WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #2

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Public Energy Authority TITLE NUMBER: 53

RULE TYPE: Legislative ; CITE AUTHORITY 5D-1-5(11)

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ______

TITLE OF RULE BEING AMENDED: ______

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 3

TITLE OF RULE BEING PROPOSED: Establishment of Rules & Procedure for the Exercise of the Powers of Eminent Domain for Qualified Projects

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON February 20, 1990 AT 4:30 p.m.. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Jim Cristy
Public Energy Authority
Community & Industrial Dev.
Building 1, Room M-146
Charleston, WV 25305

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

[signature]
General Counsel

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

West Virginia

DEPARTMENT OF COMMERCE,
LABOR & ENVIRONMENTAL RESOURCES
OFFICE OF THE SECRETARY

State Capitol | Charleston, West Virginia 25305 | 304/348-3255

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

February 9, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol Building
Charleston, WV 25305

Re: Public Energy Authority Regulations

Dear Mr. Secretary:

The West Virginia Public Energy Authority has filed with your office proposed regulations; of those submitted one deals with charges for the PEA's issuance of bonds and the second with its exercise of it's eminent domain powers pursuant to Chapter 54 of the West Virginia Code. These two proposed regulations are legislative rules and require legislative approval. The third is purely procedural dealings with notice of the PEA's meetings and is consistent with the present statute relating to the same subject.

As Secretary of Commerce, I am in complete agreement with the proposed regulations and authorize their submission.

Respectfully yours,

Leonard A. Harvey
Secretary of Commerce,
Labor and Environmental Resources

LAH:ml

cc: PEA Board Members
J. David Cecil, Legal Counsel

WEST VIRGINIA LEGISLATIVE RULE
WEST VIRGINIA PUBLIC ENERGY AUTHORITY
CHAPTER 5D-1
SERIES 3

Title: Establishment of Rules and Procedure for the Exercise of the Powers of Eminent Domain for Qualified Projects.

Section 1. General.

1.1 Scope. This legislative rule establishes the rules for the Public Energy Authority to exercise its powers of eminent domain/condemnation for qualified projects.

1.2 Authority. West Virginia Code, 1931, §5D-1-5(11), as amended.

Section 2. Purpose and Applicability of Regulations.

2.1 Purpose. The purpose of these regulations is to promulgate rules to implement the procedure required for the Public Energy Authority to exercise its powers of eminent domain/condemnation, in accordance with the following objective: To insure that owners of real property or interests in real property to be acquired for Public Energy Authority projects or public energy assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation, and to promote public confidence in the Public Energy Authority's land and rights of way acquisition programs for its qualified projects.

2.2 Applicability. These rules shall be effective from date approved under the provisions of West Virginia Code, 1931, Chapter Chapter 29A, Article 3, Section 1, et seq., as amended (Rule Making).

Section 3. Definitions.

3.1 Acquiring Entity. The term "acquiring entity" means the Authority or any entity which has a project qualified by the Authority as consistent with the Authority's statutory authority and purposes.

3.2 The Act. The term "the Act" means the West Virginia Public Energy Authority Act, West Virginia Code, 1931, §5D-1-1, et seq., as amended.

3.3 Agency. The term "Agency" means the Public Energy Authority or entity which under the auspices of the Public Energy Authority acquires real property, rights of ways, or easements.

3.4 Authority. "Authority" means the West Virginia Public Energy Authority created in section four, Article 1, Chapter 5D [§5D-1-4] of the West Virginia Code.

3.5 Bond. "Bond" means a revenue bond or note issued by the West Virginia Public Energy Authority or by the West Virginia Economic Development Authority to effect the intents and purposes of Article 1, Chapter 5D of the West Virginia Code, 1931, as amended.

3.6 Costs. "Cost" means, as applied to natural gas transmission projects, electric power generating projects or other energy projects authorized by the Authority shall include, but not be limited to: the cost of their acquisition and construction, including all costs pertaining to pipelines; the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, contract rights, lease rights and other rights or interests required by the Authority for such acquisition and construction; the cost of demolishing or removing any pipeline, buildings or structures on land so acquired, including the cost of acquiring any lands to which such pipelines, buildings or structures may be moved; the cost of acquiring or constructing and equipping a principal office and suboffices of the Authority; the cost of diverting highways, interchange of highways and access roads to private property, including the cost of land or easements therefor; the cost of all machinery, furnishings and equipment, all financing charges, and interest prior to and during construction and after completion of construction; the cost of all engineering services and all expenses of research and development with respect to natural gas transmission projects, electric power generating projects, and related facilities; the cost of all legal services and expenses; cost of all plans, specifications, surveys and estimates of cost and revenues; all working capital and other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing any such projects; all administrative expenses and such other expenses as may be necessary or incident to the acquisition or construction of any such projects; the financing of such acquisition or construction, and the cost of financing of the placing of any such project in operation. Any obligation or expenses incurred after the effective date of Article 1, Chapter 5D of the West Virginia Code, 1931, as amended, by any governmental agency, with the approval of the Authority, for surveys, borings, preparation of plans and specifications and other engineering services in connection with the acquisition or construction of a project shall be regarded as a part of the cost of such project and shall be reimbursed out of the proceeds of loans or revenue bonds as authorized by the provisions of the said Article 1, Chapter 5D of West Virginia Code, 1931, as amended.

3.7 Fair Market Value. "Fair market value" shall be determined by an appraisal made by an independent person or firm chosen by the acquiring entity. The appraisal shall be performed using the principles contained in the "Uniform Appraisal Standards for Federal Land Acquisitions" published under the auspices of the Interagency Land Acquisition Conference, United States Government Printing Office, 1972.

3.8 Governmental Agency. "Governmental Agency" means the state government or any agency, department, division or unit thereof; counties; municipalities; public service districts; regional governmental authorities and any other governmental agency, entity, political subdivision, public corporation or agency; the United States government or any agency, department, division or unit thereof; and any agency, commission or authority established pursuant to an interstate compact or agreement.

3.9 Owner. "Owner" includes all persons having any title or interest in any property rights, easements and interests authorized to be acquired by the Authority.

3.10 Person. "Person" means any public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; the United States or the State of West Virginia; any federal or state governmental agency; political subdivision; county commission; municipality; industry; public service district; partnership; trust; estate; person or individual; and group of persons or individuals acting individually or as a group or any other legal entity whatever.

3.11 Qualified Project. "Qualified project" means either a natural gas transmission project or an electric power generating project as defined by the Act [West Virginia Code, 1931, §§5D-1-4(12) and (13)] that has been voted by the Authority as consistent with the purposes of the Act.

3.12 Real Property. "Real property" as used herein is defined to include lands, structures, franchises and interests in land, including lands under water and riparian rights, and any and all other things and rights usually included within the said term, and includes also any and all interests in such property less than full title, such as easements, rights-of-way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms for years and liens thereon by way of judgments, mortgages or otherwise, and also all claims for damages for such real estate.

Section 4. Conditions for Authority's Approval.

4.1 The Authority shall exercise its right of eminent domain/condemnation only after the acquiring entity has complied with these rules and upon concurrence of a majority of the Authority's Board of Directors voting on such action. The Board shall be fully and completely satisfied:

(a) That the project is one approved by the Board as consistent with the purposes of the Act;

(b) That all reasonable efforts have been made to acquire the real property or interest in real property by the acquiring entity without success;

(c) That there are no reasonable alternatives which are economically or physically consistent with the best interests of the qualified project; and

(d) That any further attempts at negotiations between the acquiring entity and the owners may jeopardize the timely completion of the qualified project.

4.2 <u>Assurances.</u> Before the Authority may approve the exercise of its powers of condemnation, the acquiring entity seeking such approval must provide proof to the satisfaction of a majority of the Authority's Board:

(a) That the real property, right of way or easement proposed to be acquired is necessary for the finalization of the project and that alternative routes for the project have been reviewed and are not financially or physically consistent with the interests and purposes of the project.

(b) A description and location identification of the proposed real property, right of way, or easement to be acquired and the owners and interests of each in the same.

(c) An identification of the buildings, structures, or other improvements (including removable building equipment and trade fixtures) which are considered to be part of the real property, right of way, or easement for which the offer of just compensation has been made.

(d) Before submission to the Authority for condemnation approval, the entity shall establish an amount which it believes is just compensation for the real property or interest therein. The amount offered shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of the allowable damages or benefits to any remaining property.

(e) That all reasonable efforts have been made to reach a fair and reasonable accommodation between the acquiring entity and the owner including a listing of all offers, counteroffers and refusals.

(f) Along with the initial written purchase offer, the Authority shall be provided with evidence that the owner has been given a written statement by the acquiring entity, including:

(i) A statement of the amount offered as just compensation. In the case of a partial acquisition, the compensation for the real property, right of way, or easement to be acquired and the compensation for damages, if any, to the remaining real property, which shall be stated separately;

(ii) A description and location identification of the real property and the interest in the real property to be acquired;

(iii) An identification of the buildings, structures and other improvements (including reasonable building equipment and trade fixtures) which are considered to be part of the real property for which the offer of just compensation is made. Where appropriate, the statement shall identify any separately held ownership interest in the property, e.g., a tenant-owned improvement, and indicate that such interest is not covered by the offer;

(iv) Any update of just compensation as set forth in subsection (b) hereof with documentation has been considered and rejected as impracticable.

4.3 Updating Offer of Just Compensation. If the information presented by the owner, or a material change in the character or condition of the property indicates the need for new appraisal information, or if a significant delay occurred since the time of the appraisal(s) of the property, the acquiring entity shall have the appraisal(s) updated or obtain a new appraisal(s). If the latest appraisal information indicates that a change in the purchase offer is warranted, the acquiring entity shall promptly re-establish just compensation and offer that amount to the owner in writing.

Section 5. Manner of Notices.

5.1 Each notice which the acquiring entity is required to provide to a proper owner or occupant under these regulations shall be personally served or sent by certified or registered first class mail, return receipt requested, and documented in the acquiring entity's files. Each notice shall be written in plain, understandable language. Persons who are unable to read and understand the notice must be provided with appropriate translation and counseling. Each notice will indicate the name and telephone number of a person who may be contacted for answers to questions or other needed assistance.

5.2 Record Keeping and Reports.

(a) Records. The acquiring entity shall maintain adequate records of its acquisition activities in sufficient detail to demonstrate compliance with these regulations. The records shall be retained for at least three (3) years after each owner of real property or interest therein receives the final payment to which he/she is entitled under these regulations.

(b) Less-than-Full Fee Interest in Real Property. The requirement of these regulations apply to the acquisition of a life estate, or life use, acquisition by leasing, including option(s) for extension, acquisition of rights-of-ways/easements, whether temporary or permanent.

5.3 Basic Acquisition Policies.

(a) Expeditious Acquisition. The acquiring entity shall make every reasonable effort to acquire the real property or interest therein expeditiously by negotiations.

(b) Acquisition Courtesy. The acquiring entity shall make all reasonable efforts to properly, fairly and justly represent the interests of the Authority and the State of West Virginia in its acquisition endeavors.

Section 6. Criterion for Appraisals.

6.1 Definition of Appraisal. An appraisal is a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of the adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

6.2 Standards of Appraisal. A detailed appraisal shall be prepared for all acquisitions. An appraisal shall contain sufficient documentation, including valuation data and the appraiser's analysis of that data, to support his or her opinion of value. At a minimum, the appraisal shall contain the following items:

(a) The purpose and/or function of the appraisal, a definition of the estate being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal.

(b) An adequate description of the physical characteristics of the property being appraised, a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of the highest and best use, and at least a five (5) year sales history of the property.

(c) All relevant and reliable approaches to value consistent with commonly accepted professional appraisal practices. When sufficient market sales data are available to reliably support the fair market value for the specific appraisal problem encountered, the acquiring entity may require only the market approach. If more than one approach is utilized, there shall be an analysis and reconciliation of approaches to value that are sufficient to support the appraiser's opinion of value.

(d) A description of comparable sales, if any, including a description of all relevant physical, legal and economic factors such as parties to the transaction, source and method of financing and verification by a party involved in the transaction.

(e) A statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the value of the damages and benefits, if any, to the remaining real property.

(f) The effective date of valuation, date of appraisal, signature and certification of the appraiser.

6.3 Influence of the Project on Just Compensation. To the extent permitted by applicable law, the appraiser shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than due to physical deterioration within the reasonable control of the owner.

6.4 Owner Retention of Improvements. If the owner of a real property improvement is permitted to retain it for removal from the project site, the amount to be offered for the interest in real property to be acquired shall not be less than the difference between the amount determined to be just compensation for the owner's entire interest in the real property and the salvage value of the retained improvements.

Section 7. Conflict of Interest Prohibited.

7.1 No appraiser shall have any interest, direct or indirect, in the real property being appraised for the acquiring entity that would in any way conflict with the preparation of the appraisal. Compensation for making an appraisal shall not be based on the amount of the valuation. No appraiser shall act as a negotiator for real property or interests in real property which the person has appraised, except that the acquiring entity may permit the same person to both appraise and negotiate an acquisition where the value of the acquisition is $5,000 or less.