

1 State of Arkansas
2 81st General Assembly
3 Regular Session, 1997
4
5 By: Senator Bell
6
7

A Bill

SENATE BILL 680

For An Act To Be Entitled

9 "AN ACT TO REPEAL ARKANSAS CODE 14-206-101 THROUGH 14-206-
10 112, CONCERNING ACQUISITION OF UTILITIES BY
11 MUNICIPALITIES; AND FOR OTHER PURPOSES."
12

Subtitle

13
14 "AN ACT TO REPEAL ARKANSAS CODE 14-206-
15 101 THROUGH 14-206-112, CONCERNING
16 ACQUISITION OF UTILITIES BY
17 MUNICIPALITIES."
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19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
21

22 SECTION 1. Arkansas Code 14-206-101 through 14-206-112, concerning
23 acquisition of utilities by municipalities, is repealed.

24 ~~14-206-101. Applicability.~~

25 ~~(a) The provisions of this chapter shall not be applicable to the~~
26 ~~acquisition of any gas or electric public utility plant or equipment by a~~
27 ~~municipality which, on March 3, 1987, owns, whether operated by it or another~~
28 ~~entity under a franchise, lease, or other agreement or arrangement between the~~
29 ~~municipality and the entity, a system for the production, transmission,~~
30 ~~delivery, distribution, or furnishing of gas or electric utility service of~~
31 ~~the type which the municipality seeks to acquire, whether or not the~~
32 ~~municipality has granted, or in the future grants, to the public utility a~~
33 ~~franchise as defined elsewhere in this chapter.~~

34 ~~(b) The valuation provisions of ^A 14-206-109(b)(2)(A)-(E) shall have no~~
35 ~~application to any proceedings involving acquisition by a municipality~~
36 ~~described in this section of any gas or electric public utility plant or~~

1 ~~equipment.~~

2

3 ~~14-206-102. Power to acquire, construct, and operate - Notice.~~

4 ~~(a) When authorized by order of the Arkansas Public Service Commission,~~
5 ~~and not otherwise, a municipality shall have the power, subject to the~~
6 ~~provisions of this chapter, to acquire by purchase, to construct, and to~~
7 ~~operate a gas or electric public utility plant and equipment, or any part~~
8 ~~thereof, for the production, transmission, delivery, or furnishing of any~~
9 ~~public service.~~

10 ~~(b)(1) Any gas or electric public utility accepting or operating under~~
11 ~~any permit, license, or franchise heretofore or hereafter granted by any~~
12 ~~municipality, by acceptance of any such permit, license, or franchise, shall~~
13 ~~be deemed to have consented to a future purchase by the municipality of its~~
14 ~~distribution property located within the boundaries of the municipality which~~
15 ~~is actually used and useful for the convenience of the public:~~

16 ~~(A) Upon the municipality's compliance with the requirements and~~
17 ~~conditions set forth in this chapter; and~~

18 ~~(B) Upon receipt by the gas or electric public utility of the~~
19 ~~payment by payment by the municipality of the purchase price as determined in~~
20 ~~accordance with the provisions of this chapter.~~

21 ~~(2) However, the purchase price for the gas or electric public utility~~
22 ~~property shall be no less than the just compensation and damages to which the~~
23 ~~gas or electric public utility would otherwise be entitled under the~~
24 ~~constitution of this state or that of the United States.~~

25 ~~(c)(1) By accepting or operating under any such permit, license, or~~
26 ~~franchise, the gas or electric public utility shall thereby be deemed to have~~
27 ~~waived the right of the necessity of the taking, to be established by the~~
28 ~~verdict of a jury, and to have waived all other procedural remedies and rights~~
29 ~~relative to condemnation, except such rights and remedies as are provided in~~
30 ~~this chapter.~~

31 ~~(2) However, the municipality shall give the gas or electric public~~
32 ~~utility not less than ninety (90) days' written notice of its intention to~~
33 ~~make the purchase prior to taking any action to acquire those properties under~~
34 ~~this chapter.~~

35

36 ~~14-206-103. Confirmation by electors.~~

~~1 (a) Any municipality may determine to seek approval from the commission
2 to acquire the property of a gas or electric public utility as authorized
3 under the provisions of this chapter by the vote of the municipal council,
4 city commission, or governing body, taken after a public hearing, of which at
5 least thirty (30) days' notice has been given by publication in newspapers
6 having a general circulation within the municipality. This vote shall have
7 been ratified and confirmed by a majority of the electors voting thereon at
8 any general or special election held not less than thirty (30) days after a
9 passage of the vote of the municipal council or city commissioners.~~

~~10 (b) In the event the vote of the municipal council, city commission, or
11 governing body is ratified and confirmed by a majority of the electors voting
12 thereon, the clerk of the municipality shall notify the commission of the
13 results of the election within ninety (90) days thereafter. Within one (1)
14 year after the election, the municipality may file with the commission an
15 application for approval of a certificate for the acquisition or purchase of
16 the property of a gas or electric public utility as provided in this chapter.~~

17

~~18 14-206-104. Application - Economic impact statement - Review.~~

~~19 (a) In its application for a certificate, the municipality shall file
20 with the commission a verified application in such form as the commission
21 shall by rule prescribe. It shall contain the following information:~~

~~22 (1) A description of the gas or electric utility property proposed to
23 be acquired;~~

~~24 (2) The estimated costs of those properties and the proposed method of
25 financing the acquisition of those properties;~~

~~26 (3) An analysis of the projected economic or financial impact on the
27 municipality, the gas or electric public utility from which those properties
28 will be acquired and its customers, and the local community where the property
29 is located as a result of the acquisition and the operation of those
30 properties by the municipality;~~

~~31 (4) The estimated effects on energy costs to the customers of the gas
32 or electric public utility and the customers to be served by the municipality
33 as a result of the acquisition and operation of those properties by the
34 municipality;~~

~~35 (5) A statement of how the municipality will comply with all applicable
36 laws and regulations to assure that the public health, safety, economy, and~~

1 ~~convenience will not be adversely affected;~~

2 ~~—— (6) A demonstration that the municipality is technically and~~
 3 ~~financially qualified to engage in the proposed activities in accordance with~~
 4 ~~all applicable laws and regulations; and~~

5 ~~—— (7) Such other information as the municipality may consider relevant or~~
 6 ~~as the commission may by regulation or order require.~~

7 ~~—— (b) In addition, the commission shall by rule or regulation require the~~
 8 ~~filing of an exhibit containing an economic impact statement with the~~
 9 ~~application. The statement shall fully develop the factors listed in~~
 10 ~~subsection (a) of this section, treating in reasonable detail such~~
 11 ~~consideration, if applicable, of the proposed acquisition's direct and~~
 12 ~~indirect effect on:~~

13 ~~—— (1) The municipality;~~

14 ~~—— (2) The customers to be served by the municipality;~~

15 ~~—— (3) The gas or electric public utility from which the properties will~~
 16 ~~be acquired;~~

17 ~~—— (4) The remaining customers of the gas or electric public utility; and~~

18 ~~—— (5) The local economy.~~

19 ~~—— (c) Promptly after filing, the staff of the commission shall invite~~
 20 ~~comments from the gas or electric public utility which owns the property and~~
 21 ~~all state agencies entitled to service under § 14-206-105 as to the adequacy~~
 22 ~~of the municipality's statements. The invitation to comment shall advise the~~
 23 ~~gas or electric public utility and the state agencies that comments must be~~
 24 ~~received within sixty (60) days of the date of mailing or delivery thereof,~~
 25 ~~unless the commission, upon request of the gas or electric public utility or~~
 26 ~~an agency, approves a longer period for consideration.~~

27 ~~—— (d) Upon review of those comments, if any, if the staff shall determine~~
 28 ~~that the municipality failed to include or adequately develop an aspect of the~~
 29 ~~acquisition of the property, it shall then issue a deficiency letter pointing~~
 30 ~~out in detail all such specific deficiencies in the application. The~~
 31 ~~deficiency letter shall be prepared and served upon the municipality no later~~
 32 ~~than thirty (30) days after the last comments were filed. The municipality~~
 33 ~~shall promptly respond to any deficiency letter.~~

34

35 ~~—— 14-206-105. Proof of service and notice - Filing fee.~~

36 ~~—— (a)(1) Each application shall be accompanied by proof of service of a~~

~~1 copy of the application on the gas or electric public utility which owns the~~
~~2 property and on the director or other administrative head of the following~~
~~3 state agencies or departments:~~

~~4 _____ (A) Department of Pollution Control and Ecology;~~

~~5 _____ (B) Department of Industrial Development;~~

~~6 _____ (C) Department of Finance and Administration;~~

~~7 _____ (D) Arkansas Energy Office;~~

~~8 _____ (E) Attorney General;~~

~~9 _____ (F) Any school district or other political subdivision of this~~
~~10 state that is the recipient of real and personal property taxes in which any~~
~~11 of the gas or electric utility properties to be acquired by the municipality~~
~~12 may be located; and~~

~~13 _____ (G) Any other state agency or department or political subdivision~~
~~14 of this state designated by commission regulation or order.~~

~~15 _____ (2) The copy of the application shall be accompanied by a notice~~
~~16 specifying the date on or about which the application is to be filed and a~~
~~17 notice that interventions or limited appearances must be filed with the~~
~~18 commission within thirty (30) days after the date of filing, unless good cause~~
~~19 is shown.~~

~~20 _____ (b)(1) Each application shall also be accompanied by proof that public~~
~~21 notice thereof was given to persons residing in the municipality by the~~
~~22 publication of a summary of the application, and a statement of the date on~~
~~23 which it is to be filed, and a statement that interventions or limited~~
~~24 appearances must be filed with the commission within thirty (30) days after~~
~~25 the filing date set forth in the notice, unless good cause is shown, in a~~
~~26 newspaper or newspapers having substantial circulation in the municipality.~~

~~27 _____ (2) For purposes of this subsection, any economic impact statement~~
~~28 submitted as an exhibit to the application need not be summarized. However,~~
~~29 the published notice shall include a statement that the impact statements are~~
~~30 on file at the office of the commission and available for public inspection.~~

~~31 _____ (3) The municipality shall also cause copies of the economic impact~~
~~32 statement to be available for public inspection. The published notice shall~~
~~33 contain a statement of the location and the times the impact statements will~~
~~34 be available for public inspection.~~

~~35 _____ (4) In addition, the commission may, after filing, require the~~
~~36 applicant to serve notice of the application or copies of it, or both, upon~~

1 ~~such other persons, and file proof thereof, as the commission may deem~~
2 ~~appropriate.~~

3 ~~—— (c) Where any personal service or notice is required in this section~~
4 ~~and [§] 14-206-104, service may be made by any officer authorized by law to~~
5 ~~serve process by personal delivery or by certified mail.~~

6 ~~—— (d) An initial filing fee of five hundred dollars (\$500) shall~~
7 ~~accompany each application.~~

8

9 ~~—— 14-206-106. Public hearing.~~

10 ~~—— Upon receipt of an application complying with ^{§§} 14-206-104 and 14-206-~~
11 ~~105, the commission shall fix a date for the commencement of a public hearing~~
12 ~~on the application. The testimony presented at the hearing may be presented in~~
13 ~~writing or orally. The commission may make rules designed to exclude~~
14 ~~repetitive, redundant, or irrelevant testimony.~~

15

16 ~~—— 14-206-107. Parties to proceeding - Limited appearance.~~

17 ~~—— (a) The parties to the proceeding shall include the municipality and~~
18 ~~the gas or electric public utility which owns the property. In addition, each~~
19 ~~county and government agency or department or other person entitled to receive~~
20 ~~service of a copy of the application under [§] 14-206-105(a) shall be a party if~~
21 ~~it has filed with the commission a notice of intervention as a party within~~
22 ~~thirty (30) days after the service. A party to the proceeding shall also~~
23 ~~include any person whose petition for intervention is approved by the~~
24 ~~commission.~~

25 ~~—— (b)(1) Any person may make a limited appearance in the proceeding by~~
26 ~~filing a verified statement of position within thirty (30) days after the date~~
27 ~~given in the public notice as the date of filing the application. No person~~
28 ~~making a limited appearance shall be a party or shall have the right to~~
29 ~~receive further notice or to cross-examine witnesses on any issue outside the~~
30 ~~scope of its statement of position.~~

31 ~~—— (2) A person making a limited appearance is subject to being called for~~
32 ~~cross-examination only on the subject matter of the statement of position by~~
33 ~~the applicant or other party. If a person fails to appear for cross-~~
34 ~~examination, if called, the statement of position may be stricken from the~~
35 ~~record at the discretion of the commission.~~

36

1 ~~14-206-108. Decision upon application - Burden of proof.~~

2 ~~(a) The commission shall render a decision upon the record either~~
3 ~~granting or denying the application as filed or granting it upon such terms,~~
4 ~~conditions, or modifications of the financing, acquisition, operation, or~~
5 ~~maintenance of the property as the commission may deem appropriate. The~~
6 ~~commission may not grant a certificate for the financing, acquisition,~~
7 ~~operation, and maintenance of any property, either as proposed or as modified~~
8 ~~by the commission, unless it shall find and determine:~~

9 ~~(1) The nature of the probable economic impact of the acquisition on~~
10 ~~the customers of the gas or electric public utility that owns the property and~~
11 ~~on the customers to be served by the municipality;~~

12 ~~(2) That the method of financing the acquisition, either as proposed or~~
13 ~~as modified by the commission, represents an acceptable economic impact,~~
14 ~~considering economic conditions and the need for and cost to the municipality~~
15 ~~of additional gas or electric public utility services;~~

16 ~~(3) That the acquisition of the properties, the gas or electric public~~
17 ~~utility functions to be performed, the operating procedures, the properties~~
18 ~~and equipment, and the use of the properties collectively provide reasonable~~
19 ~~assurance that the municipality will comply with all applicable laws and~~
20 ~~regulations and that the public health, safety, economy, and convenience will~~
21 ~~not be adversely affected;~~

22 ~~(4) That the municipality is technically and financially qualified to~~
23 ~~acquire and operate the proposed properties in accordance with all applicable~~
24 ~~laws and regulations;~~

25 ~~(5) That the issuance of the certificate will not be detrimental to the~~
26 ~~public health, safety, economy, and convenience; and~~

27 ~~(6) That the acquisition will serve the public interest, convenience,~~
28 ~~and necessity.~~

29 ~~(b) Any municipality which files an application for approval of the~~
30 ~~acquisition or purchase of any gas or electric utility property shall have the~~
31 ~~burden of proof with respect to every element of the application. The~~
32 ~~commission shall not approve any application for approval of the purchase or~~
33 ~~acquisition by any municipality of any property of a gas or electric public~~
34 ~~utility unless it shall be shown at the hearing upon the application for~~
35 ~~approval of the acquisition, by the clear preponderance of the evidence, that~~
36 ~~neither the gas or electric public utility nor the customers of the gas or~~

1 ~~electric public utility will be adversely affected by the proposed acquisition~~
2 ~~or purchase.~~

3

4 ~~14-206-109. Denial - Purchase price, terms, and conditions of sale.~~

5 ~~(a) In the event that the commission determines, on the basis of the~~
6 ~~evidence, that either the gas or electric public utility or its customers will~~
7 ~~be adversely affected by the proposed acquisition or purchases, it shall deny~~
8 ~~the application for approval.~~

9 ~~(b)(1) In the event the commission determines, on the basis of the~~
10 ~~evidence, that the requested approval should be granted, it shall fix the~~
11 ~~purchase price to be paid by the municipality to the gas or electric public~~
12 ~~utility for any properties to be purchased from the gas or electric utility as~~
13 ~~well as all other terms and conditions of the purchase and sale.~~

14 ~~(2) The amount to be paid shall include, but shall not be limited to,~~
15 ~~the total of the following elements:~~

16 ~~(A) The present-day reproduction cost, new, of the facilities~~
17 ~~being acquired, adjusted for remaining life expectancy;~~

18 ~~(B) An amount equal to the cost of constructing any necessary~~
19 ~~facilities to reintegrate the system of the gas or electric utility outside~~
20 ~~the area to be acquired after detaching the portion to be sold;~~

21 ~~(C) An amount sufficient to reimburse the gas or electric utility~~
22 ~~for reasonable expenses it incurs preparing the aforementioned reproduction~~
23 ~~cost, new, adjusted for remaining life expectancy, including the appraisal,~~
24 ~~and all other expenses including, but not limited to, employee salaries,~~
25 ~~overheads, consultants' fees and attorneys' fees incurred in connection with~~
26 ~~the acquisition of the facilities;~~

27 ~~(D)(i) An amount equal to any severance damages which will be~~
28 ~~incurred by the gas or electric utility. Severance damages shall be measured~~
29 ~~by the present value of the estimated revenue requirements associated with any~~
30 ~~investment in plant, gas supply, expenses incurred, or other costs which would~~
31 ~~have been allocated to or paid by the gas or electric public utility's~~
32 ~~customers in that portion of the gas or electric public utility's service area~~
33 ~~to be acquired or served by the municipality and which could be shifted to or~~
34 ~~allocated to other customers of the gas or electric public utility as a result~~
35 ~~of the acquisition of the properties by the municipality.~~

36 ~~(ii) The estimated present value of any such revenue requirements~~

1 ~~shall include, but shall not be limited to, the estimated revenue requirements~~
 2 ~~associated with:~~

3 ~~_____ (a) The investment in, or other costs incurred with respect to,~~
 4 ~~existing substations, compressor stations, and other distribution,~~
 5 ~~transmission, or generating facilities;~~

6 ~~_____ (b) Expenses incurred under purchased power contracts or gas~~
 7 ~~supply contracts except to the extent the expenses arise from a plant which is~~
 8 ~~not then in commercial operation;~~

9 ~~_____ (c) Real property owned or leased by the gas or electric public~~
 10 ~~utility; or~~

11 ~~_____ (d) Other costs which would have been allocated to the customers~~
 12 ~~in that portion of the gas or electric utility's service area to be acquired~~
 13 ~~or served by the municipality;~~

14 ~~_____ (iii) The estimated revenue requirements shall be estimated for~~
 15 ~~such reasonable period of time in the future as may be justified by the~~
 16 ~~applicable facts and circumstances, but in no event shall that period of time~~
 17 ~~be less than a period of ten (10) years after the date the purchase is~~
 18 ~~projected to be consummated;~~

19 ~~_____ (E) An amount sufficient to reimburse the gas or electric utility~~
 20 ~~for any federal or state income tax effect, if any, requiring payment of~~
 21 ~~either federal or state income tax because of the involuntary transfer, which~~
 22 ~~taxes are related to recapture of tax benefits from:~~

23 ~~_____ (i) Investment tax credit or investment tax credit carry-forwards~~
 24 ~~or other accelerated income tax benefits;~~

25 ~~_____ (ii) Other income tax benefits, which have been flowed through to~~
 26 ~~ratepayers through the setting of rates by a regulatory commission, that~~
 27 ~~reflect either the amortization of investment tax credits or other accelerated~~
 28 ~~income tax benefits; and~~

29 ~~_____ (iii) An amount sufficient to reimburse the gas or electric~~
 30 ~~utility for any federal or state income tax effects that result from the use~~
 31 ~~of a net of tax allowance for funds used during construction rate by the gas~~
 32 ~~or electric utility in either the accounting for construction costs on its~~
 33 ~~books or the calculation of the depreciated replacement cost.~~

34

35 ~~_____ 14-206-110. Confirmation of sale - Modification.~~

36 ~~_____ (a) The commission shall by order fix, determine, and certify to the~~

~~1 municipal governing body, to the gas or electric public utility, and to any
2 bondholders, mortgagees, and lienors of the gas or electric utility appearing
3 at the hearing, the purchase price to be paid for the taking and severance of
4 the property of the gas or electric public utility and all other terms and all
5 conditions of sale and purchase that it shall ascertain to be reasonable,
6 which terms and conditions shall constitute the compensation and damages to be
7 paid, and the other terms and conditions of the sale and purchase.~~

~~8 (b) Upon the filing of the order by the commission with the clerk of
9 the municipality, the municipality shall thereupon be obligated to make the
10 required payment and otherwise comply with the terms and conditions of the
11 order to consummate the purchase.~~

~~12 (c) Upon the consummation of the purchase, the gas or electric public
13 utility shall execute an instrument conveying the property purchased and paid
14 for by the municipality, and the municipality may take over the control and
15 operation of the property.~~

~~16 (d) Unless the purchase price is paid and the purchase consummated
17 within one hundred eighty (180) days after the filing of the commission's
18 order with the clerk of the municipality, the commission's order shall be
19 considered null and void.~~

~~20 (e) If the commission determines that all or part of the proposed
21 acquisition should be modified, it may condition its approval of the
22 acquisition upon the modification.~~

23

~~24 14-206-111. Order - Findings of fact.~~

~~25 In rendering a decision on the application for approval of the
26 acquisition, the commission shall issue and serve upon all parties an order,
27 which shall include, or be accompanied by, findings of fact stating its
28 reasons for the action taken.~~

29

~~30 14-206-112. Rehearing - Judicial review.~~

~~31 Any party aggrieved by any decision issued on an application for
32 approval of the acquisition may apply for a rehearing as provided in ~~§ 23-2-~~
33 ~~401, and §§ 23-2-421 - 23-2-424.~~ A party aggrieved by the final decision of
34 the commission on rehearing may obtain judicial review of the decision in
35 accordance with the provisions of ~~§ 23-2-401, and §§ 23-2-421 - 23-2-424.~~~~

36

1 SECTION 2. All provisions of this act of a general and permanent nature
2 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
3 Revision Commission shall incorporate the same in the Code.

4

5 SECTION 3. If any provision of this act or the application thereof to
6 any person or circumstance is held invalid, such invalidity shall not affect
7 other provisions or applications of the act which can be given effect without
8 the invalid provision or application, and to this end the provisions of this
9 act are declared to be severable.

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11 SECTION 4. All laws and parts of laws in conflict with this act are
12 hereby repealed.

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