

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Committee Substitute**

**for**

**House Bill 2865**

By Delegate Westfall

[Originating in the Committee on Technology and

Infrastructure; February 21, 2023]



1 A BILL to amend and reenact §24-2H-4, §24-2H-5, §24-2H-6, and §24-2H-8 of the Code of West  
2 Virginia, 1931, as amended, all relating to clarifying that the Public Service Commission  
3 may enter an order in a distressed or failing utility case requiring corrective measures up to  
4 and including an acquisition by an acquiring utility; providing the Commission shall provide  
5 the list of potentially unstable water and wastewater utilities to statewide water or  
6 wastewater technical assistance non-profits; providing the Commission staff shall publish  
7 annually, by hyperlink, the list of potentially unstable water and wastewater utilities on the  
8 commission's homepage; providing that eligibility of a utility to receive state grant funding  
9 and federal grant funding in a similar manner as the distressed utility is a factor in  
10 determining whether a utility is a capable proximate utility; providing that petitions filed with  
11 the commission include factual data supporting the justification for the utility to be  
12 considered as a distressed or failing utility; providing that high loss and unaccounted for  
13 water is not evidence of a distressed or failing utility; and clarifying that an acquiring utility  
14 becomes such only after approval of the necessary operating agreement.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 2H. POWER OF COMMISSION TO ORDER MEASURES UP TO AND  
INCLUDING THE ACQUISITION OF DISTRESSED AND FAILING WATER AND  
WASTEWATER UTILITIES.**

**§24-2H-4. Preparation of list of potentially unstable water and wastewater utilities.**

1 Annually, no later than 30 days after June 30, the commission shall prepare a list of water  
2 and wastewater utilities that appear to be financially unstable by reviewing annual reports, rate  
3 case filings and other financial data available to it. Commission staff shall contact each utility  
4 placed on the list and provide advice and assistance in resolving any financial instability or  
5 managerial or operational issues that are contributing to the utility's financial instability.  
6 Commission shall provide the list of potentially unstable water and wastewater utilities to statewide

7 water or wastewater technical assistance non-profits. Commission staff shall publish annually, by  
8 hyperlink, the list of potentially unstable water and wastewater utilities on the commission's  
9 homepage no later than 31 days after June 30.

**§24-2H-5. Determination of whether a utility qualifies as a “distressed utility”, “failing utility”, or a “capable proximate utility”.**

1 (a) In determining whether a utility is distressed or failing, the commission shall consider  
2 the following factors:

3 (1) The financial, managerial, and technical ability of the utility;

4 (2) The level of expenditures necessary to make improvements to the water or wastewater  
5 utility to assure compliance with applicable statutory and regulatory standards concerning the  
6 adequacy, efficiency, safety, or reasonableness of utility service and the impact of those  
7 expenditures on customer rates;

8 (3) The opinion and advice, if any, of the Department of Environmental Protection and the  
9 Bureau for Public Health as to steps that may be necessary to assure compliance with applicable  
10 statutory or regulatory standards concerning the adequacy, efficiency, safety, or reasonableness  
11 of utility service;

12 (4) The status of the utility's bond payments and other financial obligations;

13 (5) The status and result of any corrective measures previously put into place under §24-  
14 2H-7 of this code; and

15 (6) Any other relevant matter.

16 (b) In determining whether a utility is a capable proximate utility, the commission shall  
17 consider the following factors:

18 (1) The financial, managerial, and technical ability of all proximate public utilities providing  
19 the same type of service;

20 (2) Expansion of the franchise or operating area of the acquiring utility to include the  
21 service area of the distressed utility;

22 (3) The financial, managerial, operational, and rate demands that may result from the  
23 current proceeding and the cumulative impact of other demands where the utility has been  
24 identified as a capable proximate utility; and

25 (4) Eligibility of the capable proximate utility to receive state grant funding and federal grant  
26 funding in a similar manner as the distressed utility; and

27 (5) Any other relevant matter.

**§24-2H-6. Notice to distressed or failing utility and formal proceeding.**

1 (a) A proceeding under this article may be initiated by the commission on its own motion, or  
2 by the staff of the commission, or any other person or entity having a legal interest in the financial,  
3 managerial, or operational condition of the utility, by filing a petition with the commission that  
4 includes factual data supporting the justification for the utility to be considered as a distressed or  
5 failing utility: *Provided*, That high loss and unaccounted for water is not evidence of a distressed or  
6 failing utility. In any such petition, the utility shall be named as the respondent. The commission  
7 shall include as additional parties any capable proximate public and private utilities that may be  
8 able to acquire the utility.

9 (b) The commission shall hold an evidentiary and public hearing(s) in a location in or within  
10 25 miles of the utility's service area. The commission shall give reasonable notice of the time,  
11 place, and subject matter of the hearing as follows:

12 (1) Issuance of a press release;

13 (2) Written notice by certified mail or registered mail to:

14 (A) The utility;

15 (B) The Consumer Advocate Division;

16 (C) Capable proximate public or private utility(s) that were made parties to the proceeding;

17 and

18 (D) The county commission if the utility is a public service district; or

19 (E) The municipality if the utility is owned and operated by the municipality.

20 (3) The utility shall give notice to its customers of the time, place, and subject matter of the  
21 hearing either as a bill insert or printed on its monthly bill statement as ordered by the commission.

22 (c) The public hearing shall be conducted to receive public comments, including, but not  
23 limited to, comments regarding possible options available to bring the distressed or failing utility  
24 into compliance with appropriate statutory and regulatory standards concerning actual or  
25 imminent public health problems or unreasonable quality and reliability service standards. At the  
26 evidentiary hearing, the commission shall receive evidence to determine if the utility is a distressed  
27 or failing utility and whether a capable proximate utility should acquire the utility. If there is more  
28 than one capable proximate utility, then sufficient evidence should be presented to allow the  
29 commission to determine the appropriate capable proximate utility to acquire the distressed or  
30 failing utility.

**§24-2H-8. Commission approval of operating agreement, acquisition price; rates for distressed and failing utilities; improvement plan; debt obligations; cost recovery.**

1 (a) After an order has been entered pursuant to §24-2H-7 of this code, the distressed utility  
2 and ~~acquiring~~ another public utility shall file a petition with the commission under §24-2-12 of this  
3 code to approve the necessary operating agreement if such alternative is directed by the  
4 commission. After an order has been entered pursuant to §24-2H-7 of this code, the failing utility  
5 and acquiring utility shall file a petition with the commission under §24-2-12 of this code, to  
6 approve the purchase price of the acquisition. Where the parties are unable to agree on an  
7 acquisition price, the filing may request that an evidentiary hearing be held so that the commission  
8 may determine the acquisition price and any other issues related to the acquisition. The  
9 acquisition price must, at a minimum, satisfy all outstanding loans, tax obligations, required grant  
10 repayment, liens, and indebtedness owed by the failing utility or the acquiring utility must agree to  
11 assume the indebtednesses if legally permitted. The acquiring utility shall consult with the lenders  
12 or lienholders regarding payment in full or the assumption, to the extent legally permissible, of any  
13 outstanding obligations of the failing utility.

14 (b) The parties to an acquisition may propose to the commission other methods of  
15 determining the acquisition price.

16 (c) As part of the proceeding, the acquiring utility may propose to the commission that it be  
17 permitted for a reasonable period of time after the date of acquisition, to charge and collect rates  
18 from the customers of the failing utility pursuant to a separate tariff which may be higher or lower  
19 than the existing tariff of the distressed or failing utility or may allow a surcharge on both the  
20 acquired and existing customers. A separate tariff or rate filing must be made by the acquiring  
21 utility before the commission will consider any increase in rates or allow a surcharge to be placed  
22 on the acquiring utility's acquired or existing ratepayers.

23 (d) As part of this proceeding, the acquiring utility shall submit to the commission for  
24 approval a plan, including a timetable for bringing the failing utility into compliance with applicable  
25 statutory and regulatory standards, including, but not limited to, plans for regionalization. The  
26 acquiring utility shall have previously obtained the approval of the plan from the Department of  
27 Environmental Protection and the Bureau for Public Health, as applicable, and those agencies are  
28 directed to use their full discretion in working towards long-term solutions that will support  
29 compliance. The failing utility shall cooperate with the acquiring utility in negotiating agreements  
30 with state and federal agencies, including, but not limited to, negotiation of hold harmless  
31 agreements, consent orders or enforcement moratoria during any period of remediation. In  
32 addition, the failing utility shall cooperate with the acquiring utility in obtaining the consent of the  
33 failing utility's and the acquiring utility's bondholder(s) to the acquisition. The acquiring utility must  
34 present to the commission as part of its financing plan, documentation on how the failing utility's  
35 indebtedness will be paid or assumed.

36 (e) A nonprofit acquiring public utility may seek grant funding from the Distressed Utilities  
37 Account established pursuant to §31-15A-9(i) of this code to repair, maintain, and replace the  
38 distressed water and wastewater utilities facilities as needed. The reasonably and prudently

39 incurred costs of the acquiring utility shall be recoverable in rates as provided in §24-2H-9 of this  
40 code.

41 (f) If the distressed or failing utility is a public service district, then the commission shall  
42 make a recommendation to the respective county commission(s) with regard to the acquisition of  
43 distressed or failing utilities as provided in §16-13A-2(a)(2) of this code. If the distressed or failing  
44 utility is a municipal corporation, then the commission shall make a recommendation to the  
45 respective municipal council with regard to the acquisition of distressed or failing utilities as  
46 provided in §8-12-17 of this code.

47 (g) The capable proximate utility may propose one or more of the cost recovery methods or  
48 incentives set forth in §24-2H-9 of this code as part of its petition for approval from the  
49 commission.

NOTE: The purpose of this bill is to clarify that the Public Service Commission may enter an order requiring corrective measures up to and including an acquisition of a distressed or failing utility.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.