses.

Berkshire County, Massachusetts

Established in 1997, Berkshire Connect is an effort by a local consortium of business, cultural, academic, and community leaders to aggregate demand to benefit all users. Berkshire County, located in the western end of the state, lacked access to the same affordable, high-speed telecommunications capabilities available in Boston and other cities to the east. Compared to most of Massachusetts, the Berkshire population was sparse and lacked sufficient demand to entice telecommunications providers to make major investments.

Berkshire County has been able to change that and bring the county together in a profound way that has shown the results of regional collaboration. Before Berkshire Connect, there was an absence of competition in the Berkshire telecommunications market and mediocre service compared to other regions of the state. By aggregating demand, T-1 rates in Berkshire County are now comparable to rates in Boston or New York. T-1 rates have been reduced by 70%. The initiative was funded through a state-planning grant and through subsequent appropriations approved by the administration and the state legislature. Berkshire Connect is presently funded by federal, state, and private contributions. The primary network provider is Global Crossings.

Ashland, Oregon

The City of Ashland, Oregon, population 19,000, has invested $5 million to build its own fiber optic telecommunications network. The Ashland Fiber Network was conceived as a method for the city's electric utility to begin planning for and dealing with upcoming electric deregulation. The Ashland Fiber Network (AFN) will provide Ashland businesses and residents with large-bandwidth data service, high-speed Internet service, and cable television service.

AFN Data, the large bandwidth data service, has been available to Ashland businesses since early 1999. Within the first year, 20 businesses had signed up as customers, twice number the city had projected. AFN also is available for residential use. Residents can have access to cable television and high-speed cable modem Internet use.

The estimated $5 million for implementing the Ashland Fiber Network is from an inter-department loan from electric utility revenues. This covered the initial costs for the project. Additional costs are being financed through revenue bonds and paid for by the users of AFN.

Marietta, Ohio

Marietta is home to a non-profit corporation, Sequelle Inc., formed to develop low-cost wireless Internet broadband service for its residents as well as those other towns along the Ohio River and residents in West Virginia. The Washington County Community Improvement Corp., a 37-year-old nonprofit economic development corporation, sponsors Sequelle.

Sequelle will offer broadband fixed wireless "last mile" access to the Internet and other high-speed applications. While other telecommunications offerings can provide high-speed connections or broadband capacity, Sequelle can deploy its access solutions in areas that are inaccessible to conventional wire line connections. Patented technology also will enable Sequelle to achieve more efficient use of the radio spectrum employed. The funding for Sequelle, estimated at $3 million, comes from a combination of state and federal funds, with the majority from the Ohio Department of Development.

Norfolk, Nebraska

In 1998, through the use of grants and revenue bonds, Norfolk pushed to make affordable high-speed services accessible to all businesses and residents. Working with the local hospital, banks, and other telecommunications users to combine, or aggregate, local demand, the city convinced US West to upgrade the switch for high-speed ADSL technology at a reasonable price. (ADSL is an acronym for Asymmetric Digital Subscriber Line. ADSL converts existing copper phone lines to three information channels, including a high-speed data channel. Depending upon the particular hardware configuration, ADSL can offer speeds of up to 7 megabits per second).

Local Michigan Efforts

Clare County, Michigan

Clare County has worked to create a coalition of local officials and businesses to address the growing technological concerns of the county. Created under funding from the Clare County Board of Commissioners, the coalition consists of members from Mid Michigan Community College, Michigan Works, Clare County Enterprise Community, Middle Michigan Development Corporation, area libraries, public schools, and others. The objective is to address the growing technological needs of the county. Although it is in the earlier stages, this group of interested citizens and organizations has begun to locate and apply for potential federal and corporate grants to create an effective telecommunications infrastructure.

Coldwater, Michigan

In an effort to bring the City of Coldwater into the information age, the city created a municipally owned operating agency that provides electric, water, wastewater, and communications services. The agency is the Coldwater Board of Public Utilities (CBPU). The most recent service CBPU has begun to offer is Internet services. It has become a full service Internet provider, offering Internet access for both dial-up and high-speed cable, web hosting, domain hosting, DNS service, and domain registration. For initial funding of the project, CBPU borrowed from its existing services and went to the people to issue a revenue bond.

Detroit, Michigan

The City of Detroit has completed a twelve-month telecommunications network audit and strategy report which outlines recommendations to improve the voice, data, and video transport facilities within the city. After a thorough assessment of the costs and requirements, the city is evaluating their options to pursue a public/private consortium partnership which will serve as a catalyst for telecommunications infrastructure investment. The city is interested in reviewing the development of a "carrier's carrier" fiber network to be constructed throughout the city.

Frankenmuth, Michigan

The community of Frankenmuth developed a united effort to pursue a technology upgrade. This effort is being developed through a cooperative effort between the City of Frankenmuth and the Frankenmuth Chamber of Commerce and Convention & Visitors Bureau (Chamber and CVB).

The city manager and the president of the Frankenmuth Chamber and CVB have captured the attention of technology providers by presenting the community as a "single customer". They gathered interested stakeholders within the community and helped define and articulate the vision of the community to take Frankenmuth's technology

beyond the current needs and create an environment that would accommodate "business at the speed of thought". A technology team has been established to build this technology backbone. This backbone will be a combined governmental/private sector partnership.

Holland, Michigan

The Holland Board of Public Works (HBPW) has constructed a 17-mile fiber optic backbone to support not only internal communication links between all HBPW facilities, but the community's various public services such as local hospitals, schools, and local government agencies. In addition, the HBPW included additional capacity for other services. The funding for the fiber optic ring was generated from revenues earned from its existing services (electric, water, and wastewater services).

HBPW leases the available capacity to individuals or other companies who want to establish fiber optic connections among their own locations. HBPW provides its customers with access to the fiber-ring and the ability to create and to be connected to a local-area-network (LAN). This would allow the consumer to receive and send data from anyone connected to that LAN. For a consumer to get connected to a wide-area-network (WAN-Internet) the consumer would have to purchase those services from a telecommunications vendor or an ISP. The intention of HBPW is not to become an ISP, cable provider, or a telecom vendor, but to entice companies to lease capacity from HBPW and offer those services.

Oakland County, Michigan

Oakland County has established itself as an ISP to its 61 municipal governments under an $8 million, 380-mile fiber optic network called OAKnet. The Network provides voice, data, and video communications throughout the county to assist every municipality and constituent. OAKnet provides municipalities free access to the Internet, which can save them roughly $10,000 - $12,000 a year in line and access charges and administration costs.

EXHIBIT D

RIGHT OF WAY COSTS INCURRED BY LOCAL GOVERNMENTS IN MICHIGAN FOR PROVIDING ACCESS TO TELECOMMUNICATIONS PROVIDERS

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January 16, 2002

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CONTENTS

EXECUTIVE SUMMARY

We have been asked by the Michigan Municipal League to estimate the annual costs incurred by local governments for providing right of way (ROW) to telecommunications providers in the state of Michigan. Our review estimates these costs to be $86 million annually.

In this study, we quantify only monitoring and pavement degradation costs that are incurred by local governments annually. The inclusion of other costs is likely to make the overall costs higher. We base these cost estimates on the length of underground\buried telecommunications lines listed in *Federal Communications Commission's* 2001 report on "common carriers."

Pavement Degradation Costs

Local governments incur pavement degradation costs because road cuts reduce the useful life of a road significantly. Our estimates of pavement degradation costs are based upon:

1. The conditions of Michigan roads indicated by a report in 1998 by *Public Sector Consultants.*
2. Michigan construction costs provided by *Progressive AE,* an engineering firm in Grand Rapids, Michigan.
3. Degradation functions adopted from three comprehensive, landmark studies from Austin, Texas; Burlington, Vermont; and San Francisco, California.

Annual pavement degradation costs due to telecommunications providers are estimated to be $33 million for local governments in Michigan.

Monitoring and Management Costs

We adopt a narrow definition of ongoing monitoring\management costs that includes permit negotiations, compliance monitoring, construction permit procedures, inspections,

barricading expenses, legal expenses, and mapping activities for providing right of way to telecommunications providers. Our estimate of annual monitoring\management costs due to telecommunications providers incurred by local governments in Michigan is $53.3 million.

Consequently, the total costs incurred by local governments in Michigan for providing ROW to telecommunication providers for monitoring\management and pavement degradation are estimated to be $86 million annually.

We believe that the monitoring\management cost estimate is conservative because ongoing maintenance costs (such as mowing, weeding, and snow removal) for that portion of the ROW used by telecommunications providers are not included in the analysis. Also, we have not included the additional costs to local governments from delays in sewer, water, and road construction projects due to the coordination necessary with telecommunications providers. Finally, we have not included monitoring\management costs for aerial lines. Although there is variability in the estimates generated by different methodologies for pavement degradation, we believe that the $33 million estimate is reasonable.

Our estimates do not include other costs such as ROW acquisition and development, and disruption to traffic caused by trench digging that are incurred by local governments in order to provide ROW access to telecommunications providers.

RIGHT OF WAY COSTS INCURRED BY LOCAL GOVERNMENTS IN MICHIGAN FOR PROVIDING ACCESS TO TELECOMMUNICATIONS PROVIDERS

1. INTRODUCTION

Local governments across the country bear a variety of costs in order to provide Right of Way (ROW) access to telecommunications providers. Local governments in different parts of the country have estimated the costs that are incurred in granting permits, managing and monitoring the rights of way for telecommunications providers and utilities. An analysis of numerous landmark studies that are referenced in this investigation indicate that the amount of direct and indirect costs imposed by telecommunication providers are significant. This investigation estimates the ongoing costs imposed on the local governments in Michigan by telecommunications providers through a variety of different methods.

2. COSTS IMPOSED BY TELECOMMUNICATIONS PROVIDERS

Ongoing Monitoring and Management Costs

These costs include permit negotiations, compliance monitoring, construction permit costs, inspections costs, barricading expenses, legal expenses, mapping and location activities costs.

Additional costs may include ongoing maintenance costs (of a portion of the ROW provided for telecommunications) such as mowing, weeding, and snow removal. Also, typically the time involved for completing ongoing water, sewer, and road projects is delayed because of the need to coordinate changes with telecommunications providers. We have not included these costs in the study.

Pavement and Road Degradation Costs

A significant cost for local governments is the reduction in the useful life of roads and pavements because of trench and borehole digging. Numerous empirical studies have been performed to estimate the street degradation costs imposed on local governments. If trenches are not restored properly, there is an immediate and significant deterioration in the condition of the pavement. However, even with proper restoration procedures, the cutting and patching process typically compromises the structural integrity of the pavement and shortens the life of the pavement.

In addition, the use of low-grade material and faulty sealing can result in premature deterioration of roads. Moreover, the extent of the area repaved typically needs to be more extensive to restore the original structural integrity of the street. A 1995 study sponsored by the City of Cincinnati and the American Public Works Association (*Impact of Utility Cuts on Performance of Street Pavements*) indicated that the typical amount of damage is an average of 3 feet beyond the cut edge, but it could extend up to 6 feet. In order to come close to pre-cut strength, the report indicated that the average thickness of a pavement should be 1.75 inches beyond the original thickness. Note that guidelines developed by local governments for restoration practices vary across regions. In some cases no guidelines are prescribed.

Although there is a consensus that street cuts significantly reduce the useful life of a street, many factors can cause differences in the rate of deterioration: the type of cut made in the pavement, nature of excavation, quality of backfill material, climate, and restoration quality standards. Consequently, it is not surprising that the measurement of the extent of degradation has varied. Studies conducted by many different cities indicate that depending upon the control variables, the location, and the time of the study, the extent of degradation in the useful life of a pavement because of cuts on the road can vary considerably. However, these studies indicate that the street degradation costs are substantial.

We apply the degradation functions from three comprehensive studies performed in San Francisco, Austin, and Burlington, Vermont, using Michigan road conditions and Michigan construction costs to arrive at our estimates. An extensive study by Constance Cannady based on the Austin methodology in 1998 of 20 cities in the state of Texas [1] found that annual pavement degradation costs attributable to utility cuts were an average of 30 cents per linear foot.

3. SOURCES OF VARIATION IN DIFFERENT STUDIES

One way to develop a comprehensive approach is to consider the sources of variation among different estimates.

The variation in the pavement degradation costs estimated in different regions of the country can often be traced to three factors:

1. Differences in construction costs, restoration requirements, and quality control.
2. Differences in the type of street conditions and depreciation schedules.
3. Variations due to different methodologies employed to estimate the linkage between incremental costs and street conditions.

We apply the Michigan construction costs provided by *Progressive AE* [9] and Michigan road conditions from the report by *Public Sector Consultants* [12] to determine degradation costs. Since, there is no standard procedure for evaluating street degradation costs, it is reasonable to look at the issue from the point of view of many different methods to arrive at a robust distribution of estimates.

4. TELECOMMUNICATIONS LINES IN MICHIGAN

Based on the filing of data with the Federal Communications Commission (FCC) by "common carriers" [Table 2.2; 5], we have the following breakdown of the length of telecommunications lines in Michigan:

Type of Line	Length in km (as of Dec, 2000)
Buried Cable (metallic)	180,615
Buried Cable (fiber)	12,334
Underground cable (metallic)	24,085
Underground cable (fiber)	10,386
Aerial Cable (metallic)	54,401
Aerial Cable (fiber)	1,892
Aerial (wire)	5,546

In order to keep the study simple, we do not make any attempt to estimate local governments' management and monitoring costs for aerial lines. Our cost estimates are based only on buried\underground cable of 227,420 km.

5. ESTIMATION OF STREET DEGRADATION COSTS

In order to arrive at the degradation costs due to street cuts, we apply three approaches from previous studies, as well as a new approach of cost differentials. Details of our calculations are provided in Appendix 1.

The total estimated annual degradation cost by each method is:

San Francisco degradation function:	$10,474,965
Austin, Texas degradation function:	$33,035,011
Cost Differential method:	$33,317,024
Burlington, Vermont degradation function	$79,569,710

There is considerable variation in the cost estimates by different approaches. Initially, we discuss the approaches taken by three cities.

Different City Approaches

San Francisco approach: A 1995 study, *The Effects of Utility Cuts on the Service Life of Pavements in San Francisco* [15], surveyed approximately 12,000 streets and correlated

the "conditional score" of road quality in San Francisco with three levels of road cuts by regression analysis. The City of San Francisco counts the number of cuts from the middle of one intersection to the middle of the next intersection. Overall the degradation function derived from the regression analysis in that study indicated that 3 to 9 utility cuts reduced the useful life of a road from 26 years to 18 years, or by 30 percent.

In 1997, in response to a critique by Construction Technology Laboratories (CTL), the City assembled a blue ribbon panel of five engineers and a statistician to further analyze the pavement data. The study concluded that cuts did significantly reduce the useful life of the street, depending upon the age of the road. For 1-2 cuts the reduction in the useful life of a relatively new road was 10.6%. Reductions in the useful life of older roads were in the 4%-5% range. One of our degradation functions is based on the revised report [3]. Details of our calculations are provided in Appendix 1.A.

Note that San Francisco has fairly stringent requirements for ROW restoration work and a five-year moratorium on newly resurfaced or reconstructed streets. It is not clear that local governments in Michigan generally have such strict standards. The inclement weather in Michigan (including the freeze\thaw cycles) is likely to increase the degradation factor compared to San Francisco. These points have been made by Chassen Tarakji, the consultant for the San Francisco project.

Austin approach: A 1995 study in Austin performed by Transtec Consultants [2] found that street cuts degrade the useful life of the street by an immediate decline in the Present Serviceability Index (PSI) which measures pavement quality and by increased rates of deterioration of pavement conditions over the long term. The mean age of the Austin streets was slightly less than 10 years. Using the formula developed by the Transtec consultants, the PSI deterioration because of the cut reduced the useful life of an average street by 2.5 years. The results of this approach are indicated in Appendix 1.B.

Burlington approach: The 1984 study commissioned by the City of Burlington, Vermont with ERES Consultants [13] indicated that utility cut patching significantly shortened the useful life of a pavement. Average nonpatched streets had an average life of 20.1 years

and the average life of patched streets was 11.6 years. Different methods for arriving at the pavement life reduction factor were used, and the factors ranged from 1.64 to 3.71. The study concluded that patched roads had a life reduction factor of 1.7. The details of this approach are provided in Appendix 1.C.

Cost Differential Approach

An alternative approach to estimating the degradation function is to quantify the cost of ensuring that the retrenchment and subsequent restoration work is of sufficiently high quality so that the original integrity of the street structure is almost restored. This cost differential approach measures the opportunity cost of attempting to restore the pavement to its precut condition.

For instance, Leonard Krumm, one of the civil engineers who developed the City of Minneapolis ROW management program has observed that the city has a much stricter standard than typical restoration practices. The City has guidelines that describe in detail the kind of restoration process that has to be followed. City officials inspect the backfill and concrete base. Also, the restoration of the asphalt base is performed by the City itself to ensure high quality. By estimating the costs of a restoration practice that is similar to the Minneapolis standard, we can approximate the additional cost necessary to restore the pavement close to the pre-cut condition. This cost differential estimate between a more stringent standard and the typical regional restoration practices in Michigan does not include inspection costs. Also regional restoration practices differ across local governments in Michigan. The results of this approach are provided in Appendix 1.D.

Pavement Degradation Cost Estimates

There is considerable variability in the estimates generated by the four approaches. We believe that the costs estimated by the San Francisco approach are too low for at least two reasons. First, the inclement weather in Michigan (freeze\thaw cycles) is likely to deteriorate patched pavements more rapidly compared to San Francisco. Second, the

restoration practices in San Francisco are more stringent than the typical restoration practices in Michigan.

The Burlington approach results in estimates that are probably higher than what is to be expected in Michigan. One reason for the higher cost with the Burlington method is due to the fact that roads with a Pavement Condition Index of less than 40 were left out of the analysis. Consequently, we believe this approach provides a higher degradation factor than warranted.

Based on our judgment, we believe that the annual pavement degradation costs in Michigan are likely to be closer to the estimates generated by the Austin and the Cost Differential Approach. A reasonable estimate is $33 million annually.

6. ESTIMATION OF MANAGEMENT AND MONITORING COSTS

Monitoring and management costs vary from region to region depending upon the requirements and management practices of local governments, the inspection and permit procedures in place, the traffic and climate conditions on the roads, and the number of providers involved. Costs incurred because of telecommunications providers are not monitored separately. Consequently, most monitoring and management costs are reasonable estimates made by personnel that are familiar with the work environment.

It is difficult to estimate the precise amount of ongoing management and monitoring costs incurred by local governments in Michigan. The monitoring and management costs incurred by municipalities, townships and county road commissions are not budgeted or measured along narrow functional lines for each type of service provider.

We adopt a narrow definition of ongoing monitoring and management costs to include permit negotiations, compliance monitoring, construction permit costs, inspection costs, barricading expenses, legal expenses, mapping and location activities costs.

Additional costs incurred for maintaining ROW around telecommunication lines

(such as mowing, weeding, snow removal) and costs due to delays involved in completing water, sewer, and road construction projects because of the need to coordinate changes with telecommunications providers are not included in this analysis.

Since it is difficult to obtain precise estimates of the ongoing management\monitoring costs imposed by telecommunications providers directly in a short period of time, we adopt an indirect approach. These monitoring costs were estimated for utility providers in the comprehensive Texas Study by Constance Cannady for 20 cities [1]. The average annual per foot cost for large, medium, and small cities was estimated to be 17 cents. Based on the total number of utility permits (106), approximately 42% of the permits were for telecommunications providers. When the 17 cents is adjusted for telecommunications providers, it works out to 7.1 cents per foot. We do not measure the management and monitoring costs for aerial wire or cable, although some costs may be present. Based on this benchmark of 7.1 cents per foot, the overall annual costs for monitoring buried\underground cable lines in Michigan incurred by local governments is estimated to be $53.3 million.

Although the management practices and actual costs may vary between Texas and Michigan, and also between various area governments, we believe that this is a conservative estimate of ongoing management/monitoring costs in Michigan for three reasons. First, ongoing costs of maintaining the right of way for telecommunications providers (such as mowing, weeding, and snow removal) and the costs due to the slowdown in water, sewer, and road construction projects due to telecommunications providers are not included in the analysis. Second, anecdotal evidence from local government officials indicate that the estimated per linear foot costs for municipalities are significantly higher. Third, we did not include the costs associated with aerial lines.

7. OTHER COSTS NOT INCLUDED IN STUDY

There are other substantial costs associated with the value of ROW space occupied by telecommunications providers that we have not attempted to capture in this report.

For example, the study of 20 Texas cities by Constance Cannady [1] estimated the average annual rental value of each centerline foot was $5.41 for utility providers (this value was 70% of the estimated market value).

Local governments may have to acquire a total width of ROW that is more than the actual area used by vehicles and pedestrians. For instance, the Texas study indicated that typically cities have to acquire ten feet on each side of the street. This additional area is partly used to provide easements for telecommunications and utility providers. Cities lose the forgone economic value of this area on an ongoing basis. The fair economic value of these ROW costs vary from region to region and one may disagree with the estimates. However, it is difficult to deny that these forgone costs by local governments are fairly substantial.

There are also a series of indirect costs that are incurred by local governments, including disruptions and slowdown in traffic flow because of ongoing repairs, loss of aesthetic value of streets due to telecommunications lines, etc. We make no effort to estimate these economic and indirect costs of ROW for telecommunications providers. There may be other costs that may be incurred by local governments due to telecommunications providers in the ROW that we have not included in this study.

8. CONCLUSIONS

Based on our calculations, we believe that a conservative and reasonable estimate of the amount of costs imposed by telecommunications providers is $86 million per year. Note that this estimate is based only on underground\buried telecommunications lines and a narrow definition of monitoring\management costs.

This cost estimate is subject to the following caveats. The calculations we have made rely on available objective data, as well as on some professional judgments. Estimates of the conditions of the roads in Michigan were based on the study performed by *Public Sector Consultants.* Estimates of the constructions costs were obtained from Cheryl Scales, a Vice President and an engineer at *Progressive AE* in Grand Rapids.

We made a conservative base line estimate of two annual cuts per kilometer of buried\underground cable. The amount of future annual cuts in the roads is contingent in part on the amount of growth in the telecommunications industry in Michigan. The LinkMichigan initiative is likely to accelerate this growth [7]. These cuts could be for new lines or for ongoing repair work. We did not take into account cuts that have been made recently that will continue to degrade existing pavements.

The degradation functions employed in this investigation are from three landmark studies (Burlington, Austin, and San Francisco). We did not estimate the specific degradation function of pavement life with Michigan data. However, applying a variety of degradation functions from comprehensive studies done previously, along with Michigan road conditions and Michigan construction costs, provides a reasonable benchmark for estimated costs.

We believe that our estimate of $86 million, as the annual cost incurred by local governments for providing access to ROW for telecommunications providers in the State of Michigan, is conservative compared to projections of other studies we have reviewed.

ACKNOWLEDGEMENTS

The views expressed in this report are our professional assessment and should not be construed as views of the *Seidman School of Business* or of *Grand Valley State University*.

We are grateful to Remmy Dagama for research assistance. Constance Cannady from *C2 Consulting Services* and the *Texas Municipal League* allowed us to use their monitoring\management costs estimated by their comprehensive study.

We appreciate the time spent by Cheryl Scales and Jeff Hillegonds at *Progressive AE* by talking to city/county engineers and accountants to obtain their assessments of construction cost estimates and size of patches.

We gratefully acknowledge the use of degradation functions developed by the cities of Austin [2], Burlington [13], and San Francisco [3, 15], and the degradation fee formula from the League of Minnesota Cities [4]. Verbal approval from these cities for the use of these functions has been obtained.

Finally, we are grateful to numerous city\county engineers, accountants, and other personnel who spent countless hours providing information to us on the monitoring, management, and construction costs in their jurisdiction. Unfortunately, it is difficult to list them individually.

REFERENCES

[1] C2 Consulting Services (1998), *Study of Utility Access to City-Owned Right-of-Way: Issues Concerning Existing Access Agreements and Recovery of Costs by Municipalities*

[2] *City of Austin Utility Cut Study*, Final Report, prepared by Transtec Consultant, May 1995.

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[5] Federal Communications Commission (2001) *Statistics of Communications Common Carriers*

[6] Department of Transportation Minnesota, *Indirect Costs of Utility Placement and Repair Beneath Streets*

[7] Gartner Consulting (2001), *E^3 Ventures for Michigan Economic Development Corporation, LinkMichigan Report.*

[8] Goldstein, M. and Gooding, R. (1997) *Electronic Highway Infrastructure Development and Information Services.* Prepared for Maricopa Association of Governments, Electronic Highway Users Group.

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[10] Humphrey, M. H. and Parker, N. A. (1998), *The Mechanics of Small Utility Cuts in Urban Streets Pavements: Implications for Restoration.* Transportation Research Board, January 1998.

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[14] Springsted Inc. (1998) *Public Right-of-Way Cost Recovery Plan Mid-America Regional Council*

[15] Tarakji, G. (1995), *The Effect of Utility Cuts on the Service Life of Pavements in San Francisco,* Study conducted for the Department of Public Works, City and County of San Francisco, CA.

[16] Thistle, R. (1997) *Public Right of Way Cost Recovery Plan, League of Minnesota Cities*

Appendix 1: Annual Degradation Cost Summary

The total estimated annual degradation cost:

San Francisco degradation function:	$10,474,965
Austin, Texas degradation function:	$33,035,011
Cost Differential method:	$33,317,024
Burlington, Vermont degradation function	$79,569,710

In calculating the annual degradation costs for the San Francisco, Austin, and Burlington methods, the following assumptions/calculations were used.

- The number of cuts was estimated using km of buried and underground cable and estimating two cuts per km per year.[5]

- The average size of a cut was determined based on calls to selected city/county officials.

- The average design life of the road was estimated to be 20 years and straight line depreciation was employed.

- Reconstruction costs of $7.50 sq. ft were used.[9]

- The distribution of age of road was determined by employing the "good", "fair" and "poor" categories, from the study by Public Sector Consultants.[12] We determined the appropriate weights for each category by using the amount of paved city and county roads that were in each. We used 3 years as the midpoint for the good category, 9 years for the midpoint of the fair category and 15 years as the midpoint of the poor category. Based on this breakdown we assumed cuts occurred randomly on roads.

- The degradation costs based on the Austin, San Francisco and Burlington studies were determined by using the average design life of the road and the reconstruction cost per sq. ft. Based on these we determine the degradation per sq. ft. by multiplying the cost per sq. ft. per year of degradation. This is then applied to the average size of the cut. The degradation is then the weighted average based on the condition of the road cut.

DEGRADATION CALCULATION-SAN FRANCISCO METHOD

Degradation = Life Reduction x Cost per Square Foot per Year of Degradation x Average Size of Cut

Assumptions for an Average Urban Street	
Average Design Life(years)	20
Average Size of Cut(Sq.ft)	66
Calculations	
Cost per Square Foot	$7.50
Cost per Square Foot per year of degradation	$0.38
Average Degradation	$23.03

Age of street Less than:	Remaining Life	Life Reduction	Degradation Per Square Foot ($.38xLife Reduction)	Degradation Per Ave.Size of Cut ($.38xLife Red.x Ave.Size of Cut)	Road Condition	Weighted Degradation (Rd.CxDeg.)
1	19	2.0	0.77	50.82		
2	18	1.9	0.73	48.18		
3	17	1.8	0.68	44.88	0.384	17.23
4	16	1.7	0.64	42.24		
5	15	1.6	0.60	39.60		
6	14	0.6	0.21	13.86		
7	13	0.5	0.20	13.20		
8	12	0.5	0.18	11.88		
9	11	0.4	0.17	11.22	0.375	4.21
10	10	0.4	0.15	9.90		
11	9	0.5	0.17	11.22		
12	8	0.4	0.15	9.90		
13	7	0.4	0.13	8.58		
14	6	0.3	0.11	7.26		
15	5	0.3	0.10	6.60	0.241	1.59
16	4	1.3	0.49	32.34		
17	3	1.0	0.36	23.76		
18	2	0.6	0.24	15.84		
19	1	0.3	0.12	7.92		
20	0	0.0	0.00	0.00		

Appendix 1-A

DEGRADATION CALCULATION-AUSTIN METHOD

Degradation = Life Reduction x Cost per Square Foot per Year of Degradation x Average size of Cut

Assumptions for an Average Urban Street	
Average Design Life(years)	20
Average Size of Cut(Sq.ft)	66
Calculations	
Cost per Square Foot	$7.50
Cost per Square Foot per year of degradation	$0.38
Average Degradation	$72.63

Age of street Less than:	Life Reduction	Degradation Per Square Foot ($.38xLife Reduction)	Degradation Per Average size of Cut ($.38xLife Red.x Average size of Cut)	Road Condition	Weighted Degradation (Rd.CxDeg.)
1	4.50	1.71	112.86		
2	4.28	1.63	107.58		
3	4.05	1.54	101.64	0.384	39.03
4	3.83	1.46	96.36		
5	3.60	1.37	90.42		
6	3.38	1.28	84.48		
7	3.15	1.20	79.20		
8	2.93	1.11	73.26		
9	2.70	1.03	67.98	0.375	25.49
10	2.48	0.94	62.04		
11	2.25	0.86	56.76		
12	2.03	0.77	50.82		
13	1.80	0.68	44.88		
14	1.58	0.60	39.60		
15	1.35	0.51	33.66	0.241	8.11
16	1.13	0.43	28.38		
17	0.90	0.34	22.44		
18	0.68	0.26	17.16		
19	0.45	0.17	11.22		
20	0.23	0.09	5.94		

Appendix 1-B

DEGRADATION CALCULATION-BURLINGTON METHOD

Appendix 1-C

Degradation = Life Reduction x Cost per Square Foot per Year of Degradation x Average Size of Cut

Assumptions for an Average Urban Street	
Average Design Life(years)	20
Average Size of Cut(Sq.ft)	66
Calculations	
Cost per Square Foot	$7.50
Cost per Square Foot per year of degradation	$0.38
Average Degradation	$174.94

Age of street Less than:	Remaining Life	Life Reduction (Remaining Life/1.7)	Degradation Per Square Foot ($.38xLife Reduction)	Degradation Per Ave.Size of Cut ($.38xLife Red.x Ave.Size of Cut)	Road Condition	Weighted Degradation (Rd.CxDeg.)
1	19	11.2	4.26	281.16		
2	18	10.6	4.03	265.98		
3	17	10.0	3.80	250.80	0.384	96.31
4	16	9.4	3.57	235.62		
5	15	8.8	3.34	220.44		
6	14	8.2	3.12	205.92		
7	13	7.6	2.89	190.74		
8	12	7.1	2.70	178.20		
9	11	6.5	2.47	163.02	0.375	61.13
10	10	5.9	2.24	147.84		
11	9	5.3	2.01	132.66		
12	8	4.7	1.79	118.14		
13	7	4.1	1.56	102.96		
14	6	3.5	1.33	87.78		
15	5	2.9	1.10	72.60	0.241	17.50
16	4	2.4	0.91	60.06		
17	3	1.8	0.68	44.88		
18	2	1.2	0.46	30.36		
19	1	0.6	0.23	15.18		
20	0	0.0	0.00	0.00		

COST DIFFERENTIAL APPROACH

Appendix 1-D

Total Dollar Differential =$123.55 [1]

Assumptions for an Average Urban Street

Average Design Life(years)	20
Average Size of Cut(Sq.ft)	66
Average Weighted Degradation	$73.25

Age of stre Less than:	Remaining % of Life	Road Condition	Weighted Degradation
1	0.95		
2	0.90		
3	0.85	0.384	40.33
4	0.80		
5	0.75		
6	0.70		
7	0.65		
8	0.60		
9	0.55	0.375	25.48
10	0.50		
11	0.45		
12	0.40		
13	0.35		
14	0.30		
15	0.25	0.241	7.44
16	0.20		
17	0.15		
18	0.10		
19	0.05		
20	0.00		

[1]Total Dollar Differential reflects larger patch and additional thickness to approximate Minneapolis Standards

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ACADEMIC QUALIFICATIONS

Ph.D. Economics, University of Illinois at Chicago, Winter 1985
M.A. Economics, DAV College, India

AWARDS

Fulbright Professor, National Institute of Public Administration, Malaysia, June-December 1989.

Meritorious Performance and Professional Promise Award, San Diego State University, 1987-88.

EMPLOYMENT HISTORY

1995-	**Chair and Professor,** Dept. of Economics, Grand Valley State University
1992-1994	**Professor,** Department of Economics, San Diego State University
1989-1992	**Associate Professor,** Department of Economics, San Diego State University
1985-1989	**Assistant Professor,** Department of Economics, San Diego State University
1982-1985	**Lecturer,** Department of Quantitative Methods, University of Illinois, Chicago
1981-1982	**Teaching Assistant,** Department of Economics, University of Illinois, Chicago
1976-1980	**Section Officer,** Ministry of Chemicals and Fertilizers, New Delhi, India

SELECTED CONSULTING\GRANTS

Survey analysis of the level of Business Confidence, sales, employment and exports for the Grand Rapids MSA for **Seidman Business Services.**

Editor, Seidman Business Review

Economic trends evaluations, Centennial Securities, Grand Rapids

Consultant, International Economics Department, **World Bank**, on the "Determinants of Foreign Direct Investment in Developing Countries," Spring 1994.

Co-Director, Inter-University Linkage Program (between San Diego State University, University of Calgary and El Colegio de la Frontera Norte) to analyze North American integration, **United States Information Agency**, $97,657, 1993-94.

Co-Principal Investigator (with M. Thayer), "The Loma Prieta Earthquake: An Event Study of Changes in Risk Perceptions of the Housing Market," grant from **National Science Foundation** ($93,413), 1991-92.

Consultant, American Express, Foreign Exchange Workshop, San Diego, Ca, 1990

SELECTED REFEREED PUBLICATIONS

Singh, H, Forthcoming, "Role of Political Violence in Foreign Direct Investments," *Recent Developments and Applications in Decision Making*, Kluwer Publishers: New York.

"Determinants of Foreign Direct Investment," Research note in *International Advances in Economic Research*, Vol. 7, 4, 2001.

"A Review and Analysis of the State-of-the-Art Research on Productivity Measurement," (with Ashok Kumar and Jaideep Motwani), *Industrial Management and Data Systems*, Vol. 100, 5, 2000.

" The Flat Tax and Real Estate Values: Renewing the Debate," (with James Fellows), *Real Estate Weekly*, Fall, 1997.

Some New Evidence on the Macroeconomic determinants of Foreign Direct Investment in Developing Countries" (with Kwang Jun), **World Bank Working Paper,** International Economics Department, 1995.

John J. Nader

Academic Experience:
Present:
Grand Valley State University
Visiting Professor of Economics

Davenport University;
Adjunct Professor
Teach Economics /Finance/ Management Strategy/Statistics

Business, Professional
Consultant on retainer;
Nike Inc.
Built and maintain model of consumer retail sales
1990 present

Melvin –Simon Shopping Malls;
Provide sales expectations for regional retail markets using model I developed.
1991 present

Other clients on a project basis

Founder/President; Run For Your Life, Inc. 1984-1990
Direct response life insurance company targeting runners nationwide. Company sold to John Hancock.

Foremost Insurance Company; 1978 - 1984
Vice – President Foremost Insurance Company
Research, Planning, and Development.

Professional Certification
Small Business Administration: Certified business consultant.
Licensed Property/Casualty/Life/Health Insurance

Collegiate and Professional Education:
M.S. in Applied Economics; University of Toronto 1977
M.S. in Finance/Business University of Toronto 1978
All course work completed for Doctorate in Economics.

BA Economics & BS Finance; Aquinas College; Grand Rapids, Mi
1975

Educational Training Beyond Last Degree Earned
Seminars Attended
Principles of Negotiation
Pricing Strategy for specialty insurance
Insurance company financial statement analysis

Professional Affiliations
National Association of Business Economists

Honors and Special Recognitions
SSB Teaching Award; 1998
Teacherating.com Teacher of the year GVSU. 2001

Professional Presentations: (Sample)
- Presented model of hurricane cost loading at NAIC conference; April 1980
- Seminar on *Insurance Pricing for recreational vehicles*; RVIA; 1981
- Team member creating the first pass through security backed by manufactured housing loans; ABA
  Conference,; Orlando, Fla. Feb. 1982
- Conducted a seminar on *transaction costs*; National Assoc. Shopping Center Developers; Las Vegas
  Oct.1991
- Presented at the National Sporting Goods; Atlanta; *Pricing for target markets*
- Conducted a seminar on pricing for National Pool & Spa Association; November 1999 in Cincinnati, Oh.
- Spoke at Lowell Chamber of Commerce breakfast Feb. 2000
- Scheduled to speak at Chamber of Commerce in Grand Haven Feb. 2001

List of Classes Taught
Principles of Macroeconomics
Contemporary Economic Issues
Monetary Economics (Money & Banking)
International Economics
Economic Reasoning
Intermediate Microeconomics
Management Policy & Strategy
Principles of Microeconomics
Investments
Corporate Finance
Economics & Strategy
Intermediate macroeconomics
Business Economics
Quantitative Methods

Cheryl C. Scales, P.E.

Expertise
Project Management, Site Development, Permitting,Planning and zoning assistance, Public Presentations, Site Grading and Paving, Stormwater Design & Management, Roadway Design, Pavement Management Systems,Wastewater Collection, and Water Supply and Distribution.

Education
Bachelor of Science in Civil Engineering, Michigan State University, 1984

Registration/Certification
Professional Engineer - MI

Selected Experience
Cheryl has experience in all aspects of engineering project planning, real estate site assistance, prototype development, development of standards for design and construction of site development projects, design, permitting, management, and construction services. She serves on Progressive's Board of Directors, as a Vice President and manages overall technical quality within the Civil group. Her 17 years of experience include all aspects of site design including water system supply and distribution, wastewater collection and treatment systems, roadway improvements and pavement management systems, stormwater and soil erosion management, grading, and site plans.

Key projects include:
Meijer, Inc., Grand Rapids, MI – Development of prototype documents and design criteria. Client Principal and overall manager of all Meijer Site Engineering projects since 1997. Project Manager for numerous Meijer Store sites. Duties include assisting Real Estate in site feasibility, preliminary site plan preparation, public meeting assistance, and cost estimating; preparation of construction documents, and assistance during construction

Office Depot, Delray, FL – Development of feasibility study and site design criteria documentation, preparation of preliminary site plans, and final construction documents for Odenton, Maryland Warehouse facility.

Holiday Inn Express, Charlotte, MI – Project management and design services. Work scope included complete site plan approval, permitting, and design services.

Lansing Oldsmobile Plant Pavement Analysis, General Motors, Lansing, MI - Pavement evaluation and maintenance recommendations for plant delivery area.

City of Montague, MI - 1997 street improvements including roadway, storm water, sanitary sewer, and watermain improvements, Dowling Street streetscape; design engineer for streetscape and utility improvements.

Previous experience includes:
Menards, Norton Shores, MI – Project management and design of 15 acre Menards and out lot sites located near Muskegon, MI.

Egelston Township, Muskegon County, MI - Evanston Avenue Sanitary Sewer and Pump Station - Design, permitting, bidding, and construction for sanitary sewer extension and pump station installation.

Ludington Avenue Sanitary Sewer Repair, Ludington, MI - Repair of existing 15-inch sanitary sewer in downtown Ludington.

Arlington Estates, Muskegon Township, Muskegon County, MI - Design, permitting, and construction of 225 site pre-manufactured homes sites. Includes sanitary sewer, pump station, force main, water main, and roadway extensions.

Sherwood Estates, Laketon Township, Muskegon County, MI - Design, permitting, and construction of 80 lot subdivision, includes sanitary sewer, water main, and roadway extension.

Prior to joining Progressive, Cheryl Scales assisted the City of Muskegon in implementing the Micro PAVER Pavement Management System over a three year period. This project included the field survey of 68 miles of major streets and 119 miles of secondary streets, data entry into the computer, and the production of numerous database reports outlining the pavement conditions. Cheryl was the project manager, and also assisted the city in purchasing the software and hardware necessary to run the program in-house, training City personnel to perform the pavement surveys and enters the data into the program, training city personnel how to run the program, and assisting the city in evaluating maintenance and repair techniques and costs. The city is currently updating the database and maintaining the system for their use in budgeting public works and maintenance projects.

Affiliations

Michigan Society of Professional Engineers – State Secretary 2000 – 2002,
Western Michigan State Director, 1999, Local President 1997
State Mathcounts Chairperson 1999; Western Chapter Mathcounts Committee 1999
NSPE National Society of Professional Engineers
American Society of Civil Engineers
City of Rockford - Zoning Board of Appeals 1999 to present

January 11, 2002

ProgressiveAE

Dr. Hari Singh, PhD
Chair of Economics Dept.
Seidman School of Business
Grand Valley State University
430C DeVos Center
401 W. Fulton Street
Grand Rapids, MI 49504-6431

Re: Michigan Municipal League Telecommunications Impact Survey

Dear Dr. Singh:

Construction costs vary by area due to local market conditions and specification requirements. The estimates provided by Progressive AE are reasonable for the State of Michigan.

Based on our investigation and our experience, the construction costs that we evaluated for your use from the study done in Minneapolis, MN are reasonable for use in this survey.

Sincerely,

PROGRESSIVE ARCHITECTURE ENGINEERING

Cheryl C. Scales, PE
Vice President – Civil Engineering

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CCS/js
55830101/005
cc: Progressive - Jeff Hillegonds
W:\WGEN5\55830101\2002\CS011102L.doc

EXHIBIT E

House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

BROADBAND PACKAGE

Senate Bill 880 as enrolled
Public Act 48 of 2002
Sponsor: Sen. John J. H. Schwarz, M.D.

Senate Bill 881 as enrolled
Public Act 49 of 2002
Sponsor: Sen. Leon Stille

Senate Bill 999 as enrolled
Public Act 50 of 2002
Sponsor: Sen. Valde Garcia

House Committee: Energy and Technology
Senate Committee: Technology and Energy
Second Analysis (7-12-02)

THE APPARENT PROBLEM:

The most unthinkable and improbable of technologies—gadgets and capabilities that are unimaginable to all but a few visionaries or eccentrics—sometimes have such a profound impact on the shape of human history that people forget what life was like prior to their invention. Other technologies fade into obscurity soon after they are developed. For instance, a June 24, 2002 New York Times article pronounced the death of the outhouse, suggesting to those who remained on the fence that indoor plumbing is here for the duration. Yet just a year and half after its first ride, the Pony Express was made obsolete by the telegraph. A committed skeptic might insist that only history will tell whether the Internet's appeal will endure or whether future generations will remember the Internet as the quaint and fleeting obsession of a specific time and place. Despite this (perhaps healthy) skepticism, many people believe that the currently available applications of the Internet are mere teasers that suggest, but do not yet reveal, the long-term benefits of the Internet revolution. They believe that the Internet revolution will radically transform the ways people communicate and live in the 21st century and beyond.

Describing the advent of the Internet—or any other technological development for that matter—as a "revolution" invites attempts to further develop the analogy. For instance, historians of ideas and philosophers might inquire about the nature of the "old order" that the Internet threatens to upset, insisting that without understanding that order, no one can sufficiently appreciate the Internet's uniqueness, novelty, and likely implications. While these witnesses of the revolution investigate its finer points, others feel the need to take sides. Opponents of the revolution may regard its focus on the "communication of information" as a corruption or at least impoverished version of the "true teaching and learning of knowledge". Individual "friends of the revolution", who agree that the Internet's benefits outweigh whatever costs it may involve, may dispute the importance of ensuring a certain distribution of the Internet's benefits. This internal debate between the Internet's proponents takes place within the broader discussion of the "digital divide", i.e., the gap between those who have "access" to computers and those who do not. Some people believe that being able to connect to the Internet by using a dial-up modem, whether at home, school, work, the local library, or an Internet café counts as having such access. They argue that high-speed, high-capacity Internet service, "broadband", is a luxury, and that it will remain a luxury, unless and until the market decides otherwise. But many telecommunications experts throughout the country and the state argue that broadband is rapidly becoming a necessity for consumers, businesses, governments, and institutions. Moreover, many Internet users believe that they will

need broadband in the near future, even if they can squeak by without it today. Among those who perceive broadband as a necessity, many suggest that the state and federal governments ought to promote access more actively.

Months of committee testimony and discussion in both the Senate and the House have contributed to a complex picture of both the potential benefits of broadband and the challenges confronting attempts to promote the development of the broadband infrastructure. A serious look at broadband must begin with a discussion of what *exactly* broadband is, and it turns out that providing a precise definition is not so easy. In "Connecting to the Internet: Broadband Connections," the Legislative Service Bureau's Science and Technology Division offers the following useful characterization of broadband: "The term broadband has become synonymous with advanced telecommunications capabilities and refers to high-speed data transmission and high bandwidth capacity. Simply put it refers to telecommunications technologies that can carry a lot of data and carry it at very high speeds." Characterizing broadband as a high speed and high bandwidth connection immediately prompts questions such as how fast? and how much bandwidth? The short answer is that the FCC, which no longer considers "broadband" to be a technical term, uses "advanced telecommunication capability" to describe services and facilities with an upstream, or customer-to-provider, and downstream, provider-to-customer, transmission speed of more than 200 kilobits per second, regardless of technology. The commission decided on the 200 kbps figure because this is somewhat faster than Basic Rate Integrated Services Digital Network service (ISDN), which operates at a rate of 144 kbps, and because "200 kbps is enough to provide the most popular applications, including web-browsing at the same speed as one can flip the pages of a book." A somewhat longer answer would consider the various different technologies capable of providing broadband service.—i.e., cable modem, DSL (digital subscriber line), fiber optic connections, satellite, or terrestrial wireless. Each of these technologies offers its own level of capabilities and a distinct set of advantages and disadvantages, and within certain general parameters—notably, faster than dial-up modem speeds and always-on connections—any of these technologies can count as broadband. The complexities of deploying individual broadband technologies to specific geographical regions, as well as the radically diverse needs of individual end-users, make it difficult to establish a speed definitive of broadband. For many end-users, 200 kbps speeds would be frustratingly slow, whereas for dial-up modem users, such speeds would be relatively fast. Whatever the present speed, the FCC acknowledges that the minimum acceptable connection speeds for "broadband" will need to be revised as technologies are developed and are made more widely available and as demand for both higher speeds and applications requiring higher speeds increases.

So is there evidence of a "need for speed"? That is, do people really need broadband? According to committee testimony, the state's major automobile manufacturers will require suppliers of car parts to receive and send designs and plans over the Internet within the next couple of years. The suppliers will simply not be able to stay in business if they do not have broadband. Broadband might also enable a surgeon who is relatively unfamiliar with a procedure that he or she must perform to teleconference with an expert halfway across the country or halfway around the world. In this way, broadband increases, if only indirectly, the likelihood of the procedure's success. For an auto part supplier or a patient under the proverbial knife, the need for broadband is clear enough. While such "life or death" cases may be the exception rather than the norm, the opportunity costs of continuing to use a dial-up modem must also be considered. For instance, a February 20, 2002 Detroit Free Press article discussed the case of a farmer who has come to depend on information available on the Internet and who is frustrated by the low speeds achievable with his dial-up modem. As the farmer put it, "time is money". Farmers and other businesspeople may find themselves at a real competitive disadvantage if they lack broadband service but their competitors have it, and the state will likely have difficulty attracting new businesses to the state if broadband is more readily available elsewhere than it is in Michigan. Students in rural or inner-city school districts, where broadband is not necessarily available, may become increasingly isolated from their peers in "connected" areas of the state, and they may find themselves with fewer opportunities to learn. Broadband may never be necessary in the sense that oxygen and clean water are necessary, but many people believe that the long-term costs of not deploying broadband infrastructure throughout the state is simply too high to force Michiganians to bear.

At the same time, a January 2002 EPIC-MRA poll suggests that while 25 percent of adults in Michigan consider themselves either very well or somewhat well informed about broadband, only 24 percent of adults in Michigan can (more or less, correctly) identify "broadband" with high-speed Internet access. Subscription rates for broadband services, where they

are available, seem rather low. For instance, according to FCC data, as of June 2001 97 percent of Americans lived in zip codes where high-speed Internet services were available to at least some individual, business, or institution, but only 7.8 million households and small businesses subscribed to those services. People have warned that these statistics can be deceiving, since the fact that broadband is available to one subscriber within a zip code does not necessarily mean that it is available throughout the zip code. Still, others find the gap in the numbers at least somewhat significant. Further, according to committee testimony and news reports, many telecommunications companies—e.g., SBC/Ameritech, Verizon, Sprint, and Qwest—have cut back on investment in broadband infrastructure. If broadband is truly destined to become the passport to the world of 21st century telecommunications, why haven't consumers expressed more interest in it, why aren't telecommunications companies more actively developing the infrastructure necessary for it, and why do so few people even know what broadband is? And why, when the private sector is not acting on its own, should government take the initiative in promoting broadband?

Most people believe that the question of whether broadband is, or ever will be, "necessary" is a question that residents, businesses, and institutions will ultimately have to answer for themselves. Moreover, most people agree that responsibility for convincing consumers that the benefits of broadband are real and not just hype falls upon telecommunications providers. But some people argue that consumers and providers are currently embroiled in a "chicken or egg" debate that prevents the parties from moving forward. Some observers have suggested that consumers, particularly residential consumers, are reluctant to subscribe to broadband service because they do not believe that any of the applications currently on the market require speeds higher than those they can achieve with their dial-up modems. A dial-up modem user who just browses the web and uses e-mail, occasionally downloading or uploading a file, may wish that she could connect at a higher speed or that she had an always-on connection but may not be willing to pay much extra for those conveniences. Content providers and other industry officials concede that residential consumer applications have been slow to emerge, but they argue that content providers currently have little incentive to develop such applications. Content providers have no way of knowing how much demand there is when most consumers cannot connect at speeds that would allow them to use the application. Thus, content providers and other industry representatives point to business applications that require high-speed Internet access as evidence of broadband's potential, and they dangle applications such as video-on-demand like carrots, as a way to motivate general consumer interest. Large businesses, institutions, and organizations often have access to, and take advantage of broadband service, and relatively complex content is available for these customers. Still, even those individual residential customers who want to subscribe to broadband service may find it unavailable in their area.

Determining whether broadband is "available" is not much easier than deciding upon a precise definition of broadband. The FCC and the Michigan Public Service Commission collect some data on where broadband infrastructure is deployed and where there are broadband subscribers, but the information is incomplete because so much depends on the existence, quality, and type of connection that any given end-user has to the Internet "backbone." The fact that a business or housing development has broadband service does not necessarily mean that a business or residential area just down the road has access to broadband. For instance, current DSL technology requires that an end-user be located within about three miles of a telephone switching office with equipment capable of handling digital signals, and so one resident may be able to get broadband where his neighbor may not. Cable broadband service uses the same infrastructure as cable television, which is available in many—but not all—areas of an individual city or township, let alone the state. Wireless technologies (at least currently) depend on a direct "line of sight" between equipment located at the customer's house or business and a tower or satellite, and inclement weather, mountains, and even trees, can create problems for someone who depends on reliable, uninterrupted service. Since capabilities vary according to the relevant technology, the fact that one broadband technology is available to residents of a city block may be irrelevant to a business on the same block. At the same time, broadband can often be found or made available in the unlikeliest of places, such as Granite Island. A November 2001 Detroit Free Press article tells the story of how one of the owners of the island's lighthouse, upon arriving at the island by boat, hooked up her laptop to write her mother an e-mail to let her know that she and her husband had arrived safely. The woman's mother, who lives in France, responded almost immediately to say that she had watched her daughter and son-in-law arrive through a 24-hour web-cam made possible by the island's wireless broadband service. The apparent unavailability of broadband in remote places has

created a market niche for consultants who specialize in finding solutions for customers who, often wrongly, assume that they simply have no options. In some cases, such solutions are as simple (technically) as connecting several dial-up modems together to create a combined speed equivalent to that offered by other technologies (though in this particular case, the customer would not have the always-on connection).

In the end, whether broadband is "available" to an individual customer is largely a function of how much the customer is willing to pay for the service. Large businesses can generally afford "T1 connections" to the Internet backbone. Research universities generally have the in-house expertise and capital necessary for creating the massive infrastructure that allows thousands of students, faculty, and staff to simultaneously upload and download large applications at lighting-quick speeds. And *for the right price* someone living out "in the sticks" can probably find someone willing to deliver fiber optic lines to her door. But what about the small businesses, the less wealthy residents, and the many institutions, organizations, and government agencies that simply cannot afford access to broadband? Bringing high-speed Internet access to all corners of the state, nation, and world is not simply—or even primarily, at this point—a technological problem. Rather, it is an economic problem. Although the lack of applications that require high-speed access is a significant factor in the low "take rates" for broadband where infrastructure currently does exist, another significant factor in explaining the availability or non-availability of broadband is the cost involved in deploying infrastructure to remote, sparsely populated locations. The developers of such infrastructure argue that they have little choice but to pass the costs of deploying infrastructure along to consumers, and as with many infrastructure issues, geography and population density are key factors in determining how economically feasible it is to deliver service to any particular end-user.

Another factor affecting the cost of deploying broadband infrastructure—one that people often overlook—is the rights-of-way fees charged by local units of government. For all of the Internet's promises to take us to the farthest corners of the globe and beyond, much of the information highway lies underneath "Main Street". The state constitution gives local governments significant control over setting the conditions of access to rights-of-way, and the Michigan Telecommunications Act (MTA) gives the locals the right to charge telecommunications providers for the "fixed and variable" costs associated with such access. Most local governments do not charge such fees, but many are beginning to do so or are considering doing so, and negotiating conditions of access with individual local communities can be a timely, expensive, and aggravating process for both providers and community officials. Some municipalities charge both application fees and per linear foot fees, while others charge one but not the other. Application fees for competitive local exchange providers can be as much as $10,000, and annual fees can exceed $1.00 per linear foot occupied. Making matters even more complex, incumbent local exchange providers claim an exemption from such fees on the basis of Public Act 129 of 1883, and cable companies' access to and use of local rights-of-way are governed by federal law and regulations.

Federal and state legislators and regulators are uniquely positioned to take steps to make broadband more or less attractive and available to potential end users, especially when they believe that promoting high-speed Internet access is in the public's interest. Federal legislators took steps to promote broadband deployment when they enacted the Telecommunications Act of 1996. Section 706 of the act requires the FCC and state commissions with regulatory authority over telecommunication services—in Michigan, the Michigan Public Service Commission (PSC)—to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." The act also requires the FCC to report regularly on the question of whether advanced telecommunication services are being made available "in a reasonable and timely fashion." If the FCC determines that they are not, the act requires the commission to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." On February 6, 2002, the FCC adopted and released its third "Section 706 report." The commission found, as it had found in its previous two reports, satisfactory progress in the deployment of advanced telecommunications capability, and thus determined that no *immediate* action to *accelerate* deployment is required. Still, as Section 706 implies and the FCC explicitly acknowledges in the report's introduction,

the report's findings relieve neither the FCC, nor the state commissions, of their general duty to *encourage* deployment. The details of how to meet this obligation are far from clear. Although the act clearly suggests that federal and state commissions should *facilitate* private deployment efforts, it provides little guidance for regulators who are trying to determine precisely when they should push market forces along, when they should sit back and let consumers and service providers hash things out among themselves, and when, if ever, they should curb the market. Moreover, the act's general directive is silent on the issue of local control of rights-of-way.

At the state level, the Michigan Economic Development Corporation (MEDC), the PSC, and Governor Engler have actively promoted the deployment of broadband infrastructure statewide. The MEDC issued its "LinkMichigan" plan in May 2001, and in late November the Governor began to actively promote his "Michigan HiSpeed Internet Plan," which he described as building on the MEDC's recommendations. Legislation has been introduced to encourage and facilitate private efforts to deploy broadband infrastructure—without favoring any specific technology—to make high speed Internet access available to businesses, schools and other educational institutions, hospitals and other health care facilities, governments, residents, and others throughout the state.

THE CONTENT OF THE BILLS:

Senate Bill 881 would create the "Michigan Broadband Development Authority Act." The bill would begin by enumerating legislative findings stating the need for broadband infrastructure throughout the state and declaring that it is a valid public purpose for the state to assist in financing private and public sector development of that infrastructure. "Broadband services" would be defined as services, including voice, video, and data, that provide capacity for transmission in excess of 200 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. The bill would also do the following:

- create the Michigan Broadband Development Authority (MBDA) and establish its board of directors;

- authorize MBDA to issue tax-exempt bonds and notes to finance or refinance all or part of the development of the broadband infrastructure and specify that the notes or bonds would not be a debt of the state;

- prescribe MBDA's other powers, including making loans to, and entering into joint venture and partnership arrangements with, broadband developers and operators;

- prohibit MBDA 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;

- restrict MBDA's ability to acquire real and personal property constituting portions of the broadband infrastructure;

- create a Reserve Capital Account under MBDA's control to secure its bonds and notes;

- create a seed capital loan program to make capital loans available to persons planning to apply to MBDA for financing of broadband infrastructure, with priority given to developments targeted to underserved areas of the state;

- require broadband developers and operators applying for financing under the bill to file with MBDA both a participation plan for small and minority owned businesses and a community wide outreach plan to educate the public of the availability of broadband services; and

- require the MBDA to submit an annual report relating to its activities for the preceding year to the governor, the Speaker of the House of Representatives, the Senate Majority Leader, and to each member of the House and Senate committees with oversight over utility and energy issues.

Except to the extent necessary to maintain, improve, complete or expand an element of the broadband infrastructure already acquired or financed under the act, MBDA could not enter into new partnerships or other joint ventures arrangements or provide new loans or joint venture and partnership arrangements after December 31, 2008.

Senate Bill 880 would create the "Metropolitan Extension Telecommunications Rights-of-Way Oversight Act", which according to the bill's statement of purpose, was designed to encourage competition among providers of telecommunication

services and to streamline the process for authorizing providers' access to and use of local public rights-of way, among other things. Specifically, the bill would do the following:

• create the Metropolitan Extension Telecommunications Rights-of-Way Oversight Authority (METROWA), under the authority of Section 27 of Article VII of the state constitution (see "Background Information" below), and give METROWA 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 and pay the municipality a one-time $500 administrative fee, and submit route maps, and require municipalities to grant permits;

• require a provider to pay to METROWA an annual maintenance fee per linear foot of public right-of-way occupied by the provider's facilities of five cents, beginning April 1, 2003. (For the period of November 1, 2002 to March 31, 2003, a provider would have to pay an initial annual maintenance fee of two cents per linear foot, prorated for the period. Under certain cases, these fees would be reduced "in recognition of the need to provide nondiscriminatory compensation to municipalities for management of their rights-of-way". A provider providing cable services within a metropolitan area would have to pay an annual maintenance fee of one cent per linear foot and would be allowed to satisfy the fee requirement based on aggregate investment in Internet broadband facilities in Michigan since January 1, 1996);

• extend the permit and permit fee requirements to a provider asserting rights under Public Act 129 of 1883;

• require the maintenance fee revenue to be distributed to municipalities in metropolitan areas;

• require municipalities, in order to receive fee-sharing payments, to comply with the bill and modify fees to the amount permitted under the bill;

• allow providers to take a credit against their utility property tax (pursuant to Senate Bill 999);

• discount the maintenance fees of providers implementing a shared use arrangement;

• allow METROWA to waive the fee for facilities in underserved areas;

• make exceptions to the fee requirements for educational institutions, electric and gas utilities, the state, counties, municipalities, and municipally owned utilities;

• establish "fair play" requirements for a county or municipality providing a telecommunication service or cable modem service provided through a broadband Internet access transport service;

• require providers excavating, constructing, or installing facilities within, or temporarily obstructing, a public right-of way to return the right-of-way to its original condition;

• specify remedies and penalties the Public Service Commission (PSC) could order for violations of the bill;

• require municipalities to use maintenance fee funds received under the bill solely for rights-of-way purposes and require any municipality with a population of 10,000 or more that received funds to file an annual report with METROWA on the use and distribution of the funds;

• require METROWA to file an annual report of its activies for the preceding year with the governor, the legislature, and members of the legislative committees dealing with energy, technology, and telecommunications issues; and

• repeal several sections of the Michigan Telecommunications Act (MTA) dealing with access to and use of local rights-of-way.

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

Senate Bill 880 is tie-barred to both of the other bills, and Senate Bill 999 is tie-barred to Senate Bill 880. Senate Bill 880 would take effect on November 1, 2002.

BACKGROUND INFORMATION:

Article VII, Section 27. Article VII of the state constitution deals with local government, and Section 27 deals specifically with metropolitan governments and authorities. This section states: "Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function."

Article VII, Section 29. Section 29 of Article VII of the state constitution deals with local control of highways, streets, alleys, and other public places and the use of these public places by public utilities. This section states: "No person, partnership, association or corporation, public or private, operating 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 utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

LinkMichigan. In May 2001, the Michigan Economic Development Corporation (MEDC) issued a report entitled LinkMichigan. In the report, the MEDC identified improved access to high-speed telecommunication services as "the most important state economic infrastructure issue for the new century." The MEDC noted the widespread perception that broadband is a luxury and warned that failure to prepare for the future could lead the state to lose its "preeminence" as "a recognized leader in competing for new business growth and attracting and retaining a world-class workforce." According to the MEDC, broadband access will soon become "as essential of an infrastructure service as water, phone, electric, or natural gas service is today." The report recommended that state and local governments facilitate the private sector's development of the infrastructure necessary to deploy broadband throughout the state. The full report is available on the web at: www.medc.michigan.org. The report specifically recommended the following:

1. The Michigan Department of Management and Budget should:

- aggregate collective purchasing demand of the state, higher education users, K-12 users, local government users, and any other public partners and ask (through a request for proposals) private-sector bidders interested in serving the state to provide advanced telecommunication services to each;

- require by contract that providers build and maintain a high-speed backbone infrastructure that extends to most regions of the state to serve these customers; and

- require by contract that winning vendor(s) resell excess network capacity on a non-discriminatory wholesale basis to increase competition and encourage investment in regions that might not otherwise attract new service providers.

2. The Michigan Public Service Commission should:

- establish a level regulatory playing field for all telecommunications and information carriers;

- enact a one-stop right-of-way permitting system to create common rules for all carriers; and

- establish one common tax and fee system to replace differing systems in place around the state.

3. The MEDC, along with local economic development agencies and providers, should make recommendations for:

- enacting laws and/or rules requiring all telecommunications and information carriers to provide specific network location and capability information;

- develop and enforce quality-of-service standards so that businesses and other purchasers of advanced telecommunication services are able to plan and not have business operations disrupted because of continual installation delays; and

- link reporting to the approval of right-of-way permits.

4. The MEDC should:

• provide local community planning grants so that local officials can develop their own last mile solutions for their communities;

• encourage communities to link or leverage their local strategies to the statewide backbone initiative; and

• refuse assistance to communities that have established barriers to new telecommunications investment.

Other resources. All three of the FCC's Section 706 reports on the deployment of "advanced telecommunications capability" are available on line at: www.fcc.gov/broadband/706.html. The Science and Technology Division of the Legislative Service Bureau has published several helpful backgrounders on "Connecting to the Internet."

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, Senate Bill 880 would generate between $9 and $14 million in right-of-way maintenance fee revenue during the first year of implementation and between $24 and $36 million in subsequent years. This revenue would replace the roughly $11.5 million in annual revenue currently generated by local units of government in right-of-way fees. Additional one-time revenue from the $500 permit fees would generate an additional $3 to $4 million in the first year and an indeterminate amount in future years.

While it is possible that state appropriations and expenditures would be necessary to provide for the operation of the financing authority, the fiscal implications of Senate Bill 881 are indeterminate.

Senate Bill 999 would reduce state revenue from the Utility Property Tax by an indeterminate amount. The amount could range from between $2 and $36 million per year depending upon the determination as to whether incumbent local exchange carriers imposing an End User Common Line (EUCL) charge would be eligible to recover the costs of maintenance fees through the credit. Any revenue reduction would impact the state's general fund.

For a fuller explanation of the likely fiscal impact of Senate Bills 880, 881, and 999, see the House Fiscal Agency's analysis of the bills, dated 7-9-02.

ARGUMENTS:

For:

Affordable, non-discriminatory access to broadband for all regions of the state is vitally important for the state's well being, and the state should take action to facilitate private efforts to deploy the broadband infrastructure. Although the FCC has reported that deployment is occurring in a timely and reasonable fashion, officials at the Michigan Economic Development Corporation and the Michigan Public Service Commission have argued that "average is not good enough" and that Michigan must take the lead on broadband. The opportunity cost of not acting now could make it difficult to retain businesses and attract new businesses to the state. A report by Gartner Consulting suggests that the original LinkMichigan plan, upon which Senate Bills 880, 881, and 999 are largely based, could lead to an increase of 500,000 jobs in the state within a ten-year period and a $440,000 gain in gross state product.

The benefits of actively promoting broadband would extend not only to businesses that are currently operating in the state or considering beginning operations here, but also to residents, hospitals, schools, and other institutions and organizations. Increasingly, people are seeing the availability of broadband as enhancing their quality of life, and Michiganians do not want to be left on the wrong side of the digital divide. Ensuring that schoolchildren throughout the state have speedy, efficient access to the information available on the Internet is extremely important for the state's future. Public libraries, recognizing that some residents will still be unable or unwilling to pay for broadband even if it does become widely available, would like to be able to offer high-speed access to the Internet to their patrons. Broadband can also help the state and local governments to share information in emergency situations. As with most technologies, those who are skeptical or dubious of broadband's claims will soon find themselves wondering how they could have done without it.

Senate Bill 881 would allow the state to create the Michigan Broadband Development Authority, which would, by issuing notes and bonds, make below-market financing available to broadband developers and operators. The authority, modeled on the highly successful Michigan State Housing Development Authority, would be responsible for ensuring that providers had developed sound plans, and ultimately the state would not be liable for notes and bonds that the authority issued. Without pledging the full faith

and credit of the state, the state would make it easier for broadband providers to cover their costs and thus remove a key obstacle to providing Michigan's residents, businesses, governmental agencies, organizations, and institutions with the high-speed Internet capabilities they will need in the 21st century. The bill avoids favoring any specific technology, which is important since it is unclear which technologies would best serve individual end-users' broadband needs. The bill would also create a seed capital loan program, which would emphasize the special needs of underserved areas of the state and would favor community economic development programs and smaller broadband providers. Such provisions would ensure a broad mix of providers, and notably those who were willing to take broadband to rural and urban areas, had access to METROWA financing.

Against:

The laws of supply and demand, rather than the laws of the state, should determine when and where broadband is deployed. While broadband is not available in all areas of the state, it is available and priced reasonably in many areas, and in quite a few areas potential customers may choose between competing technologies. Many people simply are not interested in high speed Internet access.

The benefits that Michigan would reap from Senate Bill 881's enactment are not as clear as some supporters of the bill suggest. Although the bill would make financing available to providers, providers would have to decide for themselves whether or not to apply for financing. Even if providers did apply for financing and deploy infrastructure throughout the state, there is no guarantee that residents and small businesses, among others, would be interested in paying for broadband. *If* broadband developers took advantage of METROWA financing to develop infrastructure, and *if* demand for broadband drastically picked up among residents and small businesses, then the METROWA *could* result in economic good times for the state. Still, the MEDC and others have argued their case largely by touting benefits that are by no means guaranteed.

Response:

While it is possible that providers would not be interested in the financing made available by MBDA, it is fairly clear that any provider thinking about developing infrastructure in the state would be attracted to the possibility of acquiring capital at low rates. MBDA would be fiscally conservative in its creation of the Reserve Capital Account and in its approach to providers' development plans. The bill contemplates the possibility that MBDA could default in the payment of principal or interest of any notes or bonds are due, but the success of MSHDA is a strong precedent for MBDA. But the state will not really be taking a major risk in promoting broadband development, especially considering that the state would not be liable on the notes or bonds issued by MBDA. The remote possibility that MBDA could turn out to be a total disaster is a reason to stress the need to proceed cautiously and the need for the legislature to maintain oversight; it is not a sufficient reason for inaction.

For:

Senate Bill 880 would create a uniform permit and fee system for broadband providers who need access to the municipal rights-of-way, under which much of the necessary infrastructure lie. In order to access this infrastructure, providers need to dig up roads and sidewalks, and such activities not only disrupt the community's ability to use the facilities but also create the need for repairs and reduce the life of the rights-of-way. The bill is clearly a compromise between owners of the infrastructure who would prefer to pay minimal—ideally, no—costs for such access and municipalities that believe that the bill's fee system will not cover their "fixed and variable costs," which they are currently entitled to recover under the MTA. Nevertheless, broadband developers would gain by knowing the costs of doing business ahead of time, without having to negotiate access with individual municipalities. And municipalities would benefit by having the incumbent local exchange carriers, which currently claim an exemption from local fees, pay their share of keeping up the rights-of-way.

The bill would promote the shared use of infrastructure, by giving a shared use discount to providers who used the same poles, trenches, and other common spaces and physical facilities, and would thereby help minimize the impact of providers' access to rights-of-way. The bill would also promote deployment of broadband infrastructure to the state's underserved areas by allowing METROWA to waive rights-of-way maintenance fees to a provider if two-thirds of the affected municipalities in an underserved area agree to have their distribution of fees reduced by that amount.

Against:

Some constitutional concerns have been raised about the concept of a state authority with broad powers over local rights-of-way. Article VII, Section 29 of

the state constitution clearly gives local governments control over their rights-of-way. Under the bill, METROWA would, among other things, "have the exclusive power to assess fees on telecommunications 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 by the provider." It appears that METROWA would violate local governments' rights to negotiate the terms of access to rights-of-way within their boundaries.

Response:

Article VII, Section 29 states that "*Except as otherwise provided in this constitution* the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." This section establishes a general presumption in favor of local control of local rights-of-way, but it clearly falls short of establishing locals' absolute control over their rights-of-way. Senate Bill 880 would explicitly reference Article VII, Section 27 in creating METROWA. This section states that "*Notwithstanding any other provision of this constitution* the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide." Thus, despite Section 29's general presumption in favor of local governments, Section 27 clearly authorizes the legislature's creation of a metropolitan authority regulating access to local rights-of-way.

Against:

Senate Bill 880 would state that one of the purposes of the act would be to "allow for a tax credit as the sole means by which providers can recover the costs under this act and to insure that the providers do not pass these costs on to the end-users of this state through rates and charges for telecommunications services." But what is good for the end-user is not necessarily good for the taxpayer. By giving providers a tax credit, taxpayers, not all of whom would subscribe to broadband services, would essentially be subsidizing the deployment of broadband to those who did subscribe to broadband.

Response:

One of the key principles of the bill package is that promoting broadband will not only provide direct benefits to those who wind up subscribing but will also provide indirect benefits to those who do not subscribe. Taxpayers will benefit by having schools and hospitals that have high speed Internet access. Projections of economic development potential also suggest that taxpayers will likely see a long-term increase in the state's general fund as a result of the bill package.

Analyst: J. Caver

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

EXHIBIT F

MICHIGAN ECONOMIC DEVELOPMENT CORPORATION

300 N. WASHINGTON SQ.
LANSING, MI 48913

CUSTOMER ASSISTANCE
517 373 9808

WWW.MICHIGAN.ORG

Doug Rothwell
President and Chief Executive Officer
Michigan Economic Development Corporation

Official Testimony Before the
Senate Technology and Energy Committee

January 9, 2002

Doug Rothwell
President and Chief Executive Officer
Michigan Economic Development Corporation

Official Testimony Before the
Senate Technology and Energy Committee

January 9, 2002

Thank you Mr. Chairman and Committee Members

There is one thing I would like you to remember from my testimony today: Average isn't good enough.

Michigan competes in a global economy—a global economy increasingly connected by high-speed communications systems. Every sector of our economy will have to connect to these high-speed communications systems in the very near future. These systems will shortly be considered basic infrastructure, like we think of sewer, water and electric lines today. And just like those basic services, the communities and states that have high-speed access will get to compete for new jobs and investment, while those that do not will sit on the sidelines.

Therefore, Michigan cannot, in any way, settle for a below average or even average communications infrastructure that leaves users stuck without affordable and reliable broadband access. Unfortunately, we are already seeing the consequences of the "have" and "have not" communities in Michigan. Too many people and communities in Michigan cannot access affordable or reliable broadband services. In a few minutes I will identify independent facts that put Michigan behind the average state in high-speed telecommunications service. But even if you believe some groups who argue we are at national averages in terms of broadband deployment, average isn't good enough. Just like fixing up our roads, or investing in new water systems, we need the best telecommunications infrastructure possible, if we are to compete in the new economy.

I admit that not everyone in Michigan, today, realizes how badly they will need this infrastructure. But the day is coming when they will "hit a brick wall" and find that accessing the internet over a regular phone line just doesn't cut it anymore. There are many businesses trying to conduct e-commerce, students trying to take on-line advance placement courses or medical professionals trying to offer better medical diagnostics who already understand this problem. Just like when the interstate highways were built or the first phone lines were installed, you want your community to be among the first in line. You don't want to be left behind.

The MEDC's Executive Committee recognized over a year ago that high-speed telecommunications was going to be a critical economic infrastructure issue for Michigan. That resulted in the MEDC issuing the LinkMichigan report this past May - which included input from more than 60 organizations and stakeholder groups across the state.

LinkMichigan called for action in four fundamental areas:

1. Creating a common statewide fee and permit system;

2. Aggregating state and other public purchasing of telecommunications services to leverage more investment in the state's backbone infrastructure;

3. Supporting the development of local telecommunications strategies; and

Note: The MEDC has already had nearly a dozen multi-county regions indicate that they will be submitting planning grant requests since our December 4th kick-off. If affordable and reliable access isn't an issue, we would not have this type of response.

4. Providing better information on current and planned telecommunications service.

Due, in part, to the weakness of the telecommunications financial markets, however, the Governor felt that with the pullback in investments by most major telecommunications carriers in Michigan, we needed to go even further than the Link Michigan Report. His proposal to provide stability and greater resources for providers to expand and improve service to all regions of the state is before you today.

I am going to let others speak to the specifics of the Michigan Hi-Speed Internet Plan, but if you look at the preliminary results of our mapping efforts, you will get a better sense of why the Governor feels more needs to be done.

These maps don't tell the whole story in terms of access. For example, there are very costly T-1 and wireless solutions available in many areas. Nonetheless, these maps begin to paint a picture of concern. In general, the farther you move away from a point of presence you see on the backbone map, the more costly services are and the stronger the likelihood that services might not even be available.

DSL coverage is limited to very narrow areas around the state. In fact, to get such service, you have to be within 12,000 feet of a central office switch that has DSL capability. And even if your district appears to have plenty of bandwidth in one of the shaded areas, many of these areas only have one provider. A monopoly provider does not always deliver "affordable and reliable" service. Communities that have multiple networks and multiple Internet Service Providers, have dramatically lower cost and service complaints.

You quickly realize by looking at these maps that high-speed telecommunications infrastructure is both a rural and an urban problem. Saying that your community is in good shape if your telephone exchange has "access" to broadband service is like

saying your community is in good shape if an interstate highway runs through it. Unless you have a road that gets you to the interstate, that highway doesn't do you a whole lot of good. That is why organizations like the U.S. Telecommunications Association (USTA) whose members are, in essence, the same as the Telecommunications Association of Michigan's (TAM's) have testified in Washington over and over again that broadband deployment is not happening fast enough. To quote from their very own website they say the following:

> "The Internet promises to be the "growth engine" that propels the American economy into the 21st century. It is changing the way we do business, how we educate our children, and is connecting hospitals so they can share valuable information that can save lives. However, if the Internet is going to continue to thrive, broadband capabilities must be allowed to be deployed on an expedited basis."

Some claim that broadband service options are "available everywhere in Michigan." If cost isn't an issue—then "technically" perhaps they are available. But, from a practical standpoint, they are out of reach of the average citizen or small business. For example, if you are within 5 miles of a major point of presence and are willing to sign a 5-year contract, T-1 service will cost roughly $300 to $400 a month plus an activation charge. If you prefer a month-to-month contract that cost goes up to $900 to $1100 a month. If you are 250 miles away from the central connection point, a 5-year contract will likely cost between $3,500 and $4,000 per month if not more. If you want month-to-month service and are 250 miles away, costs approach $8,000 to $9,000 per month, along with a hefty activation charge. And, none of this includes an Internet Service Provider (ISP) charge, averaging roughly $400 per month that would go along with these fees. These are general estimates on pricing. Each customer will have unique circumstances that can alter such costs. But the reality is that alternatives aren't really options if you can't afford them.

In closing, I want to highlight several recent studies and reports that collectively tell us just how big a problem we face:

1. The automotive sector, Michigan's number one industry, is going to require virtually every company doing business in or with the sector to do so using e-commerce. In fact, within 2 years, 70% of ALL auto suppliers will be "required" to conduct broadband-dependent activities such as computer-aided design. Today only 15% are required to do so. A dial-in system will NOT work for such activities (nor will DSL or Cable Modem service in many instances). There are literally thousands of these manufacturers and engineering firms scattered all across the state. Looking at our infrastructure maps and the current rate of investment, one has to question whether the market will respond as fast as this demand grows.

2. Michigan is 37th in the nation in the percentage of families and small businesses using high-speed lines. A strong indicator of the lack of service or access.

3. Michigan is 40th in the nation in K-12 schools with high-speed access.

4. Michigan is 51st, or dead last, in investment per phone line.

5. Michigan's largest incumbent carrier announced plans to halt its broadband deployment program.

6. While Michigan ranks 10th in the number of fiber optic miles of cabling, we rank 24th in the growth of **deployed** broadband (high speed) lines.

7. Michigan has no city in the top tier of "most wired cities" list that measures competitive choice and broadband affordability among the top 50 most populated Metropolitan Statistical Areas (MSAs) in the country (Detroit MSA ranks 38th).

8. Cable Modem availability in Michigan is slightly above the national average.

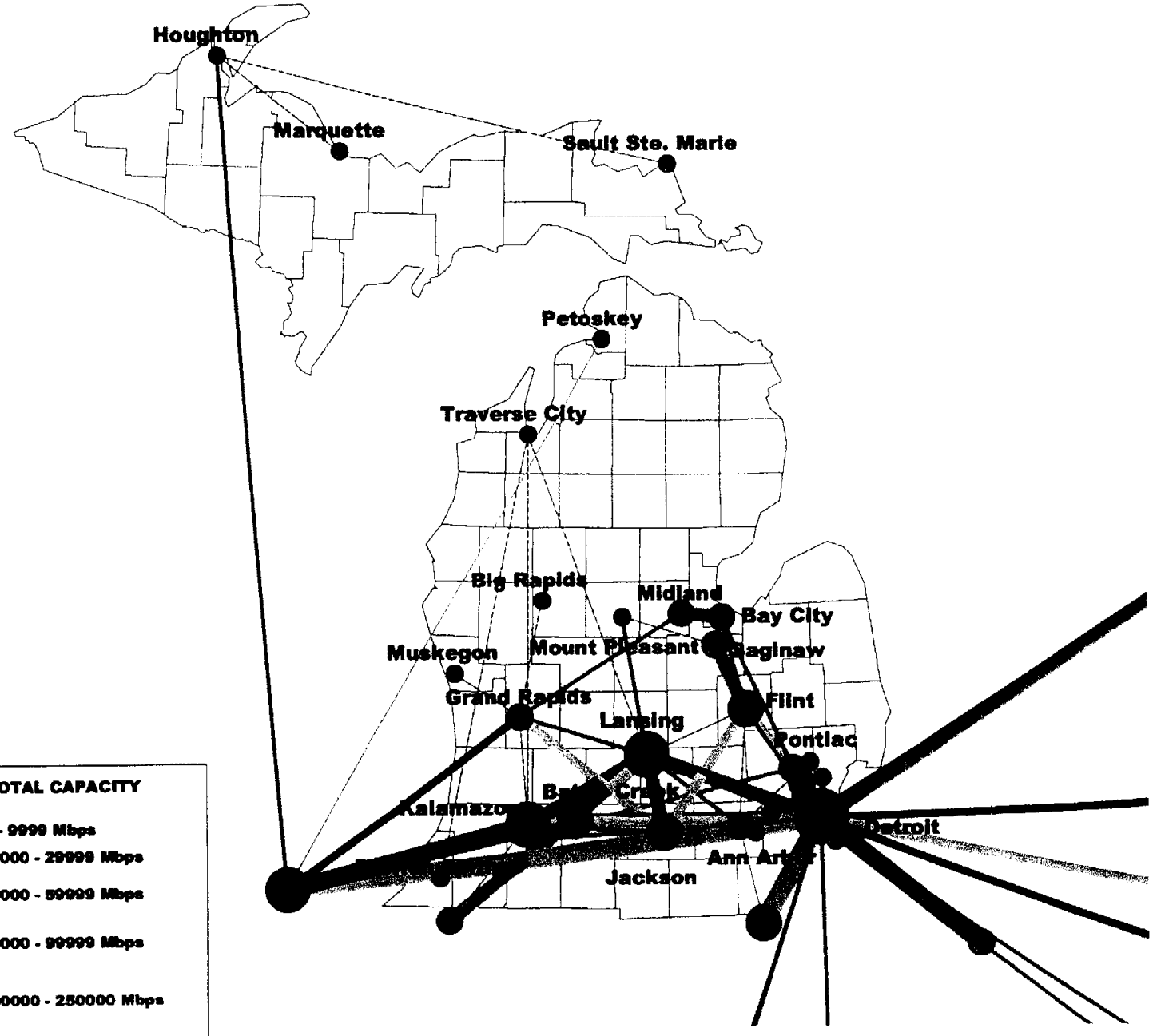
9. DSL availability in Michigan is below national averages.

The facts say we are average at best. We have learned the hard way that to grow our economy, average isn't good enough. If our state doesn't take steps now to make certain that every community, urban or rural, has affordable and reliable access to high-speed telecommunications, we will have no one but ourselves to blame for failing to compete effectively in the future.

Thank you Mr. Chairman.

Primary Network Backbone
State Of Michigan
January 2002

technology policy group
an OSC Initiative



	CITY TOTAL CAPACITY	
17	Ann Arbor	22699
9	Battle Creek	43110
6	Bay City	22488
1	Berrien Springs	45
1	Big Rapids	45
6	Birmingham	22488
1	Dearborn	45
64	Detroit	203196
10	Flint	31469
9	Grand Rapids	12668
3	Houghton	180
6	Jackson	31289
14	Kalamazoo	62778
15	Lansing	73406
1	Marquette	45
3	Midland	11244
2	Mount Pleasant	200
1	Muskegon	45
1	Petoskey	45
1	Plymouth	622
3	Pontiac	20622
1	Portage	155
1	Rochester	45
5	Saginaw	20712
1	Sault Sainte Marie	45
1	Southfield	8
3	Sterling Heights	1866
3	Traverse City	96
1	Ypsilanti	45

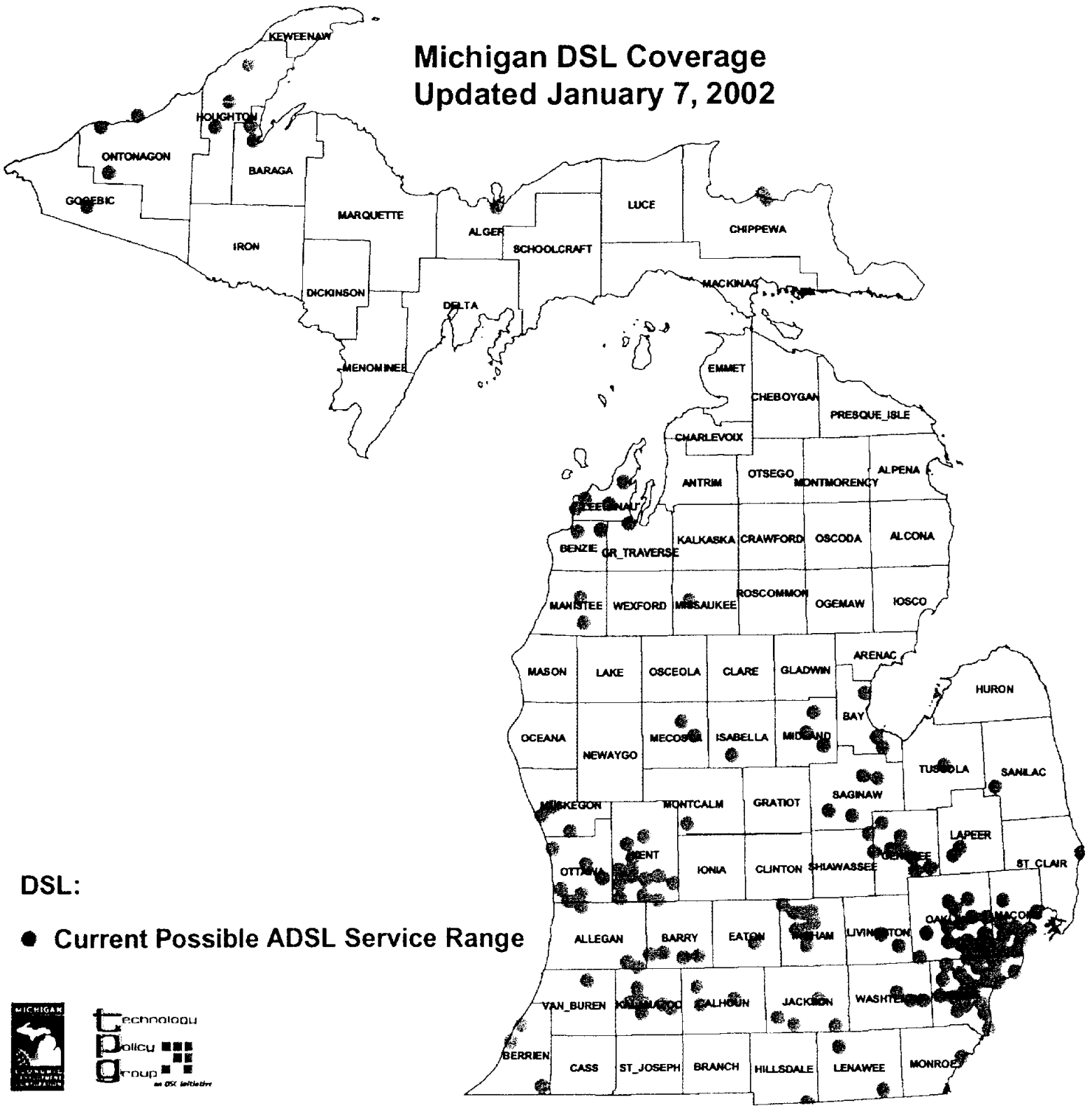
# of Connections and
Total Bandwidth in Mbps for each city

LINE CONNECTIVITY

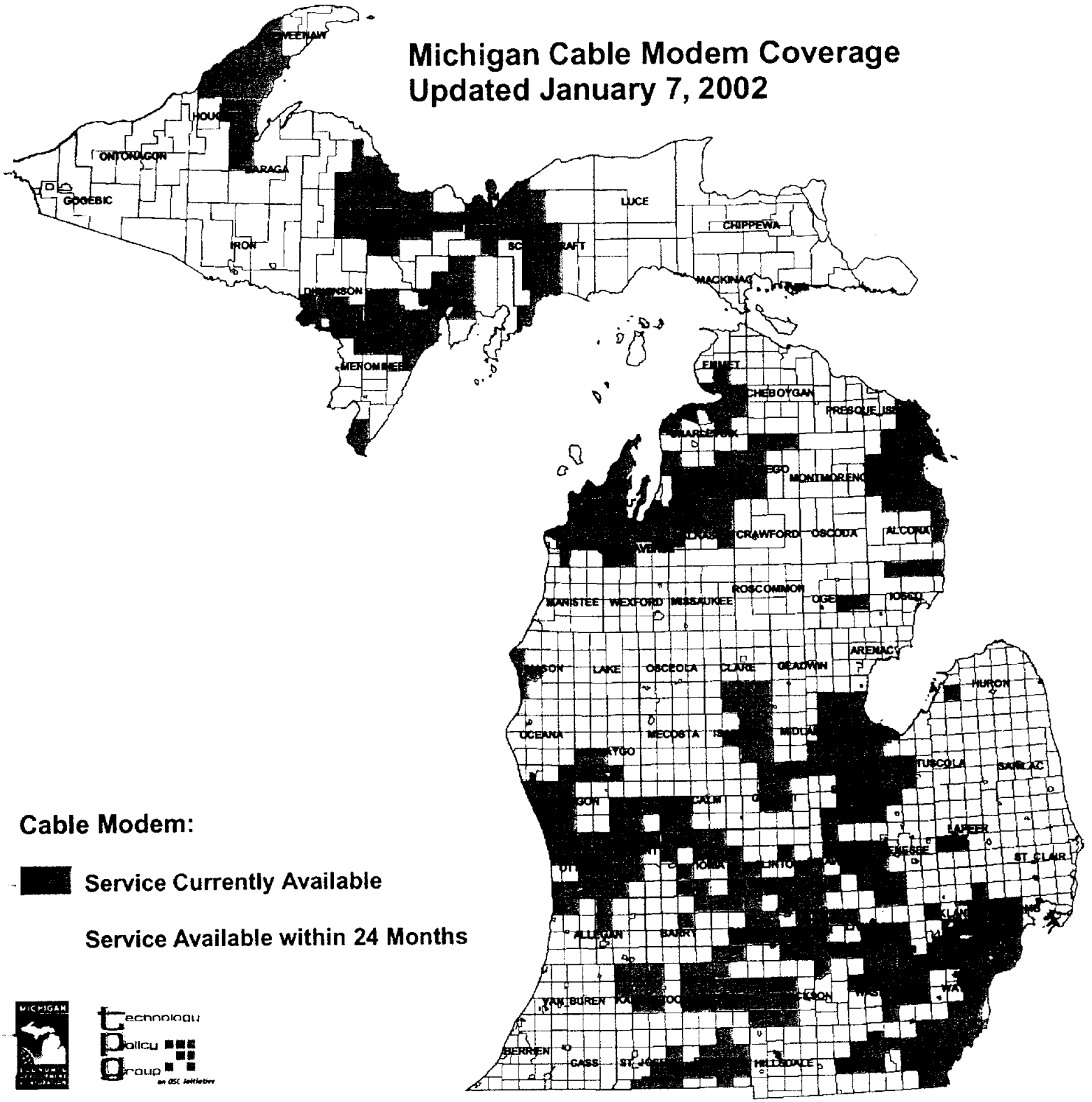
- 1 - 45 Mbps
- 45 - 1000 Mbps
- 1000 - 5000 Mbps
- 5000 - 10000 Mbps
- 10000 - 20000 Mbps
- 20000 - 35000 Mbps
- 35000 - 50000 Mbps
- Merit Network

CITY TOTAL CAPACITY

- 1 - 9999 Mbps
- 10000 - 29999 Mbps
- 30000 - 59999 Mbps
- 60000 - 99999 Mbps
- 100000 - 250000 Mbps


Michigan DSL Coverage
Updated January 7, 2002
KEWEENAW
HOUGHTON
ONTONAGON
BARAGA
GOGEBIC
MARQUETTE
IRON
ALGER
SCHOOLCRAFT
LUCE
CHIPPEWA
DICKINSON
DELTA
MENOMINEE
MACKINAC
EMMET
CHEBOYGAN
PRESQUE_ISLE
CHARLEVOIX
ANTRIM
OTSEGO
MONTMORENCY
ALPENA
BENZIE
GR_TRAVERSE
KALKASKA
CRAWFORD
OSCODA
ALCONA
MANISTEE
WEXFORD
MISSAUKEE
ROSCOMMON
OGEMAW
IOSCO
MASON
LAKE
OSCEOLA
CLARE
GLADWIN
ARENAC
HURON
OCEANA
NEWAYGO
MECOSTA
ISABELLA
MIDLAND
BAY
TUSCOLA
SANILAC
MUSKEGON
MONTCALM
GRATIOT
SAGINAW
LAPEER
OTTAWA
KENT
IONIA
CLINTON
SHIAWASSEE
ST_CLAIR
ALLEGAN
BARRY
EATON
LIVINGSTON
MACOMB
VAN_BUREN
CALHOUN
JACKSON
BERRIEN
CASS
ST_JOSEPH
BRANCH
HILLSDALE
LENAWEE
MONROE
DSL:
Current Possible ADSL Service Range
MICHIGAN
technology
policy
group

Michigan Cable Modem Coverage
Updated January 7, 2002



Cable Modem:

Service Currently Available

Service Available within 24 Months

MICHIGAN

technology policy group
an OSC initiative

EXHIBIT G

MICHIGAN MUNICIPAL LEAGUE
A CENTURY OF COOPERATION

QUESTIONS AND ANSWERS ABOUT TELECOMMUNICATIONS RIGHT OF WAY FEES AND SB 880

CURRENT LAW

1. **Q. What is the purpose of a right of way fee?**

   A. The right of way fee reimburses municipalities for costs incurred for the use of the right of way attributable to telecommunications providers.

2. **Q. What does current law provide?**

   A. Article 7, Section 29 of the state constitution permits local governments "reasonable" control of the use of their public rights of way. The telecommunications act permits a municipality to recover "fixed and variable costs." However there is anything but consensus on how to compute those costs.

3. **Q. Why shouldn't these costs be paid from taxes paid by everyone-- including providers?**

   A. Telecommunication providers are different than taxpayers in general because they are for profit companies permanently occupying public property for the purpose of conducting their business. While other for profit entities, such as common carriers, use the same public property, that use is the same as the public in general- they drive on it, but they don't dig and build on it.

4. **Q. Who is paying fees now?**

A. Agreements are currently in place, but mainly for new providers representing a distinct minority of lines. Not infrequently, however, providers have opted not to pay under the agreements they have signed. In addition, cable operators are including revenues from the provision of broadband cable modem internet service in calculating cable franchise fee payments.

5 **Q. What is the basis for providers representing the majority of lines not entering into agreements?**

A. These providers claim that an 1883 statute gives them "grandfathered" franchise rights that override the requirement of the State Constitution of 1908 to obtain a local franchise. However, many believe that this statute, while providing some right to be in the right of way, does not bar the imposition of fees for the use of the right of way.

6. **Q. What is the range of fees provided for in current agreements?**

A. The first chart summarizes agreements identified by survey. While the results are representative, they do not constitute the universe of agreements. Of 197 agreements providing for fees on a per foot basis, the average was 30 cents per foot, with about two-thirds of the agreements falling in the 21-40 cents per foot range. An additional 34 agreements are based on a percentage of gross revenue, with the most common rate at 1%.

SB 880

7. **Q. What is the fee imposed by SB 880?**

A. S-1 sets the fee at 5 cents per linear foot, and is applicable to all providers including those claiming a possible exemption under the 1883 law.

8. **Q. How is the fee collected and distributed?**

A. The bill sets up an authority to collect the fee, relying on the provisions of Article 7, Section 27 of the State Constitution, which permits the establishment of metropolitan forms of government for specific purposes. It is paid to the authority rather than each municipality. Eighty percent of the fee is distributed to municipalities and 20 percent to the authority created under SB 881.

9. **Q. For what purpose may the local share of the fee be used?**

A. S-1 specifically provides that the fee may be used *only* for rights of way purposes.

10. **Q. How will current local revenues compare to those that may be received under SB 880?**

A. Amounts paid or receivable by municipalities currently amount to about $11.5 million annually . This total includes cable modem fees, amounts paid or receivable under agreements and application and engineering fees. With the exception of some application fees capped at $500, all of these revenues will be replaced by an estimated $40 million generated from the 5 cent per linear foot right of way fee. A comparison of these revenues is shown in the attached chart.

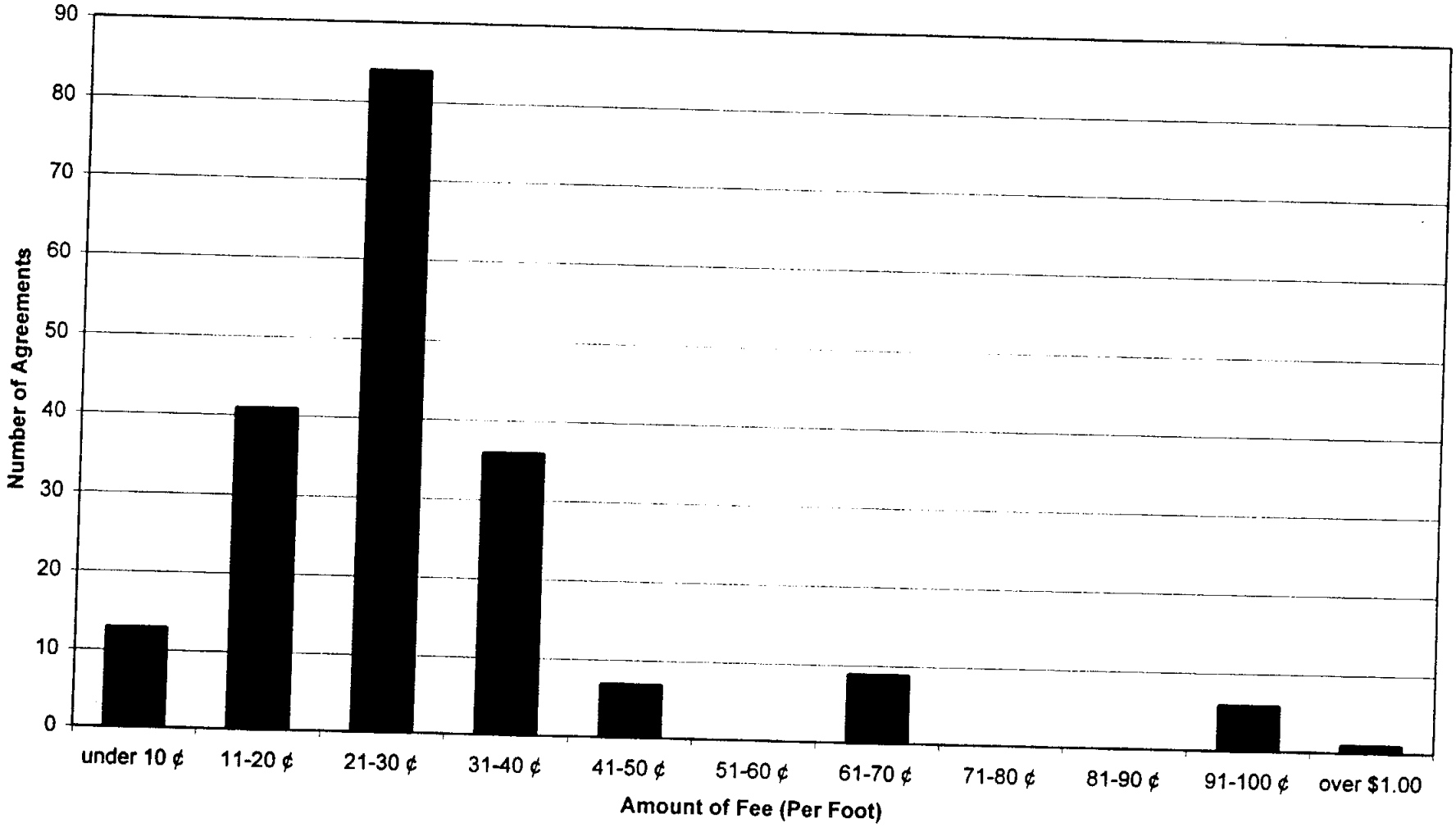
11. **Q. What happens if a court rules that the 1883 statute means that those claiming a grandfather status don't have to pay?**

A. The bill provides that no fees are collected under the bill, and the situation reverts back to previous law.

12. **Q. For those providers who aren't paying now, isn't this an increase?**

A. If a snapshot were taken today, yes. However, local governments do not agree with the "grandfathering" claims and are likely to pursue these providers under current law, and may be successful. SB 880 creates a level playing field by requiring providers to pay for costs associated with their use of public property- instead of municipal taxpayers. Whether providers pass the charge on to subscribers is limited by the bill and also, ultimately, is a business decision.

Per Foot Fees
Number of Agreements by Amount



COMPARISON OF LOCAL REVENUES FROM MAINLY NEW TELECOMMUNICATIONS PROVIDERS WITH A SMALL MINORITY OF LINES UNDER CURRENT LAW AND ALL TELECOMMUNICATIONS PROVIDERS UNDER SB 880 (millions of dollars)

	CURRENT LAW	SB 880
CABLE MODEM FRANCHISE FEES	$ 5.0	eliminated
REVENUE PAID OR PROVIDED FOR IN AGREEMENTS - SOME PROVIDERS	$ 4.5	eliminated
ENGINEERING AND APPLICATION FEES	$ 1.5	virtually eliminated
STATUTORY FEE- ALL PROVIDERS		$ 40.0
TOTAL	$ 11.5	$ 40.0

EXHIBIT H

_____

Name of Local unit of government

APPLICATION FOR ACCESS TO AND ONGOING USE OF PUBLIC WAYS BY TELECOMMUNICATIONS PROVIDERS UNDER MICHIGAN TELECOMMUNICATIONS ACT MCLA SECTIONS 484.2251 TO 484.2254

BY

[Name of Company]
("APPLICANT")

Unfamiliar with MTA?--Assistance: Municipalities unfamiliar with Michigan Telecommunications Act ("MTA") permits for telecommunications providers should seek assistance, such as by contacting the Communications Division of the Michigan Public Service Commission at 517-241-6210 or via its web site at http://www.cis.state.mi.us/mpsc/comm/rightofway/rightofway.htm.

90 Days to Act—Fines for Failure to Act: The MTA states that "A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place." The Michigan Public Service Commission can impose fines of up to $40,000 per day for violations of the MTA. It has imposed fines where it found providers or municipalities violated the MTA.

Where to File: Applicants should file copies as follows [municipalities should adapt as appropriate—unless otherwise specified service should be as follows]:

-- Three (3) copies (one of which shall be marked and designated as the master copy) with the Clerk at [insert address].

_____

_____

Name of local unit of government

APPLICATION FOR
ACCESS TO AND ONGOING USE OF PUBLIC WAYS BY
TELECOMMUNICATIONS PROVIDERS

By
[Name of Company]
("APPLICANT")

This is an application pursuant to Sections 251 through 254 of the Michigan Telecommunications Act amendments of 1995 (MCL §§ 484.2251 to 484.2254) for access to and ongoing usage of the public rights-of-way, including public streets, sidewalks, easements, highways, and alleys ("Public Ways") in Municipality for a telecommunications system. The Michigan Telecommunications Act states that "A local unit of government shall approve or deny access under this section [251] within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place."

Applicant is responsible for reimbursing Municipality's costs of reviewing and processing this application, whether or not a telecommunications permit is approved.

1 GENERAL INFORMATION

1.1 Date: _____

1.2 Applicant's legal name: _____
Mailing Address: _____
_____
_____

Telephone Number: _____
Fax Number: _____
Corporate website: _____

Name and title of Applicant's local manager (and if different) contact person regarding this application:

_____

Mailing Address: _____

_____

_____

Telephone Number: _____

Fax Number: _____

E-mail Address: _____

1.3 Type of Entity: (Check one of the following)

_____ Corporation
_____ General Partnership
_____ Limited Partnership
_____ Limited Liability Company
_____ Individual
_____ Other, please describe: _____

1.4 Assumed name for doing business, if any: _____

1.5 Description of Entity:

1.5.1 Jurisdiction of incorporation/formation:
1.5.2 Date of incorporation/formation:
1.5.3 If a subsidiary, name of ultimate parent company:
1.5.4 Chairperson; President/CEO, Secretary and Treasurer (and equivalent officials for non-corporate entities).

1.6 Attach copies of Applicant's most recent annual report (with state ID number) filed with the Michigan Department of Consumer and Industry Services and certificate of good standing with the State of Michigan. For entities in existence for less than one year and for non-corporate entities, provide equivalent information.

1.7 Is Applicant aware of any present or potential conflicts of interest between Applicant and Municipality. If yes, describe:

_____

_____.

1.8 In the past three (3) years, has Applicant had a permit to install telecommunications facilities in public rights of way revoked by any Michigan municipality?
Circle: Yes No

If "yes," please describe the circumstances

1.9 In the past three (3) years, has an adverse finding been made or an adverse final action been taken by any Michigan court or administrative body against Applicant under any law or regulation related to the following:

1.9.1 A felony;

1.9.2 A revocation or suspension of any authorization (including cable franchises) to provide telecommunications or video programming services;

Circle: Yes No

If "yes," please attach a full description of the parties and matters involved, including an identification of the court or administrative body and any proceedings (by dates and file numbers, if applicable), and the disposition of such proceedings.

1.10 [If Applicant has been granted and currently holds a license to provide basic local exchange service no financial information needs to be supplied.] (a) If publicly held, provide Applicant's most recent financial statements. If financial statements of a parent company of Applicant (or other affiliate of Applicant) are provided in lieu of those of Applicant, please explain.

1.10.1 If privately held, and if Municipality requests the information within 10 days of the date of this Application, the Applicant and the Municipality should make arrangements for the Municipality to review the financial statements.

If no financial statements are provided, please explain and provide particulars.

---

2 DESCRIPTION OF PROJECT:

2.1 Provide a copy of authorizations, if applicable, Applicant holds to provide telecommunications services in Municipality. If no authorizations are applicable, please explain.

2.2 Describe in plain English how Municipality should describe to the public the telecommunications services to be provided by Applicant and the telecommunications facilities to be installed by Applicant in the Public Ways.

2.3 Attach maps/plans showing the location (including whether overhead or underground) of Applicant's facilities in the public right-of-way. To the extent known please identify the side of the street on which the facilities will be located. (If

construction approval is sought at this time, provide engineering drawings, if available, showing location and depth, if applicable, of facilities to be installed in the public right-of-way).

2.4 Please provide an anticipated or actual construction schedule.

2.5 Please list all organizations and entities which will have any ownership interest in the facilities proposed to be installed in the Public Ways.

2.6 Who will be responsible for maintaining the facilities Applicant places in the Public Ways and how are they to be promptly contacted? If Applicant's facilities are to be installed on or in existing facilities in the Public Ways of existing public utilities or incumbent telecommunications providers, describe the facilities to be used, and provide verification of their consent to such usage by Applicant.

3 TELECOMMUNICATION PROVIDER ADMINISTRATIVE MATTERS:

Please provide the following or attach an appropriate exhibit.

3.1 Address of Applicant's nearest local office:

3.2 Location of all records and engineering drawings, if not at local office:

3.3 Names, titles, addresses, e-mail addresses and telephone numbers of contact person(s) for Applicant's engineer or engineers and their responsibilities for the telecommunications system:

3.4 Provide evidence of self-insurance or a certificate of insurance showing Applicant's insurance coverage, carrier and limits of liability for the following:

3.4.1 Worker's compensation;

3.4.2 Commercial general liability, including at least:

3.4.2.1 Combined overall limits:

3.4.2.2 Combined single limit for each occurrence of bodily injury;

3.4.2.3 Personal injury;

3.4.2.4 Property damage;

3.4.2.5 Blanket contractual liability for written contracts, products, and completed operations;

3.4.2.6 Independent contractor liability;

3.4.2.7 For any non-aerial installations, coverage for property damage from perils of explosives, collapse, or damage to underground utilities (known as XCU coverage).

3.4.3 Automobile liability covering all owned, hired, and non-owned vehicles used by Applicant, its employee, or agents.

3.5 Names of all anticipated contractors and subcontractors involved in the construction, maintenance and operation of Applicant's facilities in the Public Ways:

4 SECTION 4: CERTIFICATION:

All the statements made in the application and attached exhibits are true and correct to the best of my knowledge and belief.

NAME OF ENTITY ("APPLICANT")

_____

_____
Date

By: _____
Type or Print Name: _____

_____
Title

EXHIBIT I

RIGHT-OF-WAY
TELECOMMUNICATIONS PERMIT

TERMS AND CONDITIONS

1 Definitions

1.1 Company shall mean _____ [type of entity] organized under the laws of the State of _____ whose address is _____.

1.2 Effective Date shall mean the date set forth in Part 13.

1.3 Manager shall mean Municipality's [Mayor/Manager/Supervisor/Village President] or his or her designee.

1.4 MTA shall mean Act No. 179 of the Public Acts of 1991, as amended.

1.5 Municipality shall mean _____ a Michigan municipal corporation.

1.6 Permit shall mean this document.

1.7 Public Rights-of-Way shall mean all public rights-of-way, streets, highways, bridges and alleys in Municipality to the extent Municipality has the ability to grant the rights set forth herein.

1.8 Telecommunications Services shall mean "telecommunications services" (as such term is defined in the MTA) but shall not include "cable service" as defined in Title VI of the Federal Communications Act of 1934, 47 U.S.C. § 522 (6).

1.9 Telecommunications System shall mean Company's lines, poles and related facilities in Municipality which it uses to provide Telecommunications Services, but shall not include a "cable system" as defined in Title VI of the Federal Communications Act of 1934, 47 U.S.C. § 522 (7).

1.10 Term shall have the meaning set forth in Part 7.

2 Grant

2.1 Municipality hereby grants a permit under the MTA to Company for access to and ongoing use of the Public Rights-of-Way to construct, install and maintain a Telecommunications System in those portions of the Public Rights-of-Way identified on Exhibit A on the terms set forth herein.

2.1.1 Exhibit A may be modified by written request by Company and approval by Manager.

2.1.2 Manager shall not unreasonably condition or deny any request for a modification of Exhibit A. Any decision of Manager on a request for a modification may be appealed by Company to Municipality's legislative body.

2.2 Overlashing. Company shall not allow the wires or any other facilities of a third party to be overlashed to the Telecommunications System without Municipality's prior written consent. Municipality's right to withhold written consent is subject to the authority of the Michigan Public Service Commission under Section 361 of the MTA.

2.3 Nonexclusive. The rights granted by this Permit are nonexclusive. Municipality reserves the right to approve, at any time, additional permits for access to and ongoing usage of the Public Rights-of-Way by telecommunications providers and to enter into agreements for use of the Public Rights-of-Way with and grant franchises for use of the Public Rights-of-Way to telecommunications providers, cable companies, utilities and other providers.

3 Contacts, As-Built Plans

3.1 Company Contacts. The names, addresses and the like for engineering and construction related information for Company and its Telecommunications System are as follows:

3.1.1 The address, phone number and contact person (title or name) at Company's local office (in or near Municipality) is _____.

3.1.2 If Company's engineering drawings, as-built plans and related records for the Telecommunications System will not be located at

the preceding local office, the location address, phone number and contact person (title or department) for them is _____.

3.1.3 The name, title, address, e-mail address and telephone numbers of Company's engineering contact person(s) with responsibility for the design, plans and construction of the Telecommunications System is _____.

3.1.4 The address, phone number and contact person (title or department) at Company's home office/regional office with responsibility for engineering and construction related aspects of the Telecommunications System is _____.

3.1.5 Company shall at all times provide Manager with the phone number at which a live representative of Company (not voice mail) can be reached 24 hours a day, seven days a week, in the event of a public emergency.

3.1.6 The preceding information is accurate as of the Effective Date. Company shall notify Municipality in writing as set forth in Part 12 of any changes in the preceding information.

3.2 As-Built Plans. If Municipality maintains a file of as-built drawings of facilities in the Public Rights-of-Way, and Municipality indicates below that it desires such drawings, without expense to Municipality, Company shall provide Municipality with "as-built" maps, records and plans showing the Telecommunications System in the Public Rights-of-Way. The "as built" maps, records and plans shall be provided within thirty (30) days of the completion of the Telecommunications System and of any extensions, additions, or modifications to the Telecommunications System. This provision shall have prospective application only to construction performed after the issuance of this Permit.

___ (Check if Municipality maintains a file of as-built drawings and wishes Company to furnish as-built drawings when Telecommunication System is completed.)

3.3 Company, without expense to Municipality, shall, upon forty-eight (48) hours notice, give Municipality access to all "as-built" maps, records, plans and specifications showing the Telecommunications System or portions thereof in the Public Rights-of-Way. Upon request by Municipality,

Company shall inform Municipality as soon as reasonably possible of any changes from previously supplied maps, records, or plans and shall mark up maps provided by Municipality so as to show the location of the Telecommunications System.

4 Use of Public Rights-of-Way

4.1 No Burden on Public Rights-of-Way. Company, its contractors, subcontractors, and the Telecommunications System shall not unduly burden or interfere with the present or future use of any of the Public Rights-of-Way. Company's aerial cables and wires shall be suspended so as to not endanger or injure persons or property in or about the Public Rights-of-Way. If Municipality reasonably determines that any portion of the Telecommunications System constitutes an undue burden or interference, due to changed circumstances, Company, at its sole expense, shall modify the Telecommunications System or take such other actions as Municipality may determine is in the public interest to remove or alleviate the burden, and Company shall do so within a reasonable time period. Municipality shall attempt to require all occupants of a pole or conduit whose facilities are a burden to remove or alleviate the burden concurrently.

4.2 No Priority. This Permit does not establish any priority of use of the Public Rights-of-Way by Company over any present or future permittees or parties having agreements with Municipality or franchises for such use. In the event of any dispute as to the priority of use of the Public Rights-of-Way, the first priority shall be to the public generally, the second priority to Municipality, the third priority to the State of Michigan and its political subdivisions in the performance of their various functions, and thereafter as between other permit, agreement or franchise holders, as determined by Municipality in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.

4.3 Restoration of Property. Company, its contractors and subcontractors shall immediately (subject to seasonal work restrictions) restore, at Company's sole expense, in a manner approved by Municipality, any portion of the Public Rights-of-Way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the Telecommunications System to a reasonably equivalent (or, at Company's option, better) condition as that which existed prior to the disturbance. In the event that Company, its contractors or subcontractors fail to make such

repair within a reasonable time Municipality may make the repair and Company shall pay the costs Municipality incurred for such repair.

4.4 Marking. Company shall mark the Telecommunications System as follows: Aerial portions of the Telecommunications System shall be marked with a marker on Company's lines on alternate poles which shall state Company's name and provide a toll-free number to call for assistance. Direct buried underground portions of the Telecommunications System shall have (1) a conducting wire placed in the ground at least several inches above Company's cable (if such cable is nonconductive); (2) at least several inches above that, a continuous colored tape with a statement to the effect that there is buried cable beneath; and (3) stakes or other appropriate aboveground markers with Company's name and a toll-free number indicating that there is buried telephone cable below. Bored underground portions of the Telecommunications System shall have a conducting wire at the same depth as the cable and shall not be required to provide the continuous colored tape. Portions of the Telecommunications System located in conduit, including conduit of others used by Company, shall be marked at its entrance into and exit from each manhole and handhole with Company's name and a toll-free telephone number.

4.5 Tree Trimming. Company may trim trees upon and overhanging the Public Rights-of-Way so as to prevent the branches of such trees from coming into contact with the Telecommunications System, consistent with any standards adopted by Municipality. Company shall dispose of all trimmed materials. Company shall minimize the trimming of trees to that essential to maintain the integrity of the Telecommunications System. Except in emergencies, all trimming of trees in the Public Rights-of-Way shall have the advance approval of Manager.

4.6 Installation and Maintenance. The construction and installation of the Telecommunication System shall be performed pursuant to plans approved by Municipality. The open cut of any Public Right-of-Way shall be coordinated with the Manager or his designee. Company shall install and maintain the Telecommunications System in a reasonably safe condition. If the existing poles in the Public Rights-of-Way are overburdened or unavailable for Company's use, or the facilities of all users of the poles are required to go underground then Company shall, at its expense, place such portion of its Telecommunications System underground, unless Municipality approves an alternate location. Company may perform maintenance on the Telecommunications System without prior approval of

Municipality, provided that Company shall obtain any and all permits required by Municipality in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by Municipality.

4.7 Pavement Cut Coordination. Company shall coordinate its construction and all other work in the Public Rights-of-Way with Municipality's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing").

4.7.1 The goals of such coordination shall be to encourage Company to conduct all work in the Public Rights-of-Way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by Municipality.

4.8 Compliance with Laws. Company shall comply with all laws, statutes, ordinances, rules and regulations regarding the construction, installation, and maintenance of its Telecommunications System, whether federal, state or local, now in force or which hereafter may be promulgated. Before any installation is commenced, Company shall secure all necessary permits, licenses and approvals from Municipality or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. Municipality shall not unreasonably delay or deny issuance of any such permits, licenses or approvals. Company shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition adopted by Michigan Public Service Commission) and the National Electric Code (latest edition). Company shall comply with all zoning and land use ordinances and historic preservation ordinances as may exist or may hereafter be amended. This section does not constitute a waiver of Company's right to challenge laws, statutes, ordinances, rules or regulations now in force or established in the future.

4.9 Street Vacation. If Municipality vacates or consents to the vacation of Public Rights-of-Way within its jurisdiction, and such vacation necessitates the removal and relocation of Company's facilities in the vacated right-of-way, Company shall, as a condition of this Permit, consent to the vacation and remove its facilities at its sole cost and expense when ordered to do so by Municipality or a court of competent jurisdiction. Company shall relocate its facilities to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards.

4.10 Relocation. If Municipality requests Company to relocate, protect, support, disconnect, or remove its facilities because of street or utility work, or other public projects, Company shall relocate, protect, support, disconnect, or remove its facilities, at its sole cost and expense, including where necessary to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.

4.11 Public Emergency. Municipality shall have the right to sever, disrupt, dig-up or otherwise destroy facilities of Company if such action is necessary because of a public emergency. If reasonable to do so under the circumstances, Municipality shall attempt to provide notice to Company. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. Company shall be responsible for repair at its sole cost and expense of any of its facilities damaged pursuant to any such action taken by Municipality.

4.12 Miss Dig. If eligible to join, Company shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.

4.13 Underground Relocation. If Company has its facilities on poles of Consumers Energy, Detroit Edison or another electric or telecommunications provider and Consumers Energy, Detroit Edison or such other electric or telecommunications provider relocates its facilities underground, then Company shall relocate its facilities underground in the same location at Company's sole cost and expense.

4.14 Identification. All personnel of Company and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing Company's name, their name and photograph. Company shall account for all identification cards at all times. Every service vehicle of Company and its contractors or subcontractors shall be clearly identified as such to the public, such as by a magnetic sign with Company's name and telephone number.

5 Indemnification

5.1 Indemnity. Company shall defend, indemnify, protect, and hold harmless Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and expenses of any nature (collectively "claim" for this Part 5) (including, without limitation, attorneys' fees) arising out of or resulting from the acts or omissions of Company, its officers, agents, employees, contractors, successors, or assigns, but only to the extent such acts or omissions are related to the Company's use of or installation of facilities in the Public Rights-of-Way and only to the extent of the fault or responsibility of Company, its officers, agents, employees, contractors, successors and assigns.

5.2 Notice, Cooperation. Municipality shall notify Company promptly in writing of any such claim and the method and means proposed by Municipality for defending or satisfying such claim. Municipality shall cooperate with Company in every reasonable way to facilitate the defense of any such claim. Municipality shall consult with Company respecting the defense and satisfaction of such claim, including the selection and direction of legal counsel.

5.3 Settlement. Municipality shall not settle any claim subject to indemnification under this Part 5 without the advance written consent of Company, which consent shall not be unreasonably withheld. Company shall have the right to defend or settle, at its own expense, any claim against Municipality for which Company is responsible hereunder.

6 Insurance

6.1 Coverage Required. Prior to beginning any construction in or installation of the Telecommunications System in the Public Rights-of-Way Company shall obtain insurance as set forth below and file certificates evidencing same with Municipality. Such insurance shall be maintained in full force and effect until the end of the Term. In the alternative, Company may satisfy this requirement through a program of self-insurance, acceptable to Municipality, by providing reasonable evidence of its financial resources to Municipality. Municipality's acceptance of such self-insurance shall not be unreasonably withheld.

6.1.1 Commercial general liability insurance, including Completed Operations Liability, Independent Contractors Liability, Contractual Liability coverage, railroad protective coverage and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage, in an amount not less than Five Million Dollars ($5,000,000).

6.1.2 Liability insurance for sudden and accidental environmental contamination with minimum limits of Five Hundred Thousand Dollars ($500,000) and providing coverage for claims discovered within three (3) years after the term of the policy.

6.1.3 Automobile liability insurance in an amount not less than One Million Dollars ($1,000,000).

6.1.4 Workers' compensation and employer's liability insurance with statutory limits, and any applicable Federal insurance of a similar nature.

6.1.5 The coverage amounts set forth above may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated. If more than one insurance policy is purchased to provide the coverage amounts set forth above, then all policies providing coverage limits excess to the primary policy shall provide drop down coverage to the first dollar of coverage and other contractual obligations of the primary policy, should the primary policy carrier not be able to perform any of its contractual obligations or not be collectible for any of its coverages for any reason during the Term, or (when longer) for as long as coverage could have been available pursuant to the terms and conditions of the primary policy.

6.2 Additional Insured. Municipality shall be named as an additional insured on all policies (other than worker's compensation and employer's liability). All insurance policies shall provide that they shall not be canceled, modified or not renewed unless the insurance carrier provides thirty (30) days prior written notice to Municipality. Company shall annually provide Municipality with a certificate of insurance evidencing such coverage. All insurance policies (other than environmental contamination, workers' compensation and employer's liability insurance) shall be written on an occurrence basis and not on a claims made basis.

6.3 Qualified Insurers. All insurance shall be issued by insurance carriers licensed to do business by the State of Michigan or by surplus line carriers on the Michigan Insurance Commission approved list of companies qualified to do business in Michigan. All insurance and surplus line carriers shall be rated A+ or better by A.M. Best Company.

6.4 Deductibles. If the insurance policies required by this Part 6 are written with retainages or deductibles in excess of $50,000, they shall be approved by Manager in advance in writing. Company shall indemnify and save harmless Municipality from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished hereunder.

6.5 Contractors. Company's contractors and subcontractors working in the Public Rights-of-Way shall carry in full force and effect commercial general liability, environmental contamination liability, automobile liability and workers' compensation and employer liability insurance which complies with all terms of this Part 6. In the alternative, Company, at its expense, may provide such coverages for any or all its contractors or subcontractors (such as by adding them to Company's policies).

6.6 Insurance Primary. Company's insurance coverage shall be primary insurance with respect to Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions (collectively "them"). Any insurance or self-insurance maintained by any of them shall be in excess of Company's insurance and shall not contribute to it (where "insurance or self-insurance maintained by any of them" includes any contract or agreement providing any type of indemnification or defense obligation provided to, or for the benefit of them, from any source, and includes any self-insurance program or policy, or self-insured retention or deductible by, for or on behalf of them).

7 Term

7.1 Term. The term ("Term") of this Permit shall be until the earlier of:

7.1.1 Fifteen years from the Effective Date; provided, however, that following such initial term there shall be three subsequent renewal terms of five years. Each renewal term shall be automatic unless Municipality notifies Company in writing, at least twelve months

prior to the end of any term then in effect, that due to changed circumstances a need exists to negotiate the subsequent renewal with Company. Municipality shall not unreasonably deny a renewal term.

7.1.2 When the Telecommunications System has not been used to provide Telecommunications Services for a period of one hundred and eighty (180) days by the Company or a successor of an assign of the Company.

7.1.3 When Company, at its election and with or without cause, delivers written notice of termination to Municipality at least one-hundred and eighty (180) days prior to the date of such termination; or

7.1.4 Upon either Company or Municipality giving written notice to the other of the occurrence or existence of a default by the other party under Sections 4.8, 6, 8 or 9 of this Permit and such defaulting party failing to cure, or commence good faith efforts to cure, such default within sixty (60) days (or such shorter period of time provided elsewhere in this Permit) after delivery of such notice; or

7.1.5 Unless Manager grants a written extension, one year from the Effective Date if prior thereto Company has not started the construction and installation of the Telecommunications System within the Public Rights-of-Way and two years from the Effective Date if by such time construction and installation of the Telecommunications System is not complete.

8 Performance Bond or Letter of Credit. Municipality may require Company to post a bond (or letter of credit) as provided in Section 251(3) of Act 179 of the Public Acts of 1991, as amended [MCL § 484.2251(3)].

9 Fees

9.1 The MTA shall control the establishment of right-of-way fees. The parties reserve their respective rights regarding the nature and amount of any fees which may be charged by Municipality in connection with Public Rights-of-Way.

10 Removal

10.1 Removal; Underground. As soon as practicable after the Term, Company

or its successors and assigns shall remove any underground cable or other portions of the Telecommunications System from the Public Rights-of-Way which has been installed in such a manner that it can be removed without trenching or other opening of the Public Rights-of-Way. Company shall not remove any underground cable or other portions of the Telecommunications System which requires trenching or other opening of the Public Rights-of-Way except with the prior written approval of Manager. All removals shall be at Company's sole cost and expense.

10.1.1 For purposes of this Part 10, "cable" means any wire, coaxial cable, fiber optic cable, feed wire or pull wire.

10.2 Removal; Above Ground. As soon as practicable after the Term, Company, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by Manager, remove from the Public Rights-of-Way all above ground elements of its Telecommunication System, including but not limited to poles, pedestal mounted terminal boxes, and lines attached to or suspended from poles.

10.3 Schedule. The schedule and timing of removal shall be subject to approval by Manager. Unless extended by Manager, removal shall be completed not later than twelve (12) months following the Term. Portions of the Telecommunications System in the Public Rights-of-Way which are not removed within such time period shall be deemed abandoned and, at the option of Municipality exercised by written notice to Company as set forth in Part 12, title to the portions described in such notice shall vest in Municipality.

11 Assignment. Company may assign or transfer its rights under this Permit, or the persons or entities controlling Company may change, in whole or in part, voluntarily, involuntarily, or by operation of law, including by merger or consolidation, change in the ownership or control of Company's business, or by other means, subject to the following:

11.1 No such transfer or assignment or change in the control of Company shall be effective under this Permit, without Municipality's prior approval (not to be unreasonably witheld), during the time period from the Effective Date until the completion of the construction of the Telecommunications System in those portions of the Public Rights-of-Way identified on Exhibit A.

11.2 After the completion of such construction, Company must provide notice to

Municipality of such transfer, assignment or change in control no later than thirty (30) days after such occurrence; provided, however,

11.2.1 Any transferee or assignee of this Permit shall be qualified to perform under its terms and conditions and comply with applicable law; shall be subject to the obligations of this Permit, including responsibility for any defaults which occurred prior to the transfer or assignment; shall supply Municipality with the information required under Section 3.1; and shall comply with any updated insurance and performance bond requirements under Section 6 and 8 respectively, which Municipality reasonably deems necessary, and

11.2.2 In the event of a change in control, it shall not be to an entity lacking the qualifications to assure Company's ability to perform under the terms and conditions of this Permit and comply with applicable law; and Company shall comply with any updated insurance and performance bond requirements under Section 6 and 8 respectively, which Municipality reasonably deems necessary.

11.3 Company may grant a security interest in this Permit, its rights thereunder or the Telecommunications System at any time without notifying Municipality.

12 Notices

12.1 Notices. All notices under this Permit shall be given as follows:

12.1.1 If to Municipality, to [address], with a copy to [address].

12.1.2 If to Company, to [address], with a copy to [address].

12.2 Change of Address. Company and Municipality may change its address or personnel for the receipt of notices at any time by giving notice thereof to the other as set forth above.

13 Other items

13.1 No Cable, OVS. This Permit does not authorize Company to provide commercial cable type services to the public, such as "cable service" or the services of an "open video system operator" (as such terms are defined in the Federal Communications Act of 1934 and implementing regulations,

currently 47 U.S.C. §§ 522 (6), 573 and 47 CFR § 76.1500).

13.2 Duties. Company shall faithfully perform all duties required by this Permit.

13.3 Effective Date. This Permit shall become effective when issued by Municipality and Company has provided any insurance certificates and bonds required in Parts 6 and 8, and signed the acceptance of the permit.

13.4 Authority. This Permit satisfies the requirement for a permit under sections 251 to 254 of the MTA.

13.5 Amendment. Except as set forth in Section 2.1 this Permit may be amended by the written agreement of Municipality and Company.

13.6 Interpretation and Severability. The provisions of this Permit shall be liberally construed to protect and preserve the peace, health, safety and welfare of the public, and should any provision or section of this Permit be held unconstitutional, invalid, overbroad or otherwise unenforceable, such determination/holding shall not be construed as affecting the validity of any of the remaining conditions of this Permit. If any provision in this Permit is found to be partially overbroad, unenforceable, or invalid, Company and Municipality may nevertheless enforce such provision to the extent permitted under applicable law.

13.7 Governing Law. This Permit shall be governed by the laws of the State of Michigan.

[Municipality name]

Attest:
By:_____
Clerk

By:_____
Its:_____
Date:_____

"Company accepts the Permit granted by Municipality upon the terms and conditions contained therein."

[Company Name]

By:_____
Its:_____
Date:_____

Exhibit A

Public Rights-of-Way to be Used by Telecommunications System

Exhibit B

Bond

EXHIBIT J

Last Mile by Laser

Short-range infrared lasers could beam advanced broadband multimedia services directly into homes and offices

By Anthony Acampora

Imagine a city water distribution system that doesn't deliver water to buildings and residences because its pipes don't reach far enough. Much the same situation exists for America's high-speed data-transfer network. The multibillion-dollar optical-fiber backbone that was built to bring truly high-performance multimedia services to office and home computers across the nation has come up a bit short—for nine out of 10 U.S. businesses with more than 100 workers, less than a mile short. Despite swelling user demand, the prospect of delay-free Web browsing and data library access, electronic commerce, streaming audio and video, video-on-demand, video teleconferencing, real-time medical imaging transfer, enterprise networking and work-sharing capabilities, as well as numerous business-to-business transactions, still lies just over the horizon—actually, buried under local streets and sidewalks.

Traditional copper wires and coaxial cables connecting buildings to telephone and cable television systems simply do not possess the gigabit-per-second capacity necessary to carry advanced bandwidth-intensive services and applications, whereas optical-fiber bridges needed to connect millions of users to the optical-fiber backbone would cost too much to install (between $100,000 and $500,000 a mile). As a result, only 2 to 5 percent of that nationwide network is being used today.

Although various fiber-free data-transmission technologies, including microwave radio, digital subscriber lines and cable modems, are attempting to span the broadband connectivity gap, free-space optics (FSO)—basically, fiber-optic communications without the fiber—is thought by many experts to have the best chance of succeeding. Newly revived over the past few years after having been invented in the 1970s, FSO relies on low-power infrared laser transceivers that can beam two-way data at gigabit-per-second rates. Small-scale FSO systems have already been installed around the world by several vendors [*see box on page 53*].

The low-power infrared lasers, which operate in an unlicensed electromagnetic-frequency band, either are or can be made to operate in an eye-safe manner. Unfortunately, however, the lasers' limited power restricts their range. Depending on weather conditions, FSO links can extend from a few city blocks to one kilometer—far enough, though, to get broadband traffic from the backbone to many end users and back. Because bad weather—thick fog, mainly—can severely curtail the reach of these

CHIP SIMONS

line-of-sight devices, each optical transceiver node, or link head, can be set up to communicate with several nearby nodes in a network arrangement. This "mesh topology" would ensure that vast amounts of data can be relayed reliably from central dissemination centers out to entire cities, towns or regions.

Commercially available FSO equipment provides data rates much greater than those of digital subscriber lines or coaxial cables—from 10 megabits to 1.25 gigabits a second, more than enough for most high-end broadband services and applications. Furthermore, state-of-the-art laser diodes already on the market can be turned on and off at speeds that could transmit information at even higher rates—as much as 9.6 gigabits a second. Although this equipment has not yet been adapted for FSO use, such a system would feature optical pulses lasting a mere 100 picoseconds (100 trillionths of a second) each.

Free-space optics systems can cost one third to one tenth the price of conventional underground fiber-optic installations. Moreover, burying cabling can take anywhere from six to 12 months, whereas an FSO link can be up and running in a few days. It is little wonder, therefore, that nearly a dozen companies are developing FSO technology. If things go as proponents predict, the industry could grow from approximately $120 million in 2000 to more than $2 billion annually by 2006, according to a study conducted by the Strategis Group, a Washington, D.C.–based telecommunications research firm.

Bridging the Last Mile

FREE-SPACE OPTICS uses apparatus and techniques originally created for optical-fiber cable systems, the very technology it is meant to supplement. Digital information in the form of electronic signals (the 1's and 0's that make up binary computer codes) is sent through a roof- or window-mounted infrared laser diode transmitter that converts each logical 1 into a narrow pulse of optical energy. When the system is operational, the absence of such an invisible pulse represents a logical 0. The process of modulating data into a digital optical signal is known as on/off signaling, or keying. Transmission efficiency is enhanced by packetizing data—splitting traffic into independent packets that can be individually addressed and sent. In addition, FSO can support wavelength division multiplexing (WDM), a technique that allows a single optical path to carry tens of separate signal channels, as long as each is encoded in a slightly different wavelength.

After being emitted by the 850- or 1,550-nanometer laser diode, the optical pulses are focused by a lens and sent out as a collimated beam of light, like that generated by a flashlight. Despite focusing by the lens, the power of the beam disperses with distance. When some of the transmitted light strikes the aperture lens of a receiver (located on a roof or in a window), the collected optical power is focused onto a photodetector, which converts the pulses into a weak electrical signal. A sensitive electronic receiver next amplifies and regenerates the weak signal, completing the data-transfer link [*see top illustration on opposite page*].

Although the transmitted infrared beam is narrow, it does diverge, forming a cone with a fairly large breadth by the time it arrives at the receiving link head. The degree of beam spreading is determined by the size of the transmitting lens, varying inversely with lens diameter. As a result, the amount of energy actually striking the collecting lens falls off rapidly with distance (received energy varies inversely with the square of the distance). For any given data rate, transmitted optical power, optical receiver sensitivity and size of the receiving lens, this beam divergence imposes a maximum range over which the optical link can operate.

To increase this link distance, larger-diameter transmitting lenses must be used, thereby reducing beam spread and causing more optical power to strike the receiving lens. As the beam is narrowed, however, minute targeting variations produced by building sway and the thermal expansion and contraction of construction materials make it necessary to introduce auto-tracking capabilities at both ends. This requirement adds complexity and cost. Active tracking systems use movable mechanical platforms or articulated mirrors to point the pencil beam at the receiving lenses and to keep the receiving aperture pointed at the transmitter. Feedback controls provide regular adjustments to keep the transmitter and receiver on target.

Free-space optics systems can cost one third to one tenth the price of conventional underground fiber-optic installations.

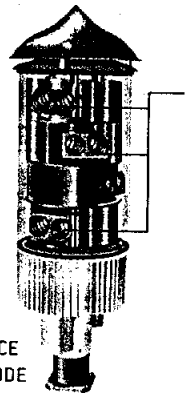
Applications for Free-Space Optics

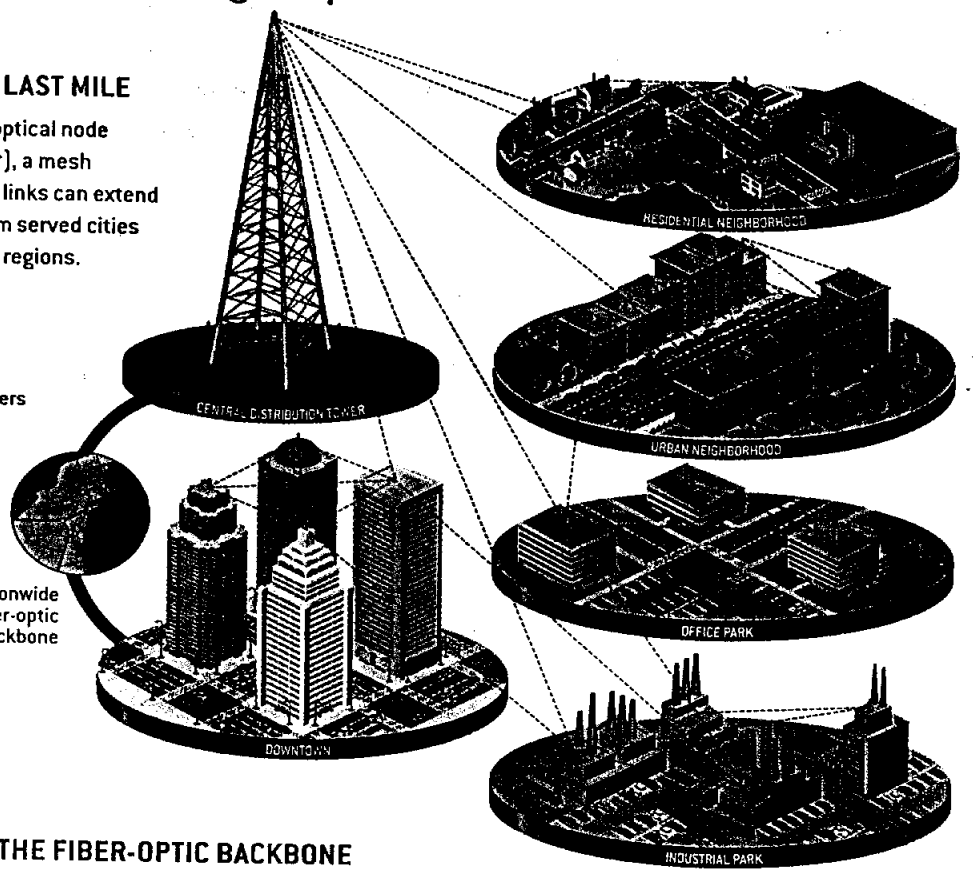
- Last-mile access: High-speed data links that connect business and consumer end users with Internet service providers and other metropolitan-area and wide-area fiber networks.
- Cellular backhaul: The means to carry cellphone traffic from local antenna towers back to facilities wired into the public switched telephone network.
- Enterprise connectivity: Easy interconnection of local-area network segments housed in separate buildings of businesses.
- Fiber backup: Low-cost redundant links to back up optical fiber, replacing a second buried fiber cable link.
- Service acceleration: Temporary high-speed service for customers waiting for an optical fiber infrastructure to be laid. Emergency communications network installation.

Spanning the Connectivity Gap

EXTENDING BROADBAND THE LAST MILE

With the multitransceiver free-space optical node (*below*) installed on buildings (*at right*), a mesh network of short-range, two-way laser links can extend the distribution of broadband data from served cities out to towns, neighborhoods and even regions.



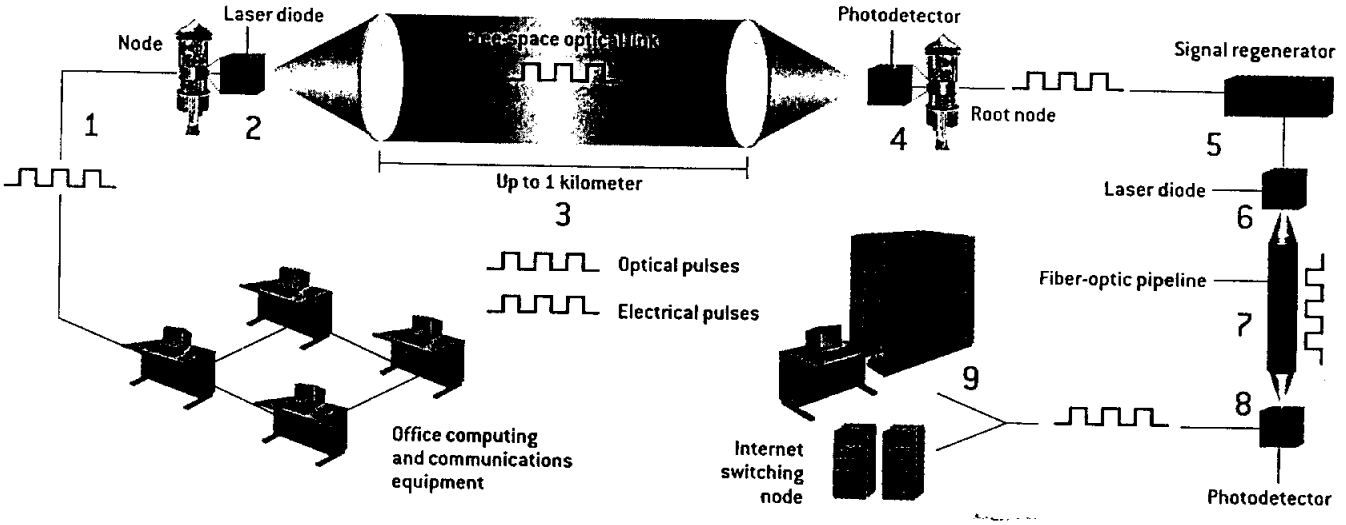


FREE-SPACE OPTICAL LINK TO THE FIBER-OPTIC BACKBONE

BEAMING BROADBAND data across the neighborhood at high speed is the principal function of a free-space optical (FSO) link. FSO links can provide the "last-mile" connection to the high-capacity fiber-optic backbone that wends its way across the U.S. Coded data for broadband applications and services that run on digital office equipment (and, in the future, their residential counterparts) are sent to a roof- or window-mounted FSO transceiver node (*1*).

The laser diode in the transceiver converts the data into infrared optical pulses that are collimated by a lens (*2*) and beamed (*3*) to another FSO node (in this case, a "root" node connected to the optical-fiber pipeline) attached to a nearby building. The receiving lens of that transceiver focuses the optical pulses into a photodetector that converts them back into electrical pulses (*4*). The pulses are then amplified and cleaned up by a signal regenerator (*5*).

Next, the electrical signals are sent down a wire to another laser diode, which optically codes them (*6*) for transmission by a fiber-optic cable that is part of the nationwide backbone (*7*). A photodetector at the end of the fiber-optic cable (*8*) reconverts the signals into electrical pulses for use by mainframe computers and servers at a major Internet switching node (*9*), which links to broadband application and service providers.



LAURIE GRACE

Lost in a Fog

SUSCEPTIBILITY TO FOG has slowed the commercial deployment of free-space optical systems. It turns out that fog (and, to a much lesser degree, rain and snow) considerably limits the maximum range of an FSO link. Fog causes significant loss of received optical power. This optical attenuation factor scales exponentially with distance. In moderately dense fog, for example, the optical signal might lose 90 percent of its strength every 50 meters. This means that 99 percent of the energy is expended over a span of 100 meters and that 99.9 percent is dissipated after traveling 150 meters. Thus, to be practical, a free-space optical link must be designed with some specified "link margin," an excess of optical power that can be engaged to overcome foggy conditions when required.

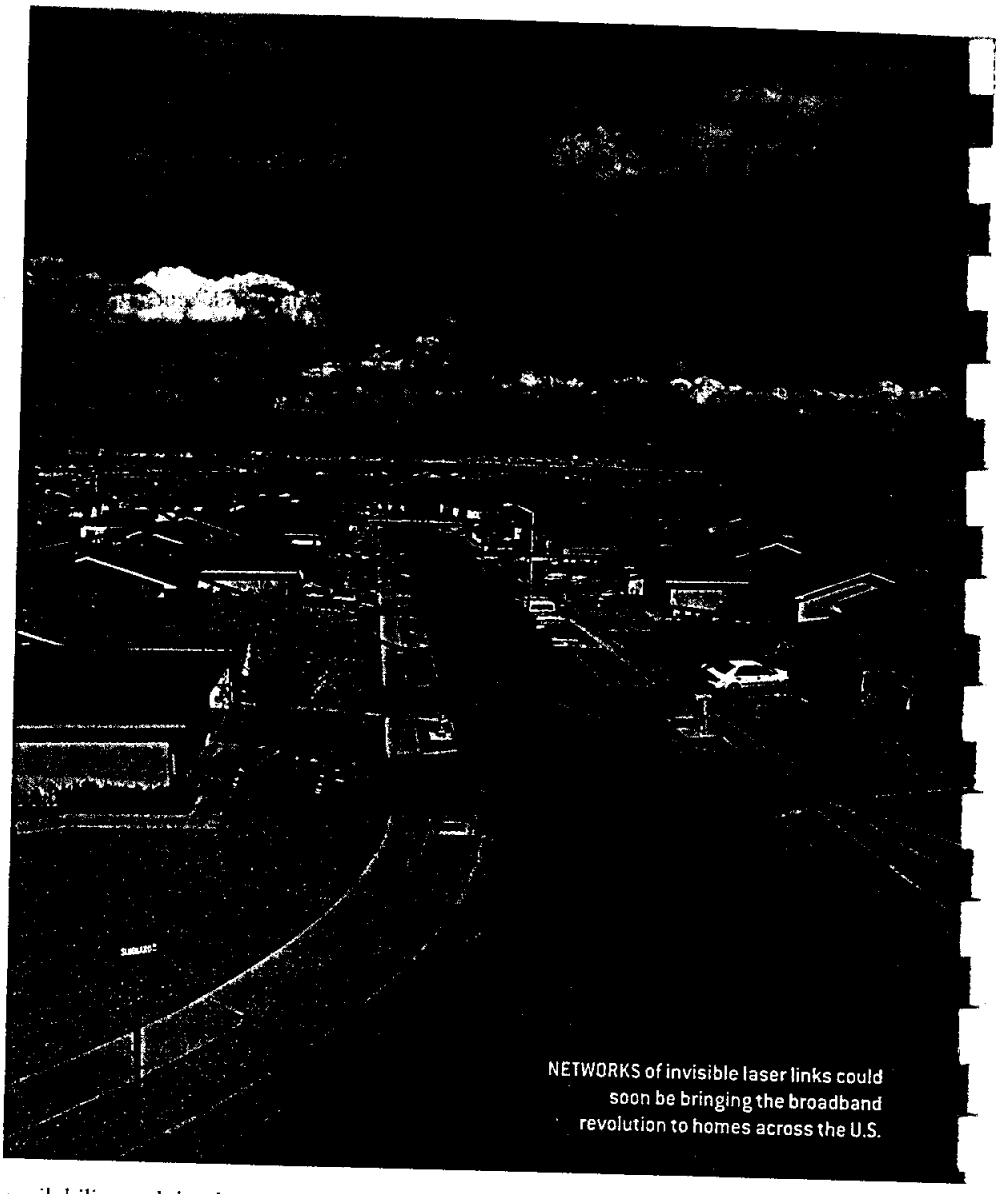
For a given link margin, it becomes meaningful to speak of another metric—the link availability, which is the fraction of the total operating time that the link fails as a result of fog or other physical interruption. Link-availability objectives vary with the application. When FSO technology is used for private-enterprise networking (for instance, to connect two offices of the same company situated in separate buildings), 99.9 percent uptime may be acceptable. This value corresponds to a downtime of about nine hours a year.

In contrast, public carrier-class service, which is provided to a carrier's prime business customers, demands a link availability of 99.999 percent (in the telecommunications business, the so-called five-nines benchmark), which translates into only five minutes of allowable downtime a year. Fiber-optic systems regularly operate at the five-nines service level. It is noteworthy that a key potential application for FSO, cellular backhaul—transmission systems that connect cellular-radio base stations with mobile switches connected to the public switched-telephone network—requires an operational availability somewhere in between, around 99.99 percent.

Achieving this high level of performance is a challenge for free-space optics. The greater the density of the fog, the greater the attenuation, the poorer the availability and the shorter the allowable range. In regions where dense fog occurs rarely, excellent link availability may be achieved at a range approaching the maximum allowable, approximately one kilometer. In less favorable climates, however, this distance would be far less.

To solve the range/reliability problem, FSO systems can be designed with limited link lengths as part of an interconnected optical mesh topology, a spider-web-like arrangement that extends broadband service to many buildings that would otherwise be too distant from the fiber-optic backbone to be reached by a single FSO link. In a mesh network, the building located closest to the optical-fiber terminus is equipped with an FSO "root" node that attaches to the fiber and contains several optical transceivers. Other served buildings are also equipped with FSO nodes with multiple transceivers. These transceivers allow the nodes to communicate with nearby neighbors in an interconnected mesh arrangement.

Signals intended for a particular building are sent from the root node down a particular set of mesh links, with intermediate nodes serving as regenerative repeaters along the way. Similarly, signals are sent from a given building to the root node along another route. Thus, the



NETWORKS of invisible laser links could soon be bringing the broadband revolution to homes across the U.S.

THE AUTHOR

ANTHONY ACAMPORA is professor of electrical and computer engineering at the University of California, San Diego, where he works on leading-edge telecommunications networking technology. He is also chief scientist and co-founder of AirFiber, a San Diego–based company that is developing free-space optical technology. Holder of 30 patents, Acampora has performed research at Columbia University and AT&T Bell Laboratories. He received his doctorate in electrical engineering from the Polytechnic Institute of Brooklyn.

length of each optical link is kept sufficiently short to achieve high immunity to fog. Should a link fail, signals would be redirected along an alternative pathway, making use of redundant routes, thereby facilitating rapid recovery from equipment failures. Finally, a mesh can be connected to several root nodes, thereby providing greater overall capacity to the collection of served buildings.

In addition to requiring a few optical transceivers, each regenerator/repeater station in a mesh system must contain an electronic switch to combine the signal traffic (multiplexing) from the local building with that beamed from other nearby buildings and to route signals between the root node and each served building. Furthermore, the necessary multiplexing, demultiplexing and switching functions mean that all the signals from all the users' diverse computing and communications equipment must be converted into a common format. This signal format conversion is accomplished by a device called a network termination unit. Although data can be passed through many nodes along various paths, it appears to users as if each signal has been delivered to the fiber backbone by means of its own dedicated transmission line. Fiberlike bandwidth can therefore be provided over wide areas, and new nodes can be installed relatively quickly and easily to bring buildings "on-net."

For each signal from each building, the network management software chooses a pathway through the mesh that passes through one of the system's root nodes. Because node failure can be sensed by the software, affected signals can be instantly directed around the problem. By reserving some unallocated capacity on each optical link, the network designer can ensure that there is sufficient capacity to reroute and recover from single- or multiple-link failures that might occur.

Free-Space Optics Developers

AirFiber (San Diego) www.airfiber.com

CableFree Solutions (Middlesex, England) www.cablefreesolutions.com/index.htm

Canon USA (Lake Success, N.Y.)

www.usa.canon.com/html/industrial_components/comgb2.htm

SONA Communications (Richmond, B.C.) www.sona.com

LightPointe (San Diego) www.lightpointe.com

Optical Access (San Diego) www.opticalaccess.com

Optical Crossing (Pasadena, Calif.) www.opticalcrossing.com

PAV Data (Warrington, England) www.pavdata.com

Plaintree Systems (Ottawa, Ontario) www.plaintree.com

Terabeam (Kirkland, Wash.) www.terabeam.com

Competing with free-space optics to unclog the last-mile bottleneck is point-to-point microwave radio, a technology that is immune to fog attenuation. On the negative side, licenses are needed to operate in most microwave radio bands, and the spectrum available in most bands is limited, which means that capacity is restricted. Microwave radio is also more costly than FSO systems and may be susceptible to transmission interference. Further, microwave radio is subject to significant signal attenuation in heavy rain, especially at higher frequencies where more spectrum might be available.

If microwave radio were operated at a frequency of 60 gigahertz, however, it could complement free-space optics. The U.S. Federal Communications Commission has allocated some unlicensed spectrum at 60 GHz for high-speed applications. The greater spectrum allocation at 60 GHz implies that more capacity can be provided and a less spectrally efficient (hence, lower-cost) modulation scheme might be used, such as simple on/off signaling. Because severe rain (which might cause a radio link failure) and dense fog (which might cause an FSO link failure) do not exist simultaneously, the opportunity exists to boost network reliability by combining 60-GHz radio with FSO. Linking the two technologies would mean that the resulting system could be highly reliable over significantly greater distances.

Although free-space optics has some distance to go in addressing its remaining concerns, it's still the best bet to reach across the last mile and bring about the long-awaited broadband revolution.

The optical mesh extends broadband service to many buildings that would otherwise be too distant to be reached by a single free-space optical link.

MORE TO EXPLORE

UniNet: A Hybrid Approach for Universal Broadband Access Using Small Radio Cells Interconnected by Free-Space Optical Links. A. Acampora, S. Krishnamurthy and S. H. Bloom in *IEEE Journal on Selected Areas in Communications*, Vol. 16, No. 6, pages 973–988; August 1998.

A Broadband Wireless Access Network Based on Mesh-Connected Free-Space Optical Links. Anthony Acampora and Srikanth V. Krishnamurthy in *IEEE Personal Communications* [now called *IEEE Wireless Communications*], Vol. 6, No. 5; October 1999.

Free-Space Laser Communication Technologies. Special issue of *Proceedings of SPIE* (published annually).

EXHIBIT K

1 of 7 DOCUMENTS

The New York Times

October 8, 2001, Monday, Late Edition - Final

SECTION: Section B; Page 13; Column 1; Metropolitan Desk

LENGTH: 816 words

HEADLINE: A NATION CHALLENGED: COMMUNICATIONS;
Phone Providers Near Ground Zero Are Still Frantically Scrambling to Catch Up

BYLINE: By JAYSON BLAIR

BODY:

At 5:20 p.m. on Sept. 11, telephone service in Lower Manhattan was knocked out when a 47-story World Trade Center building toppled onto a Verizon telephone center on West Street. Cellular antennas and data lines had already been out; now, all of a sudden, land lines went, too, and everyone from court officials to F.B.I. agents were scrambling to get phone service.

More than three weeks later, it is clear that some solutions emerged quickly, and also that the easy part is over, with the hard part just beginning. The damaged Verizon building, a switching center in a 32-story Art Deco building on West Street, has equipment in five sub-basements that were flooded by a water-main break and firefighting efforts even before 7 World Trade Center collapsed into the side of the building, ripping gaping holes into walls lined with millions of dollars in equipment.

Paul Crotty, the Verizon group president in charge on the ground, said the first priorities on the day of the attack were City Hall and 1 Police Plaza. "So from our Pearl Street offices we began stringing lines across lamp posts into 1 Police Plaza," he said.

By the next morning, Police Plaza had limited service.

A few blocks away, the F.B.I. was deciding to relocate from its offices at 26 Federal Plaza to a temporary command center in a garage on the West Side Highway. "We were notified by Verizon that phones were going to be out in a rolling phone-out across Lower Manhattan because of flooding at a switch," said Joseph Valiquette, a spokesman for the F.B.I.'s New York field office. "We decided we had to relocate."

By that Wednesday afternoon, Federal Emergency Management Agency technicians had connected the F.B.I. and the C.I.A., which also had an office in the trade center complex, to a truck that beamed telephone calls through a secure military satellite 12,000 miles above the earth's surface. The lines were managed from a FEMA center embedded in a mountain in Bluemont, Va., that was once set up as an underground bunker for the sitting president and Supreme Court justices in case of an emergency.

The next day, Thursday, Verizon was struggling to help city officials set up an emergency command center at Pier 92, where workers were installing 350 phone

lines and 25 high-speed Internet connections. In total, the company would install 18,000 emergency lines in and around the city before the week was over.

Perhaps the most difficult task was getting phone service at the New York Stock Exchange completely up and running six days after the attack. The exchange lost 20 percent of its phone lines and half of its data connections when Verizon's West Street building went out of service.

On Saturday, Sept. 15, when stock exchange officials assured the public that tests had shown that everything was ready, the new telephone connections that were being rerouted into the building were far from ready, a Verizon executive said. The executive said that it was not until about 7:30 a.m. on Sept. 17, less than two hours before Treasury Secretary Paul H. O'Neill was scheduled to ring the opening bell, that officials had enough capacity to handle the trading volume.

Mr. Crotty called it "a diving catch in the last minute of play."

Throughout the problems, Verizon's competitors were capitalizing where the telephone company could not pick up. Canon U.S.A. set up a laser that ran between satellite dishes to replace a data connection that was severed between two court buildings. Nortel Networks shipped 600 telephones that run over Internet data lines to replace the more than 2,200 telephone lines down at the courthouses. The effort involved building a mini-telephone switching center in one building.

"We told the people that build these phones that we needed the technology now," said Noel D. Adler, the chief information officer for the state courts, which had been considering testing the phones in one new courthouse. "A process that was going to take six months to do a pilot program in one small court was done in the whole New York County system in a week."

As judges in the Federal Courthouse in Manhattan were walking around doing business over their own cellular telephones, the United States attorney's office was having telephone service routed through underwater conduits running in from Brooklyn.

Once Verizon workers were allowed into the West Street building to assess the damage, officials realized that it would take months to come up with long-term solutions. They ran cables above ground on the streets to as many customers as possible. They gave cellular telephones, connected by portable antennas that were up in parking lots in the hours after the attacks, to other businesses.

At least for now, some businesses in Chinatown and Wall Street have taped over telephone numbers in their windows that started with "212" with numbers that start with "917."

http://www.nytimes.com

GRAPHIC: Photo: Micki Centilla, left, a Verizon representative, helped Sheng Guo, a technology official for the state courts in Lower Manhattan, restore Internet lines. Other offices and businesses bounced signals off satellites. (James Estrin/The New York Times)

LOAD-DATE: October 8, 2001

EXHIBIT L

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **COAST TO COAST TELECOMMUNICATIONS, INC.,** against the **CITY OF BIRMINGHAM,** Michigan.	)))))	Case No. U-12354

At the October 24, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On March 30, 2000, Coast to Coast Telecommunications, Inc., (Coast) filed a complaint against the City of Birmingham (City) pursuant to Article 2A of the Michigan Telecommunications Act (MTA), MCL 484.2251 et seq.; MSA 22.1469(251) et seq. The complaint alleges that the City failed to issue a decision approving or denying Coast's application for a right-of-way permit within 90 days, as required by Section 251(3) of the MTA, MCL 484.2251(3); MSA 22.1469(251)(3); attempted to require Coast to enter into a franchise agreement containing provisions exceeding the constraints on local government authority in Sections 251 and 252, MCL 484.2252; MSA 22.1469(252), and requested payment of fees in excess of those permitted by Section 253, MCL 484.2253; MSA 22.1469(253).

Factual Background

The dispute arises from the efforts of Coast, a competitive provider of telecommunications services, to secure a permit to construct and operate facilities within the City's public rights-of-way. Coast's proposed construction is part of a project to build a network of fiber optic rings to provide basic and advanced telecommunications services to residential and business customers within Oakland, Macomb, Wayne, Washtenaw, and Monroe counties. The initial ring, which would connect ten Ameritech Michigan central offices, including one in downtown Birmingham, is to pass through the boundaries of Birmingham and 11 other municipalities. Within Birmingham, the proposed route calls for a combination of overhead lines attached to existing poles of The Detroit Edison Company and underground facilities through existing Ameritech Michigan conduits. To secure the City's approval, Coast submitted its application for a permit together with a package of supporting documents on December 8, 1999. Ex. C-4. At that time, the City did not have a standardized form for carriers to use in applying for a permit.

In a letter dated January 24, 2000, the City informed Coast that it had forwarded the application to its counsel. Beyond that, the City apparently took no action until after the statutory 90-day period for acting on the application expired on March 7, 2000. Soon thereafter, the City verbally informed Coast that it would be submitting a proposed agreement. At that time, the City also expressed concern that the maps of the proposed route submitted by Coast with the application were unclear and did not indicate which parts of the proposed route were aerial or underground. Ex. R-8.

Under a cover letter dated March 9, 2000, the City sent Coast a draft that it characterized as "a proposed Franchise Agreement." Ex. C-6. The proposed agreement was not signed, but it has signature lines for both the City and Coast. It contains numerous provisions relating to Coast's

telecommunications operations and activities within Birmingham, including, for example, liability, indemnification, participation in MISS-DIG, a performance bond, and the minimum levels of insurance. The agreement required Coast to pay a nonrefundable application fee of $10,000 and an annual fee for use of the rights-of-way of $0.15 per lineal foot, but not in any event less than $10,000. The term of the agreement was ten years.

The City stated that the proposed agreement does not impose definitive conditions that Coast must accept in order to be granted access to the rights-of-way, but that it was the City's initial position, subject to further discussions. However, efforts to resolve the dispute either did not occur in earnest or were unsuccessful, and both parties view the other as having forced this matter into litigation.

After Coast brought this complaint and the record closed on July 18, 2000, the City passed a resolution on September 25, 2000 purporting to grant Coast a permit. (The City provided a copy of a permit issued to Coast as an attachment to its replies to exceptions.) Although the document does not help to resolve the issues raised within the confines of the record, it does present significant modifications to the terms set forth in the proposed franchise agreement sent to Coast on March 9, 2000. In at least some instances, it is more favorable to Coast.[1]

History of Proceedings

At a prehearing conference on May 18, 2000, Administrative Law Judge George Schankler (ALJ) granted leave to intervene to the Competitive Local Exchange Carriers Association of Michigan (CLECAM), Ameritech Michigan, the Michigan Municipal League (MML), the

[1]In its replies to exceptions, Coast objects to the City's reference to the permit on the ground that it is outside the record and further states that it rejected the permit as unacceptable. This order expresses no opinion regarding whether the permit complies with the MTA.

Telecommunications Association of Michigan (TAM), and AT&T Communications of Michigan, Inc., and TCG Detroit (collectively, AT&T). The Commission Staff (Staff) appeared and participated.

The ALJ conducted evidentiary hearings on June 28 and 29 and July 10, 11, and 18, 2000. The parties stipulated to a 30-day extension of the statutory deadline for deciding the case. 4 Tr. 493. See MCL 484.2203(11); MSA 22.1469(203)(11). On August 10, 2000, the parties filed briefs. In addition, Fiber Link, Inc., filed a motion for leave to file an amicus curiae brief along with the brief itself. Except for the Staff and AT&T, the parties filed reply briefs on August 21, 2000.

On September 18, 2000, the ALJ issued a Proposal for Decision (PFD), which found that the City violated the MTA by failing to issue a decision on Coast's application for a permit within the 90-day period required by Section 251(3). The ALJ also found that the City violated Section 253 by attempting to charge excessive fees. The ALJ made findings that the City did not have authority to impose several of the provisions in its proposed franchise agreement, including the following requirements: that Coast obtain the City's prior consent for changes in the ownership of its operations, that Coast make service available to all customers within the City within two years, that Coast maintain an office within Oakland County, that Coast provide service without discrimination, that disputes between Coast and the City be resolved as set forth in the franchise, and that Coast provide 9-1-1 service. As a penalty, the ALJ recommended a fine of $5,000 per day for each day after March 7, 2000, which was the 90th day after Coast filed its application.

The PFD concluded with the following postscript:

> This case addresses only the disagreements between one municipality and one provider and, even at that, it will only reveal the Commission's determinations regarding what fees may not be assessed and which provisions of the franchise may

not be imposed. The Commission does not have the opportunity to set the fees nor does it actually produce a legally correct franchise or permit which can be utilized by the parties.

Surely, there will be useful precedents arising from this case, but they will likely be appealed. At the end of that process, the parties in this case, as well as providers seeking permits in other municipalities, will still be left with the task of drafting acceptable permit language and establishing appropriate fees based on each side's reading of the judicial opinions.

Accordingly, the Administrative Law Judge additionally recommends to the Commission that it encourage interested parties, particularly MML and CLECAM, to engage in discussions designed to create a model permit and to develop a reasonable fee structure upon which all providers and local units of government can rely. To that end, the Commission might consider hosting a "collaborative" as it is doing and has done in other areas within its purview.

PFD at 43-44 (emphasis in the original).

On September 26, 2000, the City, Coast, Ameritech Michigan, CLECAM and AT&T (collectively, CLECAM/AT&T), Fiber Link,[2] and TAM filed exceptions. On September 27, 2000, the MML filed exceptions.[3] On or before October 3, 2000, the City, Coast, Ameritech Michigan, and the MML filed replies to exceptions.

In this order, the Commission adopts the PFD's finding that the City violated the 90-day statutory deadline as its principal determination. Because the City did not actually make a final decision to grant or deny a permit, the record does not provide an adequate basis to evaluate what the City might have done, or what it could or could not have permissibly done, if it had acted on

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[2]Fiber Link's exception is that the ALJ erred in denying its motion for leave to file an amicus brief. PFD at 41. The Commission agrees with the ALJ's denial of the motion.

[3]In its replies to exceptions at 19-20, Coast objects to the MML's exceptions on the ground that the MML filed them late. The Commission agrees with Coast that exceptions filed on a timely basis are particularly important in telecommunications complaint cases, which are subject to the tight deadlines set forth in MCL 484.2203(11); MSA 22.1469(203)(11). However, the Commission has read the MML's late exceptions and, under the circumstances of this dispute, does not treat the MML's positions as waived in accordance with R 460.17341(2).

the application. In this sense, an attempt to make findings on some of the issues litigated in this case would be hypothetical. (In view of the City's resolution issued on September 25, 2000, some issues may also have become moot.) Therefore, the Commission will not undertake a definitive review as to whether each of the numerous provisions proposed in the City's draft franchise agreement would have violated the MTA if the City had insisted upon them as conditions for a permit. However, the Commission will offer some discussion regarding the limits on municipal authority in Article 2A where appropriate to guide the future conduct by the parties and other providers and local governmental units confronting similar matters. To the extent that this order does not address all other allegations in Coast's complaint or findings in the PFD, the Commission concludes that it is not necessary or appropriate to decide those issues in light of the record before it in this case.

In conjunction with the ALJ's "Postscript" discussion, PFD at 43-44, the Commission adds the following general observations. As the Commission understands Article 2A of the MTA, the statutory framework strikes a balance between primarily local concerns regarding the management of public areas and the state policy of promoting facilities-based competition. It allows local governmental units to exercise permitting authority, but it also circumscribes that authority with standards that prevent local governments from undermining the competitive policies of the MTA. Thus, for example, the MTA prohibits local governments from "unreasonably" denying access to or use of a right-of-way, MCL 484.2251(3); MSA 22.1469(251)(3), and requires that any conditions imposed in a permit "be limited to the provider's access and usage of any right-of-way, easement, or public place," MCL 484.2252; MSA 22.1469(252). The MTA further empowers the Commission to adjudicate disputes between providers and municipalities.

The experience in this and other cases[4] suggests that the statutory framework for issuing permits and resolving disputes may not be as efficient as would be appropriate to promote a rapid deployment of facilities-based competition, investment in new infrastructure, and technological innovation. Attempts to resolve this case have been subject to delays both prior to and after the filing of the complaint. This process may not be the optimal means of resolving other right-of-way disputes or enforcing rights and obligations in the future. The Commission encourages telecommunications providers, local governments, and others affected by the issues presented in this and similar disputes to resolve (or at least narrow) their differences by working together on a cooperative basis. To that end, the Commission directs its Staff to implement a collaborative process for the purposes of clarifying standards regarding rights-of-way, making appropriate compromises, and developing means of more effectively implementing Article 2A of the MTA. The Commission expects representatives of providers and local government as well as other persons interested in the effective implementation of Article 2A to participate and stands ready to lend its assistance. The Commission further expects that the outcomes reached through the collaborative process will reduce the need to resolve disputes by litigation.

Statutory 90-day Deadline

a. Violation

The City does not controvert the ALJ's finding that it did not grant or deny Coast's application within 90 days. In its exceptions, the City states that its attorney attempted to make verbal contact

[4]Coast and the City of Rochester litigated a similar dispute in Cases Nos. U-12243 and U-12462. In the May 22, 2000 order in Case No. U-12243, the Commission dismissed the case as premature and noted that the City of Rochester had since enacted a new telecommunications ordinance. The dispute reemerged in Case No. U-12462, which is ongoing.

with Coast's attorney on March 7, 2000, the last day within the 90-day period, that it did inform Coast's attorney of the proposed franchise agreement on March 8, that the permit application was incomplete and the route maps were unclear, and that further discussions regarding the proposed routing occurred thereafter.

Section 251(3) provides: "A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place." MCL 484.2251(3); MSA 22.1469(251)(3). In the Commission's view, the 90-day requirement is not merely a procedural guideline, but it is an important protection against delay in the permitting process. Delay can impede competition, which requires streamlined regulatory processes so that providers can respond quickly to market-based incentives. Moreover, the 90-day provision immediately precedes a sentence prohibiting unreasonable denials of permits.[5] This suggests that the Legislature regarded the permitting process as a potential bottleneck to facilities development and that it sought to avoid that outcome. Obviously, lengthy delays of an indefinite duration can have the same deterrent effect on market-driven activities as an outright denial, particularly if the customer demand for a provider's service occurs within a limited window of opportunity.[6]

Although the City suggests that its actions in response to Coast's application were appropriate, it is undisputed that those responses did not occur until after 90 days had lapsed. More to the

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[5]"A provider's right to access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government."

[6]In its exceptions at 19-20, the City objects to the ALJ's statement that "failure to make any decision within 90 days has the effect of a denial." PFD at 28. The Commission does not agree that the ALJ equated delay with a denial, but rather he was pointing out that both delays and denials can have the same effect of frustrating the development of a competitive telecommunications infrastructure.

point, none of the City's actions discharged its obligation to decide the application with finality within 90 days, and the City's inaction continued at least up to the time that the record closed in this case. The City does not attempt to claim that its proposed franchise agreement (sent to Coast after the 90-day period) was the equivalent of a permit decision, but instead it argues that it intended to use the draft as a starting point for negotiations over the parties' differences. An offer to negotiate beyond the 90-day period is not consistent with the statutory obligation to issue a timely decision on the permit.

If the circumstances of this case had reflected nothing more serious than oversight or inadvertence, the Commission might have been inclined to view the violation as an isolated matter that is capable of being remedied quickly. However, the record makes clear that the inaction was more than an oversight. Instead, the City made no serious attempt to fulfill its responsibilities to review and act on a permit application within the statutory 90-day timeframe. It made its offer to begin negotiations after the deadline. There is no indication that the City had a process in place or planned to implement a process that would enable it to complete its review. Coast's experience indicates that, despite repeated reminders of the deadline, the City did not act in any meaningful fashion until after the 90 days had run. The City's eventual response was to submit a proposed agreement with a prohibitive fee structure and numerous other terms and conditions, at least some of which it must have known would not promote a speedy resolution of Coast's request.

It is apparent that the City's inaction was a matter within its control. From the Commission's standpoint, the City's failure to take steps that would enable it to meet its responsibilities under Article 2A is more serious than the mere fact that it did not reach a decision by March 7, 2000. The treatment of Coast's permit application is itself a consequence of the City's indifference with respect to its statutory obligations under the MTA.

As noted, in the absence of an actual decision to grant or deny a permit, there is no basis for the Commission to determine whether a permitting decision complies with the MTA or whether a denial is unreasonable. Protracted delay on the part of a local governmental unit in discharging its permitting obligations may effectively frustrate a provider's ability to invoke the MTA's enforcement mechanisms and remedies. Article 2A confers enforcement authority on the Commission and, in conjunction with the filing of a complaint, enables the Commission to provide guidance regarding how to interpret and apply the statutory standards. Indefinite delay on the part of a permitting authority means that the Commission cannot adjudicate whether a permitting decision was improper or whether the fees or other conditions imposed in a permit are unreasonable and thus have the effect of delaying or denying the provider's right to an effective remedy. The Commission will not tolerate delay when it is used for this purpose or when it effectively frustrates access to and use of the public rights-of-way.

Although some of the parties have suggested that a franchise agreement can serve the same function as a permit within the meaning of Article 2A, that is beside the point, given that the City offered only a draft franchise agreement as a basis for further negotiations and did not purport to grant either a legally binding franchise or a permit in this case. However, Coast and CLECAM/AT&T further argue that a franchise and a permit are different in legal character. While this point is not necessary to the Commission's determination that the City violated the MTA by withholding a decision on the permit application, the Commission would add the following comments for future reference.

The City has suggested that it could negotiate with Coast to assume obligations that a municipality could not impose unilaterally on a provider under the MTA.[7] Unlike a typical franchise that establishes rights and obligations between a municipality and a user of the public rights-of-way by mutual agreement, the Article 2A requirements for issuing a permit suggest a unilateral authorization on the part of the local government unit. This, in effect, means that a provider applying for a permit is entitled to receive one if it meets conditions imposed in keeping with the statute, and the local government cannot either impose additional conditions that are inconsistent with the MTA or induce the applicant's acceptance of otherwise incompatible conditions by the threat to withhold a permit. This is not to say that local governments cannot enter into agreements with permit holders. However, the governmental unit cannot induce a provider to assume obligations beyond the permissible scope of Article 2A as a condition of obtaining access to or use of the public rights-of-way.

b. Fine

In recommending a fine of $5,000 per day, the ALJ noted the testimony of Thomas Markus, the City Manager, that "the City . . . would prefer that telecommunications carriers merely avoid the City of Birmingham in the future and not come through our community because of the continuous disruptions to our rights-of-way, complaints from our citizens and drain on our limited staff and resources." 3 Tr. 304. The ALJ said that this statement indicated bad faith on the City's part, which produced a pattern of delay and eventual insistence on a franchise agreement that imposed unreasonable obligations.

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[7]The City stated its view on the restrictions set forth in its proposed franchise agreement relating to a transfer of the franchise to a potential successor in interest to Coast, as follows: "The City believes that this is a permissible provision that can be negotiated, but does agree that it is one that we cannot insist upon." City's initial brief at 31.

In their exceptions, the City and the MML argue that attributing bad faith to Mr. Markus's statement takes it out of context, but that he made the statement to rebut the suggestion that the City's proposed fees were excessive. They contend that the City's cooperative efforts to resolve this dispute indicate good faith. The City notes that it has issued permits to the five other carriers that have applied for them to date. It contends that the proposed fine is excessive and unreasonable, in view of its proposal conveyed to Coast only one day after the statutory deadline. The City also contends that the period for assessing the fine should be tolled after this litigation commenced. The MML argues that there is no correlation between the fine and any actual damages incurred by Coast, that it is contrary to the public interest to exact a large monetary fine from a municipal government that funds important public services with a limited budget, that the Commission lacks authority to fine a municipality exercising powers granted to it by Const 1963, art 7, § 29, and that the Commission should moderate the severity of its penalty in a case of first impression.

Coast argues that the City's actions in response to the application were frivolous and demonstrated a policy to discourage new providers from building their facilities. It suggests that a substantial fine is appropriate to deter future anticompetitive conduct. It argues that the City has been engaged in a course of anticompetitive conduct for years, forcing other providers either to bypass Birmingham or to enter into unlawful agreements. It thus argues that a finding of a statutory violation in this case is not a "first offense" within the meaning of MCL 484.2601; MSA 22.1469(601).

As already noted, the Commission takes the view that a protracted failure to meet the deadline for deciding a permit application is itself a serious violation, given that lengthy delays will necessarily have adverse effects on the progress of competitive telecommunications services in Michigan. The meaning of Section 251(3) is clear: a local governmental unit has no more than

90 days to grant or deny a permit. Article 2A precludes municipalities from using the permitting process as a means of discouraging the construction of facilities or exacting unwarranted concessions from the applicant. As noted, the submission of a franchise proposal to Coast did not absolve the City of its responsibility to issue a permit on reasonable, lawful terms in a timely manner. Because the City's course of conduct is without reasonable justification and had anti-competitive consequences, there is no need to evaluate or make findings regarding the subjective motivations of the officials acting on the City's behalf.

At $5,000 per day, the ALJ's recommended fine is within the lower half of the range between the $1,000 and $20,000 endpoints for a first offense under MCL 484.2601(a); MSA 22.1469(601)(a). Thus, the ALJ's assessment of the City's misconduct is not unduly harsh in light of the circumstances. However, the Commission recognizes that this case represents the first fully litigated effort to examine a local governmental unit's implementation of the permitting process in light of the MTA.[8] In the Commission's view, some measure of mitigation of the sanction is appropriate. Therefore, the Commission determines that the fine to be imposed against the City should be limited to $10,000 in total. The Commission further notes that it will be less inclined to mitigate the severity of penalties assessed in future cases presenting similar issues and may impose fines on a daily basis as appropriate in light of misconduct shown in future records.[9]

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[8]Although Coast claims that the City's violation is not a first offense, it points to no other example of adjudicated violations on the City's part.

[9]A similar course of conduct pursued by a municipality would also run the risk of invoking federal preemption under 47 USC 253(d).

Proposed Fees

The City's proposed franchise agreement included an obligation on the part of Coast to pay a $10,000 nonrecurring fee "to reimburse the City for its cost to review and process the application" and an annual franchise fee equal to the greater of $0.15 per lineal foot or $10,000, which "[t]he parties agree . . . is a fair estimate of the uniquely substantial costs and expenses incurred by the City in connection with this Agreement."[10] Ex. C-6, at 8, 9. Coast argued that the fees violated Section 253 of the MTA, which provides:

> Any fees or assessments made under section 251 shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting the permit and maintaining the right-of-ways, easements, or public places used by a provider."

MCL 484.2253; MSA 22.1469(253).

During the hearings, Coast, together with the other telecommunications providers, contended that use of public rights-of-way to run aerial and underground fiber optic lines creates minimal, if any, additional costs for the City. (Coast did not, or could not, attempt to quantify those costs, but it claimed that the City thwarted its efforts to estimate the costs during discovery.) Mr. Markus, the City Manager, testified that he established the fees on the basis of his extensive experience in municipal administration, but he did not perform any study or calculation. The City did introduce evidence of a formulaic methodology for computing a cost basis, as developed by an organization known as the Michigan Coalition to Protect Public Rights-of-Way from Telecommunications Encroachments (PROTEC). In applying the PROTEC methodology, Mr. Frank W. Audia, a

[10]Although the proposed agreement contained other fee provisions, the application fee and annual franchise fee were the most disputed.

certified public accountant with Plante & Moran, LLP, relied on financial reports and assumptions provided by or on behalf of the City to compute a cost basis for the annual fee of $12,058.

The ALJ found that the City's proposed fees violated Section 253. He determined that there was no evidence to show that the City incurred anything approaching $10,000 to process and review Coast's application. He further found that the $10,000 annual fee was deficient for similar evidentiary shortcomings and that Mr. Markus had set it on the basis of his uncorroborated judgment. The ALJ noted that it did not seem likely that the mere presence of aerial and underground lines in the rights-of-way would cause the City to incur significant ongoing costs, given that the lines require little, if any, maintenance or other expenditures of resources and effort on the part of City personnel.

The ALJ further found that the PROTEC methodology did not justify the proposed fees, noting several deficiencies. First, the ALJ rejected the concept of combining all of the costs incurred in relation to the City's rights-of-way into a common pool for allocation to the various right-of-way users. He observed that the City incurred most of the direct costs to construct and maintain the paved surfaces used by vehicular traffic. He said that the traffic-related activities provide few, if any, benefits to a provider owning overhead or underground lines and have insignificant effects on telecommunications facilities.

Second, the ALJ criticized the inclusion of indirect and overhead costs that support a variety of municipal functions, but do not have a specific relationship to streets and rights-of-way. Using the PROTEC methodology, Mr. Audia allocated to the common cost pool indirect costs associated with City activities that included, for example, the human resource office, police and fire functions, and the local district court. Ex. C-24. The ALJ took issue with both the tenuous relationship between the indirect costs and the rights-of-way as well as the imprecision of the allocation factors

used to prorate the costs to the common cost pool. He said that Mr. Audia accepted unsubstantiated time estimates supplied by City personnel in developing the factors.

Third, the ALJ rejected the conceptual methodology used to develop the allocation factors that prorate a share of the common cost pool (expressed as a dollar amount per lineal foot of right-of-way) to telecommunications users. The underlying premise (with which the ALJ disagreed) was that the various users of a typical right-of-way, including overhead and underground utilities, vehicular traffic, and pedestrians using sidewalks, cause the costs within the common pool to be incurred in proportion to the spatial relationship of their usage. In other words, the allocation factor is the proportion of physical space occupied by the provider's facilities to total used space within the right-of-way. To apply this concept, Mr. Gary J. Tressel, a certified engineering technician, developed a two-dimensional cross-sectional diagram depicting the width (primarily street and sidewalks) and height (including both overhead and underground facilities) of a typical Birmingham street configuration.[11] He then computed the square footage of the telecommunications provider's usage and divided the square footage by the total square footage of the used portion of the right-of-way cross-section to calculate the allocation factor. He recommended a ratio of 4.75% be used to determine Coast's responsibility for its share of the total costs within the common cost pool. Ex. R-27.

The MTA requires that the City's fees not exceed "the fixed and variable costs to the [City] in granting the permit and maintaining the right-of-ways, easements, or public places used by a provider." MCL 484.2253; MSA 22.1469(253). Thus, the statute permits municipalities to allocate a

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[11] In actuality, Mr. Tressel developed four different diagrams, each with different widths and combinations of overhead and underground utilities, as assumptions of typical right-of-way configurations located within Birmingham. Ex. R-28.

share of the costs regardless of whether they are fixed or variable in nature. The statute further requires that the costs be attributable to the provider's use of the rights-of-way, easements, or public places. This suggests that there must be a reasonable relationship between the costs incurred by the City for statutorily permissible purposes and the provider's usage.

The Commission agrees with the ALJ's findings relating to the fees that the City would have imposed in the proposed franchise agreement. From a procedural standpoint, there is no evidentiary showing that the City set the fees to comply with the statutory criteria. In fact, Mr. Markus stated that he originally developed the fee amount prior to the 1995 amendments adding Section 253 to the MTA. 4 Tr. 405-06. The record is devoid of any indication of the costs that the City would incur for the limited statutory purposes of granting a permit and maintaining the rights-of-way used by Coast or a similar provider.

The Commission further finds that the PROTEC methodology is deficient as a means of justifying the proposed fees. As explained by the ALJ, the assumptions used in the methodology arbitrarily include costs that do not have a reasonable relationship to a provider's usage of a right-of-way. It is difficult to understand how street and sidewalk construction and maintenance affect telecommunications facilities. It does not seem likely that a City's maintenance and upkeep of the traveled portion of a right-of-way, whether, for example, as an unpaved alley or a major traffic artery, would have much effect on the telecommunications facilities underneath it or on utility poles alongside it. If there are cost relationships, the record does nothing to reveal them. The City's suggestion that Coast's trucks may use the city streets does not explain the relationship between the City's costs and Coast's use of a small portion of the right-of-way to house its facilities. Similarly, it is far from apparent that the relationship between a provider's use of a right-of-way and the City's costs can be explained by spatial allocation factors.

In this case, the MML has asked the Commission to find that the PROTEC methodology is an acceptable approach for establishing fees, regardless of whether it was correctly applied in this case. The Commission rejects this request. The deficiencies identified by the ALJ and the Commission go beyond a mere misapplication by Mr. Audia to the City's circumstances. Many of the flaws are fundamentally embedded within the assumptions and calculations used in the PROTEC methodology.[12]

The record in this case does not support the City's proposed fee structure, but instead it strongly suggests the amounts are excessive. Absent some acceptable understanding on fee-related issues reached through the collaborative process established in this order, the Commission is not likely to find, in future cases, that comparable fee provisions would be appropriate, unless there is a persuasive showing that the fees are consistent with the cost criteria of Section 253.

Other Provisions of the Proposed Agreement

The City's proposed franchise agreement contains numerous non-fee conditions and provisions. The ALJ found some provisions to be within the City's sphere of authority, e.g., insurance and liability, and others to exceed that authority, e.g., prior City approval for changes of provider ownership and conditions of the provider's service to its customers. PFD at 28-31. The City and the MML except to findings regarding unauthorized provisions of the agreement, and Coast and other providers except to certain provisions that the ALJ upheld.

The Commission notes the statutory constraints on a municipality's right to attach conditions to a permit: First, any condition "shall be limited to the provider's access and usage of any right-

[12]The Commission expresses no opinion regarding whether the PROTEC methodology could be reformed to comply with Section 253.

of-way, easement, or public place," MCL 484.2252; MSA 22.1469(252), subject to the "authority to ensure and protect the health, safety, and welfare of the public," MCL 484.2251(2); MSA 22.1469(251)(2). Second, a provider's right of access and use "shall not be unreasonably denied." MCL 484.2251(3); MSA 22.1469(251)(3).[13]

In the context of this case, the Commission will not attempt to apply this test to the various non-fee conditions set forth in the City's proposed agreement. In view of the Commission's determination that the City violated the MTA by withholding a decision on the permit application, the Commission will not attempt to make detailed findings on each of the proposed provisions within the draft agreement. Moreover, the record does not present a suitable basis for determining whether each of the conditions imposed is within the City's legitimate authority to review access to and use of its rights-of-way or whether they have the effect of unreasonably denying access. The Commission reiterates its concern that the delay in the City's permitting process has effectively impeded the Commission from making determinations regarding whether terms and conditions of access would be reasonable and consistent with Article 2A. In future cases, the Commission will impose penalties and remedies as necessary to ensure that delay is not used as a means to withhold a permit and does not frustrate access to public rights-of-way on reasonable terms and conditions.

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[13]In keeping with the statutory framework for exercising permitting authority, a local unit of government may not attempt to create a duplicative tier of regulation of matters that are already committed to the authority of the Commission, as provided by the MTA, or the federal government under federal law. Thus, the local government may not interpose permit conditions that attempt to regulate the rates, terms, or conditions of the telecommunications service provided by the carrier to its customers.

Discrimination

In an attempt to demonstrate that the City was assessing its fees in a discriminatory manner, as prohibited by MCL 484.2253; MSA 22.1469(253), Coast noted that the City's franchise ordinance exempted Ameritech Michigan, but not other providers. Ameritech Michigan argued that it was exempt from the fees and other ordinance requirements, given that it holds a statewide franchise pursuant to MCL 484.4; MSA 22.1414. To rebut the discrimination claim, the City contended that it recently amended its ordinance, which now imposes the same requirements on Ameritech Michigan as on any other telecommunications provider.

This case is a complaint brought by Coast as a competitive provider against a local unit of government. As already noted, the principal finding is that the City violated Section 251(3) of the MTA by failing to act on the permit application. The rights of Ameritech Michigan with respect to local government are not directly at issue in the two parties' dispute, and it is not necessary to address Ameritech Michigan's rights within Birmingham or the discrimination aspect of Coast's claim against the City.

Damages

The ALJ found that the record was not adequate for assessing an award of damages for Coast's economic loss in consequence of the City's failure to grant a permit. He further recommended that a second-phase hearing be conducted to determine the amount of damages, as requested by Coast. PFD at 39.

In its exceptions, the City argues that Coast's request for a separate hearing is untimely and that the Commission's rules make no provision for a hearing relating to damages. The MML says that the Commission has no authority to bifurcate the case into two hearings, that

MCL 484.2203(11); MSA 22.1469(203)(11) requires this case to be completed within 210 days (i.e., by October 26, 2000), and that Coast failed to carry its burden of proof with respect to damages. Ameritech Michigan argues that the Commission does not have statutory authority to award money damages.

The Commission will not convene a second hearing to develop a separate record as a basis for an award of damages. It was incumbent upon Coast, as the complainant, to present evidence of its economic loss as part of its case in chief. Moreover, there is no provision in the MTA to extend a final decision in a complaint case beyond the deadline imposed by MCL 484.2203(11); MSA 22.1469(203)(11).

In its exceptions, Coast argues that it should be awarded costs and attorney fees pursuant to MCL 484.2601(f); MSA 22.1469(601)(f), as amended by 2000 PA 295. Because the operative events in this complaint preceded the enactment of 2000 PA 295, the Commission has determined not to award actual costs and attorney fees in this case.

Procedural Rulings

On July 3, 2000, Coast filed two applications for leave to appeal the ALJ's rulings on motions to strike prefiled testimony. The first application requests that the Commission reverse a ruling striking in part the testimony of Coast witness Thomas E. Davis. The second application objects to the ALJ's decision to admit the testimony of Mr. Audia on behalf of the City. In its exceptions, Ameritech Michigan also objects to Mr. Audia's testimony, the testimony of another witness, Lynn M. Lanier, sponsored by the MML to support the PROTEC methodology, and an exhibit containing discovery responses relating to Ameritech Michigan's dealings on franchise issues with other municipalities.

The Commission finds no error in the ALJ's evidentiary rulings. The stricken excerpts often lacked specific factual content, contained legal interpretations and policy arguments that could have been addressed in the parties' briefs, or largely pertained to collateral matters. The substantive disagreement of some parties with the PROTEC methodology does not mean that the testimony of Mr. Audia and others in support of it was legally irrelevant or otherwise improper. None of the evidence admitted into the record had a prejudicial effect on the parties in presenting their positions or the Commission in adjudicating this complaint.

In its exceptions, the City argues that the ALJ erred in denying its motions for a directed verdict and dismissal. The Commission finds no error in this respect. Coast met its burden of presenting a prima facie case that was sufficient to withstand a motion for summary disposition, and there are genuine issues of material fact on the record. See R 460.17323.

The ALJ made recommendations regarding Coast's proposed findings of fact. PFD at 41-42. The Commission does not accept proposed findings nos. 15 and 16, which tend to characterize the City's ordinance and proposed franchise in overly general terms and are not necessary to the decision reached in this order. The ALJ omitted a recommendation on proposed finding no. 13, which the Commission rejects for the reason that it is not clear that the PROTEC methodology completely excludes any consideration of actual costs. The Commission adopts the ALJ's recommendations on the proposed findings in all other respects. Although Coast requests that the Commission rule on proposed conclusions of law, the Commission's rulings on legal issues are adequately set forth in this order.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The applications for leave to appeal should be denied.

c. The City failed to review the permit application filed by Coast in a manner designed to produce a timely decision as required by Article 2A of the MTA and did not issue a timely decision on the application as required by Section 251(3) of the MTA.

d. A collaborative process should be instituted, with the participation of providers, local governments, and other persons interested in issues pertaining to access to and use of public rights-of-way for telecommunications facilities, to facilitate the implementation of Article 2A of the MTA.

THEREFORE, IT IS ORDERED that:

A. The applications for leave to appeal are denied.

B. The City of Birmingham shall pay a fine of $10,000 to the State of Michigan for violating the Michigan Telecommunications Act in its review of a permit application and its failure to issue a timely decision on the application.

C. The City of Birmingham shall cease and desist from further violations of Article 2A of the Michigan Telecommunications Act, MCL 484.2251 et seq.; MSA 22.1469(251) et seq.

D. The Commission Staff is directed to commence a collaborative process to facilitate the implementation of Article 2A of the Michigan Telecommunications Act, MCL 484.2251 et seq.; MSA 22.1469(251) et seq.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of October 24, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

D. The Commission Staff is directed to commence a collaborative process to facilitate the implementation of Article 2A of the Michigan Telecommunications Act, MCL 484.2251 et seq.; MSA 22.1469(251) et seq.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Chairman

_____

Commissioner

_____

Commissioner

By its action of October 24, 2000.

_____

Its Executive Secretary

In the matter of the complaint of **COAST TO COAST TELECOMMUNICATIONS, INC.**, against the **CITY OF BIRMINGHAM,** Michigan.	)))))	Case No. U-12354

Suggested Minute:

"Adopt and issue order dated October 24, 2000 finding the City of Birmingham to be in violation of the Michigan Telecommunications Act on a complaint brought by Coast to Coast Telecommunications, Inc., and imposing sanctions, as set forth in the order."

EXHIBIT M

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TCG DETROIT, a New York general partnership,

Plaintiff/Counter-Defendant,

-v-

Case No. 98-803937-CK

CITY OF DEARBORN,

Hon. Marianne O. Battani

Defendant/Counter-Plaintiff.

OPINION

1. Introduction and Facts.

This case is an action for declaratory judgment and injunctive relief and is brought by the plaintiff TCG. Detroit (TCG) against defendant, the City of Dearborn (the City). The case is presently before the court on the City's motion for summary disposition. In reviewing the motion it appears that the City has challenged the legal basis for the various counts in the complaint. Nevertheless, both parties rely on material that is outside the pleadings. Accordingly, while the City does not state the procedural basis for its motion, the court will treat it as if brought under MCR 2.116(C)(10), and will consider it under the standards applicable to motions brought under this court rule. See for example, Dzierwa v Michigan Oil Co, 152 Mich App 281, 284 (1986).

The underlying facts of the case are not disputed.[1] TCG is licensed by the

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[1] TCG first filed its suit in the Federal District Court for the Eastern District of Michigan. See TCG Detroit v City of Dearborn, Case No 96-CV-74338-DT. In that case the court dismissed those claims of TCG that were solely based on state law and otherwise (continued...)

Michigan Public Services Commission to provide local telecommunications services within the City. Its chief competitor in providing local telecommunication services within the City is Ameritech, who is the incumbent local exchange carrier. However, TCG does not possess any telecommunications facilities within the City. TCG sought, through an agreement with Detroit Edison to install fiber optic cable in existing Edison ducts. These, however, lie in the City's rights of way.

Sometime in early 1994, the City was informed of TCG's plan to install fiber optic cable in the Edison ducts. By this time approximately seven out of a planned twenty-seven miles of fiber optic cable within Edison's existing conduit had been installed in the City. The City objected and asserted, as it presently does, that TCG needed to enter into a franchise agreement with the City before entering into the City's right of ways to install telecommunications facilities, such as fiber optic cable. Thereafter TCG negotiated with the City to enter into a franchise agreement that would enable TCG to use the City's rights of way. During this time the City adopted its Telecommunications Ordinance

By September 1995, the parties nearly reached an agreement. The proposed agreement required TCG to pay the City a franchise fee of 4% of TCG's gross revenues, a $50,000 one time payment, and up to $2500 of the costs incurred by the City in connection with its granting the franchise. Also under the proposed agreement, TCG,

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[1](...continued)
granted summary judgment in favor of the City on the remaining federal claims. See Opinion, dated August 14, 1998, attached as exhibit D to the City's motion in this case. Consequently, TCG filed suit in our court to prosecute its state law claims.

In the Opinion, pp 2-5, the Court set forth a detailed synopsis of the facts that gave rise to this case. Neither party has challenged the accuracy of the Court's statement of the facts. Thus, the following brief summary is based on the statement of facts that is set forth in the Opinion.

if it should ever install its own conduit within the City, would also install, at its own cost, an inner conduit for use by the City. Finally, the proposed agreement contained a "most favored nation" clause under which TCG would be obligated to pay the City, at its election, a higher percentage of revenue in the event TCG agreed to pay a higher percentage to any other municipality within the tri-county area.

The parties continued to negotiate over the resolution of some apparently minor details when, on November 30, 1995, under 1995 PA 216, MCL 484.2101, *et seq.*, the revised provisions of the Michigan Telecommunications Act (the Act) took effect. Based on the provisions of the Act, TCG took the position that it no longer needed to enter into a franchise agreement with the City. TCG maintained that upon its complying with the provisions of the Act, the City was required to issue a permit for the use of its rights of way. Further negotiations ultimately came to an impasse and this case followed.

2. The Michigan Telecommunications Act of 1995.

Most of the relevant provisions of the Act which are involved in this case are contained in Article 2A of the Act, MCL 484.2251- 484.2254 (sections 251-254) which state as follows:

> Section 251. (1) Except as provided in subsections (2) and (3), a local unit of government shall grant a permit for access to and the ongoing use of all right- of-ways, easements, and public places under its control and jurisdiction to providers of telecommunication services.
>
> (2) This section shall not limit a local unit of government'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 unit's authority to ensure and protect the health, safety, and welfare of the public.
>
> (3) A local unit of government shall approve or deny access

> under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place. A provider's right to access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government. A local unit of government may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost 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.
>
> Section 252. Any conditions of a permit granted under section 251 shall be limited to the provider's access and usage of any right-of-way, easement, or public place.
>
> Section 253. Any fees or assessments made under section 251 shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of- ways, easements, or public places used by a provider.
>
> Section 254. A provider using the highways, streets, alleys, or other public place, shall obtain a permit pursuant to section 251.

The predecessor to the Act was first passed in 1991. See 1991 PA 179. PA 179, however, did not contain provisions analogous to those now contained in Article 2A. These provisions were first inserted in 1995 PA 216. The background behind PA 216 was explained in the House Legislative Analysis for Senate Bill 722, First Analysis, dated November 3, 1995

After summarizing the crucial and expanding role that telecommunications play in contemporary society, the House Legislative Analysis, supra, p 1, noted, "In Michigan, the provision of telecommunications service has been regulated by the Public Service Commission (PSC) under the provisions of ...[PA 179], which took effect on January 1, 1992 and will be repealed by a sunset provision within the act on December 1,

1995. Without legislation to regulate the telecommunications industry, many believe it is likely that chaos would ensue and consumers would suffer the consequences."

As reflected in the House Legislative Analysis, supra. 12, one of the goals of the reenactment of telecommunications regulatory law was to "allow for increased, fair and balanced competition among telecommunications providers in the local exchange service market. The increase in competition will allow for new providers to enter the marketplace, thus increasing choices for consumers...The provisions in the bill for opening the local telephone service market will go further towards establishing a groundwork for fair and balanced competition."

A new part of the Act concerned telecommunications' providers' access to locally owned rights of way in order to install telecommunications facilities. As noted in the House Legislative Analysis, supra 2, the proposed law would, "add an article that would require local units of government to grant a permit for access to and use of rights of way, easements, and public places to providers of telecommunications services, and limit any fees or assessments for access or use to the local unit's actual costs." (Emphasis added). Also see, Id., 10, 11. Yet, the House Legislative Analysis does not shed any other light on this section. Indeed, it is not mentioned in the section pertaining to arguments for or against enactment of the Act.

Ultimately, Senate Bill 722 was passed and became the Act. The Senate Fiscal Agency, Bill Analysis, dated 12-27-95, p 5, described Article 2A of the Act relative to local units of government:

> The bill requires a local unit of government to grant to providers of telecommunication services a permit for access to and the use of all rights of way ...under the local unit's control

> and jurisdiction. This requirement, however, does not limit a local unit of government's right to review and approve a provider's access to and use of a right of way...or limit the unit's authority to ensure and protect public health, safety, and welfare.
>
> A local unit of government must approve or deny access within 90 days from the date a provider files an application for a permit. A provider's right to access and use of a right of way..may not be unreasonably denied...
> Conditions of a permit are limited to the provider's access and use of any right of way..Any fees or assessments for access to and use of a right of way..must be on a nondiscriminatory basis and cannot exceed the local unit's fixed and variable costs in granting a permit and maintaining the rights of way...used by a provider.
>
> A telecommunication provider using the highways, streets, alleys, or other public places must obtain a permit pursuant to the bill.

Beyond the provisions of Article 2A which address local units of government, the Act further, in Article 3, provides for licensing and regulation by the Public Service Commission (the PSC) of telecommunications providers. MCL 484.2301-484.2376 (§§ 301-376).

3. The City's Motion - Counts One through Five.

Counts one through five of the complaint are premised on various violations of the Act. The first four counts address alleged violations of Article 2A. In count one TCG asserts that the City has violated § 251(1) and (3) of the Act by failing to issue a permit for the installation of facilities. TCG in count two asserts a violation of § 252's requirement that any conditions that a local unit of government may impose on the permit be limited to the providers's "access and usage of any right-of-way..." Count three asserts a violation of § 253's dictate that any fees or assessments shall not "exceed the fixed and variable

costs to the local unit of government in granting a permit and maintaining the right-of-ways..." In count four § 253 is additionally alleged to be violated on the basis of its requirement that any fees or assessments made by a local unit of government be made on a "nondiscriminatory basis." Finally, in count five TCG alleges that the City's franchise requirements unlawfully encroach on matters exclusively delegated to the PSC in violation of §§ 301 and 302 of the Act.

In the motion, the City contends that the provisions of the Act upon which TCG seeks relief in these counts violate Const 1963, Art 7, § 29. In considering this line of argument, this court is constrained by the following long standing rules. As noted in Butcher v Dep't of Treasury, 141 Mich App 116, 119 (1984), aff'd, 425 Mich 262 (1986), app dism'd, 479 US 1024; 107 S Ct 864; 93 L Ed 2d 821 (1987), "The Court will not declare a statute unconstitutional, or affirm a trial court's finding of such unconstitutionality, 'unless it is plain that it violates some provisions of the Constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter.. .. In addition to the presumption of constitutionality given to statutes, courts construe constitutional language within its 'common understanding.' To do so, courts must consider the circumstances surrounding the adoption of the constitutional provision at issue as well as the purpose of the provision." (Authorities omitted). Along with the language used in the text of a constitutional provision, courts also look to the "Committee Comments" to discern the meaning of a constitutional provision. Citizens Commercial & Savings Bank v Raleigh, 159 Mich App 110, 116, lv den, 428 Mich 920 (1987). Moreover, "Every statement in the constitution must be interpreted in light of the

whole document. Each provision is of equal integrity and none must be construed so as to nullify or substantially impair another." Id. With the foregoing in mind the court proceeds to the substance of the City's contention that the Act violates Art 7, § 29.

Art 7, § 29 states in pertinent part:

> No person... operating a public utility shall have the right to the use of the highways... of any ...city ... for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the...city; or to transact local business therein without first obtaining a franchise from the...city... Except as otherwise provided in this constitution the right of all ... cities ... to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

(Emphasis added).

The focus of the City's argument, although initially broadly premised, is ultimately narrowly framed as asserting that under Art 7, § 29, the legislature cannot limit a city's right to receive compensation from providers for their use of a municipal right of way. See City's Brief, pp 5-10. In particular the City focuses on the provisions of the first sentence of Art 7, § 29, namely that a public utility must obtain the consent of the municipality before using the public highways for the location of its facility, and a franchise from the municipality before transacting local business. It contends that historically the right of a municipality to grant franchises for the use of its streets by utilities has been held to include the right of the municipality to be compensated in a reasonable amount. Thus, since the Act interferes with this incident of its right under Art 7, § 29 to grant consent or franchises for the use of its rights of way, the Act violates the Art 7, § 29.

In contrast, TCG focuses on the language of the second sentence that gives a municipality "reasonable" control over its highways. It maintains that this qualifying

language means that the legislature has been granted oversight over a municipality's control of its streets, and that therefore, the legislature could regulate the manner in which a municipality grants franchises or exercises its power to consent for the use of its streets.

The provisions of Art 7, § 29 find their origin in the Const 1908, Art 8, § 28, the terms of which are, in relevant part, substantially the same. The Committee Comments concerning Art 8, § 28, state,

> This is a new section, and its purpose is to prevent the use of streets, alleys, highways, and public places without the consent of the local authorities first had and obtained. The word "reasonable" was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways, and public places within their corporate limits. And it was pointed out in the debates that without the word "reasonable," or a similar qualification, the section would practically deprive the state itself of authority over its highways and public places.

In People v McGraw, 184 Mich 233 (1915), a case cited by TCG, the Court reviewed the extent to which the legislature could enact laws governing, inter alia, the speed by which motor vehicles could travel on city streets. The statute involved, 1909 PA 318, § 9, removed all authority from cities from enacting ordinances concerning "motor vehicles or their speed upon or use of the public highways." It was contended that this statute violated Art 8, § 28. The argument was that this constitutional provision placed control of the roads beyond the purview of the legislature. The Court, after quoting from the Committee Comments above noted, explained the relationship between local and state legislative control over streets under Art 8, § 28:

> [I]t is clear that it was not the intention of the framers of the Constitution to deprive absolutely the state itself of control over its highways and bridges in the cities, villages, and townships. The claim that the reservation should be limited to

> the control of public utility corporations, to our minds, overlooks entirely the express language of the last sentence of said section 28. By giving the language of the whole section its ordinary and natural meaning, public utilities were placed under control of the local authorities, and the local authorities may control within reason the use of their streets for any purposes whatsoever not inconsistent with the state law.
>
> Taking the sections together, they should be so construed as to give the power to municipalities to pass such ordinances and regulations with reference to their highways and bridges as are not inconsistent with the general state law. In other words, the municipality retains reasonable control of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established or may be established, by the state itself with reference thereto. This construction allows a municipality to recognize local and peculiar conditions, and to pass ordinances, regulating traffic on its streets, which do not contravene the state laws... It follows, therefore, that the provisions of the ordinance which contravene the state law must be held to be invalid and void. But as section 9, Act 318, Public Acts 1909, clearly attempts to take away from the cities all control of their highways with reference to the use thereof by motor vehicles, such parts of said section which forbid the cities from exercising reasonable control of their highways as herein defined must be held to be unconstitutional and void.

Id., 238-239.

In City of East Lansing v Yocca, 142 Mich App 491, 495 (1985), the Court commented on the foregoing passage, and explained, "[T]he major concern is in preventing local regulation which may actually permit an act prohibited by state law, as opposed to an ordinance which is merely more restrictive than state law."

A line of Michigan cases has explored the limits to which a municipality may impose regulations regarding the safe usage of their streets. Most cases have involved the extent to which a municipality may enact ordinances or other regulations concerning

the location of utility lines, or regulate the operation of commercial passenger carriers within their borders. At least as against a general state statute authorizing a public utility to locate its facilities in cities, courts have held that a municipality may enact reasonable safety regulations concerning the location of utility lines. See, for example, Village of Plainwell v Eesley Light & Power Co. 214 Mich 461, 466-467 (1921) (and cases cited therein). In the common carriers cases, courts have generally upheld local regulations (assuming reasonableness) that affect only the operations of a carrier that are entirely within a municipality. See, for example, Red Star Motor Drivers' Ass'n v Detroit, 234 Mich 398 (1926) (Upholding a city ordinance that regulated on what streets certain buses could operate). On the other hand, municipal regulations that affected the operation of carriers that functioned on an interurban basis have been stricken where the state had enacted comprehensive legislation governing these carriers. North Star Lines, Inc v Grand Rapids, 259 Mich 654, 662-663 (1932). In North Star Lines, supra, 665, the Court, however, was careful to point out that its holding did not preclude a city from enacting ordinances that had the effect of governing wholly intracity operations and did not affect the carrier's business outside the city, such as those pertaining to determining routes within the city, regulating the rate of speed, and other types of traffic safety ordinances. Nevertheless, interestingly, in North Star Lines, the Court held that a municipality could impose a licensing fee on interurban carriers, but only to the extent that the same related to the cost of actual supervision incident to enforcing its regulations concerning traffic safety and the like. Id. 662-663.

These cases, while not expressly addressing what conditions a municipality may impose in granting its consent or agreeing to a franchise for the use of its streets

however, do serve as a general backdrop for considering the City's contention that Art 7, § 29 was meant to "fence off" from state regulation, a city's control over its streets, and that the legislature cannot infringe on local government's jurisdiction over streets in being. To support this argument, it cites to several cases, among which are Detroit, Wyandotte & Trenton Transit Co v Detroit, 260 Mich 124 (1932); City of Dearborn v Michigan Turnpike Authority, 344 Mich 37, 52 (1956).

The first of these cases, Transit Co, involved a Detroit ordinance that prohibited the operation of so-called "jitneys" on the City streets, regardless of whether they operated wholly within city limits or from some point within the city limits to some point outside of it. Subsequently, the state had enacted comprehensive legislation concerning the operation of interurban carriers. The Court, after noting that the case did not involve the first part of Art 8, § 28 regarding franchises, proceeded to refer to the purpose of the insertion of the word "reasonable," into the last portion of Art 8, § 28 , i.e., as indicated above, as a means of ensuring that the legislature retained some authority of highways in municipalities, and after distinguishing cases where the regulation had only an intra urban effect or where the state had not enacted comprehensive legislation.

The court observed, and this is the language of the decision upon which the City in our case depends, that "The legislative authority cannot infringe upon the constitutional right of the city to reasonable control of its streets." Id., 128. Yet, immediately thereafter, the Court explained that the statute in question expressly reserved to Detroit the incidents of reasonable control over its streets, and proceeded to explain that the ordinance in question went beyond this because its regulation did not merely extend for example, to the method of operation of jitneys, but instead attempted a wholesale ban

on interurban jitneys. Accordingly, the Court held that the ordinance invaded the state's properly assumed jurisdiction over these types of vehicles.

In Turnpike Authority, the Court construed the provisions of the turnpike act that authorized the state turnpike authority to acquire land for the purposes of building a turnpike. The court upheld the act against a challenge that it violated, inter alia, Art 8, § 28 , by finding that the provisions of another statute, read into the turnpike act, required the state to obtain the consent of a city before vacating or otherwise altering existing roads.

Seen in context with the foregoing case law explaining the reach of Art 8, § 28, these cases fall short of actually holding that a city's control of its streets is essentially absolute and can be exercised free of legislative authority. Instead in these cases, taken as a whole, a balance is struck between the competing interests of the state legislature and the municipalities in control over streets and roads. Where, for example in McGraw, a state statute has the effect of completely divesting a city from exercising control over its streets, courts have not hesitated in striking down that statute. On the other hand, in the face of comprehensive state wide legislation, city regulations have been overturned where their effect is to reach outside the domain of enacting regulations concerning the control of streets, i.e, largely relegated to safety considerations. See for example, North Star Lines. Finally, there remains the admonition repeatedly made in the McGraw case, and as explained in Yocca, that municipal regulations that otherwise affect its control of streets can be stricken to the extent that they are inconsistent with state general statutes in the sense of allowing conduct that otherwise would be violative of state statute. Indeed, consistent with this, in Turnpike Authority, supra, 53, the Court noted in

passing:

> The reasonableness of the city's control of its streets is not to be within the final determination by the city in all cases, for that in practical effect could erase the word 'reasonable' from the constitutional provision. The reasonableness may be determined in accordance with the State legislature's interpretation in some instances provided that such interpretation can be approved by the court.

The one Michigan case cited by the City that does involve the question of what conditions a municipality may impose in giving its consent or granting a franchise to a public utility to locate facilities in the public rights of way is Detroit v Detroit United Ry, 172 Mich 136 (1912). In United Ry, the franchise of a company to conduct railway operations in Detroit for public transportation expired, and the parties negotiated to apparent impasse on the terms of a new franchise that Detroit might grant. As in the case at bar a significant bone of contention was the amount of compensation that the defendant would pay Detroit for the franchise.

One argument raised by the defendant was that the provisions of a certain state statute governing railways precluded regulation by Detroit. The Court rejected this and noted not only that under Art 8, § 28 the defendant needed the consent of Detroit to operate a public utility within its boundaries, but also that the statute expressly provided that it did not apply to railways that operated wholly within a city. While the Court ultimately upheld a city's right to require a utility whose franchise has expired to remove its facilities from the streets, nevertheless, it is unclear that the Court actually agreed with the plaintiff's position that a municipality could impose such terms as it saw fit for the further use of its streets, but instead held that whatever terms were proposed would only take effect upon the agreement of the defendant. Id., 154-155. In any event the Court was

not faced with contrary statewide legislation, and ultimately stated, "We have determined that complainant (i.e., the municipality) could not arbitrarily fix a fee for the use of these streets by defendant .." Id., 159. This case, like the others cited by the City, is simply not conclusive on the matter at hand.

As noted earlier, in construing the meaning of constitutional provisions, a court must examine the provision itself but also in light of other provisions. Using this approach, the Court, in City of Kalamazoo v Titus, 208 Mich 252 (1919), explained the interplay between Const 1908, Art 8, § 21 (now Const 1963, Art 7, § 22), which authorized cities to adopt charters "subject to the ...laws of this State" and Art 8, § 28:

> [T]he impressive thing about these constitutional provisions is that they recognize and affirm the theory that cities owe their origin and their powers to the legislature. And while cities may refer power to do some things...directly to some of these constitutional provisions, it must be admitted that all of these provisions should be considered with reference to the fact that legislative power is vested in the legislature and that the Constitution recognizes...the general control of the legislature over cities. That the legislative power ought to be exercised in such manner as to preserve the right of local self-government is a doctrine which in application in no way modifies ...the idea of the general legislative power of creation and control.

In Titus, the Court applied this reasoning to reject an assertion under the "reasonable control" proviso of Art 8, § 28 that a city had the power to set the rates at which a public utility could charge for its services, since the setting of such rates was not reasonably related to regulating its streets. Id., 266.

Subsequent to Titus, the Court in City of Niles v Michigan Gas & Electric Co, 273 Mich 255 (1935) again undertook to examine the extent to which a city could regulate public utility rates, this time as an incident of its power to grant franchises under the first

part of Art 8, § 28. In Michigan Gas the city maintained that the power to set utility rates was included in its power to fix the terms under which it would grant a franchise to a utility to locate facilities in the city's rights of way. Specifically at issue was whether the legislature could set a time limitation on the length of franchises that was less than that prescribed in Const 1908, Art 8.

The Court while agreeing with the plaintiff in principle that the power to grant a franchise included the power to set rates, nonetheless held that this power was subject to legislative control. The Court explained:

> Primarily the authority to fix rates for public utilities is a governmental power vested in the Legislature. The Legislature may delegate it to municipalities, but only in express terms, or by necessary implication.
>
> Section 28 does not delegate such power to cities and villages....
>
> The authority of municipalities over rates, resulting from section 28, is a wholly different power. From the fact of control of streets, whether under statute or Constitution, there arises an implied power to fix reasonable rates as a condition of the use of the streets. This, in turn, carries the power to contract for rates, at least for a reasonable time. ...Such implied power of municipality to fix or contract for rates is inoperative when the Legislature exercises its reserved governmental power over them. ... A grant of power to the municipality to fix rates is an exercise of the reserved paramount power of the state by the Legislature... and supersedes the implied power.
>
> ....
>
> The grant of a franchise is an exercise of the sovereign power of the state, vested in the Legislature. The power may be delegated to municipalities, but, when so delegated, the municipality exercises it as agent of the state and upon the conditions prescribed by law...

(Emphasis added). Id., 263, 265.

In applying the foregoing to our case, it is apparent that to the extent that the

City's challenge to the Act is premised on the "reasonable control" proviso of Art 7, § 29 it cannot succeed. Contrary to the City's position, this proviso does not divest the legislature of all of its regulatory power over roads. Instead it operates as a qualification of local power in that the legislature can enact laws affecting the use of roads so long as these do not completely divest a municipality of its control over local conditions affecting its roads. Under this principle, a city is precluded from imposing regulations that would violate a valid state general law. Also, a city's "reasonable control" over its streets is relegated to matters affecting the safe use of the streets, such as traffic safety regulations, that may be more restrictive than comparable state regulations.

In our case, unlike the factual situation in McGrew, the Act, in fact, preserves local control over streets to municipalities. For example, a city's duty to issue a permit under § 251 (1) is expressly stated in § 251(2) not to limit a municipality's review to "ensure and protect the health, safety, and welfare of the public." As in Turnpike Authority, this court construes this section as preserving to municipalities their traditional prerogatives to enact ordinances relative to the safe use of streets. See for example, North Star Lines, supra.

Further, while it may be that the Act in § 253 limits the types of fees or assessments that a city may impose as a condition to granting its consent, this court notes that compensatory fees over and above its actual costs of supervising legitimate regulations relating to the health safety and welfare of its citizens, similar to the licensing fees in North Star Lines or the attempts to set rates in Titus, are essentially unrelated to its control over the streets for purposes of ensuring public safety. Hence, the fact that the Act limits the type of fees to the municipality's actual costs is not violative of Art 7, § 29.

North Star Lines.

In short, the City has failed to show how the Act violates the "reasonable control" proviso of Art 7, § 29.

The other line of attack that can be made is under the consent and franchise proviso of Art 7, § 29. Yet, to succeed in its contention, the City would need to show that this proviso did not permit legislative interference with the exercise of a municipality's right to franchise. It is doubtful that this proviso could be so construed. First, while a city retains its power to give consent for access to its streets for use by utilities, this power has never been held to be the equivalent of, for example, a holder of private property, but instead, even in a case cited by the City, it was held that a municipality's consent could not be "arbitrarily and unreasonably" refused. Union Twp v City of Mt Pleasant, 381 Mich 82, 90 (1968). Also, this conclusion would be at odds with the explanation of the nature of a city's power to grant franchises, given in Michigan Gas, that in essence what the constitutional provision effected was a delegation of the state's power to grant franchises, but that the exercise of this power remains subject to conditions placed upon it by the legislature. Additionally, the City's position runs afoul of the principle enunciated in Titus, that the constitutional provisions concerning local government must be read as a whole which includes giving effect to the specific provision of Art 7, § 22 which authorizes local units of government to enact ordinances relating to local concerns, but makes this power subject to the constitution and "law," i.e., statutes passed by the legislature.[2]

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[2] The court notes that Const 1963, Art 7, § 34 provides for a favorable construction of constitutional provisions and statutes on behalf of cities. Yet, as explained in Square Lake Hills Condominium Ass'n v Bloomfield Twp, 437 Mich 310, 319 (1991), this section (continued...)

Also, the discussion of the Court in Michigan Gas concerning the legislature's power to condition the exercise of implied municipal prerogatives under its power to grant franchises is further illustrative of the conclusion that the legislature could enact laws that limit the power of municipalities to charge fees in exchange for its grant of a franchise or consent for the use of its streets. Notably, nothing in the constitution expressly grants to municipalities the right to charge a fee for franchises. Instead, this right or power to obtain compensation is one that is implied within the right to grant a franchise. City of St Louis v Western Union Telegraph Co, 149 US 465, 470; 13 S Ct 990; 37 L Ed 810 (1893); also see, 36 Am Jur 2d Franchises, § 25, p 747; 64 CJS Municipal Corporations, § 1737, p 180. The real issue is whether the legislature can set conditions on the extent to which a municipality could extract a fee from a public utility in exchange for the municipality's consent or grant of a franchise for the use of its streets. On this point the foregoing quoted portions of the Michigan Gas case are instructive. While our case does not involve setting rates as in that case, both cases nonetheless deal with implied incidents of the right of a city to grant a franchise. It will be remembered that while the Court found that a city could set rates as a part of a franchise agreement, it could do so only so long as the legislature did not act to occupy this field. In other words, the implied power of a city to set rates as a function of its express power to grant a franchise was subject to regulation by the legislature. The reasoning and result of Michigan Gas would therefore indicate that the consent and franchise proviso of Art 7, § 29 did not divest the legislature of its power to regulate the conditions, including the type of compensation to be received, under which

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[2](...continued)
"does not provide an independent grant of authority for ...[municipalities] to act in a particular area."

a franchise would be granted.[3]

Had the legislature not occupied the field, doubtless the City in our case would be free to seek what it deemed reasonable compensation from TCG in exchange for the City's consent or franchise to TCG to use the City's streets. Yet, under Michigan Gas once the legislature has occupied the field, the City's implied powers must yield to the regulation of the legislature. Notably, in our case the legislature has not altogether precluded a city from obtaining compensation, but instead, has merely limited it.

At this point, the court notes and rejects the City's argument that the framers of Art 7, § 29 did not mean to have its franchise and consent proviso subject to governance by the legislature based on the failure of the constitutional convention to adopt an amendment that would have expressly made this proviso subject to laws.

The City contends that the history behind the adoption of Art 7, § 29 supports its view that the legislature cannot interfere with a municipalities power to grant franchises. In particular the City points out that during the 1961 Constitutional Convention, an amendment was proposed that would have amended the first sentence of this section to read: "Subject to this constitution and the general laws of the state no public utility shall

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[3] Supportive of this result is the explanation found in Blanshard v City of New York, 141 Misc 609, 614; 234 NYS 419 (1931), aff'd, 262 NY 5; 186 NE 29 (1933), where the Court after observing a provision of the New York Constitution, Art 3, § 18, required the consent of the local authorities to the granting of a franchise involving the use of the public streets and that this involved a delegation to the local authorities of the state's power to grant franchises, nevertheless held, "The Legislature may, of course, by statute, regulate the mode and manner in which such consent shall be given." Under this principle, it is generally recognized that "The legislature may expressly authorize municipalities to exact a rental or fee for the purpose of revenue from the use of their streets, or may prohibit such rental or fee, and it may limit the amount which may be charged." 64 CJS Municipal Corporations, § 1737, p 160.

have the right to use the highways of any ...city...for utility facilities without the consent of the governing body thereof nor to transact a local business therein without first obtaining a franchise from such... city ..." This amendment was defeated.

As noted earlier, it is a maxim of constitutional construction that a court should take into account the circumstances attendant upon the passage of a particular section of a constitution when construing ambiguous provisions. Yet, reliance on whatever meaning can be ascribed to the failure to adopt the proposed amendment to the final draft of this section is problematic, as explained in Singer, Sutherland Statutory Construction (5th ed), quoting from Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Washington University Law Quarterly 2 (1939):

> [A]n interpreting judge must exercise great caution in drawing inferences of legislative intent from the circumstance that amendments had been accepted or rejected during the progress of a statutory proposal....For example, a bill as originally introduced may have been amended with the mere intention of making the same essential statutory direction more clear and understandable and with no intention to change the substance of the act. Similarly an amendment may have been rejected as unnecessary rather than as an unwise alteration of the legislative policy. Rule-of-thumb comparisons of the original and final versions .. will often be misleading unless the interpreting judge is fully informed as to the statements made by the movers and opponents during the discussion of the amendments.

In our case, many of the considerations expressed by Professor Jones are evidenced in the circumstances that surround the proposal and ultimate rejection of the amendment to Art 7, § 29. First, one of the delegates that proposed the amendment, Mr. A. G. Elliot, maintained that no substantive change was intended by the amendment, and instead it was proffered only "to try to clean up the language." See, 2 Official Record, 1961

Constitutional Convention, 3144. Second, while one delegate voiced concern as to whether the amendment might mean that "local units of government don't have the power any more to do it (i.e., grant franchises) but the state highway department or some place in the State of Michigan, down in Lansing, could grant all power to override it," this objection was made on the basis of the proposed amendment after it had been modified to excise the prefatory language, and in any event Mr. Elliot, in response, stated that the amendment would not have this effect. Id., 3144-3145. Finally in arguing against the amendment's adoption, even after the prefatory language had been deleted, it was contended that the amendment might effect a substantive change and that it be defeated, "unless we are sure that we know what are doing." Id., 3145.

Given the ambiguity that surrounds the meaning of the amendatory language, and in light of court cases such as Titus and Michigan Gas that had already construed the franchise proviso as being subject to legislation, it is unclear whether Mr. Elliot's proposed amendment would have effected any change in meaning of Art 7, § 29. He certainly did not think so, and stated that the intention behind offering this amendment was only to clarify the meaning of this section. Ultimately, it was defeated based on arguments that it was unnecessary, a fear that it might altogether subject the power of municipalities to total control of the legislature, and fears that no one could satisfactorily give an explanation of its meaning. Given the circumstances attendant on the rejection of this amendment, this court cannot ascribe to its rejection, a positive intention of those delegates who rejected it that the local power to grant franchises would be free from regulation by the legislature.

Accordingly, for all the reasons stated above, the court rejects the City's

contention that the Act, in general, or specifically with respect to § 252's restriction on the fees a city may charge in granting a permit, violates Art 7, § 29.[4] The court will deny the City's motion with respect to counts one through five.[5]

4. The City's Motion - Count Six.

Next, the City contends that the court should grant summary disposition with respect to count six – which alleges a violation of equal protection – essentially for the reasons enunciated by the federal district court in dismissing TCG's complaint in the federal litigation alluded to earlier. TCG contends that this court need not follow the federal court's resolution of its equal protection claim under principles of res judicata since the present litigation involves claims under the state constitution and not the federal

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[4] The parties made other arguments concerning whether Art 7, § 29 would apply to the Act. In light of this court's finding that the Act does not violate Art 7, § 29, the court need not presently rule on these. Additionally, the City appears to have made a separate argument concerning count five. Upon review, it is unclear whether this argument was premised in part or in whole on its contention, now rejected by this court, that the Act violates Art 7, § 29. Accordingly, the court will not presently address the merits of this portion of the City's argument. The City, of course, remains free to file a subsequent motion for summary disposition specifically attacking count five. Finally, the court notes that merely because the City has enacted an ordinance that governs the terms under which it will grant a franchise to utilities does not mean that under the Act it is altogether invalid as contended by TCG in its complaint. Instead the foregoing authorities show that notwithstanding some regulation by the legislature, there still remains some room for the enactment of local ordinances. The court therefore puts off for another day the question of what parts of the City's ordinance are invalid under the Act. This question would appear to be best presented in a motion for summary disposition filed by TCG.

[5] The court notes that the City sought summary disposition as to count seven's claim that the fee sought by the City was an illegal tax on the basis of its asserted authority under Art 7, § 29. Based on the foregoing, however, the court rejects the contention that Art 7, § 29, in the face of the Act would entitle the City to charge a franchise fee over and above the limits of the standard that the Act prescribes. Therefore Art 7, § 29 simply does not provide a basis for granting the City's motion under count seven.

constitution. However, TCG fails to otherwise show how its claim in this case, in substance, differs from the one that it made in the prior federal case.

In In re Koernke's Estate, 169 Mich App 397, 399, lv den, 431 Mich 901 (1988), the court summarized the elements of res judicata: "In order for a former judgment to be a bar three requirements must be satisfied: 1) identity of subject matter; 2) identity of the parties or their privies and 3) a judgment on the merits."

With respect to the first element, "The test to be applied to determine if the subject matter of a second action is the same as that in a prior action is whether the facts are identical in both actions, or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are considered the same for purposes of res judicata. Id., 399.

In our case, it may be that the formal legal basis for TCG's claim of violation of equal protection in our case rests on the state constitution. Yet, TCG does not show how its proofs in this case to establish a violation of equal protection under the state constitution would be substantively different from those that it would have proffered in its claim for violation of equal protection under the federal constitution. Indeed, upon review the court finds that substantively, TCG would rely on the same proofs to establish a violation of its right to equal protection under either constitutions. Thus, the court finds that the TCG's present equal protection claim is the same as that at issue in the federal litigation.

Further, it is apparent that the same parties are involved in both cases. Finally, the dismissal of a claim upon the grant of a motion for summary disposition is a judgment on the merits for purposes of res judicata. Moore v Wicks, 184 Mich App 517

(1990). Also, while the court notes that the federal district court's dismissal of TCG's claim is presently on appeal, "[t]he rule in Michigan is that a judgment pending on appeal is deemed res judicata." City of Troy v Hershberger, 27 Mich App 123, 127 (1970).

Based on the forgoing, the court finds that the federal district court's dismissal of TCG's equal protection claim bars the present claim of relief for violation of equal protection under our state's constitution.[6]

MARIANNE O. BATTANI
Circuit Judge

DATED: MAR 0 8 1999

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
By _____ Deputy Clerk

[6] In any event, this court agrees with the rationale expressed by the federal district court, and would, for the reasons expressed in the federal district court's opinion, find that TCG's equal protection claim is without substantive merit.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TCG DETROIT, a New York general partnership,

Plaintiff/Counter-Defendant,

-v-

CITY OF DEARBORN,

Defendant/Counter-Plaintiff.

Case No. 98-803937-CK

Hon. Marianne O. Battani

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan, on this:

MAR 0 8 1999

PRESENT: MARIANNE O. BATTANI
Circuit Judge

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that the defendant's motion for summary disposition is **GRANTED IN PART** with respect to count six.

IT IS FURTHER ORDERED that said motion is otherwise **DENIED.**

MARIANNE O. BATTANI
Circuit Judge

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
BY: _____
DEPUTY CLERK

EXHIBIT N

METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3101.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3101.new Short title; purpose of act.

Sec. 1. (1) This act shall be known and may be cited as the "metropolitan extension telecommunications rights-of-way oversight act ".

(2) The purpose of this act is to do all of the following:

(a) Encourage competition in the availability, prices, terms, and other conditions of providing telecommunication services.

(b) Encourage the introduction of new services, the entry of new providers, the development of new technologies, and increase investment in the telecommunication infrastructure in this state.

(c) Improve the opportunities for economic development and the delivery of telecommunication services.

(d) Streamline the process for authorizing access to and use of public rights-of-way by telecommunication providers.

(e) Ensure the reasonable control and management of public rights-of-way by municipalities within this state.

(f) Provide for a common public rights-of-way maintenance fee applicable to telecommunication providers.

(g) Ensure effective review and disposition of disputes under this act.

(h) Allow for a tax credit as the sole means by which providers can recover the costs under this act and to insure that the providers do not pass these costs on to the end-users of this state through rates and charges for telecommunication services.

(i) Promote the public health, safety, welfare, convenience, and prosperity of this state.

(j) Create an authority to coordinate public right-of-way matters with municipalities.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** *484.3102.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3102.new Definitions.

Sec. 2. As used in this act:

(a) "Authority" means the metropolitan extension telecommunications rights-of-way oversight authority created in section 3.

(b) "Broadband internet access transport 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.

(c) "Commission" means the Michigan public service commission in the department of consumer and industry services.

(d) "Exchange" means that term as defined under section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102.

(e) "Incumbent local exchange carrier" means that term as defined under section 251(h) of title II of the communications act of 1934, chapter 652, 110 Stat. 61, 47 U.S.C. 251.

(f) "Metropolitan area" means 1 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 this act.

(g) "Municipality" means a township, city, or village.

(h) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.

(i) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, alley, easement, or waterway. Public right-of-way does not include a federal, state, or private right-of-way.

(j) "Telecommunication facilities" or "facilities" means the equipment or personal property, such as copper and fiber cables, lines, wires, switches, conduits, pipes, and sheaths, which are used to or can generate, receive, transmit, carry, amplify, or provide telecommunication services or signals. Telecommunication facilities or facilities do not include antennas, supporting structures for antennas, equipment shelters or houses, and any ancillary equipment and miscellaneous hardware used to provide federally licensed commercial mobile service as defined in section 332(d) of part I of title III of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 C.F.R. 20.3, and service provided by any wireless, 2-way communications device.

(k) "Telecommunication provider", "provider", and "telecommunication services" mean those terms as defined in section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102. Telecommunication provider does not include a person or an affiliate of that person when providing a federally licensed commercial mobile radio service as defined in section 332(d) of part I of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 C.F.R. 20.3, or service provided by any wireless, 2-way communication device. For the purposes of this act only, a provider also includes all of the following:

(i) A cable television operator that provides a telecommunication service.

(ii) Except as otherwise provided by this act, a person who owns telecommunication facilities located within a public right-of-way.

(iii) A person providing broadband internet transport access service.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3103.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3103.new Metropolitan extension telecommunications rights-of-way oversight authority; establishment within department of consumer and industry services; director of authority; appointment; duties; power of authority to assess fees; annual report; rules.

Sec. 3. (1) Pursuant to section 27 of article VII of the state constitution of 1963 and any other applicable law, the metropolitan extension telecommunications rights-of-way oversight authority is established as an autonomous agency within the department of consumer and industry services. The director of the authority shall be appointed by the governor for a 4-year term. The director of the authority shall report directly to the governor. The department of consumer and industry services shall provide the authority all budget, procurement, and management-related functions. The department of consumer and industry services shall also provide suitable offices, facilities, equipment, staff, and supplies for the authority in the city of Lansing.

(2) The director of the authority is responsible for carrying out the powers and duties of the authority under this act.

(3) The authority shall coordinate public right-of-way matters with municipalities, assess the fees required under this act, and 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 by the provider.

(4) The authority shall file an annual report of its activities for the preceding year with the governor and the members of the legislative committees dealing with energy, technology, and telecommunications issues on or before March 1 of each year.

(5) The authority may promulgate rules for the implementation and administration of this act under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** 484.3104.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002 *****

484.3104.new Enactment of local laws; limitation; existing rights.

Sec. 4. (1) Except as otherwise provided by this act, after the effective date of this act, a municipality in a metropolitan area shall not enact, maintain, or enforce an ordinance, local law, or other legal requirement applicable to telecommunication providers that is inconsistent with this act or that assesses fees or requires other consideration for access to or use of the public rights-of-way that are in addition to the fees required under this act.

(2) This act shall not affect any existing rights that a provider or municipality may 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.

(3) Obtaining a permit or paying the fees required under this act does not give a provider a right to use conduit or utility poles.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3105.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3105.new Use of public rights-of-way; providers subject to permit and fee requirements; facilities located in public right-of-way at effective date of act; permit application.

Sec. 5. (1) A provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities shall obtain a permit under section 15 from the municipality and pay all fees required under this act. Authorizations or permits previously obtained from a municipality under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, satisfy the permit requirement of this section.

(2) A provider asserting rights under 1883 PA 129, MCL 484.1 to 484.10, is subject to the permit and fee requirements of this act.

(3) Within 180 days from the effective date of this act, a provider with facilities located in a public right-of-way as of the effective date of this act that has not previously obtained authorization or a permit under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, shall submit an application for a permit to each municipality in which the provider has facilities located in a public right-of-way. A provider submitting an application under this subsection is not required to pay the administrative fee required under section 6(4).

(4) The authority may, for good cause, allow a provider up to an additional 180 days to submit the application required under subsection (3).

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3106.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3106.new Applications and permits issued after effective date of act; form and process; disagreement on terms; appointment of mediator; determination by commissioner; extension; request for emergency relief; filing permit application with municipality; route maps; maintenance of website by commission.

Sec. 6. (1) For applications and permits issued after the effective date of this act, the commission shall prescribe the form and application process to be used in applying to a municipality for a permit under section 15 and the provisions of a permit issued under section 15. The initial application forms and, unless otherwise agreed to by the parties, permit provisions shall be those approved by the commission as of August 16, 2001.

(2) If the parties cannot agree on the requirement of additional information requested by the municipality or the use of additional or different permit terms, either the municipality or the provider shall notify the commission, which shall appoint a mediator within 7 days from the date of the notice to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. The commission may order that the permit be temporarily granted pending resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may within 30 days of receipt of the recommendation request the commission for a review and determination of a resolution of the dispute. Except as provided in subsection (3), the determination by the commission under this subsection shall be issued within 60 days from the date of the request to the commission. The interested parties to the dispute may agree to an extension for up to 30 days of the 60-day requirement under this subsection.

(3) A request for emergency relief under section 18(1) shall have the same time requirements and procedures as under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(4) Except as otherwise provided by this act, a provider shall file an application for a permit and pay a 1-time $500.00 application fee to each municipality whose boundaries include public rights-of-way for which access or use is sought by the provider.

(5) An application for a permit under this section shall include route maps showing the location of the provider's existing and proposed facilities in the format as required by the authority under subsection (8). Except as otherwise provided by a mandatory protective order issued by the commission, information included in the route maps of a provider's existing and proposed facilities that is a trade secret, proprietary, or confidential information is exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(6) A municipality shall notify the commission when it grants or denies a permit, including information regarding the date on which the application was filed and the date on which the permit was granted or denied. The commission shall maintain on its website a listing showing the length of time required by each municipality to grant an application during the immediately preceding 3 years.

(7) Within 90 days after the substantial completion of construction of new facilities in a municipality, a provider shall submit route maps showing the location of the telecommunication facilities to both the commission and the affected municipalities.

(8) The commission shall, after input from providers and municipalities, require that the route maps required under this section be in a paper or electronic format as the commission may prescribe.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** 484.3107.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002 *****

484.3107.new Inability of provider and municipality to agree; appointment of mediator by commission; determination by commission; issuance; extension.

Sec. 7. If a provider and 1 or more municipalities are unable to agree on arrangements for coordinating 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 this act, the commission shall appoint a mediator within 7 days from the date of the notice to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may within 30 days of receipt of the recommendation request the commission for a review and determination of a resolution of the dispute. The determination by the commission under this section shall be issued within 60 days from the date of the request to the commission. The commission shall 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 expiration of the 60 days. The interested parties to the dispute may agree to an extension for up to 30 days of the 60-day requirement under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3108.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3108.new Maintenance fee.

Sec. 8. (1) Except as otherwise provided by this act, a provider shall pay to the authority an annual maintenance fee as required under this act.

(2) The authority shall determine for each provider the amount of fees required under this section. April 1 to March 31 shall be the annual period covered by each assessment and April 29 the date due for payment. The authority shall prescribe the schedule for the allocation and disbursement of the fees under this act. The authority shall disburse the annual maintenance fee to each municipality as provided under sections 10, 11, and 12 on or before the last day of the month following the month of receipt of the fees by the authority. The authority may authorize the department of treasury to collect and make the allocations and disbursements of fees required under this act. Any interest accrued on the revenue collected under this act shall be used only as provided by this act.

(3) Except as otherwise provided under subsection (6), for the period of November 1, 2002 to March 31, 2003, a provider shall pay an initial annual maintenance fee to the authority on April 29, 2003 of 2 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area, prorated for the period specified in this subsection.

(4) Except as otherwise provided under subsection (6), for each year after the initial period provided for under subsection (3), a provider shall pay the authority an annual maintenance fee of 5 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area.

(5) The fee required under this section is based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider.

(6) In recognition of the need to provide nondiscriminatory compensation to municipalities for management of their rights-of-way, the fees required under this section shall be the lesser of the amounts prescribed under subsections (3) and (4) or 1 of the following:

(a) For a provider that was an incumbent local exchange carrier in this state on January 1, 2002, the fees within the exchange in which that provider was providing basic local exchange service on January 1, 2002, when restated by the authority on a per access line per year basis, shall not exceed the statewide per access line per year fee of the provider with the highest number of access lines in this state. The authority shall annually determine the statewide per access line per year fee by dividing the amount of the total annual fees the provider is required to pay under subsections (3) and (4) by the provider's total number of access lines in this state.

(b) 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 shall be the same as that of the incumbent local exchange carrier.

(7) If the provider with the highest number of access lines in this state is unable to provide the exact number of linear feet for a determination under subsection (6), the provider shall no later than February 1, 2003 make a good faith estimate, in consultation with the staff of the authority, 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.

(8) If an estimate of the linear feet is made under subsection (7), the statewide per access line per year cost shall be determined by the authority based on that provider's good faith estimate. Upon the true

up of the estimated linear feet under subsection (9), the authority shall adjust the fees of all providers affected by subsection (6).

(9) Within 360 days of the effective date of this act, a provider making an estimate under subsection (8) shall 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 of linear feet of rights-of-way in a metropolitan area owned by the provider. If the actual amount of linear feet of rights-of-way in which facilities owned by the provider are located exceeds the estimated amount, the provider shall pay the authority the difference within 30 days of the true up. If the actual amount of linear feet of rights-of-way in which facilities owned by the provider are located is less than the estimated amount, the provider shall receive a corresponding credit from the authority against the annual maintenance fee due for payment in the succeeding year.

(10) The authority may prescribe the forms, standards, methodology, and procedures for assessing fees under this act. Each provider and municipality shall provide reasonably requested information regarding public rights-of-way that is required to assist the authority in computing and issuing the assessments under this section.

(11) Notwithstanding any other provision of this act, a provider possessing a franchise or operating with the consent of a municipality to provide and that is providing cable services within a metropolitan area is subject to an annual maintenance fee of 1 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 shall not 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. The fee required under this subsection is in lieu of any other maintenance fee or other fee except for fees paid by the provider under a cable franchise or consent agreement. A cable franchise or consent agreement from a municipality that allows the municipality to seek right-of-way related information comparable to that required by a permit under this act and that provides insurance for right-of-way related activities shall satisfy any requirement for the holder of the cable franchise or consent agreement or its affiliates to obtain a permit to provide information services or telecommunications services in the municipality.

(12) The cable provider may satisfy the fee requirement under subsection (11) by certifying to the authority that the provider's aggregate investment in this 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 subsection (11).

(13) The fees collected under this act shall be used only as provided by this act and shall be subject to an audit by the state auditor general.

(14) A provider may apply to the commission for a determination of the maximum amount of credit available under section 13b(5) of 1905 PA 282, MCL 207.13b. Each application shall include sufficient documentation to permit the commission to accurately determine the allowable credit. Except as otherwise provided under subsection (15), the commission shall issue its determination within 45 days from the date of the application. Upon certification by the commission of the documentation provided in subdivisions (a) and (b), a provider shall qualify for a credit equal to the costs paid under this act, less the amount of any credit determined under section 13b(1) of 1905 PA 282, MCL 207.13b, and shall not be subject to subsection (16) if the provider files the following documentation under this subsection:

(a) Verification of the costs paid by the provider under this act.

(b) 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 commission's approved rates and charges for those services.

(15) If the commission finds that it cannot make a determination based on the documentation required under subsection (14), it may require the provider to file its application under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(16) The maximum credit allowed under subsection (14) or (15) shall be the lesser of the following:

(a) The costs paid under this act, less the amount of any credit determined under section 13b(1) of 1905 PA 282, MCL 207.13b.

(b) The amount that the costs paid under this act, together with the provider's total service long run incremental cost of basic local exchange service, exceeds 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 section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102.

(17) The tax credit allowed under subsections (14) and (15) shall be the sole method of recovery for the costs required under this act. A provider shall not recover the costs required under this act through rates and charges to the end-users for telecommunication services.

(18) An educational institution is not required to pay the fees and charges or fulfill the mapping requirements required under this act for facilities that are constructed and used as provided under applicable provisions of section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307. To the extent that an educational institution provides services beyond that allowed by section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307, the educational institution shall obtain a permit, pay the fees and charges, and fulfill the mapping requirement required under this act for each linear foot of public right-of-way used in providing telecommunication services to residential or commercial customers. An educational institution shall notify the commission if it provides telecommunication services beyond that allowed by section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307, to a residential or commercial customer for compensation.

(19) An electric or gas utility, or 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 required under this act 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 electric or gas utility, or an affiliate of a utility, or an electric transmission provider shall only obtain a permit, pay the fees and charges, and fulfill the mapping requirements required under this act 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, or an affiliate of a utility, or an electric transmission provider shall notify the commission if the electric or gas utility, or an affiliate of a utility, or an electric transmission provider provides or leases telecommunication services to a person other than the utility or its affiliate for compensation. For the purposes of this subsection, electric and gas utility services include billing and metering services performed for an alternative electric supplier, an alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or a water utility.

(20) 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 required under this act 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 state, county, municipality, governmental entity, or utility communications and customer services such as billing or load management. The state, county, municipality, municipally owned utility, or an affiliate shall only obtain a permit, pay the fees and charges, and fulfill the mapping requirements required under this act 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 an affiliate shall notify the commission if the state, county, municipality, municipally owned utility, or an affiliate provides or leases telecommunication services to a person other than the state, county, another governmental entity, municipality, municipally owned utility, or its affiliate for compensation. For the purposes of this subsection, utility services include billing and metering services performed for an alternative electric supplier, an alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or a water utility.

(21) The authority may grant to a provider a waiver of the fee requirement of this section for telecommunication facilities located in underserved areas as identified by the authority if 2/3 of the affected municipalities approve the granting of a waiver. If a waiver is granted under this subsection, the amount of the waived fees shall be deducted from the fee revenue the affected municipalities would otherwise be entitled under sections 11 and 12. A waiver granted under this subsection shall not be for more than 10 years. As used in this subsection, "underserved area" means that term as defined under section 7 of the Michigan broadband development authority act.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** 484.3109.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002 *****

484.3109.new Fee discount.

Sec. 9. (1) If 2 or more providers implement a shared use arrangement and meet the requirements of this section, each provider participating in the arrangement is entitled to a discount of the fees required under section 8 as provided under this section.

(2) To qualify for the shared use discount, each participating provider shall do all of the following:

(a) To the extent permitted by the safety provisions of the applicable electrical code, occupy and use the same poles, trenches, conduits, ducts, or other common spaces or physical facilities jointly with another provider.

(b) Coordinate the construction or installation of its own facilities with the construction schedules of another provider so that any pavement cuts, excavation, construction, or other activities undertaken to construct or install the facilities occur contemporaneously and do not impair the physical condition, or interrupt the normal uses, of the public rights-of-way on more than 1 occasion.

(c) Enter the shared use arrangement after the effective date of this act.

(3) This section does not apply to the utilization or attachment to poles, trenches, conduits, ducts, or other common facilities that were placed in the public rights-of-way before the effective date of this act.

(4) Two or more providers that qualify for a shared use discount are entitled to a 40% discount of the fees imposed by section 8 for each linear foot of public right-of-way in which the shared use occurs.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3110.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3110.new Fee-sharing payments.

Sec. 10. (1) Except as reduced by the amount provided for under subsection (2), the authority shall allocate the annual maintenance fees collected under this act to fund the fee-sharing mechanism under section 11.

(2) To the extent that fees exceed $30,000,000.00 in any year and are from fees for linear feet of rights-of-way in which telecommunication facilities are constructed by a provider after the effective date of this act, the authority shall allocate that amount to fund the fee-sharing mechanism under section 12.

(3) To be eligible to receive fee-sharing payments under this act, a municipality shall comply with this act. For the purpose of the distribution under sections 11 and 12, a municipality is considered to be in compliance with this act unless the authority finds to the contrary in a proceeding against the municipality affording due process initiated by a provider, the commission, or the attorney general. If a municipality is found not to be in compliance, fee-sharing payments shall be held by the authority in escrow until the municipality returns to compliance. A municipality is not ineligible to receive fee-sharing payments for any matter found to be a good faith dispute or matters of first impression under this act or other applicable law.

(4) The amount received under sections 11 and 12 shall be used by the municipality solely for rights-of-way related purposes. Rights-of-way purposes does not include constructing or utilizing telecommunication facilities to serve residential or commercial customers.

(5) A municipality receiving funds under sections 11 and 12 with a population of less than 10,000 may file and a municipality receiving funds under sections 11 and 12 with a population of 10,000 or more shall file an annual report with the authority on the use and disposition of the funds. The authority shall prescribe the form of the report to be filed under this subsection, which report shall be in a simplified format.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** *484.3111.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3111.new Fee sharing; allocation of fund under section 10(1); excluded municipalities.

Sec. 11. (1) The authority shall allocate the funding provided for fee sharing under section 10(1) as follows:

(a) 75% to 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 1951 PA 51, MCL 247.663, 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 1951 PA 51, MCL 247.663, for the most recent year.

(b) 25% to be disbursed 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.

(2) Except as otherwise provided under sections 13 and 14, municipalities that are ineligible under section 13 or 14 shall be excluded from the computation, allocation, and distribution of funding under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** *484.3112.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3112.new Fee sharing; allocation of fund under section 10(2); weighted linear feet; excluded municipalities.

Sec. 12. (1) The authority shall allocate the funding provided for fee sharing under section 10(2) as follows:

(a) The amount available under this section multiplied by the percentage of weighted linear feet attributable to cities and villages, as compared to the total weighted linear feet attributable to cities, villages, and townships, shall 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 1951 PA 51, MCL 247.663, 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 1951 PA 51, MCL 247.663, for the most recent year.

(b) The amount available under this section multiplied by the percentage of weighted linear feet attributable to townships, as compared to the total weighted linear feet attributable to cities, villages, and townships, shall 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.

(2) The following shall be used under this section in determining the weighted linear feet in which telecommunications facilities are first placed by any telecommunications provider after the effective date of this act:

(a) All underground linear feet shall receive a weight of 3.0.

(b) All linear feet in a city, village, or township with a population in excess of 5,000 and not covered under subdivision (a) shall receive a weight of 2.0.

(c) All other linear feet shall receive a weight of 1.0.

(3) Except as otherwise provided under sections 13 and 14, municipalities that are ineligible under section 13 or 14 shall be excluded from the computation, allocation, and distribution of funding under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** 484.3113.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002 *****

484.3113.new Modification of fees by municipality.

Sec. 13. (1) A municipality is not eligible to receive funds under sections 11 and 12 unless by December 31, 2003 the municipality has modified to the extent necessary any fees charged to providers after the effective date of this act relating to access to and usage of the public rights-of-way to an amount not exceeding the amounts of fees and charges required under this act.

(2) To the extent a telecommunications provider pays fees to a municipality that have not been modified as required by this section, both of the following apply:

(a) The provider may deduct the fees paid from the fee required to be paid under section 8 for those rights-of-way.

(b) The amounts received shall be deducted from the amounts the municipality is eligible to receive under sections 11 and 12.

(3) The authority may allow a municipality in violation of this section to become eligible to receive funds under sections 11 and 12 if the authority determines that the violation occurred despite good faith efforts and the municipality rebates to the authority any fees received in excess of those required under section 8, including any interest as determined by the authority.

(4) A municipality is considered to have modified the fees under subsection (1) 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 section 8. The municipality shall provide each provider affected by the fee a copy of the resolution or ordinance passed under this subsection.

(5) Except as otherwise provided by a municipality, if section 8 is found to be invalid or unconstitutional, a modification of fees under this section is void from the date the modification was made.

(6) To be eligible to receive fee-sharing payments under this act, a municipality shall not hold a cable television operator in default or seek any remedy for failure to satisfy an obligation, if any, to pay after the effective date of this act a franchise fee or other similar fee on that portion of gross revenues from charges the cable operator received for cable modem services provided through broadband internet transport access services.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3114.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3114.new Telecommunication or cable modem service through broadband internet access transport service; requirements; exceptions; violation; complaint.

Sec. 14. (1) Except as otherwise provided by subsection (2), a county, municipality, or an affiliate, shall comply with all of the following requirements:

(a) Before the passage of any ordinance or resolution authorizing a county or municipality to either construct telecommunication facilities or provide a telecommunication or cable modem service provided through a broadband internet access transport service, a county or municipality shall conduct at least 1 public hearing. A notice of the public hearing shall be provided as required by law.

(b) Not less than 30 days before the hearing required under subdivision (a), the county or municipality shall prepare reasonable projections of at least a 3-year cost-benefit analysis. This analysis shall identify and disclose the total projected direct costs of and the revenues to be derived from constructing the telecommunication facilities and providing the telecommunication or cable modem service through a broadband internet access transport service. The costs shall be determined by using accounting standards developed under the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a.

(c) A county or municipality shall prepare and maintain accounting records in accordance with accounting standards developed under the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a. The accounting records required under this subdivision are subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(d) Charges for telecommunication service and cable modem services provided through a broadband internet access transport service shall include all of the following:

(i) All capital costs attributable to the provision of the service.

(ii) All costs attributable to the provision of the service that would be eliminated if the service was discontinued.

(iii) The proportionate share of costs identified with the provision of 2 or more county or municipal services including telecommunication services.

(e) A county or municipality that provides a telecommunication service or cable modem service provided through a broadband internet access transport service shall not adopt an ordinance or a policy that unduly discriminates against another person providing the same service. Subject to other requirements of this section, this subsection shall not be construed as precluding a county or municipality from establishing rates different from those of another person providing the same service.

(f) In providing a telecommunication or cable modem service provided through a broadband internet access transport service, a municipality shall not employ terms more favorable or less burdensome than those imposed by the municipality upon other providers of the same service within its jurisdiction concerning access to public rights-of-ways.

(g) A municipality shall not impose or enforce against a provider any local regulation with respect to public rights-of-way that is not also applicable to the municipality in its provision of a telecommunication or cable modem service provided through a broadband internet access transport service.

(h) In providing a telecommunication or a cable modem service provided through a broadband internet access transport service, a municipality shall not employ terms more favorable or less burdensome than those imposed by the municipality upon other providers of the same service within its

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3115.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3115.new Provider access to and use of public rights-of-way.

Sec. 15. (1) Except as otherwise provided in this section, a municipality shall, upon application, grant to providers a permit for access to and the ongoing use of all public rights-of-way located within its municipal boundaries. A municipality shall act reasonably and promptly on all applications filed for a permit involving an easement or public place.

(2) This section shall 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.

(3) A municipality shall approve or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way. A provider's right to access and use of a public right-of-way shall not be unreasonably denied by a municipality. A municipality may require as a condition of the permit that a bond be posted by the provider, which shall 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.

(4) Any conditions of a permit granted under this section shall be limited to the provider's access and usage of any public right-of-way.

(5) 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, shall promptly repair all damage done to the street surface and all installations on, over, below, or within the public right-of-way and shall promptly restore the public right-of-way to its preexisting condition. The authority shall also have the jurisdiction to require the repair and restoration of any right-of-way, including state right-of-way, which has not been repaired or restored after installation.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3116.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3116.new Cable franchise.

Sec. 16. This act does not affect the requirement of a cable operator to obtain a cable franchise from a municipality.

History: 2002, Act 48, Eff. Nov. 1, 2002.

METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** *484.3117.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3117.new Review of decision or review.

Sec. 17. A decision or assessment of the authority is subject to a de novo review by the commission upon the request of an interested person. A decision or order of the commission issued under this act is subject to review as provided under section 26 of 1909 PA 300, MCL 462.26.

History: 2002, Act 48, Eff. Nov. 1, 2002.

METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** *484.3118.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3118.new Complaint; proceeding; remedies and penalties.

Sec. 18. (1) Except as otherwise provided by this act, the time requirements and procedures governing a complaint proceeding under this act shall be the same as those under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(2) If after notice and hearing the commission finds that a person has violated this act, the commission shall order remedies and penalties to protect and make whole persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following:

(a) For failure to pay an undisputed fee assessed by the authority under this act, order the provider to pay a fine of not more than 1% of the amount of the unpaid assessment for each day that the assessment remains unpaid. For each subsequent offense under this subdivision, a fine of not more than 2% for each day the assessment remains unpaid.

(b) For a violation under section 14, order the suspension or termination of all or a portion of the fee-sharing payments to the municipality provided for under section 11 or 12.

(c) Order the person who violated this act to pay a fine of not less than $200.00 or more than $20,000.00 per day that the person is in violation. For each subsequent offense, a fine of not less than $500.00 or more than $40,000.00 per day that the person is in violation of this act.

(d) If the person is a provider, order that the provider's permit allowing access to and use of a municipality's public right-of-way be conditioned or amended.

(e) Issue cease and desist orders.

(f) Order the person who violates this act to pay attorney fees and actual costs of a person that is not a provider of telecommunication services to 250,000 or more end-users.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)
Act 48 of 2002

***** 484.3119.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002 *****

484.3119.new Provisions found invalid or unconstitutional; effect.

Sec. 19. (1) If the application of any provision of section 8 to a certain person is found to be invalid or unconstitutional, that provision and sections 3 and 15 shall not apply to any person.

(2) If section 15 does not apply under subsection (1), the permit process for access to and use of public rights-of-way shall be as follows:

(a) Except as provided in subdivisions (b) and (c), a local unit of government shall 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.

(b) This section shall not limit a local unit of government'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 unit's authority to ensure and protect the health, safety, and welfare of the public.

(c) A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place. A provider's right to access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government. A local unit of government may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost, 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.

(d) Any conditions of a permit granted under this subsection shall be limited to the provider's access and usage of any right-of-way, easement, or public place.

(e) Any fees or assessments made under this subsection shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the rights-of-way, easements, or public places used by a provider.

(f) A provider using the highways, streets, alleys, or other public places shall obtain a permit as required under this subsection.

(3) If section 15 does not apply under subsection (1), it is the intent of the legislature in enacting subsection (2) to return to the status quo prior to the effective date of this act for the granting of permits for access to and the use of all rights-of-way. Subsection (2) shall have the same construction and interpretation as sections 251 to 254 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251 to 484.2254, had prior to the repeal of these sections by this act.

(4) Except as provided under subsection (1), if any other provision or the application of any provision of this act to a certain person is found to be invalid or unconstitutional, the remaining provisions or application of a provision to other persons shall not be affected and will remain in full force and effect.

History: 2002, Act 48, Eff. Nov. 1, 2002.

METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT ACT (EXCERPT)

Act 48 of 2002

***** *484.3120.new THIS NEW SECTION IS EFFECTIVE NOVEMBER 1, 2002* *****

484.3120.new Supreme court opinion; request by legislature or governor.

Sec. 20. Pursuant to section 8 of article III of the state constitution of 1963, either house of the legislature or the governor may request the opinion of the supreme court on important questions of law as to the constitutionality of this act.

History: 2002, Act 48, Eff. Nov. 1, 2002.

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