

# WEST VIRGINIA LEGISLATURE

## 2020 REGULAR SESSION

Introduced

### Senate Bill 551

FISCAL  
NOTE

BY SENATORS SMITH, CLEMENTS, JEFFRIES, SYPOLT,

HAMILTON, ROMANO, LINDSAY, AND WOELFEL

[Introduced January 21, 2020; referred  
to the Committee on Government Organization]

1 A BILL 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 on the valuation of utility assets in the context of certain utility acquisitions and  
 7 the combination or allocation of water and wastewater revenue requirements; making  
 8 legislative findings on the valuation of utility assets in the context of an acquisition;  
 9 establishing a range within which a post-acquisition rate base addition is to be established;  
 10 providing for ancillary approvals; specifying preliminary agreements and commitments not  
 11 requiring prior approval; authorizing the Public Service Commission to combine water and  
 12 wastewater revenue requirements or allocate a portion of wastewater revenue  
 13 requirement to water customers where a utility provides both water and wastewater  
 14 service and where the combination or allocation is reasonable and results in water and  
 15 wastewater rates that are just and reasonable and based primarily on the cost of providing  
 16 service; 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.**

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 dilapidates and  
 41 abandoned buildings, ~~or~~ for the construction of paved streets, avenues, roads, alleys, ways,  
 42 sidewalks, sewers, storm water 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 acquisitions 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: (i) Understate the actual fair value of those assets to an acquiring party,  
18 (ii) fail to account for potential income that could be generated from those assets, (iii) reduce the  
19 financial benefit to utilities considering selling those assets, and (iv) 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 fair value for those assets that lies between ascertainable minimum and maximum  
24 values set forth in this section, permit the acquiring party to include the negotiated sale price of  
25 the assets in the acquiring utility's post-acquisition rate base for ratemaking purposes, and make  
26 its post-acquisition rate base determination based on the valuation approach specified in this  
27 section;

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

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

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

42 (b) Fair value of utility assets; rate base addition; ancillary approvals. –

43 (1) In any case filed pursuant to §24-2-12 of this code seeking the commission's prior  
44 consent and approval of the acquisition by an acquiring utility of the utility assets of a selling utility,  
45 the applicants may propose a negotiated sale price for the utility assets that falls between the  
46 depreciated original cost and the reproduction cost new less depreciation, and in that case the  
47 applicants will present evidence of those two values in the application.

48 (2) If the commission finds that the proposed acquisition, including the negotiated sale  
49 price, satisfies the requirements for approval in §24-2-12 of this code, including a finding that the  
50 terms and conditions of the acquisition are reasonable and that neither party thereto is given an  
51 undue advantage over the other, and do not adversely affect the public in this State, then if the  
52 negotiated sale price:

53 (i) Is within the range described in subdivision (b)(1) above, the negotiated sale price is

54 presumed appropriate and the commission will establish the rate base addition at the negotiated  
55 sale price; or

56 (ii) Is outside the range described in subdivision (b)(1) above, the commission will  
57 establish the rate base addition at no less than the lesser of the negotiated sale price and the  
58 reproduction cost new less depreciation of the utility assets.

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

64 (4) In any application described in subdivision (b)(1) above, the commission will issue a  
65 final order granting, denying, or granting in part and denying in part the relief requested in the  
66 application.

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

72 (i) The exclusivity of negotiations for a defined period;

73 (ii) The confidentiality of negotiations and nondisclosure of facts relevant to the  
74 negotiations;

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

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

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

82 (c) Request for revenue requirement combination or allocation. –

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

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

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

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

103 “Depreciated original cost” means the original cost of utility assets net of accumulated  
104 depreciation.

105 “Negotiated sale price” means the purchase price of utility assets that the acquiring utility



106 and the selling utility agree upon through voluntary, arm's-length negotiations.

107 "Original Sources of Funding" means all methods used to fund the utility assets including,  
108 but not limited to, loan funding, grant funding, and property otherwise contributed to the utility.

109 "Rate base addition" means the dollar amount of utility rate base associated with the utility  
110 assets that the acquiring utility may include in the calculation of its post-acquisition rate base for  
111 ratemaking purposes.

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

117 "Selling utility" means a water, sewer, or stormwater utility subject to the provisions of this  
118 chapter that has entered into an agreement to sell utility assets to an acquiring utility.

119 "Utility assets" or "assets" mean all or substantially all of the tangible and intangible assets  
120 of a selling utility that: (i) The selling utility has used in the provision of utility service or held for  
121 the future provision of such service, and; (ii) the acquiring utility will reasonably require to provide  
122 utility service after the acquisition to facilitate its plans for the provision of utility service after the  
123 acquisition.

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  
126 "Water and Wastewater Investment Facilitation Act."

NOTE: The purpose of this bill is to enact the Water and Wastewater Investment Facilitation Act. This act (i) expand the uses to which a municipality that sells or leases a municipal gas, electric, water, wastewater, or other public utility may apply the proceeds of any such sale or lease, (ii) establish a process to recognize the appropriate value of a selling utility's assets to be included in the calculation of an acquiring utility's post-acquisition rate base for ratemaking purposes, and (iii) authorize water and wastewater utilities owned by a single entity to combine water and wastewater revenue requirements or allocate a portion of the wastewater revenue requirement to water customers.

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