

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas  
2 82nd General Assembly  
3 Regular Session, 1999  
4

As Engrossed: S3/10/99 S3/31/99

## A Bill

Act 1322 of 1999  
SENATE BILL 869

5 By: Senator Mahony  
6 By: Representative M. Smith  
7

### For An Act To Be Entitled

10 "AN ACT TO PROVIDE THAT EXEMPT WHOLESAL E GENERATORS  
11 ARE NOT PUBLIC UTILITIES; AND FOR OTHER PURPOSES."

### Subtitle

14 "AN ACT TO PROVIDE THAT EXEMPT WHOLESAL E  
15 GENERATORS ARE NOT PUBLIC UTILITIES."

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

20 SECTION 1. Ark. Code Ann. § 23-1-101 is hereby amended to read as  
21 follows:

22 "As used in this act, unless the context otherwise requires:

23 (1) 'Corporation' includes, but is not limited to, a private  
24 corporation, an association, a joint-stock association, a business trust, and  
25 an electric cooperative corporation providing service for charge or  
26 compensation in any area or from any facility for which the commission has  
27 granted a certificate of convenience and necessity;

28 (2) 'Exempt wholesale generator' means a person, including an affiliate  
29 of a public utility, engaged directly, or indirectly through one or more  
30 affiliates, and exclusively in the business of owning or operating all or part  
31 of a facility for generating electric energy and selling electric energy at  
32 wholesale and who:

33 (A) does not own or operate a facility for the transmission of  
34 electricity, other than interconnecting transmission facilities used to effect  
35 a sale of electric energy at wholesale; and

36 (B) has applied to the Federal Energy Regulatory Commission for a

1 determination under 15 U.S.C. Section 79z-5a.

2 ~~(2)~~(3) 'Person' includes a natural person, a trustee, lessee, receiver,  
3 holder of beneficial or equitable interest, a partnership, or two (2) or more  
4 persons having a joint or common interest, and a corporation as defined in  
5 subdivision (1);

6 ~~(3)~~(4) 'Municipality' includes a city, a town, an improvement district,  
7 other than a county, and any other public or quasi-public corporation which is  
8 created or organized under the Constitution or laws of the State of Arkansas;

9 ~~(4)~~(5)(A) 'Public utility' includes persons and corporations, or their  
10 lessees, trustees, and receivers, owning or operating in this state equipment  
11 or facilities for:

12 (i) Producing, generating, transmitting, delivering, or  
13 furnishing gas, electricity, steam, or another agent for the production of  
14 light, heat, or power to, or for, the public for compensation;

15 (ii) Diverting, developing, pumping, impounding,  
16 distributing, or furnishing water to or for the public for compensation.

17 However, nothing in this subdivision shall be construed to include water  
18 facilities and equipment of cities and towns in the definition of public  
19 utility. Further, the term 'public utility' shall not include any entity  
20 described by this subdivision which meets any of the following criteria:

21 (a) All property owners' associations whose facilities  
22 are enjoyed only by members of that association or residents of the community  
23 governed by that association; or

24 (b) All entities whose annual operating revenues would  
25 cause them to be classified as Class C or lower water companies pursuant to  
26 the uniform system of accounts adopted by the Arkansas Public Service  
27 Commission. However, the term 'public utility' shall include any water  
28 company which petitions, or a majority of whose metered customers petition,  
29 the Arkansas Public Service Commission to come under the commission's  
30 jurisdiction, provided that the water company must have had combined annual  
31 operating revenues in excess of four hundred thousand dollars (\$400,000) for  
32 the three (3) fiscal years immediately preceding the date of filing the  
33 petition; or

34 (c) All improvements districts.

35 (iii) Conveying or transmitting messages or communications  
36 by telephone or telegraph where such service is offered to the public for

1 compensation;

2 (iv) Transporting persons by street, suburban, or interurban  
3 railway for the public for compensation;

4 (v) Transporting persons by motor vehicles if the vehicles  
5 are operated under a franchise granted by a municipality and in conjunction  
6 with, or as a part of, a street, suburban, or interurban railway, or in lieu  
7 of either thereof, for the public for compensation;

8 (vi) Maintaining a sewage collection system or a sewage  
9 treatment plant, intercepting sewers, outfall sewers, force mains, pumping  
10 stations, ejector stations, and other appurtenances necessary or useful for  
11 the collection or treatment, purification, and disposal of the liquid and  
12 solid waste, sewage, night soil, and industrial waste. However, nothing in  
13 this subdivision shall be construed to include sewerage facilities and  
14 equipment of cities and towns in the definition of public utility. The term  
15 'public utility' shall not include any entity described by this subdivision  
16 which meets any of the following criteria:

17 (a) All property owners' associations whose facilities  
18 are enjoyed only by members of that association or residents of the community  
19 governed by that association; or

20 (b) All entities whose annual operating revenues would  
21 cause them to be classified as Class C or lower sewer companies pursuant to  
22 the uniform system of accounts adopted by the Arkansas Public Service  
23 Commission; or

24 (c) All improvement districts.

25 (B) The term 'public utility', as used for rate-making purposes  
26 only:

27 (i) Shall include persons and corporations or their lessees,  
28 trustees, and receivers producing, generating, transmitting, delivering, or  
29 furnishing any of the services set forth in subdivisions ~~(4)~~(5)(A)(i) and (ii)  
30 to any other person or corporation for resale or distribution to, or for, the  
31 public for compensation;

32 (ii) Shall not include persons or corporations providing  
33 cellular telecommunications service and not providing any other public utility  
34 service in this state, unless the commission finds by order, after notice and  
35 hearing and upon substantial evidence, and which shall not take effect pending  
36 appeal therefrom, that the public interest requires the application of some or

1 all of the provisions of subdivision ~~(4)~~(5) of this section to such persons or  
2 corporations;

3 (C) The term 'public utility', as to any public utility defined in  
4 subdivisions ~~(4)~~(5)(A)(ii), and (vi) of this section, shall not include any  
5 person or corporation, who or which furnishes the service or commodity  
6 exclusively to himself or itself, or to his or its employees or tenants, when  
7 the service or commodity is not resold to or used by others.

8 (D) Any other provision of law to the contrary notwithstanding,  
9 the term 'public utility' shall not include an exempt wholesale generator as  
10 defined in § 23-1-101(2).

11 ~~(D)~~(E) The term 'public utility', as to any public utility defined  
12 in subdivision ~~(4)~~(5)(A)(iii) of this section, shall not include any person or  
13 corporation who or which:

14 (i) Furnishes the services exclusively to himself or itself,  
15 or to employees; or

16 (ii) Furnishes the services:

17 (a) To persons who are temporary residents or guests  
18 in a hotel or motel owned by him or it;

19 (b) Patients in a hospital owned by him or it; or

20 (c) Students of a public or private institution of  
21 higher learning who reside in housing provided by that institution;

22 ~~(E)~~(F)(i) Notwithstanding the foregoing provisions of this  
23 subsection, the term 'public utility' shall not include any person or  
24 corporation owning any interest in equipment or facilities used for any of the  
25 purposes specified in subdivisions ~~(4)~~(5)(A)(i) or ~~(4)~~(5)(B), provided that:

26 (a) The interest in the equipment or facilities is  
27 leased under a net lease directly to a public utility or to a person or  
28 corporation that is exempt from regulation as a public utility, either as a  
29 sole lessee or joint lessee with one (1) or more other public utilities or  
30 persons or corporations so exempt; and

31 (b) The person or corporation is otherwise primarily  
32 engaged in one (1) or more businesses other than the business of a public  
33 utility, or is a person or corporation all of whose equity or beneficial  
34 ownership is held by one (1) or more persons or corporation so engaged, either  
35 directly or indirectly; and

36 (c) If the lessee is a public utility, the lease to it

1 has been authorized or approved by the Arkansas Public Service Commission; and

2 (d) The lease of the interest in the equipment or  
3 facilities extends for an initial term of not less than ten (10) years, except  
4 for termination of the lease upon events set forth in the lease, unless any  
5 shorter term specified in the lease is not less than two-thirds (2/3) of the  
6 then-expected remaining useful life of the equipment or facilities or the  
7 lease is entered into following termination of a prior lease upon the  
8 liquidation, reorganization, bankruptcy, or insolvency of the prior lessee;  
9 and

10 (e) The rent reserved under the lease shall not  
11 include any amount based, directly or indirectly, on revenues or income of the  
12 lessee.

13 (ii) For purposes of this subdivision ~~(4)(E)(5)(F)~~, a public  
14 utility shall not cease to be such by reason of a lease, directly or  
15 indirectly, of a part or all of its interest in such equipment or facilities  
16 to any affiliate.

17 (iii) For purposes of this subdivision ~~(4)(E)(5)(F)~~, the  
18 term 'person or corporation' shall include any receiver, trustee, or  
19 liquidating agent of the person or corporation.

20 (iv) The exception of the definition of 'public utility'  
21 described in subdivision ~~(4)(E)(5)(F)~~(i) of this section shall continue to  
22 apply, following termination of the lessee's right to possession or use of the  
23 interest in the equipment or facilities during the lease term or following  
24 termination of the lease by the lessee or its trustee pursuant to the  
25 provisions of § 365 of the Federal Bankruptcy Code or of any similar Arkansas  
26 or federal statute, for so long as the person or corporation referred to in  
27 subdivision ~~(4)(E)(5)(F)~~(i) of this section does not supply electricity  
28 directly to the public. In any case, the exception to the definition of  
29 'public utility' described in subdivision ~~(4)(E)(5)(F)~~(i) of this section  
30 shall continue to apply for a period of ninety (90) days following the  
31 termination, except that no change in rates that would otherwise be subject to  
32 the jurisdiction of the Arkansas Public Service Commission shall be effected  
33 during the ninety (90) day period, without the approval of the Arkansas Public  
34 Service Commission;

35 ~~(F)(G)~~(i)(a) Within any county not subject to subdivision  
36 ~~(4)(F)(5)(G)~~(i)(b) of this section, any Class C or lower water company or

1 Class C or lower sewer company that would otherwise be exempt from the  
 2 definition of 'public utility' under subdivision ~~(4)(5)~~(A)(ii)(b) or  
 3 ~~(4)(5)~~(A)(vi)(b) shall be included within the term 'public utility' if such  
 4 Class C or lower water company or Class C or lower sewer company petitions the  
 5 Public Service Commission to have the company included. The provisions of  
 6 this section do not apply to water or sewer companies formed under the  
 7 nonprofit corporation laws of this state or any improvement district or water  
 8 distribution district law of this state.

9 (b) All Class C or lower water companies or Class C or  
 10 lower sewer companies that would otherwise be exempt from the definition of  
 11 'public utility' under subdivision ~~(4)(5)~~(A)(ii)(b) or ~~(4)(5)~~(A)(vi)(b) shall  
 12 be included within the term 'public utility' if a majority of the customers of  
 13 the company petition the Public Service Commission to have the company  
 14 included. The Public Service Commission shall determine the sufficiency of  
 15 the petition at a public hearing. The water or sewer company or any customer  
 16 of the company may appear and present evidence on the sufficiency of the  
 17 petition. The provisions of this section do not apply to water or sewer  
 18 companies formed under the nonprofit corporation laws of this state or any  
 19 improvement district or water distribution district law of this state.

20 (ii) The Public Service Commission shall adopt regulations  
 21 governing the petition process.

22 (iii) A Class C or lower water company or sewer company  
 23 shall provide the Public Service Commission a list of metered customers upon  
 24 request.

25 ~~(5)(6)~~ 'Rate' means and includes every compensation, charge, fare, toll,  
 26 rental, and classification, or any of them, demanded, observed, charged, or  
 27 collected by any public utility for any service, products, or commodity  
 28 offered by it as a public utility to the public and means and includes any  
 29 rules, regulations, practices, or contracts affecting any compensation,  
 30 charge, fare, toll, rental, or classification;

31 ~~(6)(7)~~ 'Commission' means the Arkansas Public Service Commission or the  
 32 Transportation Safety Agency with respect to the particular public utilities  
 33 and matters over which each commission has jurisdiction;

34 ~~(7)(8)~~ 'Commissioner' means:

35 (A) One (1) of the commissioners of the Arkansas Public Service  
 36 Commission with respect to the particular public utilities and matters over

1 which that commission has jurisdiction; or

2 (B) One (1) of the commissioners of the Transportation Safety  
3 Agency with respect to the particular public utilities and matters over which  
4 that ~~commission~~ agency has jurisdiction;

5 ~~(8)~~(9) 'Affiliated interest with a public utility' includes the  
6 following:

7 (A) Every corporation and person owning or holding directly or  
8 indirectly twenty-five percent (25%) or more of the voting securities of the  
9 public utility;

10 (B) Every corporation or person in any chain of successive  
11 ownership, or holding, of twenty-five percent (25%) or more of the voting  
12 securities of that public utility;

13 (C) Every corporation, twenty-five percent (25%) or more of whose  
14 voting securities is owned by any person or corporation owning twenty-five  
15 percent (25%) or more of the voting securities of the public utility or is  
16 owned by any person or corporation in any chain of successive ownership of  
17 twenty-five percent (25%) or more of the voting securities;

18 (D) Every person who is an officer or director of that public  
19 utility or of any corporation in any chain of successive ownership or holding  
20 of twenty-five percent (25%) or more of the voting securities of the public  
21 utility;

22 ~~(9)~~(10) 'Service' includes any product or commodity furnished and the  
23 plant, equipment, apparatus, appliances, property, and facilities employed by  
24 any public utility in performing any service or in furnishing any product or  
25 commodity devoted to the public purposes of the utility and to the use and  
26 accommodation of customers or patrons;

27 ~~(10)~~(11) 'Securities' means capital stock of all classes and all  
28 evidences of indebtedness secured or unsecured by lien upon capital assets or  
29 revenues, not including, however, any obligation falling due on or before a  
30 fixed date that is not more than one (1) year after the date of its issuance  
31 and not secured by a lien upon capital assets or revenues;

32 ~~(11)~~(12) 'Gross earnings' includes all amount received, charged, or  
33 chargeable for or on account of any public service furnished or supplied in  
34 this state by any public utility and includes all gross income from all  
35 incidental, subordinate, or subsidiary operations of the utility in this  
36 state; however, revenues from the manufacture and sale of ice shall not be

1 included. "

2

3 SECTION 2. Ark. Code Ann. § 23-18-503(9) is hereby amended to read as  
4 follows:

5 " 'Public utility' or 'utility' means any person engaged in the  
6 production, storage, distribution, sale, delivery, or furnishing of  
7 electricity or gas, or both, to or for the public, as defined in § 23-1-  
8 101~~(4)~~(5)(A)(i) and ~~(4)~~(5)(B), but does not include an exempt wholesale  
9 generator as defined in § 23-1-101(2). "

10

11 SECTION 3. Ark. Code Ann. § 23-18-504(a) is hereby amended to read as  
12 follows:

13 "(a) This subchapter shall not apply to any major utility facility:

14 (1) For which, prior to July 24, 1973, an application for the  
15 approval of the facility has been made to any federal, state, regional, or  
16 local governmental agency, which agency possesses the jurisdiction to consider  
17 the matters prescribed for finding and determination in § 23-18-519(a) and  
18 (b);

19 (2) For which, prior to July 24, 1973, the Arkansas Public  
20 Service Commission has issued a certificate of convenience and necessity or  
21 otherwise approved the construction of the facility; ~~or~~

22 (3) Over which an agency of the federal government has exclusive  
23 jurisdiction;

24 (4) That is owned by one or more exempt wholesale generators as  
25 defined in § 23-1-101(2); or

26 (5) That is a facility for generating electric energy owned by  
27 any person, including a public utility, if the costs of such facility will not  
28 be recovered in rates subject to regulation by the Arkansas Public Service  
29 Commission. "

30

31 SECTION 4. All provisions of this act of a general and permanent nature  
32 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code  
33 Revision Commission shall incorporate the same in the Code.

34

35 SECTION 5. If any provision of this act or the application thereof to  
36 any person or circumstance is held invalid, such invalidity shall not affect

1 other provisions or applications of the act which can be given effect without  
2 the invalid provision or application, and to this end the provisions of this  
3 act are declared to be severable.

4

5 SECTION 6. All laws and parts of laws in conflict with this act are  
6 hereby repealed.

7

*/s/ Mahon*

*APPROVED: 4/12/1999y*