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Fiscal Note & Local Impact Statement

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Primary Sponsors: Reps. Carfagna and O'Brien

Local Impact Statement Procedure Required: No

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Highlights

Ohio Residential Broadband Expansion Grant Program

- The bill creates the Ohio Residential Broadband Expansion Grant Program under the Department of Commerce (COM) to support the financing of broadband expansion projects in communities across the state. Broadband providers can apply for the grants to help pay for the last mile build-out of “tier one” and “tier two” residential broadband service. The tiers refer to internet access speeds defined in the bill.
- To fund the program, the bill creates the Ohio Residential Broadband Expansion Grant Program Fund (Fund 5WV0) and capitalizes it by a transfer of \$20.0 million from the Facilities Establishment Fund (Fund 7037) used by the Development Services Agency. The funding is appropriated for FY 2021.
- COM will incur costs to pay monthly stipends and reimburse expenses incurred by the five members of the Broadband Expansion Program Authority created by the bill. In total, monthly stipends could amount to a total of \$25,000 per year for the three appointed members of the Authority.
- COM will incur operating costs to start and oversee the program. According to COM, a new program manager and possibly other staff would likely be needed to help establish program guidelines, monitor awards, and enforce compliance.

Sales and use tax exemption

- The bill expands the scope of property and services purchased to build broadband infrastructure that qualifies as noncompetitive retail electric service. In doing so, it likely enables broadband infrastructure by an electric distribution company to qualify for an existing sales and use tax exemption as a public utility.

- To the extent that spending on broadband infrastructure by a broadband facilitator displaces such spending by a company or entity subject to the sales tax, there would be a reduction in sales tax revenue.
- Under codified law, the state revenue loss would be shared by the GRF (96.68%), the Local Government Fund (LGF, 1.66%), and the Public Library Fund (PLF, 1.66%). Funds deposited into the LGF and PLF are distributed to counties, municipalities, townships, and public libraries according to statutory formulas and decisions by county budget commissions.
- The bill also likely reduces revenue from local permissive county and transit authority sales taxes, which share the same tax base as the state sales and use tax.

Detailed Analysis

Ohio Residential Broadband Expansion Grant Program

Overview

The bill creates the Ohio Residential Broadband Expansion Grant Program to support the expansion of broadband services across the state. The program would be overseen by the Department of Commerce (COM). Under the program, grants are to be awarded to broadband service providers (defined by the bill as video service providers, telecommunications providers, satellite broadcast providers, or wireless service providers that are capable of providing tier one or tier two broadband service) to cover the broadband funding gap for “last mile” broadband infrastructure to eligible projects.

Eligible projects are those categorized as either “tier one” or “tier two” projects based on internet access speed. Under the bill, a “tier two” service refers to projects that offer broadband access to residences in an unserved area. “Tier one” service provides broadcast access to an area of a municipal corporation or township. Specifically, tier two broadband service refers to broadband capable of delivering internet access at speeds of at least 25 megabits per second downstream and at least three megabits per second upstream. Tier one broadband service refers to broadband that offers internet access at speeds of at least ten but less than 25 megabits per second downstream and at least one but less than three megabits per second upstream. A tier one area is an area with access to tier one service but not tier two service and includes an area where construction of a tier one service network is in progress and scheduled to be completed in two years.

Program funding and distribution of broadband expansion grants

To fund the program, the bill creates the Ohio Residential Broadband Expansion Grant Program Fund (Fund 5WV0) under COM and capitalizes it via a transfer of \$20.0 million from the Facilities Establishment Fund (Fund 7037) used by the Development Services Agency (DSA). The bill appropriates this funding in FY 2021 under Fund 5WV0 appropriation item 800411, Residential Broadband Expansion Grants.

The bill requires that money in the fund be used exclusively to issue program grants and that COM issue grants until funds for the fiscal year are exhausted. There is no cap on individual grants under the program. The bill sets forth the following disbursement schedule for each program grant awarded: (1) not more than 30% of the grant may be disbursed before

construction of the project begins, (2) not more than 60% of the grant may be disbursed periodically over the course of the construction of the eligible project, and (3) the remaining portion must be disbursed within 60 days after the broadband provider has completed the construction project. COM, however, is allowed to withhold grant payments for failure to meet at least the minimum speeds required until the required minimum service speeds are achieved.

Background on the Facilities Establishment Fund

The Facilities Establishment Fund is primarily used by DSA to provide loans under the 166 Direct Loan Program. Under that program, DSA awards loans to businesses as part of large-scale development deals, including the commitment of new or retained jobs by the company and a significant capital investment. The fund was initially capitalized through bond proceeds, but is now sustained by loan repayments under the 166 Direct Loan Program. As of May 2020, the cash balance of Fund 7037 was \$297.3 million.

Operating and oversight costs

COM will incur operating costs to administer the program. According to COM, the agency would likely need to hire a program manager to run the initiative, and other staff might be needed for outreach, education, and administrative support. Under the bill, this would include: (1) adopting rules for the program and procedures for periodic program grant disbursements, (2) soliciting, on behalf of counties after a request to do so, applications from broadband providers for grants under the program for eligible projects in the municipal corporations and townships of the county, (3) disbursing grants, and (4) developing a grant application scoring system in consultation with the Broadband Expansion Program Authority. Finally, COM, would be able to contract with an independent third party to conduct speed verification tests of an eligible project that receives a program grant.

Oversight provided by the Broadband Expansion Program Authority

The newly created five-member Broadband Expansion Program Authority within COM would be responsible for program governance and oversight. Under the bill, the Authority is responsible for monitoring the program, reviewing and scoring applications, and awarding grants. The Authority is also responsible for completing an annual report that evaluates the program's success and provides certain program information, findings, and recommendations. The Authority membership consists of the COM Director, Chief Investment Officer of JobsOhio, and three members that are appointed by each of the Speaker of the House, Senate President, and Governor. Under the bill, COM is to (1) pay a monthly stipend of \$684.86 (the FY 2021 amount that will qualify a person for one year of retirement credit with the Ohio Public Employees Retirement System) to each of the three appointed Authority members, and (2) reimburse actual and necessary expenses incurred by Authority members in performing the business of the Authority. In total, the monthly stipend for the three applicable Authority members amounts to nearly \$25,000 per year ($\$684.46 \times 12 \text{ months} \times 3 \text{ Authority members}$).

Additionally, COM may incur other administrative expenses related to the Authority such as providing office supplies, meeting space, etc. There could also be technology costs to administer the grant program including updating the website, a grants software application, a database for maintaining records, and communicating with the stakeholders. Since Fund 5WV0 is to be used exclusively for grants under the program, it is unclear what fund under the

Department of Commerce's budget will pay for costs related to the Authority as well as any staffing and other program administrative costs.

Electric distribution utilities as broadband facilitators

The bill creates new provisions affecting electric distribution utilities (EDUs) and their role as "broadband facilitators." The designation refers to an EDU that constructs broadband infrastructure in priority unserved areas of the state¹ but does not provide broadband service to customers. Broadband facilitators must apply to the Public Utilities Commission of Ohio (PUCO) for approval of broadband infrastructure construction. The bill permits them to build infrastructure in a priority unserved area within their own territory as well as the territory of a municipal electric utility, or electric cooperative.² However, the bill limits the application period before PUCO to three years after the effective date of the bill; starting on that date, broadband facilitators cannot enter into any agreements with an electric cooperative or municipal electric utility to construct broadband infrastructure in a priority unserved area.

The bill grants PUCO discretion to approve an application if it meets the specified criteria. Before granting approval, PUCO must find, among other things, that the facilitator's estimated costs to construct the infrastructure are just and reasonable, the project is not duplicative with another facilitator's approved project, and the project provides incremental benefits. The bill limits the cost of a given project to \$2.5 million. The cap excludes the facilitator's operation and maintenance expenses associated with the capital investment in the infrastructure, the facilitator's future revenue collections from the corresponding electric bill rider, or last mile funding for a broadband service provider.

Once approved by PUCO, the EDU must implement a rate mechanism (e.g., electric bill rider) to recover the "net costs" incurred by a broadband facilitator and "last mile investment costs as specified by [PUCO]." The bill further specifies that the monthly charge, including deferrals, cannot exceed \$1.00 per customer per month for residential customers and cannot exceed \$5.50 per customer per month for nonresidential customers. Because the bill requires the "full and timely" recovery of an EDU's costs, PUCO likely has little discretion to defer ratepayer charges to a future year. PUCO must annually review and update the rates charged under this rate mechanism until a broadband facilitator's net costs and any last mile investment costs are fully recovered.

No later than three and one-half years after the effective date of the bill, each EDU that had a broadband facilitator application approved by PUCO must submit a report to the Commission. The bill enumerates topics that must be addressed in the report. PUCO must subsequently submit the EDUs' reports to the Speaker of the House of Representatives, the President of the Senate, and the standing committees of the House of Representatives and the

¹ Unserved areas in one of the 32 counties within Ohio's Appalachian region that rank in the top four counties based on certain factors.

² Ohio has six certified territories, or one for each EDU: (1) Cleveland Electric Illuminating Company, (2) Duke Energy Ohio, (3) Ohio Edison, (4) Ohio Power Company, (5) The Dayton Power and Light Company, and (6) Toledo Edison. All but one EDU, Toledo Edison, serves customers in the 32-county Appalachian region.

Senate that primarily deal with broadband issues. The bill further requires PUCO to submit the report to the Broadband Ohio Office and to the Broadband Expansion Program Authority.

Sales and use tax implications

The bill will likely reduce future state sales and use tax receipts associated with the overall development of broadband infrastructure. Prospective purchases of tangible personal property and services for construction of broadband infrastructure by broadband facilitators as defined in the bill would likely qualify for a sales tax exemption under the public utility exception. The bill stipulates, “broadband infrastructure constructed” under Chapter 4926 of the Revised Code “shall qualify as noncompetitive retail electric service.”³ Although PUCO does not regulate internet service, internet service providers, or the rates of wireless service,⁴ it does regulate retail electric service.

Under continuing law in R.C. 5739.02(B)(42), “sales where the purpose of the purchaser” is to use or consume the thing transferred “directly in the rendition of a public utility service” are exempt from the state sales and use tax. Currently, broadband infrastructure does not fall under this exception because R.C. 4905.02 excludes providers of broadband service, information service (e.g., internet access service), and other analogous advanced (i.e., high speed) technologies from the definition of a state-regulated “public utility.” However, the bill regards broadband infrastructure as retail electric service, which continuing law defines as “supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption.”⁵

The expansion contemplated in the bill comes at a time when companies are reportedly planning a substantial increase, billions of dollars in the aggregate nationwide, in their overall spending on tangible property and services over the next few years, mostly related to the fifth-generation (or “5G”) networks of mobile communication, for a variety of business and personal uses.⁶ Some of the planned spending will take place in Ohio and an unknown share of that spending is likely to be taxable under current sales and use tax law. The bill makes specified spending on broadband infrastructure construction tax exempt by expanding the scope of property that qualifies as noncompetitive retail electric service. Therefore, the bill creates a sales and use tax loss where previously sales and use tax would have been collected. The potential annual revenue decrease from the bill’s provision is undetermined, as it would depend on the amount of capital deployed or services purchased for broadband infrastructure

³ R.C. 4928.17.

⁴ <https://www.puco.ohio.gov/be-informed/consumer-topics/telecommunications-overview/>.

⁵ R.C. 4928.01(A)(27).

⁶ 5G technology requires upgraded cellular networks as well as devices capable of accessing these new networks. Equipment vendors supply the next generation antennas and base stations that power 5G networks while other types of companies lease antenna space on cell towers (e.g., 200-foot tall structures visible from a highway as well as small cell facilities about the size of a backpack) to telecommunications carriers. Applicable components may include radio frequency (RF) chips installed in 5G devices.

by EDUs. This assumes that broadband infrastructure demand would have been met by entities that would pay sales and use taxes on tangible property and services on the projects.

For FY 2021, for state taxes deposited in the GRF, revenue gains and losses generally would be shared by the GRF (96.62%), the Local Government Fund (LGF, 1.68%), and the Public Library Fund (PLF, 1.70%). Any receipts that would have been collected in subsequent fiscal years would be allocated differently under current law: the allocations of GRF tax revenue to each of the LGF and PLF would amount to 1.66%, their shares under codified law, starting in July 2021 (FY 2022).

The bill will also reduce revenue from local permissive county and transit authority sales taxes. Those local taxes share the same tax base as the state sales tax.

Electric cooperatives

The bill also makes several changes in regards to access to electric cooperative easements and pole attachments that do not appear to have a fiscal effect. The bill expands the use of electric cooperative easements for the provision of broadband service and creates a process for addressing damages to servient estates. Additionally, it establishes a process for broadband providers, telecommunication providers, video service providers, and wireless service providers to request access to electric cooperatives' pole facilities. An electric cooperative is a not-for-profit, member-owned utility service that provides service solely to its members. It is financially independent, and its members pay the full cost of generation, transmission, and distribution. PUCO does not have jurisdiction over electric cooperatives.