

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

FILED

AUG 20 3 10 PM '93

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: West Virginia Development Office TITLE NUMBER: 145

CITE AUTHORITY: W.Va. Code 5B-2-3(e)

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W.Va. Code 5B-2-3(e)

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

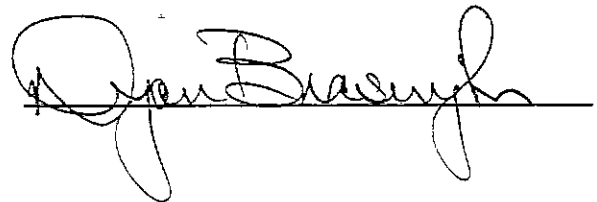
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: Series 5

TITLE OF RULE BEING ADOPTED: General Administration of the Industrial
Development and Commercial Development Bond Act: Establishment of
Application Procedures.

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS Sept 20, 1993



TITLE 145

PROCEDURAL RULE

WEST VIRGINIA COUNCIL FOR COMMUNITY
AND ECONOMIC DEVELOPMENT

SERIES 5

GENERAL ADMINISTRATION OF THE INDUSTRIAL
DEVELOPMENT AND COMMERCIAL DEVELOPMENT BOND ACT:
ESTABLISHMENT OF APPLICATION PROCEDURES

1-1-1. General.

1.1 Scope.-- This procedural rule governs the application procedure of those applying to the West Virginia Development Office for Industrial Revenue Bonds made available pursuant to West Virginia Code § 13-2C-21 [1989].

1.2 Authority. -- West Virginia Code § 5B-2-3(e).

1.3 Filing Date. -- July 16, 1993.

1.4 Effective Date. -- August 16, 1993.

1-1-2. Application and Enforcement.

2.1 Application. -- These procedural rules shall apply to the Council, the West Virginia Development Office, and all governmental bodies or persons applying for any portion of any future year's Industrial Revenue Bond allocation, as made available pursuant to West Virginia Code § 13-2C-21 [1989].

2.3 Enforcement. -- The enforcement of this rule shall be vested with the West Virginia Development Office.

1-1-3. Definitions.

3.1 "Act" means the Industrial Development and Commercial Development Bond Act, West Virginia Code § 13-2C- 1 et seq.

3.2 "Applicant" means the entity applying for industrial revenue bonds made available pursuant to West Virginia Code § 13-2C-21 [1989], including lessees, purchasers or owners of proposed commercial or industrial projects.

3.3 "Council" means the West Virginia Council for Community and Economic Development.

3.4 "Development Office" means the West Virginia Development Office.

3.5 "Director" means the executive director of the Development Office.

1-1-4. Bonding Authority.

4.1 State Bonding Allocations. -- On or before the first day of each calendar year, the Director shall determine the state ceiling based upon criteria in the United States Revenue Code.

4.2 Housing Development Fund Allocation. -- Fifty million dollars of the state ceiling shall be allocated to the Housing Development Fund for the purpose of issuing qualified mortgage bonds, qualified mortgage certificates, or bonds for qualified residential rental projects.

4.3 County Allocation. -- One half of the funds remaining after the Housing Development Fund allocation has been made shall be allocated to the counties on a per capita basis.

4.4 State Allocation. -- One half of the funds remaining after the Housing Development Fund allocation has been made shall be retained by the Development Office.

1-1-5. County Notification and Use Restrictions.

5.1 Notification. -- On or before the first day of January of each calendar year, the Director shall notify each clerk of the county commission of that county's apportionment.

5.2 Use by County. -- Individual county apportionments shall be used for issues of the county commission of that county and for issues of all municipalities or other governmental bodies within the county for the benefit of lessees, purchasers or owners of proposed commercial or industrial projects.

1-1-6. Reallocation by the State.

6.1 Reallocation Qualification. -- If the state allocation is fully distributed prior to the first day of July of each calendar year, the Development Office may reallocate to the state any or all of the remaining county allocation.

6.2 Notification. -- If reallocation is sought, the Director must notify the clerk of each county commission so affected.

6.3 Proportional Reallocation. -- Any reallocation of less than all of the then remaining county allocation shall be made proportionately from each county's then remaining allocation.

1-1-7. Notice of Inducement.

7.1 Resolution by Government Body. -- Prior to application, the involved governmental body must first adopt an inducement resolution approving the prospective issuance of bonds and setting forth the amount of bonds to be issued.

7.2 Notice of Inducement. -- Following the adoption of an inducement resolution, each governmental body seeking an allocation shall submit to the development office a notice of inducement signed by its clerk, secretary or recorder, or other appropriate official.

7.3 Information Required. -- The notice of inducement shall include information regarding the number of jobs that will be created by the project, an overview of the financing package of the project, and any material that the governmental body seeking the allocation deems necessary for appropriate review. Further, the Development Office reserves the right to request further information which it deems necessary for appropriate review.

1-1-8. Notice of Reservation of Funds.

8.1 Notice of Reservation of Funds. -- With or following proper notice of inducement resolution, the governmental body may submit its notice of reservation of funds. This notice of reservation shall include the following information:

- (a) Date of the notice of reservation of funds;
- (b) Identity of the governmental body issuing the bonds;
- (c) Date of inducement and the prospective date of issuance;
- (d) Name of the entity for which the bonds are to be issued;
- (e) Amount of the bond issue;
- (f) Type of issue; and
- (g) Project description for which bonds are to be issued.

8.2 Acceptance by Development Office. -- Each Notice of Reservation of Funds submitted with the proper information provided above shall be accepted, time stamped, and thereby qualified by the West Virginia Development Office no sooner than the first work day of May 1994, and for years thereafter, the first work day of the calendar year for which the application of funds is being made.

8.3 First Come, First Serve Allocation. -- State and County allocations to applicants shall be distributed on a first come, first serve basis, subject to the qualifications elaborated upon in the above subsection.

1-1-9. Certification.

9.1 Certification by State. -- If the state ceiling has not been exceeded, within ten days of the date stamp of the notice of reservation

of funds, the development office shall notify the governmental body submitting the reservation of funds that the amount of the bond issue has been allocated and reserved in the name of such governmental body for the project for which the bonds are to be issued.

9.2 Duration of Certification. -- If the certified bond issue has not been closed and a statement of bond closure duly executed by the clerk, secretary, recorder or other appropriate official of the governmental body reserving the same has not been received by the Development Office within one hundred twenty days of the date of the certification of reservation or before the thirty-first day of December following such date of certification if sooner, then the reservation shall expire and be forfeited.

1-1-10. Apportionment Exceeded.

10.1 Notification. -- If the amount required in the notification of reservation exceeds the available county apportionment, the Development Office shall immediately notify the governmental body proposing the issue.

10.2 Reapplication. -- Upon being notified, the governmental body may submit a new notice of reservation which is subject to the same guidelines, procedures and qualifications provided in section eight above. However, the time and date stamp of the original notice of reservation shall be controlling.

1-1-11. Forfeiture and Reversion.

11.1 Expiration of Funds. -- Upon expiration, the funds shall revert to the county and/or state allocation from which the funds were originally reserved. Upon reversion, the funds shall be available for other qualified issues.

11.2 Unexpirable Funds. -- As to any notice of reservation of funds received by the Development Office during the month of December in any calendar year with respect to any project qualifying as an elective carry forward pursuant to 26 U.S.C. § 146(f), such funds shall not expire or be subject to forfeiture.

11.3 Expiration of County Allocation. -- Any county allocation unreserved on the first day of October in any calendar year shall revert to the state allocation for the remainder of the year.

11.4 State Ceiling Funds Expired. -- Any unused state ceiling funds as of the thirty-first day of December in any year not otherwise subject to the above carry forward shall be allocated to the West Virginia Housing Development Fund.

11.5 Request for Forfeited Funds. -- Requests for reservation of forfeited or reallocated funds will be treated in accordance with section

eight above. However, the time and date stamp of the original notice of reservation shall be controlling.

1-1-12 Allocation for Subsequent Year.

12.1 Discretion to Give Subsequent Year Allocation -- When the proposed bond issuance is for the purpose of constructing an energy producing project which relies, in whole or in part, upon coal waste as fuel and qualifies as a solid waste facility under Internal Revenue Code § 142(a)(6), the project may, at the Director's discretion, be given an allocation from the state ceiling for any year subsequent to the year in which the application is made.

12.2 Housing Development Fund Monies Excluded. -- Subsequent year allocations cannot be made from future funds statutorily allocated to the Housing Development Fund.

12.3 Single Project Maximum. -- No discretionary allocation shall be made to any single project in an amount in excess of forty percent of the state ceiling available for any year subsequent to the year in which the request is made.

12.4 Federal Energy Regulatory Commission Certification. -- A discretionary allocation for a subsequent year shall not be granted unless the project for which the request is made has been certified as a qualifying facility or a cogeneration project by the Federal Energy Regulatory Commission.

12.5 Duration of Specific Certification. -- This form of reservation shall remain fully available until the first day of October in the year from which the reservation of allocation was made.

12.6 Expiration. -- If the bond issue has not been finally closed as of the first day of October in the year which the allocation was made, then the reservation expires and is deemed forfeited and such funds shall be released as provided in section eleven above.



West Virginia Development Office

Gaston Caperton, Governor



Dyan Brasington, Executive Director

Charleston, West Virginia 25305-0311

August 20, 1993

The Honorable Ken Hechler
Secretary of State
State of West Virginia
State Capitol Complex
Charleston, West Virginia 25305

Dear Mr. Secretary:

Attached please find formal notice of the adoption of a procedural rule submitted by the West Virginia Development Office, as more fully detailed on said notice. (Attachment A)

Pursuant to your regulation[s], a thirty day comment period was noticed by this office. During the period, which expired on August 16, 1993, one submission was received. (Attachment B) However, after carefully reviewing the submitted commentary, the Development Office has decided to adopt the rule as originally submitted.

As always, thank you for your prompt attention, and please feel free to call with questions and concerns.

Genuinely,

Michael J. Basile
General Counsel

:mjb

Attachments

cc: Robert Winter, Monongahela Power Co.

**Monongahela Power Company**

Part of the Allegheny Power System

ROBERT R. WINTER
Vice President, Legal Services

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August 13, 1993

WVEDA

Ms. Dyan Brasington
West Virginia Development Office
State Capitol Complex
Building 6, Room 504
Charleston, WV 25305-0311

Re: Industrial Development and Commercial Development
Bond Act -- Proposed Application Procedures-Title
145, Series 5

Dear Ms. Brasington:

The following comments are submitted on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (the "Companies") with respect to the proposed rule filed with the Secretary of State by the West Virginia Development Office (the "Office") concerning application procedures under the Industrial and Commercial Development Bond Act, West Virginia Code, Sections 13-2C-1 through 13-2C-21 (the "Act").

Each company has availed itself of tax exempt financing whenever possible in order to provide lower cost service to its customers. These financings have been used to build facilities that have resulted in a cleaner environment, enhanced long-term economic development opportunities in the state and provided a significant economic boost for the area during the construction stage of each project and thereafter. For example, the Harrison County Commission issued and sold bonds under the Act in May, 1992 and May, 1993 to help finance solid waste disposal facilities associated with the Harrison Power Station scrubber project. The scrubber project created over 600 construction jobs in 1992 and is currently employing over 1,000 workers. The average monthly payroll over the expected 43-month construction period will be over \$1 million. Long term the project preserves the jobs of approximately 2,200 coal miners and the jobs of 5,500 other workers in related industries, and the use of lower cost financing helps us to keep electric rates competitive to attract new economic development projects.

We very strongly believe that this project and earlier projects undertaken by the companies using tax-free financing have served the public interest well both short and long term

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and are the kinds of projects intended to be benefited by the Act, and we believe that the statutory "first come, first serve" basis for allocating funds has worked reasonably well.

We recognize that in recent years applications for larger amounts of tax-free financing have become more commonplace and this has resulted in requests exceeding the federal cap. Because of this, we understand the need to have a more formal procedure in place. However we do have some concerns regarding the proposed procedural rule.

In the first place, the proposed moratorium as provided in Section 1-1-8.2 of the rule is not consistent with the Act. Section 13-2C-21(b) of the Act provides that the state ceiling will be determined on or before the first day of each calendar year and allocated to the West Virginia Housing Development Fund, the state and the counties in accordance with that section. Section 13-2C-21(f) of the Act provides that the governmental body proposing to issue bonds may "at any time deemed expedient by it" submit its notice of reservation of funds concurrently with or following submission of its notice of inducement as provided in Section 13-2C-21(e).

As a practical matter, a five month moratorium effectively will prevent issuance and sale of bonds under the Act until late summer and early fall of 1994. This could automatically preclude some worthwhile projects from being undertaken and delay or prevent lower cost financing for on-going projects.

Accordingly, we suggest that Section 1-1-8.2 of the rule be revised by deleting the phrase "the first work day of May 1994, and for years thereafter,". The result of this change would be that notices of reservation of funds would be accepted no sooner than the first work day of 1994 as has been the case in prior years and will be the case in future years.

Our second concern relates to the provision of Section 1-1-7.3 of the rule specifying information to be provided with the notice of inducement. We believe that the requirements of Section 1-1-7.3 are too vague to be of much use in evaluating the merits of each project. The provision that the governmental body filing the notice of inducement submit "any material that the governmental body seeking the allocation deems necessary for appropriate review" does not lend itself to submission of consistent data about each proposed project. If the Office proposes to evaluate projects in some manner prior to approving an allocation, it is imperative that the rule be expanded and clarified to require more specific and consistent information about each project and indeed that any standard for review of projects be carefully crafted and

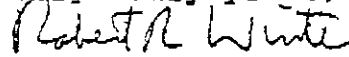
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clearly articulated to identify in a fair and unbiased manner those projects which would best serve the purposes set forth in Section 13-2C-2 of the Act. It is important that the limited resources available under the Act be utilized in a way that best serves the public interest. However, it is unclear that the review contemplated by Section 1-1-7.3 is consistent with the "first come, first serve" allocation standard in Section 13-2C-21(e) of the Act.

To summarize, we commend the Office on its effort to establish procedural regulations. However, we believe the provision of Section 1-1-8.2 of the rule deferring acceptance of notices of reservation of funds until May 1994 is contrary to the Act and as a practical matter forecloses tax-exempt financing for most of 1994. In addition, the information requirement of Section 1-1-7.3 of the rule is too vague and in any event is probably of little practical use in light of the "first come, first serve" provision of the Act. Finally, we suggest that any proposed procedural changes become effective in 1995. This would permit their more orderly implementation.

We very much appreciate this opportunity to comment.

Very truly yours,



Robert R. Winter



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Deputy Secretary of State

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(Plus all the volunteer
help we can get)

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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

TO: Dyan Brasington

AGENCY: Development Office

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: January 28, 1994

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 5 TITLE: 145 Development Office

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: *Michael R. Bate*

TITLE OF PERSON SIGNING: General Counsel

DATE: February 4, 1994

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.