

# **MERGER AND CONSOLIDATION OF UTILITY SYSTEMS: A TALE OF TWO MERGERS**

**By Bud Gilbert and Don Scholes**

## **Primary Focus**

Consolidation of utility district systems with municipal utility systems

**Applicable Law -** Depends upon type of utility systems merging, consolidating or being acquired

Merger of utility district systems with another utility district - T.C.A. § 7-82-202

Transfer of utility district system to municipality or county

T.C.A. § 7-82-202

Municipal charter and Tennessee Code Annotated provisions applicable to municipality

Transfer of city utility system to utility district

Municipal charter and Tennessee Code Annotated provisions applicable to municipality

Transfer of utility district system to private utility – Not authorized under Tennessee law  
*United Cities Gas Co. v. Wigington*, 815 S.W.2d 506 (Tenn. 1991).

Acquisition of private utility system by municipality or county

Municipal charter and Tennessee Code Annotated provisions applicable to municipality

Acquisition of municipal or county utility system by private utility

Municipal charter and Tennessee Code Annotated provisions applicable to municipality

Approval of acquisition and issuance of certificate of public convenience and necessity by the Tennessee Regulatory Authority under T.C.A. § 65-4-101 *et seq.*

## **Approvals Required**

- (1) Board of Commissioners of utility district – Resolution to transfer all of utility district’s property and obligations to municipal system
- (2) Approval of petition by the county mayor or county mayors in which the utility district is located

**Procedure for Approval of Merger or Transfer** – “Upon such petition being filed, the county mayor or mayors shall proceed in exactly the same manner as provided in this chapter for the creation of a utility district” - T.C.A. § 7-82-202(e)(1)

- (1) Governing body of utility district and municipality approve resolutions authorizing the consolidation or transfer and approving any consolidation agreement
- (2) Utility district files petition seeking approval of consolidation or transfer with the Utility Management Review Board
- (3) Utility Management Review Board has 60 days to review and comment on petition and then forwards petition to county mayor
- (4) Within 30 days of receipt of petition, county mayor holds public hearing on petition
- (5) Notice of hearing is given to nearby utility districts and municipalities
- (6) After hearing county mayor enters an order finding the consolidation or transfer is required by the public convenience and necessity and economically feasible and dissolving the utility district
- (7) Order approving the consolidation or transfer is filed with the Tennessee Secretary of State, County Register of Deeds and Utility Management Review Board

## **Motivations and Impediments to Consolidation of Utility Systems of Utility Districts with Cities**

- (1) Control of Utility Systems – Turf battles and history of disputes
- (2) Utility rates before and after consolidation
- (3) Efficiencies in operation of utility systems
- (4) Commitment to expanding utility services in utility district after consolidation

- (5) Financial health of utility systems
- (6) Politics

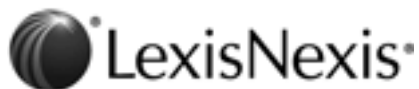
**Potential Issues to Address**

- (1) Compensation and position of utility district commissioners after consolidation
- (2) Indemnification of utility district commissioners for actions as utility district commissioners
- (3) Employment of utility district management after consolidation
- (4) Employment of utility district employees after consolidation
- (5) Employee compensation and benefits of utility district employees after consolidation
  - (a) Rate of pay
  - (b) Effect on pension and retirement benefits
  - (c) Health, dental, disability and life insurance benefit changes
  - (d) Seniority and supervisory responsibilities
  - (e) Duties and responsibilities before and after consolidation in operating combined utility system
- (6) Bond covenants of utility district affecting consolidation
  - (a) Assumption of loan by United States Department of Agriculture
  - (b) For the purpose of assuring the efficient, impartial and non-political operation of the System for the benefit of the District and the owners of the Bonds from time to time outstanding, the complete and independent control and operation of the System shall continue to be vested in the Governing Body (utility district board of commissioners)
  - (c) Other transfer restrictions or timing considerations
- (7) Approval of third parties needed for utility district contractual obligations necessary for municipality to continue providing services
- (8) Restrictions in major contracts of utility district and municipal utility system which may restrict consolidation or transfer
- (9) Transfer of operating permits from TDEC and other state agencies
- (10) Need to obtain public support for consolidation

- (11) Evaluation of likelihood of any judicial review of consolidation or transfer by persons supporting or opposing transfer

### **Ways to Address Issues**

- (1) Implement consolidation of utility district into municipality as a separate department under T.C.A. § 7-82-202(f)
- (2) Agreement to transfer all of the public functions of utility district after annexation of a portion of utility district by municipality pursuant to T.C.A. § 6-51-111
- (3) Inclusion of terms and conditions of consolidation in written contract between utility district and municipality
- (4) Pay-off of outstanding bond issues of utility district



LEXSTAT TCA 7-82-202

TENNESSEE CODE ANNOTATED

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\*\*\* CURRENT THROUGH THE 2008 REGULAR SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH SEPTEMBER 23, 2008 \*\*\*

Title 7 Consolidated Governments  
Special Districts  
Chapter 82 Utility Districts  
Part 2 --Creation

**Go to the Tennessee Code Archive Directory**

*Tenn. Code Ann. § 7-82-202 (2008)*

**7-82-202. Hearing and order of approval -- Modification, merger or consolidation.**

(a) The utility management review board shall attach its review and final comments to the petition for the incorporation of the utility district within sixty (60) calendar days of receipt of such petition by the board, its agent or representative, and forward such comments and the petition to the county mayor of any county in which the proposed district serves. Upon receipt of such petition, it is the duty of the county mayor to fix a time and place for a public hearing upon the convenience and necessity of the incorporation of the district to perform the services stated in the petition. The date of such hearing shall be not more than thirty (30) days after the receipt of the petition and its date, place and purpose shall be announced by the county mayor in a notice published not more than fifteen (15) days nor less than seven (7) days prior to the date of the hearing in a newspaper of general circulation in the proposed district, or if there be no such newspaper, then by posting such notice in five (5) conspicuous public places within the boundaries of the proposed district. If the boundaries of the proposed district include territory within five (5) miles of a city or town having a population of five thousand (5,000) or more, within three (3) miles of a city or town having a population of less than five thousand (5,000), or within three (3) miles of any water, sewerage or gas service facility of a county, city, town or utility district, notice by registered mail of the hearing, its purpose, date and place and the boundaries of the proposed district shall be given the mayor or chief executive officer of such county, city, town, and utility district at least ten (10) days before the hearing. The county mayor shall read the final comments of the board to persons at the public hearing and make copies available if requested by those in attendance. If, at the public hearing, the county mayor finds that:

- (1) The public convenience and necessity requires the creation of the district; and
- (2) The creation of the district is economically sound and desirable,

the county mayor shall enter an order so finding, approving the creation of the district, designating it as "the \_\_\_\_\_ Utility District of \_\_\_\_\_ County, Tennessee," defining its territorial limits, stating the service or services that the district shall be authorized to furnish, and appointing as commissioners of the district those persons nominated in the petition, of whom one (1) shall be appointed for a term of two (2) years, one (1) for a term of three (3) years, and one (1) for a term of four (4) years. Such order shall be filed with the county clerk and

entered on record.

**(b)** On the issue of whether the public convenience and necessity requires the creation of the district, the county mayor shall take into consideration the review and final comments of the board, and the ability of an existing utility district or an incorporated city or town to serve the area, and such existing utility district or city or town at the hearing may make known its intention to serve the area. In that event, the county mayor shall suspend action on the petition for sixty (60) days. Within the sixty (60) days, the existing utility district or city or town may submit to the county mayor its plans for serving the area, including the specific area to be served, the facilities to be installed, the services to be supplied, and a time schedule for completing installation of facilities to provide the services, and the county mayor, after considering such plans and hearing the views of the utility district's proponents on the plans, shall determine a reasonable time within which the existing utility district or city or town must provide the services. If either party thinks that the time is unreasonable, as determined by the county mayor, an appeal may be taken as provided in § 7-82-204, to determine the time. If the existing utility district or city or town fails to provide the services within the time so determined, the county mayor, unless the county mayor decides that circumstances warrant an extension of time, may create the utility district, acting on the original petition, to serve such area as the county mayor decides it can reasonably be expected to serve. If no existing utility district or city or town presents such plans to the county mayor within the sixty (60) days, the petition shall be acted upon as otherwise provided by law.

**(c)** Should a city or town exercise its prior right, as herein provided, to serve areas adjoining its boundaries within five (5) miles of a municipality of five thousand (5,000) or more in population or within three (3) miles of a municipality of less than five thousand (5,000) in population, the county mayor shall excise such areas from the boundaries of the proposed district, or strike from the petition and omit from the order the authority of the district to perform the service or services in such areas.

**(d)** Upon the creation or recreation of any utility district as provided for in this chapter, the president of the utility district shall file with the secretary of state, the utility management review board and with the register of deeds of the county or counties wherein the district is located, a true and correct copy of the order creating the utility district. The secretary of state shall maintain and keep a book for recording orders creating utility districts and all fees in connection with the recordings shall be paid by the district. Any amendments whatsoever to such order creating the utility district or any order merging, consolidating or re-creating a utility district shall be filed in like manner. The failure to so file a copy of such order or orders is a Class C misdemeanor. Whenever two (2) or more utility districts, individually located in counties having a population of not less than thirty-six thousand nine hundred ninety-five (36,995) and not more than thirty-seven thousand five (37,005) or not less than fifty-nine thousand four hundred twenty-five (59,425) nor more than fifty-nine thousand four hundred thirty (59,430), according to the 1970 federal census or any subsequent federal census, or any county having a metropolitan form of government, by resolution of the respective governing bodies of such utility districts, concur in the contraction of the territory served by one (1) of the utility districts in one (1) county and corresponding expansion of the territory served by the other utility district in another county into the county served by the contracting district, the respective utility districts shall petition the county mayor of the county wherein the utility district was created for an order permitting such modification of territory, if such modification shall result in greater efficiency and convenience in the furnishing of the services authorized by the order of creation. Upon being so petitioned, and upon entering an order modifying the boundaries of such district, the county mayor shall proceed in the manner provided in this subsection (d) and may, at such time, waive the provisions of §§ 7-82-602 and 7-82-607, relative to selection and appointment of commissioners in such territory so waived and thereby invoke the provisions of § 7-82-307, relative to selection and appointment of commissioners in such territory, so that the commissioners so selected in the resulting multi-county districts are selected pursuant to § 7-82-307 pertaining only to single county districts.

**(e) (1)** Whenever two (2) or more utility districts by resolution adopted by the respective governing bodies concur in a merger or consolidation of such utility districts, or when, by resolution, such governing body or bodies agree or propose to consolidate with a municipality or a county by transferring all of their property and obligations to the municipality or county, they may petition the county mayor of the county in which they were created for an order

permitting such consolidation, merger, recreation, or transfer of its franchise facilities, assets and obligations to a municipal corporation or a county for the purpose of more efficiently and conveniently furnishing the service or services authorized by their order of creation. Upon such petition being filed, the county mayor or mayors shall proceed in exactly the same manner as provided in this chapter for the creation of a utility district. Upon a finding that the public convenience and necessity requires merger, consolidation, recreation, sale or transfer and that the same is economically sound and feasible and in the public interest, an order shall be entered approving the merger, sale, consolidation or recreation of the district. If the petition is for a consolidation of utility districts, it shall be designated as the \_\_\_\_\_ Utility District of \_\_\_\_\_ County or Counties, Tennessee, defining its territorial limits and appointing the commissioners of the district, all in accordance with the requirements of this chapter for the creation of a utility district. In the event such order provides for the sale or transfer of all franchises, assets and liabilities to a municipality, metropolitan government or a county, then such district shall be dissolved and provision made in the order for an equitable distribution of the assets and providing for the termination of the existence of the utility district and establish the legal rights, duties and obligations of the entities and parties involved. In addition, the order shall provide that the newly created merger or consolidated utility district or purchasing governmental entity shall assume the operation of the system then being merged or re-created and account for the revenues from the system in such a manner as not to impair the obligations of the contract with reference to bond issues or other legal obligations of the district or districts, and shall fully preserve and protect the contract rights vested in the owners of such outstanding bonds, obligations, or contractual interests.

(2) Notwithstanding the provisions of this section or any other law to the contrary, two (2) or more utility districts, each of which has a board of three (3) commissioners, that concur in a merger or consolidation of such utility districts may by agreement increase the size of the board of commissioners of the merged or consolidated utility district to five (5) commissioners in accordance with the requirements of this subsection (e). The merging or consolidating utility districts that agree to increase the size of the board of commissioners to five (5) commissioners shall include the agreement in their respective resolutions concurring in the merger or consolidation and shall state such agreement in the petition for merger or consolidation submitted to the county mayor. The petition for merger or consolidation shall name in the petition up to five (5) individuals to serve as commissioners for the merged or consolidated utility district proposed by such petition, each of whom shall be an existing commissioner of one (1) of the utility districts proposing to merge or consolidate and shall be qualified to serve in accordance with § 7-82-308(d). The county mayor or mayors conducting the hearing on the petition for merger or consolidation shall appoint such individuals, named in the petition for merger or consolidation, as commissioners for the merged or consolidated utility district, unless the county mayor or mayors find such individuals are not qualified to serve as commissioners under § 7-82-308(d). If the merging or consolidating utility districts do not name five (5) individuals who are qualified to serve as commissioners under § 7-82-308(d) for the merged or consolidated utility district in the petition for merger or consolidation, then the county mayor or mayors shall appoint a sufficient number of individuals who are qualified under § 7-82-308(d) to serve as commissioners for any seats not named by the merging or consolidating utility districts in the petition. The county mayor or mayors shall appoint one (1) commissioner for an initial two-year term, two (2) commissioners for initial three-year terms and two (2) commissioners for initial four-year terms.

(3) Notwithstanding the provisions of this section or any other law to the contrary, four (4) or more utility districts, each of which has a board of three (3) commissioners, that concur in a merger or consolidation of such utility districts may by agreement increase the size of the board of commissioners of the merged or consolidated utility district to seven (7) commissioners in accordance with the requirements of subdivision (e)(2). The county mayor or mayors shall appoint two (2) commissioners for initial two-year terms, two (2) commissioners for initial three-year terms and three (3) commissioners for initial four-year terms.

(f) A municipality may acquire a utility district to be operated as a department separate from any other municipal utility. Whenever a utility district by resolution adopted by its governing body agrees or proposes to consolidate with a municipality as a separate department of such municipality by transferring all of its property and obligations to such municipality, it shall petition the county mayor of the county in which it was created for an order approving the

resolution to permit such consolidation, merger, acquisition or transfer of its franchise facilities, assets and obligations to a municipal corporation for the purpose of more efficiently and conveniently furnishing the service or services authorized by its order of creation. Upon such petition being filed, such county mayor shall proceed in exactly the same manner as provided in this chapter for the creation of a utility district, and upon a finding that the public convenience and necessity requires consolidation, merger, acquisition or transfer and that the same is economically sound and feasible and in the public interest, an order shall be entered approving such resolution. Upon the approval of such resolution by order of the county mayor, such utility district shall be dissolved and the assets, obligations, legal rights and duties of such district shall become those of the department of the municipality. Such order shall provide that the department of the municipality shall assume the operation of the utility system and account for the revenues from the system in such a manner as not to impair the obligations of contract with reference to bond issues or other legal obligations of the district, and shall fully preserve and protect the contract rights vested in the owners of such outstanding bonds, obligations or contractual interests. Such department of the municipality shall be operated separately from any other utility department of the municipality. The governing body of the municipality shall be the governing board of such department and shall appoint an advisory committee on utilities if the area served by the utility district is outside the boundaries of the municipality. The governing body of the municipality shall, by ordinance, create such advisory committee to be composed of either former utility district commissioners or residents and customers of the utility system so acquired. The advisory committee members shall be appointed by the governing body of the municipality in the number and for the term specified by the ordinance. When the former utility district ceases to be a separate department and is merged with the other utility services of the municipality into one (1) utility system, such advisory committee may be dissolved. No portion of such utility district shall be made a part of a municipal utility service without consideration being paid to the department composed of such utility district.

**HISTORY:** [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27; Acts 1959, ch. 166, § 1; 1968, ch. 529, § 2; 1973, ch. 183, § 1; impl. am. Acts 1978, ch. 934, §§ 16, 22, 36; Acts 1979, ch. 430, § 1; modified; T.C.A. (orig. ed.), § 6-2604; Acts 1989, ch. 591, § 113; 1995, ch. 64, §§ 3-9; 2000, ch. 648, § 1; 2003, ch. 90, § 2; 2005, ch. 61, § 1.]

**NOTES:**

**Compiler's Notes.**

Acts 2003, ch. 90, § 2, directed the code commission to change all references from "county executive" to "county mayor" and to include all such changes in supplements and replacement volumes for the Tennessee Code Annotated.

Acts 1995, ch. 64, § 10 provides that the amendments by Acts 1995, ch. 64 do not apply to any utility district that must, for the purpose of redefining its incorporated boundary, be recreated in accordance with existing law.

For table of U.S. decennial populations of Tennessee counties, see Volume 13 and its supplement.

In 2005, subsection (g) was deleted as similar provisions existed at § 7-82-204.

**Amendments.**

The 2000 amendment, in (f), rewrote the eighth sentence which read: "Such advisory committee shall be composed of residents and customers of the utility system so acquired and shall be created by ordinance, with members appointed by the governing body of the municipality for the same term and in the same number as the members of the governing body of the municipality." and inserted the present ninth sentence.

The 2005 amendment added (e)(2) and (e)(3).

**Effective Dates.**

Acts 2000, ch. 648, § 2. April 10, 2000.

Acts 2005, ch. 61, § 2. April 14, 2005.

**Cross-References.**

Certified mail instead of registered mail, § 1-3-111.

Multi-county districts, §§ 7-82-603, 7-82-605.

Penalty for Class C misdemeanor, § 40-35-111.

**Section to Section References.**

This section is referred to in §§ 7-82-302, 7-82-603.

**Textbooks.**

Tennessee Jurisprudence, 13 *Tenn. Juris., Gas Companies*, § 7.

**Attorney General Opinions.**

A municipality is not authorized to petition for the dissolution of a utility district, OAG 02-110 (10/07/02).

Utility districts with territory in more than one county, OAG 00-003 (1/6/00).

Expanding a utility district, OAG 00-067 (4/6/00).

**Cited:**

*NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206, 1971 U.S. LEXIS 126 (1971); *Delffs v. Delffs*, 545 S.W.2d 739, 1977 Tenn. LEXIS 607 (Tenn. 1977); *United Cities Gas Co. v. Wigington*, 815 S.W.2d 506, 1991 Tenn. LEXIS 339 (Tenn. 1991).

**NOTES TO DECISIONS**

1. Constitutionality. 2. Administrative Function. 3. Public Convenience and Necessity.

**1. Constitutionality.**

Subdivisions (a)(1) and (2) do not delegate such an unlimited discretion as to be an unconstitutional delegation of legislative power to the county judge or chair (now county mayor). *First Suburban Water Utility Dist. v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948, 1940 Tenn. LEXIS 19 (1941).

**2. Administrative Function.**

Whether a county judge (now county mayor) is sitting alone considering a one-county district, or two or more county judges are considering a multi-county district, he or they are acting as an administrative body and not a court. *White House Gas Utility Dist. v. Cross Plains Natural Gas Utility Dist.*, 60 Tenn. App. 162, 445 S.W.2d 459, 1969 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1969).

**3. Public Convenience and Necessity.**

County executive (now county mayor) was not authorized to modify the boundaries of an existing utility district,

even though the district did not provide service to area residents; the sole remedy was to seek to modify the utility's exclusive franchise if public convenience and necessity so demanded. *Town Of Rogersville ex rel. Rogersville Water Comm'n v. Mid Hawkins County Util. Dist.*, 122 S.W.3d 137, 2003 Tenn. App. LEXIS 411 (Tenn. Ct. App. 2003), appeal denied, -- S.W.3d --, 2003 Tenn. LEXIS 1236 (Tenn. 2003).