

MARKUP COPY

Rules Implementing Act 605 of 2021

RECEIVED

DEC 15 2021

BUREAU OF
LEGISLATIVE RESEARCH

I. Purpose

1. The purpose of these rules is to:
 - a. Implement Ark. Code Ann. § 14-234-801 et. seq.;
 - b. Provide oversight of retail water providers to promote efficiency in service and stability in fiscal management;
 - c. Provide training and education to governing bodies of retail water providers; and
 - d. Provide training of local, state, and federal leaders on the issues surrounding provider personnel, finances, compliance, and environmental factors.
2. The rules shall be read in conjunction with Ark. Code Ann. § 14-234-801 et. seq.

II. Definitions

The following definitions are supplemental to the definitions in Ark. Code Ann. § 14-234-801 et. seq.:

1. "Annualized Revenue Requirement" means the projected revenue if the recommended increase, as well as all previous recommended increases, is in effect for the full 12-month period.
2. "Commission" means the Arkansas Natural Resources Commission.
3. "Debt Service Coverage Ratio" ("DSCR") means Net Operating Income divided by Total Debt Service.
4. "Department" means the Arkansas Department of Agriculture, including the Natural Resources Division thereof.
5. "Future Capital Expenses" means the design and construction of new and replacement infrastructure, including any associated labor and fees.
6. "Major Development Project" means a project that exceeds twenty percent (20%) of gross revenues of the provider for the immediately preceding fiscal year.
7. "Non-operating Revenue" means revenue derived from sources other than water use charges.
8. "Net Operating Income" means earnings before interest, tax, depreciation, and amortization (EBITDA) less capital expenditures.
9. "Provider board" as used herein shall have the definition provided in Ark. Code Ann. § 14-234-801(b)(3).
10. "System" means:
 - a. For a provider that provides water service only, the provider's water system.
 - b. For a provider that provides water service and sewer service, but where the water system and the sewer system are not operated as a joint and integrated undertaking (i.e., when a separate audit is prepared for water and for sewer), the provider's water system.
 - c. For a provider that provides water service and sewer service, and the water facilities are operated as a joint and integrated undertaking (i.e., when water and sewer are combined in a single audit), the provider's joint and integrated water and sewer system.

11. “Total Debt Service” means current debt obligations, including but not limited to any interest, principal, sinking fund, and lease payments due in a given year.

III. **Refurbishment and Replacement Account**

1. Refurbishment and Replacement accounts, as required under Ark. Code Ann. § 14-234-802(e), shall only be used to make repairs or to replace water system System appurtenances.
2. Providers may designate existing depreciation or replacement accounts as the Refurbishment and Replacement Account required by Ark. Code Ann. § 14-234-802(e), so long as the amount deposited therein complies with the provisions of Ark. Code Ann. § 14-234-802(e).
3. The calculation of the amount required to be deposited into a Refurbishment and Replacement Account pursuant to these Rules and Ark. Code Ann. § 14-234-802(e) shall be based on the gross operating revenues of a System.
4. The funds shall not be used for routine repairs. Expenditures of \$1,000 or less shall be considered routine repairs.
5. Utilization of funds from the Refurbishment and Replacement account must be approved by the Provider Board prior to its use.

IV. **Rate Studies for Retail Water Providers**

1. Retail water providers shall obtain rate studies pursuant to the requirements in Ark. Code Ann. § 14-234-802.
2. A provider that plans to undertake a major development project, as defined above and in Ark. Code Ann. § 14-234-802(h)(2), shall obtain a rate study or amend the provider’s existing rate study before beginning the major development project to include consideration of the financial impact of the major development project on the fiscal sustainability of the provider.
3. Rate studies shall be based on the guidelines of the American Water Works Association and the Water Environment Federation.
 - a. The rate studies shall include:
 - i. Reports containing the following information for the current year and projections for the next five years:
 1. A comprehensive cost analysis, including:
 - a. Operations and maintenance (O&M) expenses;
 - b. Financing expenses, including but not limited to debt service payments, bond issuance costs, and commercial paper fees, if applicable;
 - c. Any required cash reserves unavailable to pay for expenses, including but not limited to the annual refurbishment and replacement account deposit requirement as set out in Ark. Code Ann. § 14-234-802(e);
 - d. Depreciation expenses;
 - e. Future capital expenses;
 - f. Expenses required for an annual audit or agreed-upon procedures and compilation report;
 - g. Expenses required for rate studies required under Ark. Code Ann. § 14-234-802; and
 - h. Any other expenses not accounted for in paragraphs (a) through (g).
 2. A comprehensive revenue earnings analysis, including:

- a. Available Cash balance;
- b. Non-rate revenue;
- c. Rate revenue without recommended increases;
- 3. For the five projected years, recommended rate increases and the projected additional revenue derived therefrom;
- 4. Debt Service Coverage Ratios;
- 5. The number of days that the available cash balance could cover O&M expenses without additional revenue;
- 6. Annualized revenue requirement.
- ii. The provider's asset management plan, including:
 - 1. inventory of essential assets and for each essential asset, without limitation, the following information:
 - a. Asset type;
 - b. Annual maintenance costs;
 - c. Year installed;
 - d. Vendor-specified useful life, if available;
 - e. Anticipated date of replacement;
 - f. Installation or replacement cost estimate; and
 - g. Projected consequence of failure.
 - 2. The provider's plan for replacement of essential assets.
- iii. Proposed changes in rates should be based on achieving and maintaining a Debt Service Coverage Ratio of 1.1 or higher.
- iv. An explanation of the provider's chosen rate design; and
- v. Recommendations for any changes to the provider's operations, including a plan on how the changes should be implemented.
- vi. Certification by the entity performing the rate study that such study complies with Ark. Code Ann. § 14-234-801 et. seq. and these Rules.
- b. Rate studies shall be provided to the Department at the time it is provided to Arkansas Legislative Audit under Ark. Code Ann. § 14-234-802(i).
- c. The Commission may request further information necessary to determine a provider's fiscal status, and providers shall cooperate with the Commission's requests.
- d. The Commission may waive any one or more requirement in Section IV(3)(a), above, upon written request.
- 4. Rate studies for providers that operate a joint and integrated water and sewer system shall analyze the total System.
- 5. Rate studies performed shall be an objective and unbiased review of the provider's fiscal status.
- 6. The Commission will maintain a list of approved entities to conduct rate studies as required under Ark. Code Ann. § 14-234-802(f)(1). The Commission may remove an approved entity from its list of approved entities if it determines that an entity violated Arkansas law or Commission rules in performing a rate study.

V. Determinations of Fiscal Distress

- 1. A Provider will be in Fiscal Distress if the Provider:
 - a. Fails to obtain a rate study as required;

- b. Fails to implement the rates contained in the completed rate study required within one (1) or two (2) years as provided under ACA 14-234-802(c)(2)(B)(ii)-(iii); or
 - c. Fails to maintain a Debt Service Coverage Ratio of 1.05 or higher.
- 2. A Provider may be determined to be in fiscal distress if the Provider:
 - a. Does not comply with the training required by Ark. Code Ann. § 14-234-805 and Section VII, below;
 - b. Fails to file with Arkansas Legislative Audit an audit report or agreed-upon procedures and compilation report required by Ark. Code Ann. § 14-234-120;
 - c. Fails to maintain unincumbered cash or cash equivalents in an amount equal to one-twelfth of the total expenses from the most recent fiscal year;
 - d. Fails to adopt budget before the beginning of a new fiscal year providing for sufficient revenues to meet or exceed anticipated expenses during that fiscal year;
 - e. Fails to make all required payments due to the United States Treasury – Internal Revenue Service, Arkansas Department of Finance and Admission, or Arkansas Department of Health;
 - f. Fails to make any bond, loan, or lease payment; or
 - g. Fails to comply with an administrative order of the US Environmental Protection Agency, Arkansas Department of Health or Arkansas Division of Environmental Quality concerning operation and maintenance of the system.
- 3. Providers determined to be in fiscal distress shall submit to the Department an improvement plan as required in Ark. Code Ann. § 14-234-802(k) detailing in writing the provider’s plan to resolve the violation or violations of rule or law or the provider’s plan to resolve its fiscal insufficiency that caused it to be considered in fiscal distress.
- 4. A provider will be determined by the Commission to no longer be in fiscal distress if:
 - a. The provider resolves the violation of rule or law that caused it to be considered in fiscal distress and obtains written verification from the Commission that the violation has been resolved; or
 - b. The provider implements a change of rates that is shown by the study to resolve the provider’s fiscal insufficiency.

VI. Miscellaneous

- 1. A provider seeking approval from the Commission under Ark. Code Ann. § 14-234-802(g) shall demonstrate its fiscal sustainability by submitting to the Commission a business plan demonstrating its technical, financial, and managerial capacity.
- 2. Pursuant to provisions relating to Commission intervention under the conditions provided for in Ark. Code Ann. § 14-234-804(d), upon request of a municipal provider or a customer or unserved customer of a municipal provider, the Department will assist in the resolution of the issue or issues if the party or parties involved demonstrate that all parties involved made a good faith effort to resolve the issue or issues.
 - a. Such intervention may include without limitation negotiation or mediation with the party or parties involved.
 - b. If the Department determines that a party is not acting in good faith, the Department may end its intervention.

VII. Training

1. The Advisory Training Board created under Ark. Code Ann. § 14-234-805 shall develop the training protocol for provider board members, including training protocol for rate studies performed under the guidelines of the American Water Works Association and the Water Environment Federation.
2. By December 31, 2022, a majority of the members of provider boards shall receive a minimum of eight hours of provider training.
3. If a change in membership of a provider board causes the provider board to have less than a majority of members who have undergone provider training, enough members of the provider board shall receive provider training within one year of the change in membership such that a majority of the board has received training.
4. Each provider board shall report the following information annually, by January 31, to the Department:
 - a. the names and contact information of each member on the provider board;
 - b. an identification of which members have obtained eight hours of provider training; and
 - c. an identification of which members have served on the board for more than ten (10) years and are exempt from the training requirement pursuant to Ark. Code Ann. § 14-234-805(a)(3).

1 State of Arkansas
2 93rd General Assembly
3 Regular Session, 2021
4

As Engrossed: H3/11/21

A Bill

SENATE BILL 386

5 By: Senator A. Clark
6 By: Representative Love
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE LAW CONCERNING RETAIL WATER
10 PROVIDERS AND RELATED SERVICE; AND FOR OTHER
11 PURPOSES.
12
13

Subtitle

14 TO AMEND THE LAW CONCERNING RETAIL WATER
15 PROVIDERS AND RELATED SERVICE.
16
17
18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
20

21 SECTION 1. Arkansas Code Title 14, Chapter 234, is amended to add an
22 additional subchapter to read as follows:

Subchapter 8 – Oversight of Retail Water Providers

14-234-801. Findings – Definitions.

(a) The General Assembly finds that:

27 (1) Oversight of providers in the state is primarily handled by
28 the Arkansas Natural Resources Commission and the Department of Health;

29 (2) The oversight of these providers is spread out and results
30 in the inability of a single state entity to monitor and help initiate
31 necessary changes in public access of water, rate structures, the
32 sustainability of the providers, and the protection of consumer rights;

33 (3) While local control is important, the current landscape of
34 providers has the potential to create inefficiencies in service and
35 instability in fiscal management;

36 (4) Combining smaller providers may be necessary in some areas



1 in order to guarantee dependable and plentiful provision of water and to
2 avoid unsustainable rate increases;

3 (5) Many providers have an aging workforce, and there is a need
4 for education of the governing bodies of these providers concerning the
5 importance of recruiting and retaining an expert workforce; and

6 (6) Training of local, state, and federal leaders on issues
7 surrounding provider personnel, finances, compliance, and environmental
8 factors is needed.

9 (b) As used in this subchapter:

10 (1) "Commission" means the Arkansas Natural Resources
11 Commission;

12 (2) "Provider" means any provider of retail water service; and

13 (3) "Provider board" means the governing body of a provider,
14 whether the governing body is organized as a board, commission, committee,
15 council, or other type of entity.

16
17 14-234-802. Fiscal distress – Improvement plans – Rates and rate
18 studies.

19 (a)(1) For the purposes of this section, a provider is in fiscal
20 distress if the provider:

21 (A) Fails to obtain a rate study as required under this
22 section;

23 (B) Fails to implement a completed rate study required
24 under this section; or

25 (C) Has been found by the commission to be in significant
26 noncompliance with rules of the commission because of inadequate funds for
27 operation and maintenance or inadequate compliance with rules of the
28 commission.

29 (2) A provider may be found by the commission to be subject to
30 this section if a member of the provider's board does not receive the
31 training required under § 14-234-805.

32 (b) The commission shall maintain and publish on the commission's
33 website a list of providers in fiscal distress.

34 (c)(1) A provider shall obtain a rate study on the following schedule:

35 (A) By July 1, 2024, and every five (5) years thereafter
36 for a provider that serves five hundred (500) or fewer customers;

1 (B) By July 1, 2025, and every five (5) years thereafter
2 for a provider that serves five hundred one (501) to one thousand (1,000)
3 customers; and

4 (C) By July 1, 2026, and every five (5) years thereafter
5 for a provider that serves more than one thousand (1,000) customers.

6 (2)(A) Rates shall adequately address costs for:

7 (i) Operation and maintenance;

8 (ii) Debt service;

9 (iii) Required reserves;

10 (iv) Depreciation;

11 (v) Future capital expenses;

12 (vi) An annual audit or agreed-upon procedures and
13 compilation report; and

14 (vii) Other expenses as necessary.

15 (B)(i) The rates recommended in the rate study that is
16 obtained and chosen by the provider shall be implemented by the provider in
17 the manner provided under the applicable law for modifying rates.

18 (ii) Except as provided in subdivision
19 (c)(2)(B)(iii) of this section, an increase in rates recommended in the rate
20 study shall be implemented within one (1) year of the receipt of the rate
21 study.

22 (iii) If recommended rates increase the provider's
23 rates by fifty percent (50%) or more from the fiscal year before the rate
24 study was completed, the provider may phase in the rate increase over a two-
25 year period.

26 (d)(1) The commission shall determine by rule the requirements of the
27 rate study, including without limitation a review of the provider's
28 refurbishment and replacement account and asset management plan.

29 (2)(A) The rate study shall use as its basis the guidelines of
30 the American Water Works Association and the Water Environment Federation.

31 (B) The commission shall determine by rule an appropriate
32 entity to provide guidelines for the rate study to use as its basis if
33 guidelines of the American Water Works Association and the Water Environment
34 Federation are unavailable.

35 (e) A provider shall deposit a minimum of five percent (5%) per annum
36 of gross revenues in a dedicated refurbishment and replacement account within

1 twelve (12) months of implementation of the rate, unless a different amount
2 is determined by a rate study.

3 (f)(1) The commission shall maintain an approved list of entities to
4 conduct rate studies required by this section, including without limitation
5 the Arkansas Rural Water Association, professional engineers, certified
6 public accountants, economists, and actuaries.

7 (2) If a provider chooses an entity to conduct the rate study
8 that is not on the approved list of entities, the entity is required to have
9 conducted at least one (1) rate study in the state in the previous five-year
10 period.

11 (g)(1) To ensure fiscal soundness, the commission shall consider and
12 approve a new provider with fewer than three hundred (300) customers within
13 the proposed service area only if:

14 (A) The commission determines that public health or the
15 environment is threatened without the approval of the new provider; or

16 (B) There is no other viable alternative.

17 (2) A new provider with fewer than three hundred (300) customers
18 seeking approval shall:

19 (A) Be organized through a political subdivision,
20 including without limitation an improvement district, a county, or a
21 municipality;

22 (B) Demonstrate the ability to remain fiscally
23 sustainable; and

24 (C) Complete a technical, financial, and managerial
25 capacity review conducted by the commission.

26 (h)(1) A provider that plans to undertake a major development project
27 shall obtain a rate study or amend the provider's existing rate study before
28 beginning the major development project to include consideration of the
29 financial impact of the major development project on the fiscal
30 sustainability of the provider.

31 (2) As used in this subsection, "major development project"
32 means a project that exceeds twenty percent (20%) of gross revenues of the
33 provider for the immediately preceding fiscal year.

34 (i) A provider shall file its most recent rate study annually with
35 Arkansas Legislative Audit at the same time the provider files its audit
36 report or agreed-upon procedures and compilation report as required under §

1 14-234-120.

2 (j)(1) The commission shall annually identify and notify a provider if
3 the provider is in fiscal distress.

4 (2) The provider may appeal the finding to the Pulaski County
5 Circuit Court.

6 (k)(1) A provider found to be in fiscal distress shall file an
7 improvement plan with the commission, including without limitation specific
8 action to be taken to correct financial, technical, and managerial
9 deficiencies, within ninety (90) days of the finding of fiscal distress.

10 (2)(A) Upon receipt of the improvement plan under this
11 subsection, the commission shall review the improvement plan and:

12 (i) Approve the improvement plan in whole or in
13 part;

14 (ii) Modify the improvement plan; or

15 (iii) Deny the improvement plan.

16 (B) At the time the commission determines that the
17 provider is no longer in fiscal distress, the commission shall remove the
18 fiscal distress designation and notify the provider.

19 (l) If a provider is found to be in fiscal distress, the provider
20 shall not receive state financial assistance for water operations until an
21 improvement plan that has been approved by the commission is in place, unless
22 the financial assistance is immediately necessary to ensure preservation of
23 the public peace, health, and safety, as determined by the commission.

24 (m) If the provider is found to be in fiscal distress, the provider
25 shall obtain written authorization from the commission to:

26 (1) Incur additional debt;

27 (2) Accept assistance for the refurbishment or replacement of
28 facilities or construction of facilities not within the provider's
29 improvement plan; or

30 (3) Transfer assets to another entity.

31
32 14-234-803. Workforce recruitment and retention – Education.

33 A provider shall:

34 (1) Work with the Association of Arkansas Counties and the
35 Arkansas Municipal League to develop training for leaders of the county or
36 municipality;

1 (2) Provide suitable compensation and incentives to encourage
2 individuals to consider a career with the provider; and

3 (3) Promote the recruitment, education, and licensing of
4 employees of the provider.

5
6 14-234-804. Municipal providers – Provision of water to nonresident
7 customers – Advisory committee.

8 (a)(1) If a municipal provider is unable or unwilling to provide
9 service to a nonresident property owner residing in the provider’s service
10 area, the commission may require the municipal provider to release the
11 nonresident property owner to a willing provider.

12 (2) If required by the willing provider, a nonresident property
13 owner may be required to pay the costs of necessary extensions to connect to
14 the willing provider.

15 (3) A municipal provider shall not release a service area of the
16 municipal provider if the release would invalidate or encumber the issuance
17 or retirement of a bond, promissory note, or certificate of indebtedness
18 related to the service area.

19 (b)(1) A municipal provider that is willing to provide service to
20 areas outside the municipal boundaries and within its service area shall do
21 so through an application made by the affected property owner or through an
22 agreement executed by the municipal provider and the affected property owner.

23 (2) If the municipal provider has a prerequisite that the
24 affected property owner annex into the municipal boundaries before providing
25 service, the prerequisite shall be clearly defined in an application or
26 agreement.

27 (3) Failure to clearly define any annexation requirement within
28 the application or agreement prohibits the municipal provider from requiring
29 annexation in exchange for service for those areas without agreement from the
30 affected property owner.

31 (c)(1) If a municipal provider services customers outside the
32 municipal boundaries of the municipal provider and the number of those
33 customers outside the municipal boundaries and in unincorporated areas equals
34 or exceeds twenty percent (20%) of the total customer base of the municipal
35 provider, a nonvoting advisory committee to the municipal provider board
36 shall be created by the governing body of the municipality in which the

1 municipal provider is located.

2 (2) The makeup and duties of an advisory committee created under
3 subdivision (c)(1) of this section shall be determined by the governing body
4 of the municipality that creates the advisory committee.

5 (3) Two (2) nonresident customers from the area served outside
6 the municipal boundaries and in unincorporated areas shall serve on the
7 advisory committee.

8 (d) The commission shall intervene if a municipal provider:

9 (1) Is prohibited from providing water to potential customers
10 within the municipal provider's service area by the political subdivision
11 under which the municipal provider is organized;

12 (2) Practices business irresponsibly in relation to consumer
13 rights; or

14 (3) Is not following best management practices in providing
15 water service.

16 (e) Except as otherwise provided in this section, a consumer shall not
17 be denied access to service if suitable distribution and collection
18 infrastructure already exists or if the consumer is willing to pay for
19 suitable distribution and collection infrastructure, unless:

20 (1) A municipal provider has made the decision not to extend
21 service outside the municipal boundaries of the municipal provider;

22 (2) An engineering, capacity, physical feasibility, or fiscal
23 feasibility issue exists as determined by a professional engineer or
24 certified public accountant; or

25 (3) A consumer does not submit an application or enter into an
26 agreement under subsection (b) of this section.

27
28 14-234-805. Training.

29 (a)(1)(A) Within one (1) year of election or appointment, a majority
30 of the members of a provider board shall receive a minimum of eight (8) hours
31 of provider training as promulgated by rule of the commission.

32 (B) A member of a provider board as of January 1, 2021,
33 shall receive the training required under this section by December 31, 2022.

34 (2) If a majority of the members of a provider board do not
35 receive the training required under this section, the commission may find the
36 provider is subject to § 14-234-802.

1 (3) This section does not apply to a member of a provider board
2 who has served on the provider board for ten (10) years or more.

3 (b) The commission shall consult with an advisory training board for
4 the development of the training required under this section, whose members
5 shall include without limitation:

6 (1) The Secretary of the Department of Health or his or her
7 designee;

8 (2) The Director of the Arkansas Natural Resources Commission or
9 his or her designee;

10 (3) The State Director of the United States Department of
11 Agriculture Rural Development in Arkansas or his or her designee;

12 (4) The Chief Executive Officer of the Arkansas Rural Water
13 Association or his or her designee;

14 (5) The Executive Director of the Association of Arkansas
15 Counties or his or her designee;

16 (6) The Executive Director of the Arkansas Municipal League or
17 his or her designee;

18 (7) The Chief Executive Officer of Central Arkansas Water or his
19 or her designee;

20 (8) The Chair of the Board of Directors of Communities
21 Unlimited, Inc. or his or her designee;

22 (9) The Chair of the Arkansas Water Works and Water Environment
23 Association, Inc. or his or her designee;

24 (10) The Director of the Arkansas Environmental Training Academy
25 or his or her designee;

26 (11) The Chair of the House Committee on City, County, and Local
27 Affairs;

28 (12) The Vice Chair of the House Committee on City, County, and
29 Local Affairs;

30 (13) The Chair of the Senate Committee on City, County, and
31 Local Affairs;

32 (14) The Vice Chair of the Senate Committee on City, County, and
33 Local Affairs; and

34 (15) The President of the Arkansas Water and Wastewater Managers
35 Association.

36

1 14-234-806. Rules.

2 The commission shall promulgate rules necessary to implement this
3 subchapter.

4
5 14-234-807. Applicability.

6 This subchapter does not apply to:

7 (1) A water system regulated by the Arkansas Public Service
8 Commission as a public utility under § 23-1-101(9);

9 (2) A municipal utility system owned or operated by a
10 municipality that provides electric service to retail customers in addition
11 to water service, including an electric system:

12 (A) Managed or operated by a nonprofit corporation under §
13 14-199-701 et seq.; or

14 (B) Owned or operated by a municipality or by a
15 consolidated utility district under the General Consolidated Public Utility
16 System Improvement District Law, § 14-217-101 et seq.;

17 (3) A privately owned provider that supplies the majority of its
18 retail water service to nonresidential customers; or

19 (4) A water system operated jointly between two (2)
20 municipalities in which each municipality is located in a different state.

21
22 SECTION 2. TEMPORARY LANGUAGE. DO NOT CODIFY. Rules.

23 (a) When adopting the initial rules to implement this act, the
24 commission shall file the final rules with the Secretary of State for
25 adoption under § 25-15-204(f):

26 (1) On or before January 1, 2022; or

27 (2) If approval under § 10-3-309 has not occurred by January 1,
28 2022, as soon as practicable after approval under § 10-3-309.

29 (b) The commission shall file the proposed rules with the Legislative
30 Council under § 10-3-309(c) sufficiently in advance of January 1, 2022, so
31 that the Legislative Council may consider the rules for approval before
32 January 1, 2022.

33
34 */s/A. Clark*

35 APPROVED: 4/5/21