

# **WEST VIRGINIA LEGISLATURE**

**2021 REGULAR SESSION**

**Introduced**

## **Senate Bill 523**

BY SENATOR MAYNARD

[Introduced March 2, 2021; referred  
to the Committee on Government Organization]



1 A BILL to amend and reenact §24-2H-3, §24-2H-5, and §24-2H-8 of the Code of West Virginia,  
2 1931, as amended, all relating to correcting certain code references.

*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-3. Definitions.**

1 (a) A “distressed utility” is a water or wastewater utility that, for financial, operational, or  
2 managerial reasons:

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

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

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

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

- 19           **(b)** “Failing water or wastewater utility” means a public utility that:
- 20           (1) Meets the definition of a distressed water or wastewater utility, and either:
- 21           (2) ~~(A)~~ Has not, after a reasonable time period, been stabilized and improved by corrective
- 22 measures put in place under ~~§24-2H-4~~ §24-2H-7 of this code; or
- 23           (3) ~~(B)~~ Has had the requirements of ~~§24-2H-4~~ §24-2H-7 of this code suspended for good
- 24 cause shown by an order of the commission.
- 25           **(c)** “Capable proximate water or wastewater utility” means a public utility which regularly
- 26 provides adequate, safe, and reasonable service of the same type as the distressed utility and is
- 27 situated close enough to the facilities of a distressed utility that operational management is
- 28 reasonable, financially viable, and nonadverse to the interests of the current customers of the
- 29 nondistressed utility.

**§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-4~~ §24-2H-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) Any other relevant matter.

**§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-4~~ §24-2H-7 of this code, the  
2 distressed utility and acquiring utility shall file a petition with the commission under §24-2-12 of  
3 this 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  
11 to assume the indebtednesses if legally permitted. The acquiring utility shall consult with the

12 lenders or lienholders regarding payment in full or the assumption, to the extent legally  
13 permissible, of any 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  
17 be permitted for a reasonable period of time after the date of acquisition, to charge and collect  
18 rates from the customers of the failing utility pursuant to a separate tariff which may be higher or  
19 lower than the existing tariff of the distressed or failing utility or may allow a surcharge on both  
20 the 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  
28 are 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  
48 or incentives set forth in §24-2H-9 of this code as part of its petition for approval from the  
49 commission.