

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
OWENS, P.J., AND MARKEY AND SERVITTO, J.J.

OSHTEMO, CHARTER TOWNSHIP OF

Appellant,

Supreme Court Case No. 150695

v

Court of Appeals Case No. 317893

**MICHIGAN PUBLIC SERVICE
COMMISSION and MICHIGAN
ELECTRIC TRANSMISSION
COMPANY, LLC**

MPSC Case No. U-17041

Appellees.

**AMICUS CURIAE BRIEF OF THE MICHIGAN
CABLE TELECOMMUNICATIONS ASSOCIATION**

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STATEMENT OF QUESTION PRESENTED

I. IS THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PA 30, CONSISTENT WITH THE FIRST SENTENCE OF CONST 1963, ART 7, § 29?

Appellee Michigan Electric Transmission Company, LLC answers: “Yes”

Appellee Michigan Public Service Commission answers: “Yes”

Appellant Charter Township of Oshtemo answers: “No”

Amicus Curie Michigan Cable Telecommunications Association answers: “Yes”

STATEMENT OF JURISDICTION

The Michigan Cable Telecommunications Association concurs with the Statement of Jurisdiction presented by the Appellee Michigan Electric Transmission Company, LLC and incorporates that statement by reference.

**STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT OF
AMICUS CURIAE**

**A. Description of the Michigan Cable Telecommunications Association
and Its Interest in this Appeal**

The Michigan Cable Telecommunications Association (“MCTA”) is a Michigan nonprofit corporation whose membership consists of many of the operators of cable telecommunications systems in Michigan. MCTA members serve approximately two million customers in all eighty-three (83) of Michigan’s counties - - about 85% of all cable customers in Michigan. MCTA represents the Michigan cable industry and has participated as *amicus curiae* in state and federal courts on issues of significance to the cable industry. Before the Michigan Court of Appeals in this proceeding, MCTA was granted leave to participate as an amicus and filed an amicus brief.

This appeal presents an issue of major significance to the telecommunications and cable industry, because it will establish the scope of a Michigan municipality’s authority pursuant to Article 7, Section 29 of the Michigan Constitution to regulate the access to and control over the highways, streets, alleys and other public places located within a municipality. Since MCTA’s members rely upon the access to the public rights of way to provide their services, a decision in this case will directly impact the ability of MCTA’s members to provide broadband, digital voice and cable television services to their nearly two million Michigan customers. These services furnish Michigan residents with access to the information and tools that are essential for achieving a quality education, finding employment, conducting business and competing in the global marketplace. Without reasonable access to the public rights of way to provide these vital services, Michigan residents and the Michigan economy will be acutely harmed.

B. Description of the Issue on Appeal

The Michigan Electric Transmission Company, LLC (“METC”) filed an application with the Michigan Public Service Commission (“MPSC”) pursuant to the Electric Transmission Line Certification Act, 1995 PA 30, MCL 460.561, *et seq.* (“Act 30”) seeking approval to construct a wholesale transmission line designed to prevent brown-outs and black-outs in the Kalamazoo and Battle Creek region. In exercising its delegated authority pursuant to Act 30, the MPSC granted a certificate of public convenience and necessity stating “that the overall benefits justify construction and there is a clear need to proceed with construction to maintain reliability [of the electric grid].” (July 29, 2013 Order in MPSC Case No. U-17041 at p 25.)

After participating in the contested case proceeding before the MPSC, the Charter Township of Oshtemo (“Oshtemo Township”) filed an appeal asserting that the Commission’s issuance of a certificate was inconsistent with Oshtemo Township’s authority provided under Article 7, Section 29 of the Michigan Constitution, because Act 30 preempted local ordinances inconsistent with the MPSC certificate. In *In re the Application of Michigan Electric Transmission Co*, 309 Mich App 1; 867 NW2d 911 (2015), the Court of Appeals rejected Oshtemo Township’s appeal, concluding that Act 30:

. . . is not an unconstitutional blanket usurpation of Oshtemo Township’s ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22. (*Id.*, at p 20).

This Court then granted leave to appeal stating: “The parties shall include among the issues to be briefed whether the Electric Transmission Line Certification Act, 1995 PA 30, effective May 17, 1995, is consistent with the first sentence of Const 1963, art 7, § 29.” Supreme Court Order, 498 Mich 955 (December 23, 2015).

C. Summary of MCTA's Argument

In enacting Act 30, the Michigan Legislature did so, in part, to prevent municipalities from enforcing local ordinances that would have a tremendous adverse impact on significant issues of statewide concern. For example in this instant case, Act 30 prevents the enforcement of one municipality's local ordinance which would create the risk of brown-outs and black-outs for other Michigan communities. Act 30 plays an important role in protecting statewide interests necessary to promote the public health, safety, welfare and prosperity of Michigan.

Not only has such statewide legislation been enacted to promote and ensure statewide access to electricity, the Michigan Legislature has also enacted legislation to promote statewide access to telecommunications and cable services. For example, the Michigan Legislature enacted the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, 1992 PA 48, MCL 484.3101, *et seq.*, to create a streamlined process for allowing telecommunication providers access to municipal rights of way due to "evidence . . . that unreasonable fees charged [by] some local units" adversely impacted the statewide deployment of broadband infrastructure. (Floor Analysis for SB 880, House Fiscal Agency, March 13, 2002; Attachment A to this brief.) Similarly, when cable providers sought local franchises from municipalities the Federal Communications Commission found that municipalities' "requests for unreasonable concessions are not isolated" and "impose undue burdens upon potential cable providers." (*Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 43 (2006); the relevant portion is attached as Attachment B to this brief.) These types of abuses lead the Michigan Legislature to enact the Uniform Video Services Local Franchise Act, 2006 PA 480, MCL 484.3301, *et seq.*, to create a streamlined but still local cable franchising process.

This appeal examines whether Act 30 runs afoul of first sentence of Article 7, Section 29 of the Michigan Constitution, which 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. (Emphasis added.)

The plain text of this sentence simply requires public utilities to obtain: (1) the consent of a municipality before using the municipality's public rights of way, and (2) a franchise before transacting a local business within the municipality. On its face, this sentence imposes only those two requirements on public utilities and nothing more.

In examining whether Act 30 runs afoul of this sentence, it is equally important to examine what the text of this sentence does not state either implicitly or explicitly. First, this sentence **does not** reserve to a municipality the unqualified or unfettered right to grant, deny or condition its consent, let alone to do so in a manner inconsistent with state law. Second, this sentence **does not** upset the traditional relationship between the Michigan Legislature and a municipality - - a mere political subdivision of the state - - such that a municipality may usurp and impose regulatory authority that the Michigan Legislature has already determined to be inimical to the public health, welfare and safety of Michigan. Third, this sentence **does not** provide any self-executing power or authority to a municipality to grant, deny or condition its consent.

In sum, the plain text of the first sentence of Article 7, Section 29 only places two requirements on public utilities: (1) to obtain a consent to use the public rights of way and (2) to obtain a franchise to transact a local business. The plain text of this sentence does not even

address, let alone govern, the manner in which a municipality may grant, deny or condition its consent or franchise. As a result, a municipality in granting, denying or conditioning its consent must do so in a manner consistent with and in compliance with other Michigan law, including Act 30. Therefore, Act 30 is entirely consistent with the first sentence of Article 7, Section 29.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

MCTA concurs in the Counter Statement of Facts and Procedural History set forth by Appellee METC and incorporates that statement by reference.

STANDARD OF REVIEW

MCTA concurs in the Standard of Review set forth by Appellee METC and incorporates that standard by reference.

ARGUMENT

Act 30 Does Not Violate Const 1963, art 7, § 29 by Allowing an MPSC Certificate to Take Precedence over a Conflicting Ordinance Prohibiting or Regulating the Construction of a Transmission Line.

A. Act 30 Does Not Violate the Text of the First Sentence of Article 7, Section 29.

When interpreting the Michigan Constitution, this Court’s primary task is to give effect to the common understanding of the text. *Lapeer County Clerk v. Lapeer County Circuit Court*, 469 Mich 146, 155; 665 NW2d 452 (2003). “The primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification.” *Wayne County v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). A court “typically discerns the common understanding of a constitutional text by applying each term’s plain meaning at the time of ratification.” (Id., at p 468-469.)

In *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), this Court quoting *Cooley's Constitutional Limitations* explained:

“A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* ‘For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed.’ (Cooley’s Const Lim 81).” (*Id.*; emphasis in original.)

Here, the common understanding of the first sentence of Article 7, Section 29 creates no conflict with Act 30.

The first sentence of Article 7, Section 29 of the Michigan Constitution 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.

On its face, this sentence simply prohibits certain conduct of a public utility - - in that a public utility may not use the public rights of way without first obtaining the consent of a municipality, and it may not transact local business without obtaining a franchise from the municipality. The question of how and under what circumstances a municipality may grant, deny or condition its consent is not addressed in any manner by this sentence. In fact, this sentence grants no explicit authority to a municipality - - let alone sovereign or self-executing authority - - to determine when its consent may be granted, denied or conditioned.

In ratifying this straight-forward provision, the people of Michigan merely required public utilities to obtain a municipality's consent to use the public rights-of-way. Nothing in this sentence even remotely suggests that the people of Michigan intended to ratify a unique constitutional scheme where a municipality in determining whether to grant, deny or condition its consent could contravene the mandates of other state law passed by the Michigan Legislature designed to be promote the public health, safety and well-being of all of its citizens. As a result, Act 30 is not in conflict with the common understanding of the first sentence of Article 7, Section 29.

In an effort to avoid analyzing the actual text of this sentence to determine its common understanding, Oshtemo Township instead references *dicta* in *People v McGraw*, 184 Mich 233, 238; 150 NW 836 (1915) and argues that “[a]lthough the consent clause is framed as a limitation on the activities of utilities, it is, in effect, a grant of authority to local units of government.” (Appellant’s Brief at p. 6.) This argument not only ignores the plain text of the constitutional provision, it also ignores the fact that the *McGraw* decision never addressed the manner in which the consent provision may or may not be exercised. Nonetheless, the *McGraw* court did reject the notion that a municipality could act in contravention of general state law. The *McGraw* court stated:

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. (*Id.*, at p 238; emphasis in original.)

Nothing in *McGraw* even addresses let alone holds that a municipality, through the consent clause, may regulate a public utility in a manner inconsistent with state law.

Similarly, Oshtemo Township's reliance on the statement in *Anchor Bay Concerned Citizens v Anchor Bay Board of Education*, 55 Mich App 428, 431- 432; 233 NW2d 3(1974) that "[t]he Legislature cannot adopt a statutory standard which conflicts with a constitutional standard" is misplaced. (Appellant Brief at p. 7.) In *Anchor Bay* the court addressed the number of signatures needed for a recall petition. Since the Michigan Constitution created a specific constitutional formula for ascertaining the number of signatures, the Legislature was prohibited from creating a different statutory standard. In other words, the recall provisions set forth in the Michigan Constitution were self-executing. With respect to the first sentence of Article 7, Section 29, there is no constitutional formula or standard as to how a municipality may grant, deny or condition its consent. Thus, unlike the statute addressed in *Anchor Bay*, Act 30 does not conflict with any self-executing provision of the Michigan Constitution.

B. Nothing in the Text of the First Sentence of Article 7, Section 29, Upsets the Traditional Relationship Between the State Legislature and Municipalities.

As established above, all that the plain text of the first sentence of Article 7, Section 29 does is require a public utility to obtain consent from a municipality before using the public rights of way for the specified purposes, and obtain a franchise from a municipality before transacting a local business. Nothing in this first sentence upsets or interferes with the traditional role of the Michigan Legislature with respect to its sovereign relationship over municipalities. It is a complete *non sequitur* to assert that, because the Michigan Constitution requires public utilities to obtain municipal consent that the Constitution has somehow usurped the traditional relationship that exists between the Michigan Legislature and municipalities; and that municipalities are now somehow granted sovereign power which may not be interfered with by the Michigan Legislature. A constitutional requirement imposed on public utilities to

obtain municipal consent does not support an argument that the Michigan Legislature has been deprived its sovereign power over municipalities.

A municipality is a “political subdivision” of the State of Michigan and a “creature[] of legislation.” *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 60; 669 NW2d 845 (2003). As political subdivisions, municipalities are subject to requirements imposed by the Michigan Legislature, even where a municipality’s authority to act is recognized in the Michigan Constitution. For example, in *Bay City v State Board of Tax Administration*, 292 Mich 241, 257; 290 NW 395 (1940), municipalities that had created their own public utilities objected to a statute which subjected their municipal utilities to a state licensing and taxation regime. The municipalities argued that their right to own and operate utilities was granted by the Michigan Constitution [then Article 8, §§ 23, 24 and 25] and therefore, the statute imposing licensing and taxes upon them was unconstitutional. This Court disagreed and stated :

The constitutional authorization of municipal utilities is not self-executing. Instead numerous legislative enactments have been found necessary to provide the means and method of enabling cities and villages to acquire and conduct such utilities. For example see sections 1684–1692, 2100–2122, 2231–2237, C.L.1929; being 5.1420–5.1428, 5.1895–5.1917, 5.2074–5.2080, Stat. Ann. In this connection see *City of Allegan v. Iosco Land Co.*, 254 Mich. 560, 236 N.W. 863. Except such legislative enactments contravene constitutional provisions they are valid. *Stanhope v. Village of Hart*, 233 Mich. 206, 206 N.W. 346, upon which appellants rely is by no means as broad in its decision as appellants infer, and does not sustain their claim that sections 23, 24 and 25, Article VIII of the constitution are self-executing. **In asserting freedom or exemption from legislative regulation in the exercise of their governmental and proprietary functions, these cities and villages seem to overlook the fact that, except as to certain express constitutional grants and limitations of power, they are only creatures of legislation.** Our constitution provides:

‘The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages * * *’. Art. 8 § 20.¹

(*Id.*, at p 257; emphasis added; footnote added.)

Just as the Michigan Legislature may enact statutes requiring the licensing and taxation of municipal utilities that the Michigan Constitution recognizes a municipality has the right to create, the Michigan Legislature may enact statutes impacting the manner in which the municipal consent provision in the Michigan Constitution may or may not be exercised with regard to a public utility’s use of the public rights of way. Given that this Court has found that the Michigan Legislature has the right to regulate municipal utilities specifically allowed for by the Constitution, the Michigan Legislature may also regulate the manner in which consent is provided.

Similarly, this Court in *Niles v Michigan Gas & Electric Co*, 273 Mich 255, 265 -266; 262 NW 900 (1935) rejected the argument that the constitutional provisions allowing a municipality to grant franchises would allow the municipality to set utility rates in a manner inconsistent with a state statute. This Court stated:

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.** 26 C. J. 1013, 1024, et seq.; 12 R. C. L. 186. Sections 25 and 29 do not purport to withdraw from the Legislature its sovereign power over franchises and confer it upon municipalities. They do no more than establish limits of time and conditions of irrevocability of such franchises as the Legislature may delegate to municipalities the power to grant.

¹The current constitutional provisions regarding establishment of the counties, townships, cities and villages as corporate bodies with powers and immunities provided by law are found at Const 1963 art 7, §§ 1, 17, and 21.

Nor, under the cases above cited, particularly *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998, cited by Mr. Justice NORTH, **does section 28 grant to municipalities the sovereign power to fix public utility rates.** Section 2107 was an exercise by the Legislature of such sovereign power, delegated to fourth-class cities, but confined to the power to contract for ten years and no longer. The contract may be, but need not be, attached to a franchise. Its inclusion in a franchise cannot enlarge the delegated authority. A city cannot exceed its charter powers and confer prohibited authority upon itself by a particular method of usurpation. (*Id.*)

Thus, this Court has recognized that the consent and franchise provision in the Constitution do not grant sovereign power to municipalities, but instead requires a municipality to exercise its power as an “agent of the state and upon the conditions prescribed by law.” *Id.*

When the people ratified the first sentence of Article 7, Section 29, nothing in the text suggested that the people intended to grant sovereign authority to municipalities with respect to granting consents or franchises to public utilities. Nothing in this first sentence even implicitly - - let alone explicitly - - interferes with the traditional role between the Michigan Legislature and municipalities. In ratifying this first sentence, the people would have had every expectation that the powers being provided to a municipality pursuant to this sentence were to be exercised as an agent of the state and as prescribed by state law. Applying the rationale of this Court’s decisions in *Bay City* and *Niles*, the Michigan Legislature’s traditional sovereign authority over a municipality was not altered by the first sentence of Article 7 Section 29.

C. The Authority to Grant, Deny or Condition Consent is not Self-Executing and Therefore It is Subject to Other Provisions of the Constitution and Law.

1. A municipality’s conduct must be consistent with other state law.

While the first sentence of Article 7, Section 29 requires a public utility to obtain municipal consent to use the public rights of way and a franchise to transact local business, this sentence, in and of itself, does not specify the manner in which a municipality may grant or

withhold its consent or a franchise. As recognized by the Michigan Court of Appeals in *City of Lansing v State of Michigan*, 275 Mich App 419; 737 NW2d 818 (2007) this first sentence is not self-executing. (*Id.*, at p 433 at fn 4.) “In order to grant effect to this provision, a city must exercise its authority to grant or withhold consent through its general power to adopt resolutions and ordinances relating to its municipal concerns.” (*Id.*, at p 433.) As the Court of Appeals in *City of Lansing* concluded:

Under Const 1963, art 7, § 22, each city and village is granted the “power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.” Because a city’s general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city’s authority to grant or withhold consent to use its highways, streets, alleys, and other public places can only be exercised through an ordinance or resolution, it follows that a city’s ability to grant or withhold consent is also subject to the constitution and laws. Consequently, when Const 1963, art 7, §§ 22 and 29 are read in conjunction, the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29. (*Id.*)

The Michigan Constitution at Article 7, Section 22 establishes that a city’s or village’s authority to grant or withhold consent “is also subject to the constitution and laws.” In acting pursuant to Article 7, Section 29, these municipalities must do so in a manner consistent with state law, including Act 30.

While Article 7, Section 22 applies to cities and villages, the authority of a charter township, such as Oshtemo Township, to grant or withhold consent is equally subject to the constitution and other laws of this State. Article 7, Section 17 of the Michigan Constitution states “Each organized township shall be a body corporate with powers and immunities **provided by law.**” (Emphasis added.) Thus, a charter township’s authority to enact ordinances and pass resolutions comes from authority granted by law enacted by the Michigan Legislature.

In enacting the Charter Township Act, MCL 42.1, *et seq.*, the Michigan Legislature directly limited the ability of a charter township to regulate its public rights of way in a manner inconsistent with state law. For example, Section 16 of The Charter Township Act, in relevant part states:

Except insofar as limited by state law and the provisions of this act, the township board shall have power to establish and vacate and use, and to control and regulate the use of the streets, alleys, bridges, and public places of the township and the space above and beneath them, such regulation of its streets, alleys, bridges, and public places shall be deemed a matter of local concern. (Emphasis added.)

Like cities and villages, a charter township's authority to control and regulate the use of its public rights of way are subject to and limited by other state law, such as Act 30.

2. A municipality's conduct must also be consistent with the last sentence of Article 7, Section 29.

A municipality's granting or withholding consent must also be consistent with the other provisions of the Michigan Constitution, including the last sentence in Article 7 Section 29 which states:

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. (Emphasis added.)

While the first sentence of Article 7 Section 29 places a requirement on public utilities to obtain a consent or a franchise, this second sentence actually addresses a separate issue -- the scope of control that the Constitution reserved to a municipality over its public rights of way. The text of this sentence governs a municipality's control over its public rights of way, which would include their use by both public utilities and others, such as the motoring public. Here the last sentence of Article 7, Section 29 recognizes that the right to control exercised by a municipality must be

“reasonable.” Here it is not reasonable for a municipality to exercise control over its public rights of way in a manner that is inconsistent with a statute, here Act 30, enacted by the Michigan Legislature to preserve the public health, safety, welfare and prosperity of this State.

As this Court held in the *City of Taylor v. Detroit Edison Co.*, 475 Mich 109; 745 NW2d 109 (2008), “[c]onsistent with our longstanding precedent, we hold that a municipality’s exercise of ‘reasonable control’ over its streets cannot impinge on matters of statewide concern **nor can a municipality regulate in a manner inconsistent with state law.**” (*Id.*, at page 112; emphasis added.) In *Taylor*, this Court concluded that when a municipal “ordinance conflicts” with other law the ordinance “must yield.” (*Id.*, at p 119.) The authority of a municipality to grant or withhold consent must be reasonable, *i.e.*, consistent with statutes enacted by the Michigan Legislature.

D. Even Oshtemo Township Concedes its Authority to Withhold Consent is Subject to a Reasonableness Standard.

Oshtemo Township asserts that, while the Michigan Legislature has no right to interfere with its authority to grant or withhold consent, a municipality’s “consent cannot be unreasonably refused or unreasonably burdensome.” (Appellant brief at p 29.) In part, Oshtemo Township argument acknowledges this Court’s past statements that municipal consent cannot be “refused arbitrarily and unreasonably.” *Union Twp v Mt Pleasant*, 381 Mich 82, 90; 158 NW2d 906 (1968). Oshtemo Township’s argument is that the remedy is with the courts if a municipality acts arbitrarily or unreasonably in withholding consent, but the Michigan Legislature has no authority whatsoever, to interfere with this authority even when the Michigan Legislature is adopting legislation regarding matters of statewide concern.

In making this argument, Oshtemo Township is tacitly acknowledging that the people of Michigan in ratifying the Constitution did not intend to allow local concerns to arbitrarily and

unreasonably thwart statewide concerns. If neither the Michigan Legislature nor the Michigan courts could trench upon the municipalities' consent authority, then municipalities would be able to behave in a manner that could cause real and significant harm to the well-being of the people. For example, one municipality could effectively veto an entire utility project designed to provide essential public services to other Michigan communities or one municipality could simply withhold consent to such a project in order to extract the proverbial "king's ransom," thus burdening the economics and viability of a needed project to provide essential services.

While the first obligation of this Court is to faithfully interpret the constitution, nothing in the first sentence of Article 7, Section 29 even remotely suggests that the people of Michigan intended such an egregious result. As ratified by the people, the plain language of this sentence only required public utilities to obtain municipal consent. This one sentence of the Constitution does not provide unfettered authority to a municipality to grant or withhold consent. Even Oshtemo Township finds untenable an argument that the people in ratifying the Constitution intended to provide to municipalities such an unqualified and unchecked power to grant or withhold consent. Therefore, it claims that the courts have the right to interfere when a municipality acts arbitrarily or unreasonably, and it insists that there is no role for the Michigan Legislature.

This argument must be rejected because it usurps the role created by the Constitution for the Michigan Legislature and attempts to replace it with judicial power. "The legislative power of the State of Michigan is vested in a senate and a house of representatives." (Article 4, Section 1.) "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." (Article 4, Section 51.) Further, through its legislative acts, the

Michigan Legislature determines the power and authority of counties (Article 7, Section 1), townships (Article 7, Section 17) and cities and villages (Article 7, Section 21). As this Court has stated the “exercise of the sovereign power of the state [is] vested in the Legislature” and this “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.” (*Niles, supra*, 273 Mich at 265.) Here, it is entirely appropriate - - and consistent with the Constitution and this state’s jurisprudence - - to allow the Michigan Legislature to enact legislation which impacts the ability of municipalities to grant or withhold consent under Section 7, Article 29. Nothing in the first sentence of Section 7, Article 29 deprives the Michigan Legislature of this power.

Yet, Oshtemo Township seeks to substitute the constitutional authority vested in the Michigan Legislature to regulate municipalities with judicial power to regulate municipalities, if and when it is judicially determined that the municipality’s conduct is arbitrary or unreasonable. This argument ignores the constitutionally mandated separation of powers among our three branches of government: “No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” (Article 3, Section 2)” Here, the constitution expressly granted the power to the Michigan Legislature over municipalities and nothing in the first sentence of Article 7, Section 29 limits that power or shifts that power to the judicial branch. The power to regulate the conduct of municipalities rests with the Michigan Legislature and its enactment of Act 30 was a proper exercise of its constitutional power and authority.

CONCLUSION

WHEREFORE, the Michigan Cable Telecommunications Association respectfully requests this honorable Supreme Court to affirm the Court of Appeals.

Respectfully Submitted,

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Counsel for Michigan Cable Telecommunications
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Date: April 15, 2016

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FISCAL ANALYSIS

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SENATE BILL 880 SUBSTITUTE (H-4)

Sponsor: Sen. John J. H. Schwarz

House Committee: Energy and Technology

FLOOR ANALYSIS - 3/13/02

Analyst(s): Bob Schneider

SENATE BILL 881 SUBSTITUTE (H-4)

Sponsor: Sen. Leon Stille

House Committee: Energy and Technology

SENATE BILL 999 SUBSTITUTE (H-2)

Sponsor: Sen. Valde Garcia

House Committee: Energy and Technology

SUMMARY

The bill 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 would replace 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 – 4 million in the first year and an indeterminate amount in future years.

The fiscal implications of SB 881 are indeterminate at this time. It is possible that state appropriations and expenditures will be necessary to provide for the operation of the financing authority. Under SB 880 as introduced, the financing authority would have received some of the maintenance fee revenue generated under the right-of-way fee provisions. This is not the case under the House committee-reported bills.

SB 999 would reduce state revenue from the Utility Property Tax by an indeterminate amount. This amount could range from between roughly \$2 – 3 million to \$24 – 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.

BACKGROUND:

On November 29, 2001, Governor John Engler announced that legislation was being introduced to establish the MI HiSpeed Internet Plan. The plan was developed out of earlier proposal – LinkMichigan – developed by the Michigan Economic Development Corporation. The legislation is aimed at expediting the development and deployment of broadband technology throughout the state. The plan has two main features:

- Establishing a common right-of-way fee paid by telecommunications providers to local units of government – Anecdotal evidence had suggested that unreasonable fees charged some local units as well as the fact that some telecommunications providers (incumbent local telephone companies) were not subject to these fees. This component of the plan is contained within Senate Bill 880.
- Creation of statewide finance authority to assist in broadband deployment – The authority was deemed to be needed in order to ensure deployment in certain urban and rural areas that might not otherwise attract private funding. The authority would be modeled after the Michigan Housing Development Authority (MSHDA), a public financing authority autonomous from the State. A separate bill – Senate Bill 881 – would create this authority.

The Senate Technology and Energy Committee held meetings throughout January and into early February on the bills as introduced. On February 14, 2002, the Senate Committee reported substitutes for both bills to the Senate floor. The Senate then amended and finally passed the bills on February 20, 2002.

The House Committee on Energy and Technology reported the bills on March 13, 2002. Below is overview of the major features of the bills as reported, focusing on an analysis of the anticipated fiscal effects of the bills.

Senate Bill 880 – Right-of-Way Permit Fees

The bill would create a new right-of-way oversight authority within the Department of Consumer and Industry Services and give this authority the exclusive right to assess fees on telecommunications providers for access to public rights-of-way within virtually all local units of government in the State (the plan excludes municipalities in certain very small counties, but allow these municipalities to opt into the provisions of the bill). The bill then sets specific right-of-way fees that are to be assessed on certain categories of providers. The bill establishes an effective date of November 1, 2002 for these provisions. Specific provisions are reviewed below:

- Annual maintenance fee on telecommunications providers – The bill establishes uniform fees that telecommunication providers must pay in order to utilize public rights-of-way for their facilities (cables, wire, etc.). The bill sets an annual fee of 2 cents per linear foot of occupied right-of-way on most telecommunication providers (e.g. local phone companies) for the period between November 1, 2002 and March 31, 2003, and then increases this fee to 5 cents per linear foot in subsequent one-year periods beginning April 1, 2003. In addition, Section 8(6) of the bill provides that the fee to any one incumbent local telephone provider not exceed the statewide per access line cost that the fee imposes on the incumbent local telephone provider with the highest number of access lines in this state (which is Ameritech). Furthermore, any other provider would have its fees within each local exchange area limited to the same fee per linear foot as that paid by the incumbent local exchange telephone provider serving in that exchange. Finally, the bill exempts educational institutions, certain electric and gas utilities, and governmental entities from the fees as long as access to right-of-way is used solely for internal purposes (i.e. not to provide Internet access to other business or residential consumers).
- Annual maintenance fee on cable providers - Cable providers are charged a lower 1 cent fee per linear foot of occupied right-of-way and are allowed to bypass the fee if the provider can show a certain level of investment in broadband capacity. Testimony before the Senate committee suggests that most, if not all, cable providers would qualify for this exemption. Cable providers would continue, however, to pay franchise fees to the local units of government within which they provide service.
- Extension of maintenance fee to incumbent local phone providers – Currently, incumbent local telephone providers such as Ameritech and Verizon assert that they are exempt from paying right-of-way fees to local units of government and, in fact, have not paid those fees. The bill would require these incumbent providers to pay the maintenance and permit fees outlined in the bill.
- Prohibition against passing maintenance fee costs to customers: The bill contains a provision in section 8(17) prohibiting providers from passing the costs of the maintenance fees on to their customers. Instead, the bill allows these providers to claim a credit against their Utility Property Tax for any demonstrated costs that can be shown to arise from the fees. The actual credit is provided for in SB 999. Additional provisions limit the amount of credit for each provider to the amount by which fee costs imposed by the bill combined with the providers “total service long-run incremental cost” of providing local phone service (which is used by the Public Service Commission (PSC) as the cost factor in determining rates) exceeds all revenues generated for local phone service (including End User Common Line (EUCL) charges). This provision could affect the amount that Ameritech and Verizon could claim as a credit since both levy a EUCL charge. In particular, Ameritech’s EUCL charge was added since its last rate review by the PSC.
- Distribution of maintenance fee revenue – Proceeds from the maintenance fees would be returned by formula to local units of government. The first \$30.0 million in fee revenue would be distributed 25% to townships (based on linear feet of right-of-way in each township and 75% to cities and villages (based on the Act 51 transportation funding formula). Any revenue over \$30.0 million would be distributed based on weighted average of the amount of linear feet of right-of-way through each unit. Local units would have refrain from charging other right-of-way related fees in order to collect their share of this revenue. While the Governor’s proposal in the bill as introduced was to utilize some of this fee revenue to administer the financing authority outlined below in SB 881, this provision was removed by the Senate and remains out of the House committee-reported bill.
- One-time permit fee: In addition to the annual maintenance fee described above, providers other than cable providers would have to pay a \$500 permit fee each time the provider accessed right-of-way within a particular municipality (e.g. to lay new wire or cable). Educational, electric and gas utility, and governmental entities are also exempt from this provision as described in the first bullet above.

The fiscal ramifications of the bill are difficult to determine given the lack of available data on occupied right-of-way. During Senate committee deliberations, it was estimated that the State’s largest provider – Ameritech - would be subject to roughly \$20 - \$30 million in maintenance fees at 5 cents per linear foot. This would amount to between \$8 - 12 million in right-of-way maintenance fees in the first year period and \$20 - 30 million in subsequent years. The access line limitation noted above would apparently limit fees imposed on other incumbent local exchange providers to an amount of

no more than Ameritech's cost per access line serviced. This suggests that between \$1 – 2 million in additional revenue would be generated in the first year and \$3 - 5 million in additional revenue would be generated in subsequent years from these other incumbent local exchange providers. Other providers (e.g. competitive local exchange providers) would contribute smaller amounts of probably less than \$1 million per year. Growth in occupied rights-of-way by Ameritech would increase these revenues further over time. However, no reliable data exists on the extent to which this will occur. Finally, additional one-time revenue from the \$500 permit fees would be generated within the first year period which would generate an additional \$3 – 4 million in that year.

The fees imposed in the bill would increase local revenues above the level currently being collected for right-of-way maintenance. Testimony during Senate committee deliberations from the Michigan Municipal League suggested that revenue from right-of-way fees generated by local units of government is currently around \$11.5 million annually.

In terms of the proposed tax credit, the tax credit to the Utility Property Tax would likely reduce state revenue by an amount offsetting the fee revenue for most providers. However, as discussed above, Ameritech and Verizon would have to justify their EUCL charges before they could receive this credit. If the EUCL charges were justified, the credit could amount to roughly \$24 - 36 million per year after the initial period. However, if the EUCL charges are found to bring total revenues above total costs (fee costs plus local phone services costs), credits could be eliminated for these entities. In this case, the revenue impact of the credit could be reduced to \$2 – 3 million annually. In either case, any revenue impact would reduce state general fund revenues.

Finally, administration of the new right-of-way authority would increase state costs by an indeterminate amount.

Senate Bill 881 – Michigan Broadband Development Authority

Senate-passed SB 881 establishes a public broadband financing authority within the Department of Treasury to assist in financing the deployment of broadband infrastructure around the State. The authority would be governed by an eleven member board composed of the President and CEO of the Michigan Economic Development Corporation, the State Treasurer, the Executive Director of the Michigan State Housing Development Authority, and eight other members appointed by the Governor with the advice and consent of the Senate. Included in these eight members would be a board president and vice-president who would serve at the pleasure of the Governor. Other appointed members would serve for fixed terms.

The authority would be authorized to issue tax-exempt bonds and notes to finance the development of the State's broadband infrastructure. The bill specifies that these bond are not a debt of the State. The authority would be required to create a reserve capital account to secure its bond and note issues.

Proceeds from the bond and note issues could be used to make loans and enter into joint venture and partnership agreements with broadband developers through the year 2008. After December 31, 2008, the authority could not enter into any new loan or agreement involving a new component of the broadband infrastructure. The bill includes specific limitations on the authority's activities as well. In particular, the authority could not make loans or enter into joint venture or partnership agreements with any governmental entity or non-profit organization except in connection with developing a portion of the broadband infrastructure to be used exclusively by governmental entities and non-profit organizations. Thus, the authority could not provide assistance in developing infrastructure for the public and non-profit sectors which would be used to provide broadband access to the private sector and thus compete with private sector providers. The bill also provides for the establishment of a Seed Capital Loan Program to make loans to persons planning to apply to the authority for financing of broadband infrastructure. The bill specifically allocates \$1 million from the program during the initial 2 years of its operations towards rural underserved and urban underserved areas.

The fiscal implications of SB 881 are indeterminate at this time. It is possible that state appropriations and expenditures will be necessary to provide for the operation of the financing authority. Under SB 880 as introduced, the financing authority would have received some of the maintenance fee revenue generated under the right-of-way fee provisions. This is not the case under the current bills.

In addition, the bill provides that the Governor include appropriations in the Executive budget recommendation to replenish the Reserve Capital Account if funds fall below the level necessary to maintain required reserve levels on bond and note issues. Final action on this matter would be subject to legislative approval, however. Again, it is not clear that such appropriations would be necessary.

SB 999 – Utility Property Tax Credit

The bill would reduce annual state general fund revenue by an indeterminate amount. The bill would establish a utility property tax credit of 6% of the amount of eligible broadband investments. The credit, however, would be limited to between 3 (for tax year 2003) and 12% (by tax year 2006 and beyond) of a utility's total liability under the act or to the amount of credit received in the preceding tax year, whichever is greater. The credit also could not exceed a utility's total tax liability.

The bill also allows providers to claim a credit for any costs imposed by the maintenance fees imposed in SB 880 net of the broadband investment credit discussed in the first paragraph. Essentially, this limits the credit to the amount paid towards maintenance fees unless the broadband investment credit exceeds the amount of fees paid.

The fiscal impact of the bill again depends upon the issue discussed above in the section related to SB 880 related to EUCL charges. If the EUCL charges imposed by Ameritech and Verizon were found to be justified in terms of revenues and costs, the credit could amount to roughly \$24 - 36 million per year after the initial period. However, if the EUCL charges are found to bring total revenues above total costs (fee costs plus local phone services costs), credits could be eliminated for these entities. In this case, the revenue impact of the credit could be reduced to \$2 – 3 million annually. In either case, any revenue impact would reduce state general fund revenues. There is also the potential that some utilities could claim credits exceeding fee payments if broadband investments are sufficiently high.

ATTACHMENT

B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 621(a)(1) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as amended)
by the Cable Television Consumer Protection and)
Competition Act of 1992)

**REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: December 20, 2006

Released: March 5, 2007

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements;
Commissioners Copps and Adelstein dissenting and issuing separate statements.

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conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.¹⁴⁷

42. We do not find persuasive incumbent cable operators' claims that build-out should necessarily be required for new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.¹⁴⁸

43. ***LFA Demands Unrelated to the Provision of Video Services.*** Many commenters recounted franchise negotiation experiences in which LFAs made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities, connection of 220 traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.¹⁴⁹ In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.¹⁵⁰ AT&T provided examples of impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.¹⁵¹ FTTH

¹⁴⁷ AT&T Comments at 45. *See also infra* para. 63.

¹⁴⁸ *See* NTCA Comments at 7; Verizon Reply at 54-55; American Consumer Institute Comments at 7; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17142-17143 (2003) ("*Triennial Review Order*"); *See also* High Tech Broadband Coalition Comments at 4-5 (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order*, due in large part to the elimination of barriers to entry in that Order).

¹⁴⁹ Verizon Comments at 57 & Attachment A at 16-17. The *Wall Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a \$13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Verizon with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1. *But see* Verizon Comments at 65, filed February 13, 2006 (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed \$6 million over 15 years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of \$13 million that it said would be used for both PEG support and the construction of a redundant institutional network."); Verizon Revised Comments, filed March 6, 2006 at 65 (amending the second sentence of their comments above, in response to a request from the City of Tampa, to state that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided a summary 'needs assessment' in excess of \$13 million for both PEG support."); Tampa Reply at 3-4 (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide \$13.5 million dollars as a condition of granting a cable television franchise," and calling the *Wall Street Journal* article assertions an "urban legend"); John Dunbar, *FCC's Cable TV Ruling Criticized*, ASSOCIATED PRESS, Jan. 29, 2007 (stating that "[The Tampa City Attorney] said Tampa gave Verizon a \$13 million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, but that there was never 'a specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

¹⁵⁰ Verizon Comments at 75.

¹⁵¹ AT&T Comments at 24.

Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, \$1 million franchise fee payment and fund a \$50,000 scholarship with additional annual contributions of \$7,200.¹⁵² The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 percent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.¹⁵³ Based on this record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.

44. **Assessment of Franchise Fees.** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.¹⁵⁴ Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap established in Section 622(b),¹⁵⁵ but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia, municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise fees.¹⁵⁶ Other LFAs have requested consultant and attorneys' fees.¹⁵⁷ Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues.¹⁵⁸ Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.¹⁵⁹

45. The parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.¹⁶⁰ Third, a new entrant must negotiate these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. **PEG and I-Net Requirements.** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local Franchising NPRM*, we received numerous comments asking for clarification of what requirements LFAs reasonably may impose on franchisees to

¹⁵² FTTH Council Comments at 38.

¹⁵³ BSPA Comments at 8. BSPA argues that under the current franchising process, LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use the capital to benefit consumers. BSPA claims that LFAs use the capital to build and maintain I-Nets, city broadcasting facilities, and traffic light control systems. *Id.*

¹⁵⁴ See, e.g., AT&T Comments at 64-67; BellSouth Comments at 38-40; Cavalier Telephone Comments at 7; FTTH Council Comments at 38-40. *But see* NATOA Reply at 27-35.

¹⁵⁵ 47 U.S.C. § 542(b).

¹⁵⁶ Verizon Comments at 59.

¹⁵⁷ *Id.* at 59-60.

¹⁵⁸ *Id.* at 63.

¹⁵⁹ AT&T Comments at 65-67; BellSouth Comments at 39.

¹⁶⁰ AT&T Reply at 31-32.