WEST VIRGINIA CODE CHAPTER 24 ARTICLE 2H

WV Legislature

§24-2H-1. Short title.

This article shall be known and cited as the Distressed and Failing Utilities Improvement Act.

WV Legislature

§24-2H-2. Legislative findings.

(a) The provision of safe drinking water and the collection and treatment of wastewater has resulted in a drastic reduction in the incidence of disease, increase in life expectancy, and other major public health advancements.

(b) Development of water and wastewater infrastructure has advanced economic development through increased production and productivity within West Virginia's economic sectors and commercial expansion geographically throughout the state.

(c) A number of water and wastewater utilities face substantial capital investment needs to maintain and replace aging infrastructure with limited financial resources.

(d) For some water and wastewater utilities, adequately addressing infrastructure needs may adversely affect their ability to maintain reasonable rates and ability to borrow funds to address such needs.

(e) Many water and wastewater utilities have experienced a loss of customers resulting from decline in populations served which has created an additional rate burden on the remaining population.

(f) Failure to timely address infrastructure needs has resulted in the inability of water and wastewater utilities to adequately serve customers and maintain regulatory compliance, thereby threatening human health and hindering economic growth.

(g) West Virginia needs a comprehensive plan to confront the financial, organizational, and regulatory challenges faced by water and wastewater utilities in the state to ensure that all citizens of West Virginia have access to safe drinking water and adequate and safe wastewater treatment.

WV Legislature

§24-2H-3. Definitions.

(a) A "distressed utility" is a water or wastewater utility that, for financial, operational, or managerial reasons:

(1) (A) Is in continual violation of statutory or regulatory standards of the Bureau for Public Health, the Department of Environmental Protection, or the commission, which affect the water quality, safety, adequacy, efficiency, or reasonableness of the service provided by the water or wastewater utility;

(B) Fails to comply within a reasonable period of time with any final, nonappealable order of the Department of Environmental Protection, Bureau for Public Health, or the commission concerning the safety, adequacy, efficiency, or reasonableness of service, including, but not limited to, the availability of water, the potability of water, the palatability of water, or the provision of water at adequate volume and pressure, and the collection and treatment of wastewater;

(2) Is no longer able to provide adequate, efficient, safe, and reasonable utility services; or

(3) Fails to timely pay some or all of its financial obligations, including, but not limited to, its federal and state tax obligations and its bond payments to the West Virginia Water Development Authority, the United States Department of Agriculture, or other bondholders; fails to maintain its debt service reserve; or fails to submit an audit as required by its bond or loan documents or state law.

(b) "Failing water or wastewater utility" means a public utility that:

Meets the definition of a distressed water or wastewater utility, and either:

(A) Has not, after a reasonable time period, been stabilized and improved by corrective measures put in place under §24-2H-7 of this code; or

(B) Has had the requirements of §24-2H-7 of this code suspended for good cause shown by an order of the commission.

(c) "Capable proximate water or wastewater utility" means a public utility which regularly provides adequate, safe, and reasonable service of the same type as the distressed utility and is situated close enough to the facilities of a distressed utility that operational management is reasonable, financially viable, and nonadverse to the interests of the current customers of the nondistressed utility.

WV Legislature

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

Annually, at least by November 1, the commission shall prepare a list of water and wastewater utilities that appear to be financially unstable by reviewing annual reports, rate case filings and other financial data available to it. Commission staff shall contact each utility placed on the list and provide advice and assistance in resolving any financial instability or managerial or operational issues that are contributing to the utility's financial instability. The commission shall provide the list of potentially unstable water and wastewater utilities to the West Virginia Rural Water Association. Commission staff shall publish annually, by hyperlink, the list of potentially unstable water and wastewater utilities on the commission's homepage no later than November 1.

WV Legislature

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

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

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

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

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

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

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

(6) Any other relevant matter.

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

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

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

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

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

(5) Any other relevant matter.

WV Legislature

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

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

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

(1) Issuance of a press release;

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

(A) The utility;

(B) The Consumer Advocate Division;

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

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

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

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

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

WV Legislature

§24-2H-7. Commission order for acquisition of failing utility; list of distressed and failing utilities to Legislature.

(a) Following the evidentiary hearing, the commission shall enter a final order stating whether the utility is a distressed or failing utility and identifying the capable proximate utilities, if any, as defined in §24-2H-3 of this code. If the commission determines that a utility is a distressed utility, then the commission may make an order consistent with subsection (b) of this section. If the commission determines that the utility is a failing utility, then the commission may order the acquisition of the failing utility by the most suitable capable proximate water or wastewater utility, if there is more than one.

(b) Before the commission may designate a water or wastewater utility as failing and order acquisition by a capable proximate utility it shall determine whether there are any alternatives to an ordered acquisition. If the commission determines that an alternative to designating a utility as failing and ordering an acquisition is reasonable and cost effective, it may order the distressed utility and, if applicable to the alternative a capable proximate utility, to implement the alternative. Commission staff shall work with the utility to implement the alternative, as necessary. Alternatives that the commission may consider include, but are not limited to, the following:

(1) Reorganization of the utility under new management or a new board, subject to the approval of the applicable county commission(s) or municipal government;

(2) Operation of the distressed utility by another public utility or management or service company under a mutually agreed arms-length contract;

(3) Appointment of a receiver to assure the provision of adequate, efficient, safe and reasonable service and facilities to the public pursuant to §24-2-7(b) of this code;

(4) Merger of the water or wastewater utility with one or more other public utilities, subject to the approval of the applicable county commission(s) or municipal government;

(5) The acquisition of the distressed utility through a mutual agreement made at arms-length; and

(6) Any viable alternative other than an ordered acquisition by a capable proximate utility.

(c) The commission shall provide a list of utilities designated by a final order of the commission as a distressed or failing utility to the Legislature as part of its annual Management Summary Report beginning in the 2021 reporting period and annually thereafter. The commission shall provide the same list to the Water Development Authority and the Infrastructure and Jobs Development Council on or before January 31 of each year beginning in 2021.

(d) Notwithstanding any provision of this code to the contrary, the commission shall not order a utility to acquire a distressed or failing utility if the aggregate cost of necessary

WV Legislature

capital improvements for the distressed or failing utility which will be borne by the acquiring utility exceeds:

(1) the aggregate required contribution under the commission's extension of mains rules for new customers; or

(2) grant funds from the Water Development Authority Distressed Utilities Account created under §31-15A-9(i) of this code; or

(3) other grant funds; or

(4) any combination of the above.

WV Legislature

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

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

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

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

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

(e) A nonprofit acquiring public utility may seek grant funding from the Distressed Utilities

WV Legislature

Account established pursuant to §31-15A-9(i) of this code to repair, maintain, and replace the distressed water and wastewater utilities facilities as needed. The reasonably and prudently incurred costs of the acquiring utility shall be recoverable in rates as provided in §24-2H-9 of this code.

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

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

WV Legislature

§24-2H-9. Recovery of costs for acquisition, operation, repairs and improvements to distressed or failing utility facilities.

The commission may approve an appropriate and reasonable cost recovery mechanism to allow the capable proximate utility to recover its acquisition costs and projected cost of service of operating, maintaining and improving the facilities of the failing water or wastewater utility or its net costs incurred for operating, maintaining and improving the distressed utility under an operating agreement. The cost recovery mechanism may include a surcharge or surcharges on both acquired and existing customers if approved by the commission in a separate rate or tariff proceeding which shall be considered by the commission on an expedited basis without the need for a full base rate proceeding. Rate increments and surcharges established pursuant to this section shall be subject to adjustment on an annual basis to reflect changes in costs, additional projected capital and operating costs and true-up of any over or under recoveries of costs. Cost recovery mechanisms may also include:

(1) A surcharge above existing rates that allows recovery of additional incremental cost increases, net of contributions necessary to operate, maintain and improve the failing utility's service level to an acceptable level and into compliance with all applicable regulatory standards;

(2) An acquisition adjustment to private for-profit utilities as an incentive to acquire a failing utility;

(3) An increased return on investment as an incentive to acquire a failing utility; or

(4) Any other incentive method proposed by the acquiring utility if the method is determined by the commission to be appropriate, reasonable and in the public interest.

WV Legislature