



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

July 20, 2022

Kris E. Warner
Executive Director
West Virginia Economic Development Authority
180 Association Drive
Charleston, WV 25311

Sarah Canterbury
General Counsel to the State Treasurer &
Chairman
West Virginia Board of Treasury Investments
315 70th Street E
Charleston, WV 25304

Dear Director Warner and Ms. Canterbury:

You have asked for an Opinion of the Attorney General regarding the West Virginia Economic Development Authority's statutory power to issue broadband loan insurance. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions ... upon questions of law, whenever required to do so, in writing, by ... any ... state officer, board or commission." To the extent this Opinion relies on facts, it depends solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your request explains that the Authority recently approved a request for loan insurance from Citynet, Bridgeport, West Virginia under the Broadband Loan Insurance Program ("BLINS Program"). The Legislature created the BLINS Program to provide funds for insuring debt instruments between financial institutions and broadband providers who are expanding in underserved areas of West Virginia. Your letter describes that Citynet is in the process of constructing a fiber network in Greenbrier, Nicholas, Pocahontas, Taylor, and Webster Counties with funding, in part, through a federal program. When Citynet received the award through this program four years ago, the federal government required Citynet to carry loan insurance. Citynet did not qualify for loan insurance under the BLINS Program at that time; instead, it used two letters of credit through MVB Bank that Citynet secured with cash collateral.

Citynet later qualified for the BLINS Program following the adoption of Senate Bill 295 in 2021, which expanded the BLINS Program to specifically allow it to insure debts related to federal broadband expansion programs like Citynet's. So in May 2022, Citynet applied to the Authority for loan insurance. Since Citynet already had the two letters of credit, receiving insurance under the BLINS Program would let Citynet "re-collateralize" these existing loans by swapping out the cash on deposit and using the loan insurance as collateral instead—thus freeing the cash for other purposes. Specifically, your request says that Citynet would be able to use the cash to continue developing other broadband projects.

As part of the loan insurance application process, MVB sent a written certification to the Authority that "but for the authority insuring the debt instrument, MVB would not otherwise make the loan based on the creditworthiness of the loan applicant." This certification is required under West Virginia Code § 31-15-8a(b)(2), and MVB's letter tracks the statutory text almost exactly.

Your letter raises the following legal questions:

- (1) *Does West Virginia Code § 31-15-8a allow re-collateralization under these circumstances?*
- (2) *If so, does MVB's attestation satisfy the statutory requirement for a certification that the bank would not issue a loan "but for" the Authority's loan insurance?*

On the first question, we conclude that the statute permits this type of (admittedly unusual) "collateral swapping" because it falls within the statute's plain terms and does not appear to qualify as refinancing under the facts you described. On the second question, we conclude that the letter from MVB likely satisfies Section 31-15-8a's certification requirement, though that fact alone would not *require* the Authority to award loan insurance to the extent it may have questions about the certification's underlying factual basis.

DISCUSSION

Re-collateralization

Your first question asks whether Citynet's plan to switch out previous collateral for new collateral passes muster under West Virginia Code § 31-15-8a. In light of the statute's broad terms and the fact that it appears there are no changes to the loan *except* new collateral, a reviewing court would very likely conclude that the statute allows for this sort of unorthodox exchange.

"As with any issue of statutory interpretation," we first "look to the relevant and controlling language." *State ex rel. Dep't of Health and Hum. Res., Child Support Enf't Div. v. Baker*, 210 W. Va. 213, 216, 557 S.E.2d 267, 270 (2001). The statute defines "[d]ebt instrument" in part as "any note, loan agreement, or *any other form of indebtedness whatsoever*." W. Va. Code § 31-15-8a(a)(4) (emphasis added). This "clear and unambiguous language" would

certainly include Citynet's letters of credit from MVB. *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959). Looking to the terms "any other" and "whatsoever," it seems clear that the kind of debt at issue here falls within the expansive "words that were purposely included" in the statute. *State v. Butler*, 239 W. Va. 168, 178, 799 S.E.2d 718, 728 (2017).

Next, there is nothing in the statute that bars issuing loan insurance after the lender and broadband provider reach an initial loan agreement. Considering again "the relevant and controlling language," *Baker*, 210 W. Va. at 216, 557 S.E.2d at 270, the Legislature empowered the Authority "to insure, for up to 20 years, the payment or repayment of all or any part of the principal of and interest on *any form of debt or security* entered into by an eligible broadband provider with a financial institution," so long as that debt is used for the purposes of the statute. W. Va. Code § 31-15-8a(b)(1) (emphasis added). Beyond the limit for length of coverage, there is no timing requirement or similar caveat in the statute. And significantly, the statute *does* contain exhaustive requirements for loan insurance that cover a host of other factors. *See* W. Va. Code §§ 31-15-8a(b)-(d). The Legislature did not include as one of them the idea that loan insurance needs to be contemporaneous with the granting of the loan. Courts recognize that "[i]t is imperative" not to "arbitrarily read into a statute that which it does not say." *Butler*, 239 W. Va. at 178, 799 S.E.2d at 728. The Legislature is presumed to act intentionally, so courts will not "add to statutes something that the Legislature purposely omitted." *Id.* Thus, while this situation is unusual, nothing in the statute's plain language forbids it from a timing perspective.

The last potential statutory hurdle is whether swapping collateral is equivalent to refinancing: The statute expressly forbids the Authority from insuring "the refinancing of existing debt." W. Va. Code § 31-15-8a(b)(2). Though the statute does not define refinancing, courts give undefined statutory terms their "common, ordinary and accepted meaning in the connection in which" the Legislature uses them. *Nicole L. v. Steven W.*, 241 W. Va. 466, 471, 825 S.E.2d 794, 799 (2019) (citation omitted). Here, the term "refinancing" is commonly understood to mean "[a]n exchange of an old debt for a new debt, as by negotiating a different interest rate or by repaying the existing loan with money acquired from a new loan." *Refinancing*, Black's Law Dictionary (11th ed. 2019). This meaning is consistent with how the Legislature uses the term in other parts of the Code, too. In the revenue bond context, for instance, "refinancing" is defined as "funding, refunding, paying or discharging" debts by "means of refunding bonds or the proceeds received from the sale thereof." W. Va. Code § 13-2A-2.

At least under the facts you described, this situation does not fall within these definitions. There appears to be no new loan created, and the original debt obligation was not paid off with new funds or otherwise discharged. Your request does not reference any new terms like changed interest rates or a different repayment schedule, either. In fact, there seems to be no changes to the loan at all beyond the identity of the collateral. If there were, this situation would likely run afoul of the Legislature's concern not to "permit[] the authority to insure the refinancing of existing debt." But under these limited facts, this situation does not qualify as a refinancing. "Re-collateralizing" may be unusual, but it meets the statute's broad terms.

The “But For” Certification Requirement

Your second question asks whether the Authority may certify that Citynet’s application satisfies the requirement that the lender “provide[] written certification to the authority that, but for the authority’s insuring the debt instrument, the financial institution would not otherwise make the loan based solely on the creditworthiness of the loan applicant.” W. Va. Code § 31-15-8a(b)(2). We conclude that the Authority may—but it is also not required to do so.

Again, this situation presents unusual facts. It is not immediately clear how a lender can certify that it would not issue a loan based on the applicant’s creditworthiness “but for” loan insurance when the lender *did* issue the same loan four years ago *without* loan insurance. Of course, there may be other factors at play in this situation not apparent from your request, and it is beyond the scope of this Opinion to speculate on the financial basis for MVB’s certification. What is clear is that MVB has provided a written certification to the Authority that tracks the statute’s terms: MVB certified that “but for the authority issuing” insurance, “MVB would not otherwise make the loan based on [Citynet’s] creditworthiness.”

This written certification satisfies the statutory requirement on its face, and the law does not impose an independent duty on the Authority to investigate it further. Nothing in the statute states or implies that the Authority must test the veracity or accuracy of a certification. The statute requires only that “the participating financial institution *provide[]* written certification.” W. Va. Code § 31-15-8a(b)(2) (emphasis added). Here, MVB did. Since it is not proper to “read into a statute that which it does not say,” *Butler*, 239 W. Va. at 178, 799 S.E.2d at 728, “provid[ing]” the certification is enough for Citynet’s application to check this statutory box.

Other sections of the statute strengthen this conclusion that the Legislature did not intend to place a duty on the Authority to investigate certifications. The Legislature knows how to give the Authority homework—for example, it required the Authority to “select applicants who demonstrate a minimal risk of default” and placed a mandatory “shall” duty on the Authority to “consider,” “[a]t a minimum,” six specific “criteria in determining whether to approve a loan insurance application.” W. Va. Code § 31-15-8a(c)(3). These criteria focus on detailed aspects of the applicant’s creditworthiness and relevant broadband experience: (1) financial ability to complete the project and repay the loan; (2) credit history; (3) past earnings and projected cash flow; (4) past performance in economic development programs; (5) prior experience with broadband service deployment; and (6) the nature and value of the collateral being offered. *Id.* §§ 31-15-8a(c)(3)(A)-(F). The Legislature also required the applicant to submit detailed financial and business records to give the Authority the tools it needs to make these assessments. *Id.* §§ 31-15-8a(c)(2)(A)-(G). In short, these provisions—which specifically task the Authority with making detailed evaluations while ensuring that it has the data to do so accurately—stand in contrast with Section 31-15-8a(b)(2)’s sparse requirement that a lender “provide[] written certification.” Because the Legislature did not expand the Authority’s duty to “consider” financial factors to the trustworthiness of a bank’s certification, we conclude that a reviewing court would likely “assume the omission was intentional.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995).

Finally, though, we note that just because the statute *allows* the Authority to certify a loan insurance application as complete under facts like these, there is no indication that the statute *mandates* it to accept the application. The six criteria described above are not exhaustive. The statute requires the Authority to consider them “*at a minimum*” when “determining whether to approve a loan insurance application.” W. Va. Code § 31-15-8a(c)(3) (emphasis added). This language is “free from ambiguity” and plainly allows the Authority to consider other factors beyond the listed six. Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 715, 172 S.E.2d 384, 385 (1970). In other words, simply receiving the certification does not mean that the Authority must approve the application. If the Authority questions the circumstances around or basis for a lender’s certification—or has concerns about any other aspect of an application, for that matter—it can “consider” those factors, too.

Sincerely,



Patrick Morrissey
Attorney General

Lindsay S. See
Solicitor General

Caleb A. Seckman
Assistant Solicitor General