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Via Hand Delivery

April 21, 2009

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Avenue
Lansing, MI 48915

Re: Oneida Charter Township and David M. Lee, Robert E. Ludlum, Lawrence J. Emery and James Brandt v. City of Grand Ledge

Dear Clerk:

Enclosed for filing in relation to the above captioned matter, please find an original and seven (7) copies of the **Brief of Amici Curiae the Michigan Municipal League and the Public Corporation Law Section of the State Bar of Michigan, in Support of Defendant-Appellant's Application for Leave to Appeal**. Also enclosed is our Proof of Service of same upon counsel of record.

We understand that a motion is not necessary pursuant to MCR 7.306(D)(2).

Please stamp and return the extra copy with our messenger and file in accordance with your usual procedures. Thank you for your assistance in this matter.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By:
Don M. Schmidt

Enclosures

c: Parties of Record (via US Mail)

DELIB:3081194.1\107546-00018

STATE OF MICHIGAN
IN THE SUPREME COURT

ONEIDA CHARTER TOWNSHIP,

Plaintiff,

and

DAVID M. LEE, ROBERT E. LUDLUM, LAWRENCE J. EMERY and JAMES BRANDT,

Plaintiffs-Appellees,

v

CITY OF GRAND LEDGE,

Defendant-Appellant.

_______________________________________/

Supreme Court Case No: 138520

Court of Appeals Case No: 277093

Eaton County Circuit Court
No. 05-001588-CZ

BRIEF OF AMICI CURIAE
THE MICHIGAN MUNICIPAL LEAGUE AND THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Amici Curiae adopt the Statement of the Order Appealed from and the Relief Sought of the Defendant-Appellant, City of Grand Ledge, in its Application for Leave to Appeal.

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STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt the jurisdictional summary of the Defendant-Appellant, City of Grand Ledge, in its Application for Leave to Appeal.

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STATEMENT OF QUESTION PRESENTED

DOES THE PLAIN LANGUAGE OF MCL 123.141, EXEMPT FROM ITS ACTUAL COST RESTRICTIONS A CITY WHICH IS NOT A CONTRACTUAL CUSTOMER OF ANOTHER WATER DEPARTMENT AND THAT SERVES LESS THAN 1% OF THE POPULATION OF THE STATE.

Defendant-Appellant, City of Grand Ledge, answers:	Yes
Plaintiffs-Appellees answer:	No
The Court of Appeals answers:	No
The Eaton County Circuit Court answers:	Yes
Amici Curiae answer:	Yes

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STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts of the Defendant-Appellant, City of Grand Ledge, in its Application for Leave to Appeal.

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DESCRIPTION OF AMICI CURIAE

I. The Michigan Municipal League.

The Michigan Municipal League (the League) is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is improving the quality of municipal government within the state by providing technical, educational, and administrative resources to its member cities and villages, while increasing public awareness of Michigan local governments' functions and needs. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation affecting the structure, operation, authority, or financial well-being of municipalities within the state.

The League's member municipalities provide necessary and critical public services to their residents, including municipal water services. In addition to providing municipal water service to their own residents, over sixty (60) cities and villages throughout the state provide water service to residents of other jurisdictions through intergovernmental agreements with those other jurisdictions.

II. The Public Corporation Law Section of the State Bar of Michigan.

The Public Corporation Law Section (the "Section") is an affiliate section of the State Bar of Michigan. It is composed of Michigan lawyers interested in issues related to municipalities and other public entities in the state. The Section provides educational

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programs for its members as well as the public at large. Any member of the State Bar of Michigan is eligible for membership in the Section.

INTRODUCTION

I. Public Policy Implications.

This case has major public policy implications for local governments in Michigan. As discussed below, this case significantly impacts the public policy of both water provision and intergovernmental cooperation in Michigan.

Although there are no legal requirements compelling cities and village to enter into intergovernmental agreements to provide water service to customers outside of their boundaries, there are strong economic and public policy reasons for them to do so. Such agreements can be a win-win situation for both local governments and residents. Among other things, such agreements can avoid needless and expensive capital investment of public dollars in duplicate municipal water systems in a geographic area, thereby conserving scarce public resources for use on other pressing public needs.

The state of Michigan has a strong public policy of promoting intergovernmental cooperation embodied in the 1963 Michigan Constitution. Article 7, section 28, of the Constitution directs the legislature to enact laws authorizing counties, cities, villages, townships, and districts to, among other things, enter into contracts to provide services to one another, transfer services from one to the other, share the costs of providing services, and cooperate with one another in providing such services. More specifically relating to water service, this public policy is embodied also in article 7, section 24, which expressly authorizes cities and villages to provide municipal utilities, including water service,

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outside of their corporate limits. The statute at issue in this case, MCLA 123.141 *et seq.*, was enacted to implement this public policy as set forth in the above-referenced constitutional provisions.

Unfortunately, the decision of the Court of Appeals, if allowed to stand, will have the effect of thwarting this strong public policy and the widely-accepted basis for entering into intergovernmental agreements for water service. This is because there will be little or no incentive for cities and villages to provide municipal water service to other jurisdictions. Indeed, the Court of Appeals' decision creates a *disincentive* for cities and villages to provide such service. This runs precisely counter to the current urgent demand for more, not less, governmental efficiency.

II. <u>Background and Context of Intergovernmental Water Service Agreements.</u>

In this case of first impression, the Court of Appeals has effectively amended the statute at issue by imposing new restraints on the water rates smaller cities and villages (those serving less than 1% of the state's population) may charge to customers outside of their boundaries. For years (both before and after the 1981 amendment to the statute at issue in this lawsuit), a city or village which had the capability to supply water would negotiate with a municipality needing municipal water (usually an adjacent township), the terms of an intergovernmental agreement to supply the water. The terms typically included, among other things, a limitation on the capacity of the system to be used or the flow of water to be supplied, the length of the agreement, the billing procedure, the maintenance and repair responsibilities, the amount, if any, of capital contribution to be provided by the receiving municipality, and of course the rates to be charged, either to the

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township (wholesale agreement) or directly to the township's residents (retail agreement), for water service.

While larger municipal water systems generally have a good idea of their actual costs to supply water to customers outside of their jurisdiction, it would be fair to say that most smaller systems probably do not. This is because larger systems generally have (and can afford) more sophisticated and detailed rate systems, including cost-of-service studies and rate studies. Not so with smaller systems. Cost-of-service studies and rate studies are expensive, requiring detailed records and accountings of past capital investments and current and projected revenues and expenses together with the labor cost of analyzing the records. Many smaller systems simply do not have the extensive records, staff, or the financial wherewithal to undertake expensive and time consuming costs of service studies and rate studies.

Such studies are not really necessary for a smaller water system. In negotiations involving smaller water systems, both local governments usually recognized the principle that there was some additional (but not necessarily easy to identify or quantify) costs for providing water service to outside customers. Additionally, they recognized that the water-supplying municipality was entitled to some compensation for voluntarily taking on the additional obligations and risks of providing water to customers outside its municipal boundaries.

The frequent result of these negotiations was a mutual and informed agreement between the two local governments that the rate charged to customers in the township would be a multiple of the rate charged to customers in the city or village. (In fact, this

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principle was so commonly accepted that the negotiations were usually not whether there would be a difference, but how much the difference would be.)

This multiple could be reflected as a percentage above the rate charged inside the city or village, or as a stated monetary amount above the rate charged in the city or village. So long as the two local governments could agree on a rate structure through cooperative discussions and bargaining, it was expensive, impractical, and unnecessary to tie the rates to the actual cost of providing the service. Tying the rates to the actual cost of providing the service in most cases would require a rate study, including a cost-of-service study. Incurring the expense of these studies would not dramatically increase each party's understanding of the water system's economics, it would, however, have the ultimate effect of unnecessarily increasing the rates for all involved because the water system would have to pay the costs of the studies. These costs would, naturally, then be passed on to the residents and customers of the water system.

This process has gone on for decades and has, for the most part, well served the cities, villages, and townships outside of the Detroit service area. Indeed, Michigan's reputation for responsible provision of water consistent with protecting public health is testimony to this cooperative process's success. Unfortunately, the Court of Appeals' decision could very well put a halt to this long-standing and successful practice which has developed through intergovernmental cooperation.

III. The Facts of this Case Warrant the Granting of Leave to Appeal.

It cannot be gainsaid that the availability of clean, potable water is a matter of paramount public health, safety, and welfare in this state. As such, this case has

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significant public interest to this state and is not only by, but is also against, a political subdivision of the state. *See* MCR 7.302(B)(2). Furthermore, this case involves legal principles of major significance to the state's jurisprudence (the interpretation of an important statute involving municipal corporations and intergovernmental cooperation). MCR 7.302(B)(3). As this case satisfies at least two of the grounds for leave to appeal, leave should be granted in this case.

STANDARD OF REVIEW

This case involves matters of statutory construction, which are reviewed de novo. *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004). The cardinal principle of statutory construction is that courts must give effect to legislative intent. *See e.g., Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). If the Court finds the language of the statute is clear, no further analysis is necessary or allowed and the Court must apply the legislation as it is written. *Eggleston v Bio-Medical Applications*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Hesse v Ashland Oil*, 466 Mich 21, 30; 642 NW2d 330 (2002). If the court finds that there is more than one reasonable interpretation for the statute, then judicial construction is appropriate. *See Mayor of Lansing,* 470 Mich at 178.

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ARGUMENT

THE PLAIN LANGUAGE OF MCL 123.141, EXEMPTS FROM ITS ACTUAL COST RESTRICTIONS A CITY WHICH IS NOT A CONTRACTUAL CUSTOMER OF ANOTHER WATER DEPARTMENT AND THAT SERVES LESS THAN 1% OF THE POPULATION OF THE STATE.

I. The Court of Appeals Decision is Inconsistent With the Plain Language of the Statute.

The Court of Appeals held that Grand Ledge must charge customers in Oneida Township the actual cost to Grand Ledge of providing service to those customers. The basis for this ruling was subsection 3 of the statute, which reads:

> The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.

MCL 123.141(3) (emphasis added).

It is evident from the plain language of subsection 3 that its terms only apply to an entity "which is a contractual customer as provided by subsection (2)." Subsection 3 specifically refers to subsection 2, so it is applicable only to the situation described in subsection 2, e.g. "contractual customers" as described in subsection 2, not to other contractual situations. Grand Ledge is not a contractual customer as provided in subsection 2 (it is actually a contractual supplier) and therefore falls outside the legislative scope of subsection 3's requirements.

The pertinent portion of subsection 2 reads:

> This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state.

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MCL 123.141(2) (emphasis added).

To be a "contractual customer as provided by subsection (2)" (and thus bound by the rate restrictions in subsection 3), Grand Ledge would have to be a "contractual customer of another water department" and would have to serve 1% or more of the state's population. The parties have stipulated that Grand Ledge is not a contractual customer of another water department and that it does not serve 1% or more of the state's population. Similarly, though Oneida Township is a contractual customer "of another water department" (being a contractual customer of Grand Ledge), it does not meet the second part of the test either, i.e., it does not serve 1% or more of the state's population. Thus, both Grand Ledge and Oneida are expressly exempted from the restrictions of subsection 3 as neither is a "contractual customer as provided in subsection (2)."

This narrow application of subsection 3 to a "contractual customer" is how the statute has been read for 28 years. For good reason, because this interpretation is exactly what the legislature intended:

> The bill would provide that a municipality, once having bought water from another city, must sell it to the inhabitants of the municipality at a rate which does not exceed the actual cost of the service.

House Legislative Analysis Section, HB 4029, September 24, 1981 attached as Exhibit B (emphasis added).

The Court of Appeals interpretation expands the statute's reach to contractual relationships that the legislature did not intend to disturb.

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II. The Court of Appeals Opinion Fails to Consider an Express Term Contained in the Statute.

The statute, in subsection 1, provides that a municipal corporation is referred to in the act as a "corporation." Grand Ledge, as a municipal corporation, is thus a "corporation" under the act. In order for the Court of Appeals to be correct in its ruling that the restriction of subsection 3 applies to all retail situations, instead of only those situations involving "a contractual customer as provided by subsection (2)," the legislature should have used the term "corporation" in subsection 3. It did not do so. The legislature, if it desired, could have easily written subsection 3 to read "The retail rate charged by a "corporation" shall not exceed the actual cost of providing the service."

Subsection 3 does not use the term "corporation", but rather refers back to "a contractual customer as provided by subsection (2)." As previously indicated, Grand Ledge is not a contractual customer under the act. Therefore, Grand Ledge is not subjected to the rate restrictions of subsection 3.

III. The Court of Appeals Decision Renders a Portion of the Statute Nugatory, Contrary to the Rules of Statutory Construction.

As discussed above, subsection 2 of the statute expressly exempts water systems that are not a contractual customer of another water department and that serve less than 1% of the state's population from the "actual cost" restrictions of subsection 2:

> This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state.

MCL 123.141(2) (emphasis added).

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The Court of Appeals interpretation subjects those same systems that are exempt from the "actual cost" restrictions in subsection 2, to the "actual cost" restrictions in subsection 3. This interpretation renders the exemption in subsection 2 nugatory. In reviewing a statute's language, every word should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Provisions of a statute must be construed in light of the other provisions of the statute. *Mayor of Lansing*, 470 Mich at 178 (quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993)).

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IV. The Court of Appeals Decision Fails to Take Into Account the Specific Context and Situation the Legislature was Trying to Deal with in Amending the Statute.

The Court of Appeals erred in holding that the statute as written is not ambiguous and by not considering the problem the legislature was trying to resolve as is evident from the legislative history of the amendment. Under the rules of statutory construction, a statute which has two reasonable interpretations is considered ambiguous and judicial construction is appropriate. *See Mayor of Lansing*, 470 Mich at 178.

The question of whether two differing interpretations exist is easily answered by looking at the judicial history of this case. The trial court held that subsection 3 does not apply to Grand Ledge while the Court of Appeals held that it did. The trial court properly found that the statute was ambiguous, acknowledging "the statute is, at best, confusing." (Trial Ct Op at 14, Jan. 25, 2009, attached as Exhibit A). On the other hand, the Court of Appeals found "the language of MCL 123.141 is plain and unambiguous." *Oneida*

Charter Township v Grand Ledge, ___ Mich App ___; ___ NW2d ___; 2009 WL 367205 (2009). One simply cannot read MCL 123.141 without concluding it is ambiguous and confusing. However, much if the ambiguity is clarified when the statute is read in context with the legislative history and intent of the amendment.

As is clear from the House Legislative Analysis Section Report for House Bill 4029, the Bill adopted to enact the amendment, the legislature was acting in response to compound problems with the City of Detroit's system. At the time of the amendment, the City of Detroit system served 97 communities and was the "focus of a great deal of controversy." House Legislative Analysis Section, HB 4029, September 24, 1981, attached as Exhibit B. The House Legislative Analysis recognized that the existing law, by setting a minimum and maximum rate which a city selling water could charge, limited Detroit in charging certain customers rates which did not cover Detroit's costs and permitted Detroit to charge certain customers more than its actual cost of providing service. *Id.* The House Legislative Analysis also recognized instances of customer cities purchasing water from Detroit then reselling the water to their residents at excessive markups. *Id.*

The fact that this bill was aimed at addressing the Detroit situation is evident by the use of "the City" in three different places in the statute. In three separate sentences, the statute uses the phrase "the City" instead of "a City."[1] The "City" the legislature was

[1] See the first, second and fourth sentences of subsection 2 of the statute. MCL 123.141(2).

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referring to was obviously the City of Detroit. The intent of this language is clear from the House Legislative Analysis:

> This bill would not apply to a water system which is not the contractual customer of another water department and which serves less than one percent of the population of the state.

House Legislative Analysis Section, HB 4029, September 24, 1981, attached as Exhibit B.

V. The Court of Appeals, Despite Finding that the Statute was not Ambiguous, Improperly Created a Definition of "Contractual Customer."

Despite finding that the statute was not ambiguous, the Court of Appeals nonetheless, rather than limiting its interpretation to the plain words of the statute, went on to create a definition of the term "contractual customer" which added to, and is inconsistent with, the plain words of the statute. The Court of Appeals incorrectly defined the term "contractual customer" in subsection 2 to be limited only to those contractual customers who take water on a "wholesale" basis, and not those who take water on a "retail" basis:

> Subsection (2), while not precisely setting forth a definition of "contractual customer," determines that the relationship between the contracting parties will provide the definition of who is a "contractual customer":
>
> > The price charged by the *city to its customers* shall be at [sic] rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed *contractually between the city and its wholesale customers* during the remaining life of the contract. Emphasis added, MCL 123.141(2).
>
> Thus, a "contractual customer" is one which contracts with a city for water services in general and one which contracts for wholesale water services in particular.

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...

> While subsection (2) is the general charging scheme for water departments selling water services, subsection (3) specifically applies to entities selling water services to retail customers.

Oneida Charter Twp v Grand Ledge, ___ Mich App ___; ___ NW2d ___; 2009 WL 367205 (2009).

There is simply no basis for the Court of Appeals to insert its own definition of who is a "contractual customer" into the statute, particularly when it has just determined that the statute is not ambiguous.

As shown above, the statute makes no such distinction. The fact that a sentence in subsection 2 indicates that the actual cost limitation in that subsection does not remove any minimum or maximum limits imposed contractually for "wholesale customers" cannot be expanded by the Court of Appeals to mean that the limitation in subsection 2 applies only to wholesale customers and therefore the limitation in subsection 3 applies to any and all retail customers.

The effect of this incorrect interpretation on the arrangement under which local governments will be willing to supply water to other local governments through intergovernmental agreements will be major, not to mention illogical. Under the Court of Appeals' interpretation, whether a water-supplying municipality (other than Detroit) may charge more than its actual cost to provide service to customers outside of its boundaries depends solely on whether the service is provided on a wholesale basis or on a retail basis. According to the Court of Appeals, if it is on a wholesale basis, the water-supplying municipality is not bound by the actual cost limitation because of the

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exemption language in subsection 2 of the statute. If it is on a retail basis, it is limited to actual cost by the limitation in subsection 3. This makes no sense.

As the historical and commonly-accepted practice is for the water-supplying municipality to charge an additional amount for serving customers outside of its boundaries, this decision will create a major disincentive to supply such water or to provide water outside of their boundaries only on a wholesale basis. One of the problems with supplying water on a wholesale basis is that many of the water-receiving municipalities do not want to establish and operate a retail billing and collection system for water service. They would prefer to let the water-supplying municipality, which already has a retail billing and collecting system in place, provide that function as part of its service. Having the water-supplying municipality provide the retail billing and collection with its existing system avoids the unnecessary duplication of separate systems for this function. This fosters the strong public policy in this state of intergovernmental cooperation as discussed in the Introduction of this brief.

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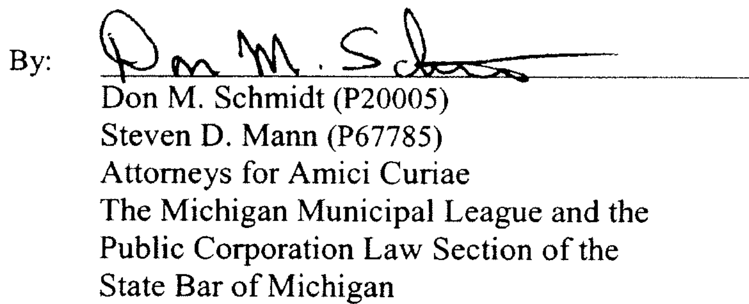
CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Amici Curiae respectfully request that this Court grant Defendant-Appellant's Application for Leave to Appeal and reverse the decision of the Court of Appeals.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.



By: ______________________

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Dated: April 21, 2009

DELIB:3075126.10\107546-00018

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

ONEIDA CHARTER TOWNSHIP, a
Michigan Charter Township, and David M.
Lee, Robert E. Ludlum, Lawrence J. Emery
and James Brandt, individuals,
Plaintiffs,

v

FILE NO. 05-1588-CZ

CITY OF GRAND LEDGE, a Michigan
Home Rule City,
Defendant.

OPINION

On October 27, 1980 the defendant City of Grand Ledge ("City") entered into an agreement with the neighboring Oneida Charter Township ("Township") to provide sanitary sewer and water services to properties within a Designated Service Area. As a result of this Agreement three primary issues present themselves for resolution by the Court. The plaintiffs seek several declarations:

(1) That the City may not lawfully deny sewer extensions to Township properties within the Designated Service Area;

(2) That the City's double water rates to Township customers are void, and that the City must provide water service to Township customers and City customers at the same rates;

(3) That the City's various up-front fees for Township sewer and water connections are void, and that the City may not lawfully collect these fees from Township customers.

THE AGREEMENT

The Court must first look to the Agreement signed by the City and Township officials on October 27, 1980. The Agreement provides, inter alia, as set forth below:

> WHEREAS, the facilities operated by CITY have sufficient operating capacity to provide sanitary sewer service and treatment and potable water supply for the anticipated needs of that area of TOWNSHIP defined as the Sanitary Sewer Boundary Area in CITY's approved Official Pollution Control Plan on file with the State of Michigan Department of Natural Resources, said area being designated on "Exhibit C" and Exhibit D", attached hereto and made a part hereof, said area being hereinafter referred to as the "Designated Service Area", and
>
> WHEREAS, TOWNSHIP and CITY have determined that an extension of such services will be of mutual benefit, NOW, THEREFORE, in consideration of the promises and undertakings of the parties hereto, IT IS AGREED AS FOLLOWS:
>
> 1. That this Agreement shall continue in force for a period of forty (40) years from and after the date above written.
>
> 2. The TOWNSHIP, when requesting sanitary sewer and water service within the Designated Service Area, shall submit its request to the City Council and said request shall include the following data:
>
> A. The legal description of the area to be served;
> B. Anticipated maximum population to be served;
> C. The name(s) of the owner(s) of record of all parcels of land located within said area and the name of the developer of said land, if the identity of the developer is known and is not an owner;
> D. Land use plan for the area, including a tentative street layout and showing existing and proposed utilities;
> E. Expected sewage and water flow as represented by residential equivalents.

> CITY shall notify TOWNSHIP in writing of any objections to TOWNSHIP's request, as submitted. In the absence of notification of objections within sixty (60) days of submission, such request shall be deemed as having been approved by CITY.

It was clearly the intention of the parties when entering into the Agreement to provide a mechanism whereby Township residents in the designated area may receive services. The City, by the nature of the Agreement, does not have to accept the requests of the Township, but must provide written notice of its objections within sixty (60) days. This Agreement allows the City to evaluate the anticipated maximum properties to be served and the expected sewage and water flow as represented by residential equivalents. The City sewer lines and mains must have sufficient unused capacity to accommodate the requested extension of sewer lines.

This Court disagrees that it was the intent of the Township and the City to enter into an Agreement where the City was obligated to service all extensions in the disputed areas regardless of the population served and the capacity of the unused drains. Indeed, the Township's Ordinance, adopted less than a month after the Agreement, stated:

> No connection to the system will be permitted unless there is capacity available at all downstream sewers, lift stations, force main, and the sewage treatment plan, including capacity for treatment of B.O.D. and suspended solids (Ordinance No. 11-80, Section 7B.1 p3).

Also, in the July, 1993 "Oneida Township Master Plan", the Township agreed that "The Township Agreement with the City also limits the amount of capacity that can be added due to limitations and interceptor pipe sizes and capacity of the wastewater treatment plant."

The Agreement provides that the Township's right to connect to the City system is contingent upon City approval of the Township's request for extensions and the existence of sufficient capacity in those systems. The discretion to be exercised by the City is not unlimited, but is governed by the Agreement. The Township has the right under the Agreement to be served by the City subject to certain limitations and expected sewage and water flows. In July 1973 the City accepted a federal grant and a state grant to finance 75% of the City's proposed Waste Water Treatment Plant. One condition of the grants was that the annexation cannot be a condition for providing sewage treatment services to adjoining community or communities.

The City and the Township joined in the preparation of a federally-funded area-wide Facilitative Plan "to develop and implement a plant which will result in a coordinated waste treatment management system for the area". While both parties anticipated that the City would have sufficient operating capacity to accommodate the Designated Service Area in the 1977 study, this study does not include the area to be serviced. No specific capacity was designated by the parties in the Agreement.

It is reasonable that all parties recognized the capacity for potential use was limited, as was the capacity of the Waste Treatment Plant. In fact, the Oneida Township Ordinance recognized this.

The Township would have the Court read the Agreement that the City has the obligation to provide sewer and water services to the Township as long as the request complies in form with Paragraph 2. It seems more reasonable that

the provisions of Paragraph 2 were put into the Agreement to permit the City to evaluate the capacity for any proposed extensions. The City could not disapprove the request for extensions unreasonably but could consider the impact on the system when considering whether to grant further expansion. In the Master Plan the Township conceded that the Agreement limits the amount of capacity that can be added to the system based upon pipe size and the Wastewater Treatment Plant. The Township has the right to connect to the system but only if the system's capacity is sufficient to accommodate the extension.

SANITARY SEWER SYSTEM CAPACITY

Both parties offered the testimony of experts on the Grand Ledge Sewer System capacity. The Township argues and its experts concluded that the Wastewater Treatment Plant (WWTP) has the capacity for additional wastewater flows to serve the Township extensions. The City's experts disagreed that the system had capacity. The Court is asked to evaluate the testimony and reach a conclusion where the experts apparently could not reach a consensus, the capacity of WWTP.

While the Court heard extensive and technical testimony from the experts the difference in many ways depends on how the respective experts view the problem and its resolution. The Township expert, Brent Bodner, P.E. is an engineer for the MEDQ, while the other expert, Jeff Fisher, a non-engineer with a degree in environmental science, is employed by the MEDQ. The essence of the evaluation by Fisher and Bodner went to the average flows of the wastewater

treatment plant itself. No studies or evaluation were performed on the collection system.

The City's experts are employees of Fishbeck, Thompson, Carr & Huber, engineers with extensive experience in waste water treatment plants and systems. The City's engineers conducted a flow monitoring system at locations within the system by installation of temporary flow meters. Their conclusion was that the projected future flow from the service area exceeded the capacity.

Bodner/Fisher looked only at the average daily flows and determined that this amount was within the capacity of the Wastewater Treatment Plant. While they recognized the SSO policy of the state agency, they did not find it appropriate to apply this policy to determine available capacity for additional sewer connections. The response recommended by Bodner was to fix the defects in the system, not deny future connections.

The Court finds the City's experts to be more credible and convincing. They are engineers with an impressive history and experience in the sort of problems that face the City of Grand Ledge. It also makes more sense to examine the entire system, including an analysis of construction and remedial measures taken to reduce infiltration and inflow, consideration of SSOs, analyses of pumping station capacity, and previously constructed sanitary sewer services.

"Peak flow" also is an element which logically should be considered in a capacity analysis of problem areas during peak flow times. Many of the conclusions of the City's engineers were confirmed by the Township's consulting

engineers. "Average flow" analysis implemented by Bodner/Fisher is not sufficient to evaluate the collection system capacity. As stated in the defendant's brief,

> "(A)verage flow" at the Wastewater Treatment Plant cannot and does not reflect how the system actually functions, such as peak flow requirements, collection system capacity issues, wet weather influence on system effluent volumes and the requirement that the Grand Ledge system must meet specified design storm criteria, i.e., that it must be able to convey and treat the effluent generated in a 25-year, 24-hour storm, and must at the same time be able to accommodate existing wastewater generated on a peak flow basis, and to serve those to whom a prior commitment for service has been made.

No data was supplied to contradict the findings of the engineers.

The City has the responsibility of protecting its citizens and users of the system from transgressions within the system. The City engineers have provided the City with a thorough analysis and recommendations. The City has not abused its authority or responsibility by following its engineers' recommendations and lessening the possibility of sanitary sewer backups and flooding.

The credible testimony of the City's engineers is that WWTP is at or beyond capacity. Adding new extensions outside the sewer area may lead to unfortunate and significant consequences to the detriment of the public.

The Township and interested owners argue that the problem with the system is the City's problem and that the City has the responsibility to extend sewer service to Township properties. The City's engineers' testimony, however, indicate that the problem is everyone's problem as increasing the flow to the Treatment Plant will jeopardize the integrity of the system, placing users of that system at risk. By the terms of the Agreement the City can object to the

applications and can consider the "expected sewer flow and the anticipated population to be served". The City by the Agreement did make a commitment to the Township to provide sewer services and it is not within the City's unbridled discretion whether to do so. The issue is whether the City has the capacity to provide services for the proposed extension and this Court is satisfied from the testimony of the City engineers that at this time it does not.

The Township also argues that the City discriminates in permitting expansion within the City and denying expansion by the Township. This Court disagrees. The City has, as it should, considered capacity that it already has committed when deciding whether it will have sufficient capacity to allow expansion within the City and within the Township. The City has demonstrated that it has previously committed such capacity. Indeed, the City engineers are arriving at their conclusions considering this committed capacity. The Township has offered little credible evidence to contradict this claim.

The Township also claims that contrary to the Agreement and the law, the City has used the "lack of capacity" problem to encourage annexation to the City. In support of this argument the Township has introduced a letter regarding property developed by Dible. The Court is not convinced from the evidence that a letter in 1989 forms a sufficient basis to conclude that the City is using water and sewer availability as a method to entice annexation.

The City has not arbitrarily denied sewer extensions and has based its decisions on well-founded and evidentiary supported opinions of its engineers. A moratorium on future connections is not unreasonable or arbitrary.

EQUAL PROTECTION AND DUE PROCESS ISSUES

Plaintiffs claim that the City has deprived them of constitutional and due process rights. It did this by not fulfilling its objectives to provide sewer services and to discriminate against Township users.

To assert a valid claim for deprivation of Fourteenth Amendment Rights plaintiffs must demonstrate "a property interest protected under the Fourteenth Amendment". *RSWW, Inc. v Keego Harbor*, 397 F3d 427, 434 (CA 6.2005). The property interest here is given by the terms of the Agreement.

However, the Fourteenth Amendment protections do not apply between political subdivisions. *South Macomb Disposal Authority v Township of Washington*, 790 F2d 500 (CA 1986). The Township's ability to extend sanitary sewer from the City owned system is dependent upon the approval of a request for such an extension. The request cannot be unreasonably withheld. Here the unavailability of capacity has been demonstrated by the City and capacity is a condition of sewer service.

This case is clearly distinguished from *Washtenaw County Health Dept v T & M Chevrolet, Inc.*, 406 Mich 418 (1979) where the Court required the City to provide sanitary sewer to the City to a single commercial user outside the City limits to abate an existing public health hazard. Here the City of Grand Ledge is not providing extensions to the system until the issue of capacity is resolved. There is no 14th Amendment or protected right that would require the extension of sanitary sewer. The extension is controlled by the terms of the Agreement. The City can consider the capacity of the system and the effect of additional

recipients on the system. It has done that and has reasonably concluded that extensions may jeopardize the system.

WATER RATE AND CHARGES

Water services charged to the Township by the City are found in the Agreement:

> ...TOWNSHIP users shall be required to pay for water service, including tapping the main and/or furnishing of a water meter, in amounts as may be established by CITY Ordinances pertaining to users outside the CITY limits, which charges shall be at least twice the amount currently being charged to CITY users for the same service. Rates for sewer and water service, permit fee and any other charges, rates and manner of collection and billing thereof shall be in accordance with the then-effective Ordinances of the CITY.

This provision of the Agreement corresponds to the City Ordinance which reads:

> Section 1. The common council for the City of Grand Ledge, Michigan shall from time to time determine the water rates for users of water supplied by the City of Grand Ledge, Michigan and in no event shall the rates fixed for said users lying without the City limits of said City of Grand Ledge be less than twice the rates fixed for users of like quantities of water lying within said City, and further provided that the rates as fixed shall be applied to each meter installation by any one customer who has more than one meter installation.

Also the contract was in accord with PA 1917 No. 34, which was amended by PA No. 53 of 1957:

> Municipal corporations having authority by law to sell water outside their territorial limits, hereafter referred to as corporations, may contract for such sale with cities, villages or townships having authority to provide a water supply for their inhabitants, but the price charged shall not be less than nor more than double that paid by customers within their own territory. The price charged may be more than double that paid by consumers within their own territory if the water is delivered to a city, village or township lying outside the county within which the corporations are situated, and lying more than ten miles beyond the territorial limits of the corporations. Any price charged that is more than double shall bear a reasonable relationship to the service rendered.

This statute was amended by PA 1981 No. 89, after the Agreement. The section provided:

> (1) A municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits may contract for the sale of water with a city, village, township or authority authorized to provide a water supply for its inhabitants.
>
> (2) The price charged by the city to its customers shall be at [a] rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another department and that serves less than 1% of the population of the state. This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection...
>
> (3) The retail rate charged to inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.
>
> (4) This act shall not apply to a jointly operated water system or authority that supplies raw untreated water to two or more municipalities.

The Township and interested property owners make several arguments as to the unenforceability of the contract agreement and the changes made to the Township users.

A. <u>IS THE DOUBLE WATER RATE CONTRARY TO THE AGREEMENT?</u>

The Township claims that the double water rate is contrary to the express terms of the parties' Agreement which only allows doubling of charges for "tapping the main and/or furnishing a water meter". This Court disagrees.

Paragraph 13 of the Agreement reads in part:

> . . . TOWNSHIP users shall be required to pay for water service including tapping the main and/or furnishing of water meter, in amounts as may be established by CITY ordinance pertaining to users outside the CITY limits as same may then exist or from time to time be amended, which charge shall be at least twice the amount currently being charged CITY users for the same service. Rates for sewer and water service, permit fee, any other charges, rates and manner of collecting and billing thereof, shall be in accordance with the then-effective ordinances of CITY as they pertain to users outside the corporate limits of CITY.

This paragraph applies to water services <u>including</u> tapping the main and furnishing the meter. Also City Ordinance No. 156, which was in existence before the contract, provides that users of city water outside city limits pay at least "2x multiplier".

The Township also argues that the multiplier should only apply to the rate in effect when the contract was signed. However, the language of paragraph 13 states that the rates subject to the multiplier will be as they "then exist or may from time to time be amended, which charges shall be at least twice the amount currently being charged to City users for the same service . . ." Furthermore Township users have been charged the "2x" multiplier since 1980, which manifests the intent of the parties.

B. <u>DOES THE AGREEMENT FAIL FOR LACK OF MUTUALITY?</u>

Plaintiffs contend that the Agreement as applied by the City binds only the Township but not the City because it sets a rate "at least double" the City-use rate. Such language, plaintiffs argue, does not bind the City to the sale of water at <u>any determinable price</u>, and is therefore void and unenforceable because it fails to meet the mutuality requirement for a valid contract.

The requirement of mutuality means that both parties to an agreement are bound, or neither is bound. *Reed v Citizens Ins. Co.*, 198 Mich App 443, 449 (1993). "It is a well established principle of the law of sales that it is essential to the validity of a sales contract that a definite price be either stated in the contract, or be ascertainable from the contract's express or implied provisions." 49 ALR 2d 508-513.

Plaintiffs seek invalidation of Paragraph 13 because of lack of mutuality. Plaintiffs believe that if the Court were to do this, the price would be subject to renegotiations by the parties.

This Court disagrees that it should invalidate Paragraph 13. The price to Township users is clearly ascertainable. Under the statute in effect when the contract was signed the City "could" charge more than double in-City rates to the Township, but:

> . . .the price charged may be more than double that paid by consumers within their own territory if the water is delivered to the city, village or township lying outside the county in which the corporations are situated, and lying more than 10 miles beyond the territorial limits of the corporations. Any price charged that is more than double shall bear a reasonable relationship to the service rendered.

This condition does not apply to the City of Grand Ledge. In addition the City has charged and Township residents have paid the minimum rate for 26 years. Clearly the established rate under the Agreement is 2x the City users' rate.

C. <u>DOES THE DOUBLE WATER RATE VIOLATE MCL 123.141?</u>

The Township argues that eight months after the Agreement when the legislature amended MCL 123.141 the law eliminated the double water rate provision of the Agreement and required the City to charge an amount

representing the "actual cost of service as determined under the utility basis of rate-making." The Township and the City analyze the change in the statute in different ways. The Township distinguishes between retail and wholesale customers and argues that MCL 123.141(3) controls the water rate charged by the City to the Township at the "actual cost of providing the service".

While the statute is, at best, confusing, the City's analysis is more convincing. A review of the legislative history explains the changes as well as the phrase: "This subsection shall not apply to a water system that is not a contractual customer of another department and that serves less than 1% of the population of the state."

The larger community (presumably Detroit) was caught in the dilemma of having to charge communities to which it was providing water double the city's rates even though the cost was substantially less; and by the same token having to charge far reaching communities less than its actual costs.

According to the House legislative analysis section, "many of Detroit's water service customers pay more than actual cost of service while some pay less. . . . Thirty-four overcharged customers will pay $4.8 million this fiscal year to help provide water to undercharged customers." Thus subsection (2) excludes water systems that are not a contractual customer of another department and that serves less than 1% of the population of the state.

Since the City of Grand Ledge is not a contractual customer of another water department and only provides water outside its boundaries to a portion of Oneida Township, subsection (2) requiring the price charged must be based on

actual cost, does not apply to the City. The factor of two was a negotiated factor in the Agreement and is not necessarily based on cost of service. The change in the statute does not apply to the City.

The Township also claims that the City is bound by subsection (3). The Court disagrees. Subsection (3) applies to "contractual customers" referenced in subsection (2). This was to assure that cities, villages, townships or customers which purchase water from another system cannot charge their own inhabitants a rate above cost. The legislative analysis confirms this.

D. DOES THE DOUBLE RATE VIOLATE THE HEADLEE AMENDMENT?

The Headlee Amendment (Mich Const. 1963, art. 9, §31) states that units of government are prohibited from levying any tax not authorized by law or charter or from increasing the rate of an existing tax above that rate authorized by law or charter without the approval of a majority of the qualified electors of the unit of local government. The Headlee Amendment applied to any tax not authorized at the time of the amendment.

The Township argues that the City's double water rates are hidden taxes rather than fees which have never been approved by the voters. This Court disagrees that the Headlee Amendment applies to this case. At the time the Headlee Amendment went into effect, 1978, double water rates were already authorized by statute.

Also the Township relies upon the Michigan Supreme Court case of *Bolt v City of Lansing*, 459 Mich 152 (1998). This case struck down the City of

Lansing's "storm water sewer fee" added to the City's sewer rates. The Court said that this was an impermissible tax since it had not been approved by the voters.

The *Bolt* case is clearly distinguishable from the case at bar. In *Bolt* the City charged each parcel of the property in the City. The Court distinguished a fee from a tax when the activity which results in that fee is voluntarily undertaken.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water . . . No one can be compelled to take water unless he chooses . . . The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not, as the price does or does not suit them. P 162

The City cannot levy taxes against the citizens of Oneida Township; nor can the City compel Oneida property owners to receive or accept water services from the City. Headlee does not apply.

E. <u>DOES THE DOUBLE RATE VIOLATE DUE PROCESS AND EQUAL PROTECTION?</u>

The Township also argues that the Due Process Clause in the Equal Protection Clause of the Constitution precludes the City from setting unreasonable, arbitrary and capricious water rates. In *Atlas Valley Golf and Country Club, Inc. v Village of Goodrich*, 227 Mich App 14 (1977) the Court ruled that the County could charge non-residents a higher rate for use of the sewer system only if residents pay indirect costs that non-residents do not pay, and the rate must be reasonable in light of the indirect costs.

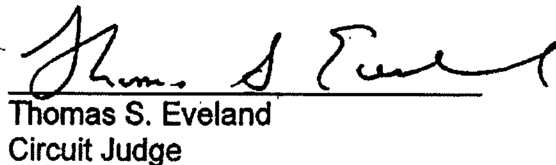
In the case at bar, however, the rates and charges are embodied in a contract for the sale of water, not sewer, and is governed by the statutory authorization of MCL 123.141 which specifically provides the double multiplier.

SANITARY SEWER AND WATER CAPITAL INVESTMENT FEED

The Agreement provided that certain Township residents pay to the City as sanitary sewer capital investment fees and a water capital investment fee (Par. 14, 15). Exhibit A attached to and made part of the Agreement set forth the formula for computing the sanitary capital investment fee, and the parties agreed to amounts for the years 1978 and 1979. Exhibit B provided a formula to compute the water capital investment fee and agreed upon amounts for the years 1978 and 1979.

The formula is unambiguous as the parties have employed the formula for 26 years. The water and sewer capital investment fee calculated from 1978 through June 30, 2006 has been provided. Again these are not violations of Headlee, nor can they be taxes, but rather charges, for providing a product, water or sewer, to the Township.

Dated: 1-25-07



Thomas S. Eveland
Circuit Judge

cc: William K. Fahey
J. Richard Robinson
James L. Shonkwiler

PROOF OF MAILING

STATE OF MICHIGAN)
) SS
COUNTY OF EATON)

Jane Echtinaw, being first duly sworn, deposes and says that on the 26th day of January, 2007 she served a copy of the Opinion dated 1-25-07, 2007 upon the following parties by mailing same to them at the addresses shown, First Class Mail, postage fully prepaid.

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Jane Echtinaw
Jane Echtinaw

EXHIBIT B

650 Roosevelt Building
Phone: 517/373-6466

HOUSE BILL 4029 as enrolled
Second Analysis (9-24-81)

Sponsor: Rep. John Bennett
House Committee: City Government
Senate Committee: Municipalities & Elections

THE APPARENT PROBLEM:

Public Act 34 of 1917 authorizes municipally owned water systems to contract to provide water to other local governments. By far the largest such network of agreements is that involving the City of Detroit Water and Sewerage Department. This system, which involves 97 communities, has also been the focus of a great deal of controversy. Some communities have complained of their rates being raised to what they consider to be unreasonably high levels, while other communities have been accused of bearing less than a fair share of the cost. Part of the difficulty in setting fair rates arises from the tremendous complexity of assigning proportional responsibility for such a huge, intricate, and interconnected system; but the difficulty also arises in part from the limitations placed on rate-making by Public Act 34. Detroit officials believe that the first difficulty has been largely overcome by a study performed by the Boston consulting firm of Camp, Dresser, and McKee (CDM) and the development of a computer program from that study which serves to identify the actual cost of providing water to each community. The first rates based on the CDM study went into effect December 1, 1980, but these rates were distorted by the effects of Public Act 34. This law sets the minimum and maximum rates which a city selling the water service may charge a community purchasing it when that community lies within ten miles of the originating city's borders. The minimum is the same rate charged within the city doing the selling and the maximum is twice that rate. Detroit charges its own citiens $2.75 per 1,000 cubic feet (Mcf) of water, so that $2.75 is the least it can charge a municipal customer within ten miles of its city limits and $5.50 is the most it can charge. Detroit can actually supply water to some cities more cheaply than it can to itself. Thus, the actual cost of supplying Dearborn and River Rouge is $1.42 and $1.37 respectively but by law they must pay $2.75. The cost of supplying some nearby cities is greater than $5.50. The cost of service in Farmington Hills is $8.02, in West Bloomfield Township it is $11.55, and the cost of supplying the Oakland County Drain Commission is $23.67 per Mcf; yet all these entities pay the maximum $5.50. Detroit's share in the sytem results in an actual cost per Mcf of $3.07. By setting its own rate at $2.75 the city forces a subsidy of 32 cents per Mcf from other communities. In effect some communities are subsidizing the provision of water service to other communities. Some persons think that the law should be amended to require each community to pay the actual cost of the service it receives.

Once a city has purchased water from another city it is free, so far as Public Act 34 is concerned, to charge its own retail customers whatever it likes. There have been numerous cases of municipalities contracting for water service from other communities and then reselling the water to their own citizens at a rate which greatly exceeds any reasonable increment for the cost of service within the city limits. This is effectively a hidden tax, easily concealed because most citizens will assume they are paying exorbitant rates set by another city. Some people think the law should be changed to provide that when a municipality is guaranteed the provision of water at the cost of actual service it should also be required to retail the water to its own inhabitants at the cost of service.

THE CONTENT OF THE BILL:

The bill would amend Public Act 34 of 1917 to strike the language establishing the present minimum and maximum rates which may be charged by municipal corporations selling water to other municipalities and to eliminate the distinction between communities within ten miles of the seller and more distant cities. The bill would provide that the rate charged all purchasers must be based on the actual cost of the service as determined by the utility basis of rate-making. Maximum and minimum rates contained in existing contracts would remain in force for the life of those contracts. The bill would take efect April 1, 1981 and rates would have to be adjusted to its provisions at the time of the next rate change, however, any city not in conformity by April 1, 1982 would have to adjust its next rate change so as to produce the amount of estimated revenue which would have been produced if the adjustment had been retroactive to April 1, 1982.

The bill would also provide that a municipality, once having bought water from another city, must sell it to the inhabitants of the municipality at a rate which does not exceed the actual cost of the service.

The bill would not apply to a water system which is not the contractual customer of another water department and which serves less than one percent of the population of the state, nor to a jointly operated water system providing untreated water to two or more municipalities.

FISCAL IMPLICATIONS:

There are no fiscal implications to the state.

ARGUMENTS:

For:

The present rate-making limitations result in obvious inequities. Thirty-four of Detroit's water service customers pay more than the actual cost of service while ten pay less. In effect the thirty-four overcharged customers are subsidizing the cost of water service to the ten undercharged customers. The City of Detroit alone will benefit this year in the amount of $3.4 million. The other undercharged customers will pay almost $1.4 million less than their actual cost of service. Thus, the thirty-four overcharged customers will be paying a total of $4.8 million this fiscal year to help provide service to undercharged customers. Now that the Detroit water system has at its disposal a reliable method of equitably apportioning costs

there is no reason why water service customers should not pay the actual cost of service.

For:

The principle that water service should be available at cost ought to extend to the individual retail customer as well as to the wholesale municipal customer. Some municipalities have been charging their own inhabitants a rate far above the acutal cost of service. Local officials know that most residents will assume that the heavy charges are imposed by the vending city rather than added on by their own local governments. If the residents of a community are willing to be taxed in their water bills they are, of course, free to do so, but hidden taxes should be forbidden. The bill's requirement that local units contracting to buy water under the bill's guarantee of actual cost of service rates also retail the water to their inhabitants at actual cost of service is sound public policy.