

State of Arkansas

76th General Assembly

Regular Session, 1987

SENATE BILL 340

By: Senators Bookout and Hoofman

"AN ACT TO PROTECT THE CUSTOMERS OF GAS OR ELECTRIC UTILITIES FROM UNNECESSARY AND UNJUSTIFIED RATE INCREASES, TO REQUIRE PUBLIC SERVICE COMMISSION APPROVAL PRIOR TO THE ACQUISITION BY ANY MUNICIPALITY OF ANY PROPERTY OF A PUBLIC UTILITY; TO ESTABLISH CRITERIA WHICH MUST BE SATISFIED PRIOR TO ISSUANCE BY THE COMMISSION OF SUCH APPROVAL; TO ESTABLISH CRITERIA FOR VALUATION OF ANY PROPERTY OF SUCH PUBLIC UTILITY ACQUIRED BY ANY MUNICIPALITY; TO REPEAL THE PARTIAL EFFECT OF SECTIONS 46, 47, 48 AND 49 OF ACT 324 OF 1935 [ARK. STAT. ANN. §§73-244, 73-245, 73-246 AND 73-247] TO THE EXTENT THAT THEY APPLY TO GAS OR ELECTRIC PUBLIC UTILITIES, AND FOR OTHER PURPOSES."

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

SECTION 1. When authorized by order of the Arkansas Public Service Commission ("Commission"), and not otherwise, a municipality shall have the power, subject to the provisions of this Act, to acquire by purchase, to construct, and to operate a gas or electric public utility plant and equipment, or any part thereof, for the production, transmission, delivery or furnishing, of any public service. Any gas or electric public utility accepting or operating under any permit, license, or franchise, heretofore or hereafter granted by any municipality, shall by acceptance of any such permit, license, or franchise, be deemed to have consented to a future purchase by the municipality of its distribution property located within the boundaries of the municipality which is actually used and useful for the convenience of the public upon the municipality's compliance with the requirements and conditions hereinafter set forth and upon receipt by the gas or electric public utility of the payment by payment by the municipality of the purchase price as determined in accordance with the provisions of this Act. Provided, however, the

purchase price for such gas or electric public utility property shall be no less than the just compensation and damages to which the gas or electric public utility would otherwise be entitled under the Constitution of this State or the United States. By accepting or operating under any such permit, license or franchise, the gas or electric public utility shall thereby be deemed to have waived the right of the necessity of such taking to be established by the verdict of a jury and to have waived all other procedural remedies and rights relative to condemnation, except such rights and remedies as are provided herein. Provided, however, the municipality shall give the gas or electric public utility not less than ninety (90) days written notice of its intention to make such purchase prior to taking any action to acquire such properties under this Act.

SECTION 2. Any municipality may determine to seek approval from the Commission to acquire the property of a gas or electric public utility as authorized under the provisions of this Act by the vote of the municipal council, city commission or governing body, taken after a public hearing, of which at least thirty (30) days' notice has been given by publication in newspapers having a general circulation within the municipality, which vote has been ratified and confirmed by a majority of the electors voting thereon at any general or special election held not less than thirty (30) days after a passage of the vote of the municipal council or city commissioners. In the event the vote of the municipal council, city commission or governing body is ratified and confirmed by a majority of the electors voting thereon, the Clerk of such municipality shall notify the Commission of the results of such election within ninety (90) days thereafter and, within one year after the election, the municipality may file with the Commission an Application for approval of a Certificate for the acquisition or purchase of the property of a gas or electric public utility as hereinafter provided.

SECTION 3. (a) In its application for a certificate, the municipality shall file with the Commission a verified application in such form as the Commission shall by rule prescribe which shall contain the following information: A description of the gas or electric utility property proposed to be acquired; the estimated costs of such properties, and the proposed method of financing the acquisition of such properties; an analysis of the projected

economic or financial impact on the municipality, the gas or electric public utility from which such properties will be acquired and its customers and the local community where the property is located as a result of the acquisition and the operation of such properties by the municipality; the estimated effects on energy costs to the customers of the gas or electric public utility and the customers to be served by the municipality as a result of the acquisition and operation of such properties by the municipality; a statement of how the municipality will comply with all applicable laws and regulations to assure that the public health, safety, economy and convenience will not be adversely affected; a demonstration that the municipality is technically and financially qualified to engage in the proposed activities in accordance with all applicable laws and regulations; and such other information as the municipality may consider relevant or as the Commission may by regulation or order require. In addition, the Commission shall by rule or regulation require the filing with the application of an exhibit containing an Economic Impact Statement which shall fully develop the factors listed above, treating in reasonable detail such consideration, if applicable, of the proposed acquisition's direct and indirect effect on the municipality, the customers to be served by the municipality, the gas or electric public utility from which the properties will be acquired, the remaining customers of the gas or electric public utility and the local economy. Promptly after filing, the staff of the Commission shall invite comments from the gas or electric public utility which owns the property and all State agencies entitled to service under Subsection (b) of this Section as to the adequacy of the municipality's statements. The invitation to comment shall advise the gas or electric public utility and the said State agencies that comments must be received within sixty (60) days of the date of mailing or delivery thereof, unless the Commission upon request of the gas or electric public utility or an agency approves a longer period for consideration. Upon review of said comments, if any, if the staff shall determine that the municipality failed to include or adequately develop an aspect of the acquisition of the property, it shall issue a deficiency letter pointing out in detail all such specific deficiencies in the application. Such deficiency letter shall be prepared and served upon the municipality no later than 30 days after the last comments were filed. The municipality shall promptly respond to any such deficiency letter.

(b) Each application shall be accompanied by proof of service of a copy of such application on the gas or electric public utility which owns the property, the director or other administrative head of the following State agencies or departments: (1) Department of Pollution Control and Ecology; (2) Department of Industrial Development; (3) Department of Finance and Administration; (4) State Energy Office; (5) Attorney General; (6) any school district or other political subdivision of this State that is the recipient of real and personal property taxes in which any of the gas or electric utility properties to be acquired by the municipality may be located; (7) and any other State agency or department or political subdivision of this State designated by Commission regulation or order. The copy of such application shall be accompanied by a notice specifying the date on or about which the application is to be filed, and a notice that interventions or limited appearance must be filed with the Commission within thirty (30) days after the date of filing, unless good cause is shown.

(c) Each application shall also be accompanied by proof that public notice thereof was given to persons residing in the municipality by the publication of a summary of the application, and a statement of the date on which it is to be filed, and a statement that intervention or limited appearances must be filed with the Commission within thirty (30) days after the filing date set forth in said notice, unless good cause is shown, in a newspaper or newspapers having substantial circulation in such municipality. For purposes of this Subsection any economic impact statement submitted as an exhibit to the application need not be summarized, but the published notice shall include a statement that said impact statements are on file at the office of the Commission and available for public inspection. The municipality shall also cause copies of the economic impact statement to be available for public inspection. The published notice shall contain a statement of the location and the times said impact statements will be available for public inspection. In addition, the Commission may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons, and file proof thereof, as the Commission may deem appropriate.

(d) Where any personal service or notice is required herein, such service may be made by any officer authorized by law to serve process, by personal delivery or by certified mail.

(e) An initial filing fee of Five Hundred Dollars (\$500.00) shall accom-

pany each application.

SECTION 4. (a) Upon receipt of an application complying with Section 3 of this Act, the Commission shall fix a date for the commencement of a public hearing thereon. The testimony presented at such hearing may be presented in writing or orally, provided that the Commission may make rules designed to exclude repetitive, redundant or irrelevant testimony.

SECTION 5. (a) The parties of the proceeding shall include the municipality and the gas or electric public utility which owns the property. In addition, each county and government agency or department or other person entitled to receive service of a copy of the application under Subsection (b) of Section 3 of this Act, shall be a party if it has filed with the Commission a notice of intervention as a party within thirty (30) days after said service. A party to the proceeding shall also include any person whose petition for intervention is approved by the Commission.

(b) Any person may make a limited appearance in the proceeding by filing a verified statement of position within thirty (30) days after the date given in the public notice as the date of filing the application. No person making a limited appearance shall be a party or shall have the right to receive further notice, or to cross-examine witnesses on any issue outside the scope of its statement of position, and such person making a limited appearance is subject to being called for cross-examination only on the subject matter of such statement of position by the applicant or other party. If such person fails to appear for cross-examination, if called, such statement of position may be stricken from the record at the discretion of the Commission.

SECTION 6. (a) The Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions or modifications of the financing, acquisition, operation or maintenance of the property as the Commission may deem appropriate. The Commission may not grant a certificate for the financing, acquisition, operation and maintenance of any property, either as proposed or as modified by the Commission, unless it shall find and determine (1) the nature of the probable economic impact of the acquisition on the customers of the gas or electric public utility that owns the property and on the customers to be

served by the municipality; (2) that the method of financing the acquisition either as proposed or as modified by the Commission represents an acceptable economic impact, considering economic conditions and the need for and cost to the municipality of additional gas or electric public utility services; (3) that the acquisition of the properties, the gas or electric public utility functions to be performed, the operating procedures, the properties and equipment, and the use of the properties collectively provide reasonable assurance that the municipality will comply with all applicable laws and regulations and that the public health, safety, economy and convenience will not be adversely affected; (4) that the municipality is technically and financially qualified to acquire and operate the proposed properties in accordance with all applicable laws and regulations; (5) that the issuance of the certificate will not be detrimental to the public health, safety, economy and convenience; and (6) that the acquisition will serve the public interest, convenience and necessity. Any municipality which files an application for approval of the acquisition or purchase of any gas or electric utility property shall have the burden of proof with respect to every element of such application and the Commission shall not approve any application for approval of the purchase or acquisition by any municipality of any property of a gas or electric public utility unless it shall be shown at the hearing upon the application for approval of such acquisition, by the clear preponderance of the evidence, that neither the gas or electric public utility nor the customers of such gas or electric public utility will be adversely affected by the proposed acquisition or purchase. In the event the Commission determines, on the basis of the evidence, that either the gas or electric public utility or its customers will be adversely affected by such proposed acquisition or purchases, it shall deny the application for approval. In the event the Commission determines, on the basis of the evidence, that the requested approval should be granted, it shall fix the purchase price to be paid by the municipality to the gas or electric public utility for any properties to be purchased from the gas or electric utility as well as all other terms and conditions of the purchase and sale. The amount to be paid shall include, but is not limited to, the total of the following elements:

- (i) the present-day Reproduction Cost, New, of the facilities being acquired, adjusted for remaining life expectancy (RCN-ARL);
- (ii) an amount equal to the cost of constructing any necessary facilities to re-integrate the system of the gas or electric utility outside the area to

be acquired after detaching the portion to be sold;

(iii) an amount sufficient to reimburse the gas or electric utility for reasonable expenses it incurs preparing the aforementioned RCN-ARL, including the appraisal, and all other expenses, including, but not limited to, employee salaries, overheads, consultants fees and attorneys fees incurred in connection with the acquisition of the facilities;

(iv) an amount equal to any severance damages which will be incurred by the gas or electric utility. Severance damages shall be measured by the present value of the estimated revenue requirements associated with any investment in plant, gas supply, expenses incurred or other costs which would have been allocated to or paid by the gas or electric public utility's customers in that portion of the gas or electric public utility's service area to be acquired or served by the municipality and which could be shifted to or allocated to other customers of the gas or electric public utility as a result of the acquisition of such properties by the municipality,. The estimated present value of any such revenue requirements shall include, but shall not be limited to, the estimated revenue requirements associated with: (a) the investment in, or other costs incurred with respect to, existing substations, compressor stations and other distribution facilities, transmission facilities, generating facilities, (b) expenses incurred under purchased power contracts or gas supply contracts, (c) real property owned or leased by the gas or electric public utility or (d) other costs which would have been allocated to the customers in that portion of the gas or electric utility's service area to be acquired or served by the municipality. The estimated revenue requirements shall be estimated for a reasonable period of time in the future as may be justified by the applicable facts and circumstances but in no event shall such period of time be less than a period of ten (10) years after the date the purchase is projected to be consummated;

(v) an amount sufficient to reimburse the gas or electric utility for any federal or state income tax effect, if any, requiring payment of either federal or state income tax because of the involuntary transfer, which taxes are related to recapture of tax benefits from (1) investment tax credit or investment tax credit carry-forwards or other accelerated income tax benefits and (2) other income tax benefits which have been flowed through to ratepayers through the setting of rates by a regulatory commission that reflect either the amortization of investment tax credits or other accelerated income tax

benefits and (3) an amount sufficient to reimburse the gas or electric utility for any federal or state income tax effects that result from the use of a net of tax allowance for funds used during construction rate by the gas or electric utility in either the accounting for construction costs on its books or the calculation of the depreciated replacement cost.

The Commission shall by order fix, determine and certify to the municipal governing body, to the gas or electric public utility and to any bond holders, mortgagees, and lienors of such gas or electric utility appearing at such hearing, the purchase price to be paid for the taking and severance of the property of such gas or electric public utility and all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable, which terms and conditions shall constitute the compensation and damages to be paid, and the other terms and conditions of such sale and purchase; and upon the filing of the order by the Commission with the Clerk of such municipality, the municipality shall thereupon be obligated to make the required payment and otherwise comply with the terms and conditions of such order in order to consummate such purchase. Upon the consummation of such purchase the gas or electric public utility shall execute an instrument conveying the property purchased and paid for by the municipality and the municipality may take over the control and operation thereof. Unless the purchase price is paid and the purchase consummated within 180 days after the filing of the Commission's order with the clerk of the municipality, the Commission's order shall be considered null and void.

(b) If the Commission determines that all or part of the proposed acquisition should be modified, it may condition its approval of such acquisition upon such modification.

SECTION 7. In rendering a decision on the application for approval of the acquisition, the Commission shall issue and serve upon all parties, an order, which shall include or be accompanied by, findings of fact stating its reasons for the action taken.

SECTION 8. Any party aggrieved by any decision issued on an application for approval of such acquisition may apply for a rehearing as provided in Ark. Stat. Ann. §§73-229 - 73-229.3. Any party aggrieved by the final decision of the Commission on rehearing may obtain judicial review thereof in accordance

with the provisions of Ark. Stat. Ann. §§73-229 - 73-229.3.

SECTION 9. The provisions of this Act shall not be applicable to the acquisition of any gas or electric public utility plant or equipment by a municipality which, on the effective date of this Act, owns, whether operated by it or another entity under a franchise, lease or other agreement or arrangement between the municipality and the entity, a system for the production, transmission, delivery, distribution or furnishing of gas or electric utility service of the type which the municipality seeks to acquire, whether or not the municipality has granted or in the future grants to the public utility a franchise as defined elsewhere in this Act. The valuation provisions of Section 6(i) through 6(v) of this Act shall have no application to any proceedings involving acquisition by a municipality described in this Section of gas or electric public utility plant or equipment.

SECTION 10. The provisions of this Act repeal those parts of Sections 46, 47, 48 and 49 of Act 324 of 1935, the same being Ark. Stat. Ann. §§73-244, 73-245, 73-246, and 73-247 (Repl. 1979), to the extent they are applicable to gas or electric utilities. This section shall have no effect on the provisions of Sections 46, 47, 48 and 49 of Act 324 of 1935, the same being Ark. Stat. Ann. §§ 73-244, 73-245, 73-246 and 73-247 (Repl. 1979), which enable a municipality to acquire a water or sewer utility.

SECTION 11. Emergency. It is hereby found and determined by the General Assembly that the acquisition or purchase by a municipality of the property of any gas or electric public utility may result in adverse consequences for the customers of such gas or electric public utility and that therefore, in order to avoid such adverse consequences for any customers, such acquisitions or purchases should be first approved by the Public Service Commission which is charged with the regulation of such gas or electric utilities and that such approval should not be granted in the absence of a clear showing that the gas or electric public utility and its customers will not be adversely affected. The existing statutory provisions do not adequately protect customers of regulated gas or electric public utilities and, therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health, and welfare, shall be in full force and

effect from and after its passage and approval.