

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Enrolled

Senate Bill 523

BY SENATOR MAYNARD

[Passed March 18, 2021; in effect 90 days from passage (June 16, 2021)]

1 AN ACT 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 Meets the definition of a distressed water or wastewater utility, and either:
21 (A) Has not, after a reasonable time period, been stabilized and improved by corrective
22 measures put in place under §24-2H-7 of this code; or
23 (B) Has had the requirements of §24-2H-7 of this code suspended for good cause shown
24 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-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-7 of this code, the distressed utility
2 and acquiring utility shall file a petition with the commission under §24-2-12 of this code to approve
3 the necessary operating agreement if such alternative is directed by the commission. After an
4 order has been entered pursuant to §24-2H-7 of this code, the failing utility and acquiring utility
5 shall file a petition with the commission under §24-2-12 of this code, to approve the purchase
6 price of the acquisition. Where the parties are unable to agree on an acquisition price, the filing
7 may request that an evidentiary hearing be held so that the commission may determine the
8 acquisition price and any other issues related to the acquisition. The acquisition price must, at a
9 minimum, satisfy all outstanding loans, tax obligations, required grant repayment, liens, and
10 indebtedness owed by the failing utility or the acquiring utility must agree to assume the
11 indebtednesses if legally permitted. The acquiring utility shall consult with the lenders or

12 lienholders regarding payment in full or the assumption, to the extent legally permissible, of any
13 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.

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, 2021.

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Governor