Enrolled
Committee Substitute
for
Senate Bill 551

SENATORS SMITH, CLEMENTS, JEFFRIES, SYPOLT,
HAMILTON, ROMANO, and LINDSAY (original sponsors)

[Passed March 7, 2020; in effect 90 days from passage]
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AN ACT to amend and reenact §8-12-17 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §24-2-4g, all relating generally to the Water and Wastewater Investment and Infrastructure Improvement Act to encourage investment in water and wastewater utilities; describing and expanding permissible uses for proceeds of a sale or lease of a municipal utility; making legislative findings; providing for use of negotiated sales price in certain filings; providing for rate based addition using negotiated sales price under certain circumstances; providing for additional approvals under certain circumstances; specifying preliminary agreements and commitments not requiring prior approval; authorizing the Public Service Commission to combine water and wastewater revenue requirements or allocate a portion of wastewater revenue requirement to water customers under certain circumstances; and setting forth 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.

In any case where a municipality owns a gas system, an electric system, a waterworks system, a sewer system, or other public utility and a majority of not less than 60 percent of the members of the governing body thereof shall deem it for the best interest of such municipality that such utility be sold or leased, the governing body may so sell or lease such gas system, electric system, waterworks system, sewer system, or other public utility upon such terms and conditions as said governing body in its discretion considers in the best interest of the municipality: Provided, That such sale or lease may be made only upon: (1) The publication of notice of a hearing before
the governing body of the municipality, as a Class I legal advertisement in compliance with the
provisions of §59-3-1 et seq. of this code, in a newspaper published and of general circulation in
the municipality, such publication to be made not earlier than 20 days and not later than seven
days prior to the hearing; and (2) the approval by the Public Service Commission of West Virginia.
The governing body, upon the approval of the sale or lease by a majority of its members of not
less than 60 percent of the members of the governing body, shall have full power and authority to
proceed to execute or effect such sale or lease in accordance with the terms and conditions
prescribed in the ordinance approved as aforesaid, and shall have power to do any and all things
necessary or incident thereto: Provided, however, That if at any time after such approval and
before the execution of the authority under the ordinance, any person should present to the
governing body an offer to buy such public utility at a price which exceeds by at least five percent
the sale price which shall have been so approved and authorized or to lease the same upon terms
which the governing body, in its discretion, shall consider more advantageous to the municipality
than the terms of the lease which shall have been previously approved as aforesaid, the governing
body shall have the power to accept such subsequent offer, and to make such sale or such lease
to the person making the offer, upon approval of the offer by a majority of not less than 60 percent
of the members of the governing body; but, if a sale shall have been approved by the governing
body as aforesaid, and the subsequent proposition be for a lease, or, if a lease shall have been
approved by the governing body, and the subsequent proposition shall be for a sale, the governing
body shall have the authority to accept the same upon approval of the offer by a majority of not
less than 60 percent of the members of the governing body. The person making such proposition
shall furnish bond, with security to be approved by the governing body, in a penalty of not less
than 25 percent of such proposed bid, conditioned to carry such proposition into execution, if the
same shall be approved by the governing body. In any case where any such public utility shall be
sold or leased by the governing body as hereinabove provided, no part of the moneys derived
from such sale or lease shall be applied to the payment of current expenses of the municipality,
but the proceeds of such sale or lease shall be applied in payment and discharge of any
indebtedness created in respect to such public utility, and in case there be no indebtedness, the
governing body, in its discretion, shall have the power and authority to expend all such moneys
when received for the purchase or construction of firefighting equipment and buildings for housing
such equipment, a municipal building or city hall, and the necessary land upon which to locate
the same, for capital investments in public works projects, vehicles and equipment, including
without limitation law-enforcement vehicles and equipment, for the demolition of dilapidated and
abandoned buildings, for the construction of paved streets, avenues, roads, alleys, ways,
sidewalks, sewers, stormwater systems, floodwalls, and other like permanent improvements, for
fulfilling municipal pension and other post-employment benefit obligations, for reducing taxes, and
for no other purposes. In case there be a surplus after the payment of such indebtedness, the
surplus shall be used as aforesaid.

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

(a) The Legislature finds that:

(1) Many West Virginia publicly owned municipal, public service district-owned, and
investor-owned water and wastewater utilities face substantial capital investment needs to replace
aging utility infrastructure and to maintain compliance with regulatory requirements, and many
municipalities that own and operate utility systems are confronted with additional financial
challenges arising from diminishing tax bases, the need to repair streets and other municipally
owned facilities, and unfunded or underfunded liabilities for pension and other post-employment
benefit programs;

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

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

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

(5) To assist utilities that provide both water and wastewater utility service in moderating
the rate impact of wastewater service investment on wastewater system customers, it is
appropriate to authorize the combination of water and wastewater revenue requirements or the
allocation of a portion of a wastewater revenue requirement to water customers if such a
combination or allocation is just and reasonable and results in water and wastewater rates that
are based primarily on the cost of providing service;
(6) Expanding the permissible uses by a municipality of the proceeds of a sale of utility assets as provided for in §8-12-17 of this code will also facilitate and encourage a municipality’s ability to sell its utility assets, should it choose to do so; and

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

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

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

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

(3) In its order granting, denying, or modifying the relief requested in an application described in subdivision (1) of this subsection, the commission may also approve any rate
stabilization plan, tariff change or provision, or surcharge mechanism proposed by the applicants and that the commission finds reasonable in view of the proposed transaction and the acquiring utility’s proposed post-acquisition improvements to the utility assets.

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

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

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

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

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

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

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

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

(1) A single utility that provides both water and wastewater utility services may request a combination of the revenue requirements of the water and wastewater utility services or an allocation of a portion of the wastewater revenue requirement to water customers. Such a request may be made as a separate filing with the commission or as part of a base rate case, a tariff filing,
a statutory consent case under §24-2-12 of this code, or another proceeding before the
commission.

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

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

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

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

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

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

(5) “Rate-base addition” means the dollar amount of utility rate base associated with the
utility assets that the acquiring utility may include in the calculation of its post-acquisition rate base
for rate-making purposes.
(6) "Reproduction cost new less depreciation" means an estimate of the cost to construct, at current prices, an exact duplicate or replica of the utility assets, without regard to the original sources of funding for those assets, using the same materials, construction standards, design, layout, and quality without adjustment for deficiencies, super-adequacies, and obsolescence of those assets, net of depreciation.

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

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

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

(e) This section, together with the amendments to §8-12-17 of this code, made during the 2020 regular session of the West Virginia Legislature, shall be known and referred to as the Water and Wastewater Investment Facilitation Act.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
Chairman, Senate Committee

[Signature]
Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

[Signature]
Clerk of the Senate

[Signature]
Clerk of the House of Delegates

[Signature]
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 25th Day of March, 2020.

[Signature]
Governor