



WATKINS & EAGER

**Mississippi Municipal
Attorneys Association
Summer Conference CLE**

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**“Governance, Structures, and
Opportunities for Municipal Utility
Systems”**

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Purpose of Presentation

- Review structures for and governance of municipal utility systems.
- Review opportunities for improvement of existing systems, expansion of existing systems, and acquisitions of other systems.
- Review procedures for and costs and benefits of divestment of municipal utility systems.
- *Checking to see if you “Are Smarter than a Supervisor?”*

“Governance, Structures, and Opportunities for Municipal Utility Systems”

Combining public laws and programs, private programs, public dollars, and private dollars to fund the costs of the acquisition of or capital improvements to municipal utility systems, in order to maintain or enhance access to high-quality, affordable, and environmentally compliant utility services, including water, sewer, gas, electric, and garbage, in order to promote quality of life and economic development and maintain or increase system revenues.

- Local dollars and programs – rate system revenues, (limited) ad valorem taxes, sales taxes, special assessments, bond proceeds, etc.
- State laws, programs, and dollars – appropriations, loan and grant programs, bond proceeds, etc.
- Federal laws, programs, and dollars – loan and grant programs via USDA, EPA, HUD, EPA, etc.
- Private programs and funds – investment by the public, business, developers, etc.

Types of Analysis

- **Legal Analysis – Can we do this? How do we do this?**
- **Financial Analysis – What is the return on investment of time and money?**
- **Policy Analysis – Should we do this?**

***These analyses are often intermingled and come at differing times in the process.**

Summary of Topics

- **State of Play of Utility Systems in Mississippi and Beyond**
- **General Powers for Utility Systems**
- **Types of Utility Systems**
- **Ownership, Governance, and Structures of Utility Systems**
- **Acquisition of Utility Systems**
- **Regionalization of Utility Systems**
- **Divestment of Utility Systems**
- **General Overview & Procedures for Borrowing**
- **Specific Methods of Borrowing, including**
 - **Federal or State Loan Programs**
 - **Revenue Bonds**
 - **General Obligation Bonds**
 - **Other – Special Assessments (various), TIF, Urban Renewal, etc.**
 - **Urban Renewal**
 - **Lease Purchase of Equipment and Facilities**
 - **Mississippi Development Bank (MDB)**
 - **Mississippi Business Finance Corporation (MBFC)**

State-of-Play of Utility Systems

- **Opportunities**
 - improve the system
 - get bigger or get smaller?
 - acquire systems
 - divest systems
 - regionalize
- **Risks**
 - Costs of compliance with state and federal regulations
 - Changes to rates and/or oversight (PSC)
 - Pandemic gaveth & tooketh away
 - lots of federal dollars and flexibility early.....then not.....
 - costs of and access to labor and goods and services

General Powers of the Municipality

- Pursuant to Section 21-17-1 *et seq.* –
 - authority to purchase and hold real estate for all proper municipal purposes, including water, sewer, and electric systems
 - authority to “appropriate” funds for current expenses of the lawful activities of the Municipality
- Pursuant to Section 21-27-11 *et seq.* –
 - further authority to appropriate and use lawfully available funds of the municipality, in addition to revenues of the system, for immediate expenses of the operation and maintenance of the system
 - authority to control, manage, and operate utility systems, including water, sewer, gas, electric, and garbage
 - expend revenues or bond proceeds to “improve” an existing system or to “acquire” an existing system
 - authority to combine systems in various combinations
 - authority to purchase and hold real estate for all proper municipal purposes, including water, sewer, and electric systems

General Powers of the Municipality

- Pursuant to Section 21-27-11 *et seq.* –
 - to establish, maintain, and collect rates for the services of such systems
 - May provide service to customers not more than 5 miles outside the corporate limits of the municipality
 - not subject to regulation by the Public Service Commission, unless service more than one mile outside the corporate limits of the municipality; billing and service disputes are subject to review and arbitration by the PSC
 - further discussion herein about use of revenues derived from operation of the system

Types of Utility Systems

- **Water** – “waterworks system, water supply system”
- **Sewer** – “sewage system, sewage disposal system”
- **Gas** – “gas producing system, gas generating system, gas transmission system or gas distribution system”
- **Electric** – “electric generating, transmission, or distribution system”
- **Garbage*** – “garbage disposal system, rubbish disposal system, and incinerators”
- “combinations thereof” and “parts and appurtenances thereto”

Ownership, Governance, and Structures

- **Public Ownership (state or local government)**
 - **Municipal – owned and operated by governing authority of the municipality or by a board of commissioners created by the governing authority to manage the affairs of the utility system**
 - authority to create a commission by resolution to control, manage, and operate such systems
 - may not diminish powers or abolish commission without election
 - **Regional – utility districts created by counties via Section 19-151-1 or by Local and Private Act of the Mississippi Legislature, which can acquire assets of public or private systems**
- **Private**
 1. **Proprietary (For-Profit)**
 2. **Not-For-Profit**

Acquisition of Utility Systems

- authorized to acquire other systems (public or private)
- “acquire” means to “construct, purchase, gift, exercise of power of eminent domain and other methods by which a municipality may acquire a system”
- using revenues of the system, bond proceeds, or federal/state grant funds
- authority to assume debts of acquired systems
- also subject to various covenants in bond resolutions

“Regionalization” of Utility Systems

- **By Local and Private Act of the Mississippi Legislature**
 - **may create regional utility district, incorporating property within counties and including municipalities**
 - **largely mirrors general municipal and county law in terms of authority**
 - **but, typically affords greater flexibility in various areas**
 - **see recent Capitol Region Utility Authority**

“Regionalization” of Utility Systems

- Pursuant to 19-5-151 *et seq.*—
 - utility districts may be created by procedures controlled by governing authorities of the county
 - “any contiguous area situated within any county....not being situated within the corporate boundaries of any existing municipality....having no adequate water system, sewer system, garbage and waste collection and disposal system, or fire protection facilities serving such area”
 - subject to limitations contained in resolutions of governing authority of county, utility districts are limited to water, sewer, garbage, waste, and fire protection, or combinations thereof
 - authority to “acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate” systems and to contract with to accomplish such purpose
 - largely mirrors general municipal and county law in terms of authority

“Regionalization” of Utility Systems

- Pursuant to 19-5-151 *et seq.* —
 - by petition by governing authority of county or by property owners or by private, non-profit water authorities
 - requires published notice, holding of a public hearing on question, and election (3/5th approval); slight differences for multi-county jurisdiction
 - authority to use revenues of district or limited tax levy (4 mills) for operation, maintenance, capital improvements, assumption of debt, payment of district bonds, etc.
 - authority to “annex” additional property for inclusion in the utility district

Divestment of Utility Systems

- Authorized to “sell, lease, or otherwise dispose of any or all electric, water, gas, or other municipally-owned utility system or properties
- “on such terms and conditions, and with such safeguards as will best promote and protect the public interest”
- “empowered and authorized to transfer title....by warranty deed, bill of sale, contract, or lease, in the manner provided by law”
- “notice of intention to make such sale, lease, or disposition....setting out the price and other general terms and conditions of such proposed sale, lease, or disposition shall be given by publication,” subject to binding election if so required
- “may” use the proceeds of the sale (i) to retire outstanding debt of the system or (ii) invest proceeds, but covenants of outstanding bonds almost certainly require payment of outstanding debt first

Transfers of Real Property*

- Various authorities, but broadest is Section 57-7-1 of the Code
- Transfer “lands....not needed....for other governmental purpose”
- May be “set aside and improved for industrial or commercial purposes....or....leased or sold”
- Without bids or appraisal if municipality receiving “good and valuable consideration”
- “Good and valuable consideration” is broadly defined and a factual determination for the governing authority

General Overview of “Bond” Law

- **What is a Bond?** The term “bond” includes every form of written obligation (with specified dates of repayment and periodic interest rates) that may be legally issued by any public entity.
- **What is covered by “Bond Law”?** All borrowing by public entities is subject to state law regarding issuance of bonds, regardless of what the obligation is called—i.e., bonds, notes, loans, certificates, lease—and type of security—i.e., general obligation, revenue, special assessments.
- **Mississippi State Law.** The Code governs the authority to issue, sell, and repay obligations. Mississippi’s “Home Rule” law excludes authority to borrow money without specific authority.
- **Federal Tax Law.** The Internal Revenue Code of 1986, as amended, and IRS regulations promulgated thereby, determine tax-exempt status.
- **Federal Securities Law.** Requirements on disclosure concerning the issuer/borrower and the debt obligations, both at sale and ongoing disclosure requirements.

General Procedures for Borrowing

- **The governing body of a government unit (most likely municipalities, counties, and hospitals, but possibly other government units) must make various findings of fact and preference and act in a public meeting at various times and in various ways, including, but not limited to:**
 - **statement of type of resolution(s)**
 - **citation of authority (State law)**
 - **authorized purpose of the proposed funds and description of project**
 - **maximum principal amount to be borrowed**
 - **term of repayment**
 - **publication of notices of various sorts (public comment or protest, sale, validation, etc.)**
 - **compliance with any applicable statutory debt limitations**
 - **security for repayment (general obligation, revenue, special assessment, etc.)**
 - **court or State approvals**
 - **details regarding compliance with federal tax law and federal securities law**

Notes on Working Capital Expenditures

- Regulations define “working capital expenditures” as any costs that are not “capital expenditures” (such as land, buildings, equipment, etc.)
- Examples include employee salaries and benefits, operating lease payments, debt service payments, and other current operating expenditures
- 4 general circumstances for working capital expenditures
 1. Temporary cash flow or operating deficits
 2. To address long-term structural deficits
 3. Part of a larger project for newly financed capital expenditures
 4. To fund extraordinary, nonrecurring costs not customarily payable from current revenues

Borrowing Process via General Municipality Bond Act

- **Authority** – Section 21-33-301 *et seq.*; resolution of the governing authority
- **Authorized Purpose** – erecting municipal buildings, and purchasing buildings or land therefor, and for repairing, improving, adorning and equipping the same; erecting or purchasing waterworks, gas, electric and other public utility plants or distribution systems or franchises, and repairing, improving and extending the same; establishing sanitary, storm, drainage or sewerage systems, and repairing, improving and extending the same; protecting a municipality, its streets and sidewalks from overflow, caving banks and other like dangers; constructing, improving or paving streets, sidewalks, driveways, parkways, walkways, and purchasing land therefor; constructing bridges and culverts; altering or changing the channels of streams and water courses to control, deflect or guide the current thereof; purchasing machinery and equipment which have an expected useful life in excess of 10 years
- **Security** – secured by the full faith and credit of the municipality, including ad valorem tax levies, if and when necessary; for “waterworks, gas, light and power plants, or distribution systems”, may be furthered “secured by a pledge of the revenue of the utility to be constructed or purchased with the proceeds thereof, which pledge of revenue shall be in addition to the pledge of the full faith and credit of such municipality”
- **Term** – not to exceed 20 years, unless utilizing the MDB
- **Structure** – bonds of the municipality
- **Purchasers** – underwriters, banks, MDB, the U.S. Department of Agriculture, Rural Development (“USDA”)

Borrowing Process via General Municipality Bond Act

- **Debt Limitations** – bonded indebtedness secured by the full faith and credit of the municipality shall not exceed an amount that is 15% of the municipality's most recent Assessed Valuation of all taxable property in the municipality; however, this debt limitation is a ceiling on borrowing and does not necessarily reflect the municipality's ability to repay the bonds without increasing tax levies
- **Public Notice** – in order to issue the bonds of the municipality without an election on the question thereof, the municipality must pass a resolution of intent to issue the bonds and publish the resolution three times in a newspaper of general circulation in the municipality; if 10% or 1,500 qualified electors, whichever is less, submit signed petitions to the municipality in opposition to the bond issuance without an election, then an election must be held; the municipality may affirmatively call an election on the subject of the bond issuance if it so chooses
- **Sale of the Bonds** – the sale of the municipality's bonds must comply with public bidding requirements, unless issued via a conduit issuer such as MDB or sold to the USDA

Borrowing Process via General Municipal Revenue Bond Act

- **Authority** – Section 21-27-11 *et seq.*; resolution of the governing authority of the municipality and governing authority of the commission (if applicable)
- **Authorized Purpose** – to “improve” an existing system or to “acquire” an existing system; “improve” means to “repair, better, enlarge, extend and other methods of improving a system” and “acquire” means to “construct, purchase, gift, exercise of power of eminent domain and other methods by which a municipality may acquire a system”
- **Security** – payable solely from the revenues derived from the operation of the system acquired or improved with the bond proceeds
- **Term** – not to exceed 30 years, unless borrowing from USDA (35 years)
- **Structure** – bonds of the municipality or the commission
- **Purchasers** – underwriters, banks, MDB, USDA

Borrowing Process via General Municipal Revenue Bond Act

- **Debt Limitations** – based upon sufficient revenues to (i) operate and maintain the system, (ii) maintain adequate reserve, contingency, and other required funds (prior to transfers to general fund, if any), and (iii) pay prior debt service (if any)
- **Public Notice** – in order to issue the bonds of the municipality without an election on the question thereof, the municipality must pass a resolution of intent to issue the bonds and publish the resolution three times in a newspaper of general circulation in the municipality; if 20% of the qualified electors submit signed petitions to the municipality in opposition to the bond issuance without an election, then an election must be held; the municipality may affirmatively call an election on the subject of the bond issuance if it so chooses
- **Sale of the Bonds** – the sale of the bonds must comply with public bidding requirements, unless issued via a conduit issuer such as the MDB or sold to the USDA

Interim Financing for Projects

- **Authority** – Section 23-33-326; resolution of the governing authority
- **Authorized Purpose** – borrow money in anticipation of receipt of funds from confirmed grant or loan from federal or state government (or agencies thereof) unless prohibited by federal law or by the terms of the agreements
- **Security** – secured by and repaid from the grant or loan proceeds, earnings thereon, from any other proceeds, revenues or earnings received in connection with the grant or loan, and may be further secured by and repaid from available revenues of a municipally owned utility
- **Term** – “shall be repaid within a reasonable time after receipt of funds” from the federal or state government
- **Structure** – notes of the municipality
- **Public Notice** – none
- **Purchasers** – underwriters, banks, MDB, USDA

Lease-Purchase Process via General Municipal Law

- **Authority** – Section 31-8-1; resolution of the governing authority
- **Authorized Purpose** – enable municipalities to “acquire public buildings, facilities and equipment through the use of rental contracts”
- **Security** – (a) full faith and credit of the municipality, including ad valorem tax levies if and when necessary, similar to Borrowing Process via General Municipality Bond Act; or (b) payable from the general funds of the municipality, including specific annual appropriations of the municipality for the specific payments of the lease, and likely including diversions from system revenues
- **Term** – not to exceed 20 years for public buildings; not to exceed the estimated useful economic life of equipment used in conjunction with public buildings; or a combination thereof

Lease-Purchase Process via General Municipal Law

- **Public Notice –**
 - if full faith and credit of the municipality is not pledged, there is no requirement for public notice via resolution of intent and publication in the local newspaper
 - if full faith and credit of the municipality is pledged, in order to enter into the lease without an election on the question thereof, the municipality must pass resolution of intent to enter into the lease and publish the resolution three times in a newspaper of general circulation in the municipality; if 10% or 1,500 qualified electors, whichever is less, submit signed petitions to the municipality in opposition to the lease without an election, then an election must be held; the municipality may affirmatively call an election on the subject of the lease if it so chooses
- **Structure –** evidenced by lease-purchase agreements of the municipality (the “Lessee”) with various parties (including governmental agencies, private entities, or public leasing corporations) (the “Lessor”), with option to purchase facilities and equipment at end of financing term, and certificates of participation (“COPS”) in payments under the lease
- **Purchasers –** underwriters, banks, MDB, USDA
- **Sale of the Bonds –** The municipality would be exempt from public bidding laws for the financing process and possibly for the construction project

Mississippi Development Bank

- **Authority** – Section 31-25-1 *et seq*; resolution of one or more governing authority of the Municipality; resolution of the Board of Directors of MDB (the “MDB Board”)
- **Authorized Purpose** – MDB may issue its own bonds to provide funds for a loan to the municipal utility system or serve as the conduit issuer of any bonds of the municipal utility system, both for any authorized purpose of the municipal utility system. When MDB loans funds to the municipal utility system or is the conduit issue of any bonds of the municipal utility system, the municipal utility system must still comply with all substantive and procedural requirements of the Code, including, but not limited to, the authority to issue the bonds for a particular purpose, publications of notice of intent to issue the bonds, the security for repayment, the term of repayment, any public notice requirements, etc.
- **Security** – The security for repayment of a loan from MDB or conduit bonds of the municipal utility system may follow one of the following options: (a) a pledge of all legally available revenues of the municipal utility system, including revenues of the municipal utility system and the avails of any ad valorem tax levies if and when necessary; or (b) the full faith and credit of the municipality, including any ad valorem tax levies if and when necessary. Additional security may be offered by the municipal utility system by entering into an “intercept agreement” with MDB to allow MDB to intercept “all or any part of any monies” which the municipality is “entitled to receive from” the State.

Mississippi Development Bank

- **Term – not to exceed 30 years**
- **Structure – evidenced by bonds of MDB and bonds or notes of the municipal utility system**
- **Purchasers – underwriters, banks, USDA**
- **Sale of the Bonds – The municipal utility system would be exempt from public bidding laws for the financing process and would be authorized to directly negotiate with an “independent registered municipal advisor,” a placement agent, or an underwriter for the sale of the bonds of MDB.**
- **Tax Implications – If the loan is issued via MDB, the loan may be tax-exempt but will not be “bank-qualified”**
- **Debt service reserve funds are explicitly authorized.**
- **Capitalized interest is available to delay principal payments for a period of time to allow generation of revenues of the municipal utility system or avails of ad valorem tax levies.**

Mississippi Business Finance Corporation

- Private non-profit utility systems may be able to utilize the MBFC as a conduit to borrow funds for projects on a tax-exempt basis.
- Typically for projects \$10 million+, but fact and circumstance specific.
- May require action by various State agencies, public notices, etc.

Mississippi Municipal Attorneys Association

Thanks for the opportunity!

Please contact us with any questions!

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