

HOUSE BILL REPORT

2SSB 5034

As Reported by House Committee On:

Environment

General Government Appropriations & Oversight

Title: An act relating to private infrastructure development.

Brief Description: Concerning private infrastructure development.

Sponsors: Senate Committee on Environment, Water & Energy (originally sponsored by Senators Kilmer, Kastama, Shin, Hatfield, Zarelli, Conway and Hewitt).

Brief History:

Committee Activity:

Environment: 3/11/11, 3/15/11 [DPA];

General Government Appropriations & Oversight: 3/24/11, 3/28/11 [DPA(ENVI)].

Brief Summary of Second Substitute Bill (As Amended by House)

- Expands the jurisdiction of the Utilities and Transportation Commission (UTC) by requiring certain wastewater companies to comply with the UTC's regulations.
- Requires wastewater companies subject to regulation by the UTC to obtain a certificate and file a bond or surety prior to providing sewerage services for compensation.
- Creates provisions to address an expansion or transfer of a sewerage system or a transfer of a wastewater company.
- Modifies general laws applicable to UTC-regulated utilities to make them applicable to wastewater companies.
- Permits the UTC to begin rulemaking to implement the requirements of the bill, including rules to implement a regulatory fee on wastewater companies.

HOUSE COMMITTEE ON ENVIRONMENT

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended. Signed by 14 members: Representatives Upthegrove, Chair; Rolfes, Vice Chair; Short, Ranking Minority Member; Harris, Assistant Ranking Minority Member; Fitzgibbon, Jacks, Jinkins, Morris, Moscoso, Nealey, Pearson, Takko, Taylor and Tharinger.

Staff: Courtney Barnes (786-7194).

Background:

The Utilities and Transportation Commission.

The Utilities and Transportation Commission (UTC) regulates the rates, services, and practices of privately-owned utilities and transportation companies. These companies include electricity, natural gas, certain telecommunications service, water, solid waste collection, commercial ferry service, transportation of household goods, certain auto transportation service, and transportation of petroleum through pipelines.

Some UTC-regulated entities, including solid waste collection companies, certain auto transportation companies, and commercial ferries, must obtain a certificate of public convenience and necessity from the UTC in order to lawfully operate in the state. With respect to some services, the UTC may consider an applicant's financial resources and prior experience in the field. Certificates issued by the UTC may include conditions, including operating parameters and service rates.

Currently, the UTC does not regulate companies operating wastewater systems.

Wastewater Systems.

Wastewater systems collect, treat, and dispose of sewage or surface water run-off. These systems range in size from small, on-site sewage systems serving single homes to large, urban systems serving thousands of customers. On-site sewage systems are regulated by the Department of Health (DOH). Generally, on-site systems are installed and operated by private individuals or organizations. Large wastewater systems, which are regulated by the Department of Ecology (DOE), are installed by local government entities, including cities, counties, and special purpose districts.

Receiverships.

A receivership is the means by which a court, through an appointed receiver, takes custody of property pending litigation. Receivers are appointed in various circumstances, such as: if a business is in danger of insolvency; during the pendency of a judicial or non-judicial foreclosure action where the property's revenue-producing potential is in danger of being lost or where the receiver must collect rent; or if a statute requires a state agent to seek an appointment of a receiver.

The court appoints a general receiver if the receiver is to take possession and control of all or substantially all of the debtor's property with authority to liquidate that property. A custodial

receiver is appointed if the receiver is to take charge of limited or specific property and is not given authority to liquidate property.

Eminent Domain.

Eminent domain is the term used to describe the power of a government to take private property for public use. The power has been recognized by federal and state courts as inherent and necessary for the existence of government. The federal and state constitutions and statutes define, restrict, and delegate the power of eminent domain and provide a procedural framework for its exercise. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

There are constitutional provisions addressing eminent domain powers for specific entities (such as telephone companies) and for specific purposes (such as water irrigation and mining). In addition, there are hundreds of statutes in the Revised Code of Washington dealing with eminent domain powers. Some of these statutes confer eminent domain powers on governmental entities, such as counties and special districts, as well as giving the power of eminent domain to corporations, such as railroads, electrical utilities, and pipeline companies.

Summary of Amended Bill:

Wastewater Companies and the Utilities and Transportation Commission.

Certain wastewater companies are subject to regulation by the UTC.

Jurisdiction.

Wastewater companies subject to the UTC's jurisdiction are entities that own, or propose to develop and own, a sewerage system that is designed to either serve:

- a peak flow of 27,000 to 100,000 gallons per day if treatment is by a large on-site sewerage system; or
- 100 or more customers.

Municipal, county, or other publicly-owned wastewater systems are excluded from the UTC's jurisdiction. Wastewater company service that is provided to customers outside of an urban growth area is also excluded from the UTC's jurisdiction.

Issuance of Certificate of Public Convenience and Necessity.

Wastewater companies within the UTC's jurisdiction may not provide sewerage services for compensation without first obtaining a certificate from the UTC declaring that the public convenience and necessity requires the sewerage service. In determining whether to issue a certificate, the UTC must consider the following factors:

- a comprehensive business plan detailing the design, construction, operation, and maintenance of the proposed service system;
- demonstration of sufficient financial resources to properly operate and maintain the system, and to replace and upgrade capital assets;

- the need to develop a standalone system instead of connecting to an existing system;
- a statement of prior experience by the petitioner in the form of an affidavit or declaration;
- a certification from the municipal corporation that it is not willing and able to provide the proposed sewerage services; and
- a certification from the municipal corporation that the company's proposed service is consistent with the locally approved general sewer plan.

After notice and public comment, the UTC may issue or refuse to issue a certificate to the wastewater company. The UTC may also issue a certificate for partial exercise and attach terms and conditions that the public convenience and necessity may require.

Bond or Surety.

Prior to the UTC approving a wastewater company to provide new service or extend existing service, the wastewater company must file and maintain a bond or equivalent surety with the UTC. The bond or surety must ensure that there are sufficient funds to:

- design, construct, operate, and maintain the proposed sewerage system;
- replace and upgrade capital assets as required by federal or state law or by order of the DOH or the DOE; and
- allow additional connections to the sewerage system, if approved by the DOH or the DOE.

The bond or equivalent surety is payable to the UTC upon: (1) an order to transfer a system of sewerage to a capable wastewater company; (2) notice that the wastewater company does not intend to renew or has failed to renew the bond or surety; or (3) a petition by the UTC to place a wastewater company in receivership.

Expansion.

A wastewater company must obtain the UTC's approval before expanding an existing system beyond the capacity specified in the current certificate or acquiring new systems by construction or purchase.

Regulatory Fee.

Wastewater companies subject to the UTC's jurisdiction must pay a regulatory fee to cover the UTC's program costs. The bill contains provisions addressing late payments and delinquent fees. The UTC is authorized and empowered to adopt and issue rules and regulations to implement the regulatory fee.

Transfer of Ownership.

If the UTC finds that a wastewater company is unfit to provide wastewater service, the UTC may order the transfer of such systems to a capable wastewater company. Provisions in the bill address the type of information the UTC may consider in determining whether a wastewater company is unfit to provide service. A capable wastewater company approved by the UTC to acquire a sewerage system from an unfit wastewater company must submit a financial plan to the UTC for bringing the acquired system into compliance.

The sale price for the unfit wastewater company's system must be determined by agreement between the unfit wastewater company and the acquiring wastewater company, and is subject

to the UTC's approval. A wastewater company acquiring an unfit wastewater company's system has the same immunity from liability as wastewater companies assuming substandard systems.

Receivership.

The UTC may petition the Thurston County Superior Court to place a wastewater company in receivership. If no entity is willing and able to be named as receiver, the court must appoint the county or other municipal corporation whose geographic boundaries include, in whole or in part, the system of sewerage at issue.

Any appointed receiver may not be held personally liable for any good faith, reasonable effort to assume possession and operation of the sewerage system. The court must authorize the receiver to impose reasonable assessments on the customers of the sewerage system to recover expenditures for improvements necessary for the public health and safety. The bill limits the circumstances in which a court can terminate a receivership and order the return of the system to the owners.

Within 12 months of the appointment of the receiver, the UTC must develop a plan for transfer of the sewerage system to a new operator. If the UTC finds that no private entity is able to take over the sewerage system, the UTC must provide its findings to the court and the court may order the municipal corporation, whose geographic boundaries include the sewerage system, to initiate negotiations to purchase the system.

Rule Making.

The UTC may adopt rules to implement the bill. The UTC may collect payments from wastewater companies and other private entities that have notified the UTC of their willingness to cover the rule-making costs. The UTC is not required to conduct rule making until it has collected sufficient payments to cover the projected costs of the rule making.

UTC Regulations.

General laws applicable to UTC-regulated electric, natural gas, water, and telecommunications companies are applied to wastewater companies. These laws relate to service quality; rate setting; filing of tariffs; complaint proceedings; and notice requirements.

Sewerage and Water General Plan.

A municipal corporation or private utility, including a wastewater company, may petition for amendments to the sewerage and water general plan adopted by a county legislative authority.

Eminent Domain.

Municipal corporations and private entities are granted the power of eminent domain in circumstances where:

- a capable wastewater company tries to acquire an unfit wastewater company's sewerage system and the compensation to be paid cannot be negotiated by the companies or approved by the UTC; or

- a municipal corporation or private entity tries to acquire a wastewater company that has been placed in receivership and negotiations fail or otherwise do not result in the purchase of the company in receivership.

Amended Bill Compared to Second Substitute Bill:

The amended bill clarifies in what circumstances the bond or equivalent surety is payable to the UTC. The amended bill restructures the provisions concerning the appointment of a receiver to clarify the role of the UTC and the court, including requiring the UTC's petition to be filed in Thurston County. The second substitute bill contained a provision making the bill effective only if the UTC received legislative approval of the regulatory fees proposed by the UTC. The amended bill removes this provision and removes the reporting notice associated with this contingency.

Technical changes are made throughout the amended bill to improve grammatical structure and organization and provide consistency between terms and sections.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect July 1, 2012, except for section 29, relating to the UTC's rule-making authority, which takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill is designed to allow private infrastructure to increase private economic development. Where there is a lack of sewerage service, economic development cannot continue. Some states allow private companies to offer sewerage services. The bill would allow private wastewater systems to operate subject to regulation by the UTC. Effective growth management needs infill and property infrastructure. If municipal governments are not able to provide the infrastructure, it makes sense to let the private sector fill the need. The bill would allow the private sector to fill the need while still providing protections to the public health and the environment. The rule-making model proposed in the bill is structured similar to the Energy Facility Site Evaluation Council model. The bill assures that best practices will be used and homeowners will be protected against financial or functional failure of the sewerage system.

(Opposed) The goal of the bill is not at issue. The concern is what happens when a private sewerage system fails. When systems fail, they may become the problem of the municipality. If the sewerage system goes into receivership, a municipality may become the owner of last resort. This provision is unfair. The state should be responsible for the cost of integrating a failed system instead of the rate payer. The bill should be amended so that any new sewerage system meets the standard of the municipality where the system will be constructed.

Persons Testifying: (In support) Senator Kilmer, prime sponsor; and Rick Slunaker, Associated General Contractors of Washington.

(Opposed) Phil Watkins, City of Kennewick.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT

Majority Report: Do pass as amended by Committee on Environment. Signed by 13 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Armstrong, Blake, Fitzgibbon, Ladenburg, Moscoso, Pedersen, Van De Wege and Wilcox.

Staff: Michael Bennion (786-7118).

Summary of Recommendation of Committee On General Government Appropriations & Oversight Compared to Recommendation of Committee On Environment:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect July 1, 2012, except for section 29, relating to the Utilities and Transportation Commission's rule-making authority, which takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) None.

(Information only) The bill would not affect a wastewater company serving itself because the bill defines such a company as an entity providing service to 100 or more customers or that meets a certain volume of peak flow. The intent is to regulate private companies that are part of a large residential development or a residential and commercial mixed development providing service to a large number of customers and receiving compensation in return. There is a safety valve if a company is found to be unfit or fails and requires the transferring of ownership to a new company. The bill requires wastewater companies to purchase a bond or surety set for each company from the Utilities and Transportation Commission, and that would act to support operations for up to three years.

(Opposed) None.

Persons Testifying: Chris Rose, Utilities and Transportation Commission.

Persons Signed In To Testify But Not Testifying: None.