

TAUD UPDATE ON CONDUCTING UTILITY BOARD MEETINGS WITH ELECTRONIC ACCESS

March 24, 2020

You received a couple of emails from TAUD last week regarding the ability of the governing boards of utility districts, utility authorities, and municipal and county utility boards (“utility boards”) to hold board meetings electronically. You may have read and heard about this issue from other sources as well. Some confusion has resulted because of the manner in which the State of Tennessee tried to address this issue. Last week, the General Assembly attempted to pass legislation to give the members of the governing bodies of local governments the ability to participate in board meetings electronically (Senate Bill 2897/House Bill 2815). The House and Senate Committees approved different versions of the bill on Wednesday, March 18. The House and Senate passed these different versions of the bill on Thursday, March 19. Most people expected the House and Senate to work out their differences in the language of bill. No agreement was reached on final language for the bill before the General Assembly recessed late on Thursday, March 19.

On Friday, March 20, 2020, Governor Bill Lee issued Executive Order No. 16 which in essence authorizes the governing bodies of local government to have electronic board meetings through May 18, 2020. <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee16.pdf>. Late on Friday, March 20, 2020, the Comptroller’s Office issued a Memorandum to give local governments guidance on the parameters and conditions for conducting an electronic board meeting by the governing body of a local government based upon Executive Order No. 16. <https://comptroller.tn.gov/content/dam/cot/igf/documents/budgets/COVID19LocalGovernmentGuidanceRev.pdf>

The purpose of this Update is to describe these parameters and conditions for utility boards and to provide some practical ways to meet these requirements.

- Members of a utility board may participate in a board meeting electronically when the utility board determines that that meeting electronically is necessary to protect the health, safety, and welfare of Tennesseans in light of the COVID-19 outbreak.
- Public notice of the meeting should include a statement that the meeting will allow members to participate by electronic means.
- If the utility board determines that the public should not be present at the physical location of the electronic meeting, then the board must make reasonable efforts to ensure that the public may access the meeting live via electronic means. The public notice of the meeting should state that the public will not have physical access to the meeting location and should include instructions about how the public may electronically access the meeting.
- If the utility board determines that it cannot provide the public live access after making reasonable efforts, the board must make a clear audio or video recording of the meeting

and make the recording available to the public as soon as practicable after the meeting, but no later than two business days after the meeting.

- The meeting should be audible to the public at the location of the meeting specified in the notice of the meeting.
- Each member participating electronically or otherwise should be able to hear each other simultaneously and speak to each other during the meeting.
- Documents to be discussed at the meeting should be provided to members participating electronically prior to the meeting, to the extent doing so is practicable.
- All votes at the meeting should be by roll call vote.
- The board should make a determination on the record that meeting electronically is necessary to protect public health, safety, and welfare in light of the COVID-19 outbreak and document this determination in the minutes of the board meeting conducted electronically.
- A board member who participates electronically is deemed present for the purposes of establishing a quorum and voting, but is not entitled to receive the meeting per diem.

Some Practical Considerations

Public Notice When Electronic Participation is Permitted

- If a utility district or other utility board is going to conduct a meeting in which board members will participate electronically, the utility cannot rely upon the date and time of the regular board meeting being printed on the back of the bill as sufficient public notice of the electronic meeting (which the utility should not rely upon anyway). The utility should publish a notice of the regular meeting in the local newspaper with the required language for an electronic meeting and include the required language in any methods the utility currently uses for public notice of board meetings (website, posting, etc.)
- Add the following language to the public notice you usually use for the utility's regular board meeting: "***Board members will be permitted to participate by electronic or other means.***"
- The utility may want to consider continuing to allow the public to have physical access to the location of the utility board meeting. In today's environment, I suspect, no one is going to show up in most cases. If they do, the utility personnel present at the meeting location can make sure appropriate social distances are maintained among anyone who attends the meeting. Continuing to allow the public physical access to the meeting location relieves the utility of having to either: (1) give the public electronic access to the

meeting and include instructions on how to have this electronic access in the public notice; or, (2) make an audio or video recording of the meeting.

Conducting the Electronic Board Meeting

- The General Manager, Superintendent or other senior management employee should be physically present at the utility office to set up the electronic meeting whether by teleconference or by online virtual meeting applications such as Zoom, Skype or other similar applications.
- When the meeting is called to order, the board president or chairman should make a statement along these lines: “***Board members are being permitted to participate in this meeting by electronic means to protect public health, safety, and welfare in light of the COVID-19 outbreak.***” This statement should be included in the minutes of the board meeting.
- To the extent practicable, a board member attending a meeting electronically must be provided with any documents discussed or made available for the meeting.
- Votes must be taken by a roll call vote. This means the president or chairman must ask each commissioner or board member how he or she is voting on any motion offered during the meeting and must declare his or own vote on the motion rather than relying on a simultaneous ye or nay voice vote by all board members.
- Each board member participating electronically or otherwise should be able to hear each other simultaneously and speak to each other during the meeting, and any members of the public present must be able to hear each member who is participating electronically.

Payment of Meeting Per Diem

- When a board member participates in a meeting electronically, the board member is considered present for the purposes of meeting a quorum and voting. The board member is not entitled to receive the meeting per diem the member normally receives when he or she attends a board meeting in person.

Other Considerations

- Of course, the utility board has the option to cancel a board meeting due to the COVID-19 outbreak. Cancellation of a meeting is a viable option when the board has business which can wait until the next regular monthly meeting to conduct.
- Remember that Executive Order No. 16 only permits electronic meetings through May 18, 2020, unless that date is extended by Governor Lee for a longer period.
- The considerations in the Update are appropriate for the small boards of utility districts, utility authorities, and municipal and county utility boards. These considerations may not

appropriate for the larger governing boards of municipalities and counties which may be the governing board of a water, sewer or natural gas utility. The governing boards of municipalities and counties should seek advice on having electronic meeting from their legal counsel.

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