

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 551

SENATORS SMITH, CLEMENTS, JEFFRIES, SYPOLT, HAMILTON,

ROMANO, LINDSAY, AND WOELFEL *original sponsors*

[Passed March 7, 2020; in effect 90 days from passage]

1 AN ACT to amend and reenact §8-12-17 of the Code of West Virginia, 1931, as amended; and to
2 amend said code by adding thereto a new section, designated §24-2-4g, all relating
3 generally to the Water and Wastewater Investment and Infrastructure Improvement Act to
4 encourage investment in water and wastewater utilities; describing and expanding
5 permissible uses for proceeds of a sale or lease of a municipal utility; making legislative
6 findings; providing for use of negotiated sales price in certain filings; providing for rate
7 based addition using negotiated sales price under certain circumstances; providing for
8 additional approvals under certain circumstances; specifying preliminary agreements and
9 commitments not requiring prior approval; authorizing the Public Service Commission to
10 combine water and wastewater revenue requirements or allocate a portion of wastewater
11 revenue requirement to water customers under certain circumstances; and setting forth
12 defined terms.

Be it enacted by the Legislature of West Virginia:

CHAPTER 8. MUNICIPAL CORPORATIONS.

ARTICLE 12. GENERAL AND SPECIFIC POWERS, DUTIES AND ALLIED RELATIONS OF MUNICIPALITIES, GOVERNING BODIES AND MUNICIPAL OFFICERS AND EMPLOYEES, SUITS AGAINST MUNICIPALITIES.

§8-12-17. Sale or lease of municipal public utility.

1 In any case where a municipality owns a gas system, an electric system, a waterworks
2 system, a sewer system, or other public utility and a majority of not less than 60 percent of the
3 members of the governing body thereof shall deem it for the best interest of such municipality that
4 such utility be sold or leased, the governing body may so sell or lease such gas system, electric
5 system, waterworks system, sewer system, or other public utility upon such terms and conditions
6 as said governing body in its discretion considers in the best interest of the municipality: *Provided,*
7 That such sale or lease may be made only upon: (1) The publication of notice of a hearing before

8 the governing body of the municipality, as a Class I legal advertisement in compliance with the
9 provisions of §59-3-1 *et seq.* of this code, in a newspaper published and of general circulation in
10 the municipality, such publication to be made not earlier than 20 days and not later than seven
11 days prior to the hearing; and (2) the approval by the Public Service Commission of West Virginia.
12 The governing body, upon the approval of the sale or lease by a majority of its members of not
13 less than 60 percent of the members of the governing body, shall have full power and authority to
14 proceed to execute or effect such sale or lease in accordance with the terms and conditions
15 prescribed in the ordinance approved as aforesaid, and shall have power to do any and all things
16 necessary or incident thereto: *Provided, however,* That if at any time after such approval and
17 before the execution of the authority under the ordinance, any person should present to the
18 governing body an offer to buy such public utility at a price which exceeds by at least five percent
19 the sale price which shall have been so approved and authorized or to lease the same upon terms
20 which the governing body, in its discretion, shall consider more advantageous to the municipality
21 than the terms of the lease which shall have been previously approved as aforesaid, the governing
22 body shall have the power to accept such subsequent offer, and to make such sale or such lease
23 to the person making the offer, upon approval of the offer by a majority of not less than 60 percent
24 of the members of the governing body; but, if a sale shall have been approved by the governing
25 body as aforesaid, and the subsequent proposition be for a lease, or, if a lease shall have been
26 approved by the governing body, and the subsequent proposition shall be for a sale, the governing
27 body shall have the authority to accept the same upon approval of the offer by a majority of not
28 less than 60 percent of the members of the governing body. The person making such proposition
29 shall furnish bond, with security to be approved by the governing body, in a penalty of not less
30 than 25 percent of such proposed bid, conditioned to carry such proposition into execution, if the
31 same shall be approved by the governing body. In any case where any such public utility shall be
32 sold or leased by the governing body as hereinabove provided, no part of the moneys derived
33 from such sale or lease shall be applied to the payment of current expenses of the municipality,

34 but the proceeds of such sale or lease shall be applied in payment and discharge of any
35 indebtedness created in respect to such public utility, and in case there be no indebtedness, the
36 governing body, in its discretion, shall have the power and authority to expend all such moneys
37 when received for the purchase or construction of firefighting equipment and buildings for housing
38 such equipment, a municipal building or city hall, and the necessary land upon which to locate
39 the same, for capital investments in public works projects, vehicles and equipment, including
40 without limitation law-enforcement vehicles and equipment, for the demolition of dilapidated and
41 abandoned buildings, for the construction of paved streets, avenues, roads, alleys, ways,
42 sidewalks, sewers, stormwater systems, floodwalls, and other like permanent improvements, for
43 fulfilling municipal pension and other post-employment benefit obligations, for reducing taxes, and
44 for no other purposes. In case there be a surplus after the payment of such indebtedness, the
45 surplus shall be used as aforesaid.

46 The requirements of this section shall not apply to the sale or lease of any part of the
47 properties of any such public utility determined by the governing body to be unnecessary for the
48 efficient rendering of the service of such utility.

CHAPTER 24. PUBLIC SERVICE COMMISSION.

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-4g. Establishing the value of utility assets in the context of the acquisition of a utility or utility assets and providing for the combination or allocation of water and wastewater revenue requirements.

1 (a) The Legislature finds that:

2 (1) Many West Virginia publicly owned municipal, public service district-owned, and
3 investor-owned water and wastewater utilities face substantial capital investment needs to replace
4 aging utility infrastructure and to maintain compliance with regulatory requirements, and many
5 municipalities that own and operate utility systems are confronted with additional financial

6 challenges arising from diminishing tax bases, the need to repair streets and other municipally
7 owned facilities, and unfunded or underfunded liabilities for pension and other post-employment
8 benefit programs;

9 (2) Given these challenges, some of these utilities may be unable to continue to provide
10 acceptable levels of utility service at reasonable rates, and may wish to consider the sale of their
11 utility assets, and this decision will require those utilities to consider the expected valuation of
12 their utility assets, the manner in which the post-acquisition rates of their customers will be
13 established and moderated, and the purposes to which the proceeds of any sale of utility assets
14 by a municipality may be devoted under state law;

15 (3) For utilities considering the sale of their utility assets, a valuation of the utility assets
16 that is primarily based on the original cost of those assets less depreciation and less the value of
17 contributed property will: (A) Understate the actual fair value of those assets to an acquiring party;
18 (B) fail to account for potential income that could be generated from those assets; (C) reduce the
19 financial benefit to utilities considering selling those assets; and (D) thereby disincentivize those
20 utilities from selling those assets;

21 (4) To assist utilities considering the sale of their utility assets in making informed decisions
22 on whether to sell their utility assets, the commission will permit acquiring and selling parties to
23 negotiate a value for those assets, permit the acquiring party to include the negotiated sale price
24 of the assets in post-acquisition rate base for rate-making purposes, and make its post-acquisition
25 rate-base determination based on the valuation approach specified in this section;

26 (5) To assist utilities that provide both water and wastewater utility service in moderating
27 the rate impact of wastewater service investment on wastewater system customers, it is
28 appropriate to authorize the combination of water and wastewater revenue requirements or the
29 allocation of a portion of a wastewater revenue requirement to water customers if such a
30 combination or allocation is just and reasonable and results in water and wastewater rates that
31 are based primarily on the cost of providing service;

32 (6) Expanding the permissible uses by a municipality of the proceeds of a sale of utility
33 assets as provided for in §8-12-17 of this code will also facilitate and encourage a municipality's
34 ability to sell its utility assets, should it choose to do so; and

35 (7) The enactment of these regulatory improvements will facilitate the repair and
36 replacement of utility infrastructure by improving access to investment capital and moderating the
37 rate impact to customers of investments in utility infrastructure, and thereby enhancing the state
38 of water and wastewater utility infrastructure assets and the service provided by those assets, all
39 of which are in the best interest of West Virginia and its citizens.

40 (b) *Value of utility assets; rate-base addition; ancillary approvals.* —

41 (1) In any case filed pursuant to §24-2-12 of this code seeking the commission's prior
42 consent and approval of the acquisition by an acquiring utility of the utility assets of a selling utility,
43 the applicants may propose a negotiated sale price for the utility assets that is in accordance with
44 utility asset valuation methodologies, such as depreciated original cost, or reproduction cost new
45 less depreciation, or other industry standard utility asset valuation methods, excluding the use of
46 fair market appraisal valuation methods: *Provided*, That the applicants will present evidence of
47 those asset values in the application: *Provided, however*, That the utility asset valuation
48 methodologies and definitions referenced in §24-2-4g(d) of this code apply solely to cases filed
49 pursuant to chapter 24 of this code.

50 (2) If the commission finds that the proposed acquisition, including the negotiated sale
51 price, satisfies the requirements for approval in §24-2-12 of this code, including a finding that the
52 terms and conditions of the acquisition are reasonable and that neither party thereto is given an
53 undue advantage over the other, and does not adversely affect the public in this state, then the
54 commission will establish the rate based addition at the negotiated sale price, as determined and
55 in accordance with subdivision (1) of this subsection.

56 (3) In its order granting, denying, or modifying the relief requested in an application
57 described in subdivision (1) of this subsection, the commission may also approve any rate

58 stabilization plan, tariff change or provision, or surcharge mechanism proposed by the applicants
59 and that the commission finds reasonable in view of the proposed transaction and the acquiring
60 utility's proposed post-acquisition improvements to the utility assets.

61 (4) In any application described in subdivision (1) of this subsection, the commission will
62 issue a final order granting, denying, or granting in part and denying in part the relief requested
63 in the application.

64 (5) Nothing in this section or §24-2-12 of this code requires an acquiring utility or a selling
65 utility to obtain the prior consent and approval of the commission to enter into agreements or
66 undertake commitments incident to the negotiation, due diligence, or finalization of an agreement
67 to purchase and sell utility assets, including, without limitation, agreements and commitments
68 relating to:

69 (A) The exclusivity of negotiations for a defined period;

70 (B) The confidentiality of negotiations and nondisclosure of facts relevant to the
71 negotiations;

72 (C) The payment of transaction costs as between the parties, the reimbursement of those
73 costs upon closing of an acquisition of utility assets, or the allocation of costs in the event the
74 acquisition is not consummated;

75 (D) The acquiring utility's completion of post-acquisition additions or improvements to the
76 utility assets or its commitments as to post-acquisition rates and charges for utility service; or

77 (E) Any other commercial term reasonably necessary to facilitate the negotiation, due
78 diligence, or finalization of the purchase and sale agreement.

79 (c) *Request for revenue requirement combination or allocation.* —

80 (1) A single utility that provides both water and wastewater utility services may request a
81 combination of the revenue requirements of the water and wastewater utility services or an
82 allocation of a portion of the wastewater revenue requirement to water customers. Such a request
83 may be made as a separate filing with the commission or as part of a base rate case, a tariff filing,

84 a statutory consent case under §24-2-12 of this code, or another proceeding before the
85 commission.

86 (2) If the commission finds that a combination or allocation requested under subdivision
87 (1) of this subsection: (A) Will enable the acquisition and construction of wastewater infrastructure
88 improvements or compliance with regulatory requirements at a more moderate rate impact for
89 wastewater customers; and (B) will result in a combined water and wastewater rate, or separate
90 water and wastewater rates that are just, reasonable, and based primarily on the cost of providing
91 service, then the commission may authorize the utility to implement the combination or allocation,
92 subject to such modifications as the commission may determine to be appropriate.

93 (d) *Definitions.* — The following words and phrases when used in this section will have the
94 meanings given to them in this section unless the context clearly indicates otherwise:

95 (1) “Acquiring utility” means: (A) A water, sewer, or stormwater utility subject to the
96 provisions of this chapter that has entered into an agreement with a selling utility to acquire utility
97 assets of the selling utility; or (B) any person or business entity that has entered into such an
98 agreement and that, upon commission approval of the acquisition of those utility assets, will
99 become a water, sewer, or stormwater utility subject to the provisions of this chapter.

100 (2) “Depreciated original cost” means the original cost of utility assets net of accumulated
101 depreciation.

102 (3) “Negotiated sale price” means the purchase price of utility assets that the acquiring
103 utility and the selling utility agree upon through voluntary, arm’s-length negotiations.

104 (4) “Original sources of funding” means all methods used to fund the utility assets,
105 including, but not limited to, loan funding, grant funding, and property otherwise contributed to the
106 utility.

107 (5) “Rate-base addition” means the dollar amount of utility rate base associated with the
108 utility assets that the acquiring utility may include in the calculation of its post-acquisition rate base
109 for rate-making purposes.

110 (6) “Reproduction cost new less depreciation” means an estimate of the cost to construct,
111 at current prices, an exact duplicate or replica of the utility assets, without regard to the original
112 sources of funding for those assets, using the same materials, construction standards, design,
113 layout, and quality without adjustment for deficiencies, super-adequacies, and obsolescence of
114 those assets, net of depreciation.

115 (7) “Selling utility” means a water, sewer, or stormwater utility subject to the provisions of
116 this chapter that has entered into an agreement to sell utility assets to an acquiring utility.

117 (8) “Utility assets” or “assets” mean all or substantially all of the tangible and intangible
118 assets of a selling utility that: (A) The selling utility has used in the provision of utility service or
119 held for the future provision of such service; and (B) the acquiring utility will reasonably require to
120 provide utility service after the acquisition to facilitate its plans for the provision of utility service
121 after the acquisition.

122 (9) “Utility asset valuation” means industry standard valuation methods of determining the
123 value of utility assets, regardless of original sources of funding.

124 (e) This section, together with the amendments to §8-12-17 of this code, made during the
125 2020 regular session of the West Virginia Legislature, shall be known and referred to as the Water
126 and Wastewater Investment Facilitation Act.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

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Day of, 2020.

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Governor