WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: West Virginia Public Energy Authority TITLE NUMBER: ______

CITE AUTHORITY West Virginia Code, 1931, §5D-1-5, as amended

AMENDMENT TO AN EXISTING RULE: YES____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: N/A

TITLE OF RULE BEING AMENDED: N/A

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

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

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

J. David Cecil
General Counsel

DATE:

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:

LEGISLATIVE RULE TITLE:

1. Authorizing statute(s) citation West Virginia Code, 1931, §5D-1-5, as amended

2. a. Date filed in State Register with Notice of Hearing:

   b. What other notice, including advertising, did you give of the hearing?

   Advertised in both Charleston newspapers giving date of Public Hearing. (copy attached)

   c. Date of hearing (s): May 30, 1990

   d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

   Attached ______ No comments received X

   e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

   December 18, 1990 (Draft Minutes of Board Meeting)

   f. Name and phone number of agency person to contact for additional information:

   J. David Cecil, General Counsel

   342-7111

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

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 Assurances. 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. <u>Conflict of Interest Prohibited.</u>

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.

AFFIDAVIT OF PUBLICATION

STATE OF WEST VIRGINIA,

KANAWHA COUNTY, TO-WIT:

I, Jean Waldron OF

THE CHARLESTON GAZETTE, A DAILY DEMOCRATIC NEWSPAPER, PUBLISHED IN THE CITY OF CHARLESTON, KANAWHA COUNTY, WEST VIRGINIA, DO SOLEMNLY SWEAR THAT THE ANNEXED NOTICE OF: AMENDED NOTICE

WAS DULY PUBLISHED IN SAID PAPER(S) ON THE DATES LISTED BELOW, AND WAS POSTED AT THE FRONT DOOR OF THE COURT HOUSE OF SAID KANAWHA COUNTY, WEST VIRGINIA, ON THE

24TH DAY OF MAY , 1990 .

DATES PUBLISHED:

05/23/90 GAZETTE

SUBSCRIBED AND SWORN TO BEFORE ME THIS

25TH DAY OF MAY , 1990 .

Frances A. Hartman

NOTARY PUBLIC OF KANAWHA COUNTY, WEST VIRGINIA

PRINTERS FEE $ 10.37

OFFICIAL SEAL
NOTARY PUBLIC
WEST VIRGINIA
TMAN
25314
My Commission Expires Dec. 19, 1999

AMENDED
LEGAL NOTICE

Public take notice that the West Virginia Public Energy Authority will hold, pursuant to the provisions of Chapter 29A of the Code of West Virginia, a PUBLIC HEARING on May 30, 1990, at 10:00 a.m. at the Holliday Inn, Clarksburg/Bridgeport, West Virginia (Exit 119 of Interstate 79), on proposed regulations of the West Virginia Public Energy Authority concerning: (1) procedures for giving notice to public and media of PEA meetings; (2) establishing fee schedule and cost allocations to issue bonds; and (3) establishing rules and procedures for PEA's exercise of powers of Eminent Domain. Copies of the proposed regulations are available upon request.

(811258)

Draft Copy
For Review

BOARD MEETING

OF THE

WEST VIRGINIA PUBLIC ENERGY AUTHORITY

May 30, 1990
Holiday Inn
Clarksburg, West Virginia

The meeting of the West Virginia Public Energy Authority was held on May 30, 1990, at the Holiday Inn, Clarksburg, West Virginia. Chairman Williams convened the meeting at 10:06 a.m.

Board Members Present:

Steven R. Williams
Mike Browning
Thomas A. Cerra
Carroll H. Curry
Paul P. Fulks
Thomas H. Sharpe
Jimmy Joe Wedge

Board Members Absent:

S. Austin Caperton, III
Charles R. Hooten, Jr.

Others Present:

J. David Cecil	Counsel for Public Energy Authority
Dwight Keating	Business Consultant
Norman Kilpatrick	Surface Mining Research Library
Al Ducci	
Carl Irwin	West Virginia University
Teed Wafle	Morgantown Energy Association

Chairman Williams opened the meeting by asking for approval of the board minutes for March 14, 1990. Mr. Cerra made a motion, Mr. Wedge seconded the motion. The motion was passed unanimously. Chairman Williams asked Mr. Cecil for his comments on the Rules and Regulations.

Mr. Cecil stated that the rules and regulations dealt with the following: (1) The notice of meetings of the Public Energy Authority, (2) The establishment of fee schedules and cost allocations for the issuance of bonds by the Authority, and (3) The exercise of powers of eminent domain, which basically provided notice and protection to the land owners.

Chairman Williams asked if anyone from the public wished to comment on the rules and regulations. There being none, Chairman Williams then asked Mr. Wafle to give an update on the Morgantown Energy Project.

Mr. Wafle stated that the major undertaking which they had to do was to demolish the Old Glass Plant and treat the soil which had been contaminated. The cost of the treatment effort at the time of completion would be approximately $2.5 million. As of February 22, all of the soil had been treated. Due to the large quantity of the soil, the site grade had to be raised a total of five feet during the process to accommodate the extra volume of material.

The main contractor for the project is Bechtel Power Construction Company from Maryland. Due to the mild winter, completion of the project is ahead of schedule. The original project completion date is June, 1992 and they are projecting completion three months prior to that date. The total project cost to date is over $44 million. The total project budget is $170 million.

Mr. Cerra asked, "Was the M.O.V.E. appeal based on specific things or was it part of their general attack on the whole project?" Mr. Wafle replied that M.O.V.E. had appealed every permit on the same grounds, saying that the City of Morgantown did not act properly by giving MEA a permit for that site. They have appealed four permits. Three of the permits were governing Bechtel work. Fortunately, Bechtel had applied early enough for their permits that the appeal process had not really affected them. The permit for the steam line is the first one which will have an impact on the project.

They have had two hearings at the Board of Zoning Appeals for the first two permits. The Board of Zoning Appeals upheld the permit by unanimous vote in both cases. M.O.V.E. immediately appealed that ruling to the Circuit Court of Monongahela County, and the first permit that was upheld in December had been appealed to the Circuit Court of Monongahela County. They had a hearing before the judge on May 9, 1990, and MEA is expecting a decision at any time. Another Bechtel permit had been appealed and MEA has a hearing scheduled for June 13 before the Board of Zoning Appeals. Work under that permit has stopped and fortunately, none of that work is critical and is not scheduled to start until after that time. Assuming that the appeal is upheld again by the Board of Zoning Appeals, the stop work order would be lifted and MEA would foresee no problems.

Mr. Cecil inquired if the EPA problem had been resolved. Mr. Wafle stated that it essentially resolved. The latest "wrinkle" in the EPA fallout from the EPA review was that the Air Pollution Control Commission had scheduled a hearing to review the consent order that the University had originally received when they decided to stop burning coal and burn gas temporarily.

Chairman Williams then discussed the minutes regarding the meeting which he, Len Harvey, Dwight Keating and Austin Caperton had with William Berry, Chairman of Dominion Resources, parent company of

Virginia Electric Power Company; Jim Rhodes (Phonetic), President of Virginia Electric Power Company; and Larry Ellis, Vice President and Assistant Planning and Power Supply Manager.

Chairman Williams stated that at the last meeting, Len Harvey had set up a meeting on April 25, 1990, with VEPCO to try to ascertain their level of interest in West Virginia. In trying to summarize the prospects, Chairman Williams felt that they were very discouraging as far as Virginia's political and economic interest in having a major transmission line built that would require them to commit to purchase 1,000 megawatts commencing over a one - to two - year period. VEPCO felt that it was not politically feasible, as they are basically a Virginia Corporation and have their own interest for power generation in Virginia. From a standpoint of committing that much to a single source of future generating capacity, it gave them some concerns about what would happen if the project did not come through when it was needed.

Chairman Williams felt that the positive side of the meeting was AEP and APCO had announced jointly with VEPCO the plans to enhance the transmission interconnections with the two companies in finding a construction of 765kv line that would essentially run across the southern part of West Virginia and tie into VEPCO's system. Chairman Williams stated that the power may or may not go over the 765kv line, but by building the line they could take some of the load from the other lines that might make additional tie-in spots. In Austin Caperton's absence, Chairman Williams stated that he could not speak for Mr. Caperton, but he felt like the Authority and West Virginia's efforts should focus on the announced transmission line.

Chairman Williams stated that they had scheduled a meeting on June 13, with Dick Northup, Vice President of Appalachian Power Company, in order to try to determine what kind of commitments the Authority might be able to obtain from them with regards to West Virginia. Chairman Williams then asked Mr. Dwight Keating for his comments regarding the meeting with VEPCO.

Mr. Keating stated that VEPCO wanted the line for several purposes. First, to relieve the northern part of the system where they are overloaded, as VEPCO had a real strong desire for the line to be built. Second, it will provide additional system security. Third, it allows access to additional generating capacity.

Chairman Williams stated that there are some issues that the Board needs to discuss with regard to public interest which needs to remain confidential in complianace with the Public Information Act. The Chairman then asked if there were any additional business to discuss before the Board went into Executive Session.

Mr. Cecil stated that the Board needed to vote on the rules and regulations.

Chairman Williams asked for a motion to pass the rules and regulations. Mr. Cerra made a motion and Mr. Sharpe seconded the motion. The motion was passed unanimously. The meeting then went into Executive Session.

Following Executive Session, Chairman Williams stated that subject to approval of the Governor, the Board would like to retain Mr. Keating to assist the Board in pursuing power transmission opportunities. Mr. Cerra made a motion and Mr. Curry seconded the motion. The vote was passed unanimously.

There being no further business, the meeting was adjourned at 12:04 PM.