



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF AN EMERGENCY RULE

AGENCY: Public Energy Authority TITLE-SERIES: 53-05

RULE TYPE: Legislative Amendment to Existing Rule: No

RULE NAME: Rule to Petition the Public Energy Authority for
Approval of Decommissioning or Deconstruction
Activities Related to Any Coal, Oil, or Natural Gas
Fueled Power Plant

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

W. Va. Code 5d-1-5c(c)

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

PRIMARY CONTACT:

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THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY THE SECRETARY OF STATE OR THE 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST. THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Statement of Facts and Circumstances new emergency rule, Public Energy Authority (SB 609)

During the 2023 Regular Legislative Session, the West Virginia Legislature passed, and Governor Justice signed, Senate Bill 609 (SB 609 or Bill). The Bill amended the Public Energy Authority's oversight and regulatory powers relating to and requiring the approval of the Public Energy Authority before decommissioning or deconstructing an existing coal, oil, and natural gas fueled electric power plant. SB 609 authorizes the Public Energy Authority (PEA) to promulgate legislative rules, and it also requires the promulgation of emergency rules.

The Public Energy Authority is authoring this rule under its emergency authorization because the Authority needs emergency rules in place to adequately assert the public's interest in determining the viability of power plants across the State. So that the public, power plant owners and operators, and the Authority itself, are aware of and understand the process now required to undertake decommissioning or deconstruction activities for fossil fuel fired power plants, it is necessary to promulgate this emergency rule and establish a set procedure.

Interested entities include, but are not limited to:

Public Service Commission
Department of Environmental Protection
Department of Revenue
County Commissions
FERC
PJM
Electric Utilities

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND OR EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

n/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

n/a

C. ECONOMIC IMPACT ON THE STATE OR ITS RESIDENTS:

n/a

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

No fiscal impact.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Graham Platz--By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

Title 53
Legislative Rule
Public Energy Authority

Series 5

**RULE TO PETITION THE PUBLIC ENERGY AUTHORITY FOR APPROVAL OF
DECOMMISSIONING OR DECONSTRUCTION ACTIVITIES RELATED TO ANY COAL, OIL,
OR NATURAL GAS FUELED POWER PLANT**

§53-5-1. General.

- 1.1. Scope -- The following rule governs the petitioning of the Public Energy Authority for approval of decommissioning or deconstruction activities for any coal, oil, or natural gas fueled power plant and sets forth the requirements and administrative procedure for that process.
- 1.2. Authority -- W. Va. Code § 5D-1-5c(c).
- 1.3. Filing Date --
- 1.4. Effective Date --
- 1.5. Sunset Provision --

§53-5-2. Definitions.

2.1. "Alternative fuel source" means a source of fuel other than coal, oil, or natural gas; Provided, that current coal plants may consider natural gas an alternative fuel.

2.2. "Authority" means the West Virginia Public Energy Authority, as established in W. Va. Code §5D-1-1 et seq.

2.3. "Chair" means the Chair of the West Virginia Public Energy Authority.

2.4. "Decommissioning activities" means any activity that removes from service or facilitates, furthers, or otherwise prepares for the removal from service, any coal, oil, or natural gas fueled power plant.

2.4.1. "Decommissioning activities" does not include any regulatory action before the Public Service Commission of West Virginia ("PSC") or the PJM Interconnection initiated by the Petitioner in anticipation of filing a Petition under this rule.

2.5. "Deconstruction activities" means any activity to dismantle, disassemble, or to reduce a coal, oil, or natural gas fueled power plant into its constituent parts such that the plant is no longer able to generate electricity.

2.5.1. "Deconstruction activities" does not include any regulatory action before the PSC or the PJM Interconnection initiated by the Petitioner in anticipation of filing a Petition under this rule.

2.6. "Facility" means the coal, oil, or natural gas fueled power plant that is the subject of the Petition pursuant to W.Va. Code §5D-1-5c, including the parcel of real property upon which the Facility is located, and all other structures, attachments, fixtures, improvements, or personal property, whether above-ground or below-ground, used by the Facility.

2.7. “Generating unit” means a generator and its excitation system which converts primary energy into electric energy.

2.8. “Green technologies” means technologies that emphasize low carbon emissions.

2.9. “Non-producing” means a power plant that is not generating electricity for local or regional grids.

2.10. “Novel technologies” means new and different technologies not currently used by the Facility, including unprecedented combinations of existing technologies.

2.11. “Owner” means the person(s) or entity having title to the Facility.

2.12. “Operators” means the person(s) or entity having responsibility for the day-to-day operations of the Facility.

2.13. “Petitioner” means the Owner(s) of the Facility and the person(s) or entity seeking approval for decommissioning or deconstruction activities.

2.14. “PJM Interconnection or PJM” means the regional transmission organization that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.

2.15. “PSC” means the Public Service Commission of West Virginia, as established in W. Va. Code §24-1-1 *et seq.*

2.16. “Third-party evaluator” means the person selected by Petitioner, and approved by the Authority, to conduct an independent and unbiased analysis of Petitioner’s request for decommissioning or deconstruction activities.

2.17. “Unreasonably withheld” means to withhold, arbitrarily and capriciously, the approval of decommissioning or deconstruction activities without consideration or regard for the facts and circumstances presented.

2.18. “Utility” means any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, distributing or selling electric energy for light, heat, power, or other purposes, which are now or may hereafter be held to be a public service.

§53-5-3. Eligibility to petition for decommissioning or deconstruction activities; Exempt from rule.

3.1. Petitioners shall meet the following requirements prior to petitioning the Authority for approval to undertake decommissioning or deconstruction activities:

3.1.1. If Petitioner is a utility, regulated by the PSC, it shall first obtain approval from the PSC on Petitioner’s planned decommissioning or deconstruction activities, in accordance with W. Va. Code §24-1-1 and W. Va. Code §24-2-5.

3.1.2. If the Facility is connected to the PJM Interconnection, Petitioner shall obtain a deactivation analysis in compliance with PJM Manual 14D, Section 9: Generator Deactivations.

3.1.3. The Facility shall be in material compliance with all applicable local, state, and federal regulations.

3.1.4. Petitioner provides notice to the West Virginia Department of Environmental Protection (“DEP”) of its intent to undertake decommissioning or deconstruction activities and requests from the DEP a pre-closure inspection to identify areas of concern.

3.2. Any coal, oil, or natural gas fueled power plants that have been non-producing prior to March 6, 2018, are exempt from this rule.

§53-5-4. Notice.

4.1. Petitioners shall file a Notice of Decommissioning or Deconstruction Activities (“Notice”) with the Authority prior to Petitioning for approval of decommissioning or deconstruction activities.

4.2. The Notice shall include:

4.2.1. The name and physical address of the Facility.

4.2.2. The name, address, and telephone number of each owner and operator of the Facility.

4.2.3. The nameplate statistics for the Facility, including the fuel source, capacity, net capacity factor, and carbon emissions.

4.2.4. The PSC’s order approving decommissioning or deconstruction activities, if applicable.

4.2.5. The Deactivation Analysis performed by PJM, if applicable.

4.2.6. A summary of the proposed decommissioning or deconstruction activities and the commencement date of those activities.

4.2.7. A statement explaining the need for decommissioning or deconstruction activities.

4.2.8. The Facility’s estimated life-expectancy when it was constructed, and the Facility’s estimated life-expectancy as of the date of the Petition.

4.2.9. The name, address, and telephone number of the proposed third-party evaluator.

4.2.9.a. Petitioners shall include supporting justifications for their selection of the third-party evaluator, including but not limited to experience, industry qualifications, and professional associations.

4.3. Eight (8) copies of the Notice shall be filed with the Authority, in addition to the requirements set forth in sections 6.1., 6.2., 6.3., and 6.4. of this rule.

4.4. The Authority shall review the proposed third-party evaluator upon receipt of Petitioner’s Notice and Certification of Service and will determine whether the third-party evaluator has the experience and qualifications to conduct an objective, quantitative and qualitative analysis.

4.4.1. The third-party evaluator should be capable of performing an analysis of the size and scope outlined in this rule, capable of distilling large amounts of data and information, and capable of communicating the findings of the analysis clearly.

4.4.2. If the Authority denies the Petitioner’s choice of third-party evaluator, the Petitioner shall have thirty (30) days from the denial to propose another third-party evaluator for approval by the Authority.

4.4.3. If the Authority approves the Petitioner’s choice of third-party evaluator, the Petitioner shall have ninety (90) days from the issuance of the approval of the Petitioner’s third-party evaluator to perfect the petition.

§53-5-5. Petition Requirements.

5.1. Each petition shall include the following minimum requirements:

5.1.1. An analysis by the third-party evaluator that evaluates, through objective quantitative and qualitative analysis, the social impact the decommissioning or deconstruction activities will have at a local and statewide level, including, but not limited to:

5.1.1.a. Other potential uses of the Facility, including the implementation of novel and green technologies or alternative fuels within the Facility.

5.1.1.b. Any actions to be taken by the Petitioner to prevent the Facility from becoming a nuisance or safety concern to the local community.

5.1.1.c. The impact on the local community's ability to support and maintain existing residents and businesses.

5.1.1.d. Any actions already taken by the Petitioner to offset any anticipated social impacts.

5.1.2. An analysis by the third-party evaluator that evaluates, through objective quantitative and qualitative analysis, the environmental impact the decommissioning or deconstruction activities will have at a local and statewide level, including, but not limited to:

5.1.2.a. All entities that are currently liable for the Facility's environmental liabilities.

5.1.2.b. Whether the Facility is following all applicable terms and conditions of its Title V operating permit pursuant to W. Va. CSR §45-30-6, including the payment of fees pursuant to W. Va. CSR §45-30-8.

5.1.2.c. The number, size, and location of all ash ponds, embankments, or impoundments used by the Facility.

5.1.2.d. Whether there has been any settlement, movement, erosion, seepage, leakage, cracking, or other deterioration of any Facility ash pond, embankment, or impoundment.

5.1.2.e. Any analysis of the hazard potential resulting from the failure or breach of any Facility ash pond, embankment, or impoundment.

5.1.2.f. Whether, and in what amount, there are currently pollutants, chemicals, or other hazardous materials stored or located within the Facility.

5.1.2.g. Whether there has been any soil or groundwater contamination resulting from the release or discharge of any pollutants, chemicals, or other hazardous material from the Facility.

5.1.2.h. Any actions taken by the Petitioner to offset any anticipated environmental impacts resulting from the decommissioning or deconstruction activities.

5.1.3. An analysis by the third-party evaluator that evaluates, through objective quantitative and qualitative analysis, the economic impact the decommissioning or deconstruction activities will have at a local and statewide level, including, but not limited to:

5.1.3.a. The anticipated job loss at the Facility.

5.1.3.b. The anticipated job loss for vendors and other businesses providing goods and services to the Facility.

5.1.3.c. The impact on revenues for school districts and local, county, and state governments.

5.1.3.d. The amount of coal, oil, or natural gas used annually by the Facility for the previous five (5) years.

5.1.3.e. The amount of severance tax paid annually to the State of West Virginia for the coal, oil, and natural gas used by the Facility for the previous five (5) years.

5.1.3.f. Any actions taken by the Petitioner to offset any of the anticipated economic impacts.

5.1.4. A detailed explanation of the funds Petitioner currently has set aside, committed, and available to complete the decommissioning or deconstruction activities, including:

5.1.4.a. The amount of funds set aside, committed, and available.

5.1.4.b. Whether Petitioner has secured contingency financing in the event the total cost of decommission or deconstruction of the Facility exceeds the amount of funds set aside by Petitioner.

5.2. A petition shall also include, attached as exhibits:

5.2.1. A copy of the third-party evaluator's analysis; Provided the analysis may be summarized in the Petition itself.

5.2.2. Copies of all federal, state, or local permits pertaining to the Facility that are applicable and in effect as of the date the Petition was filed.

5.2.3. Copies of all Certificates of Convenience and Necessity, if any, granted to the Facility from any federal, state, or local governmental entity.

5.2.4. Copies of all Certificates of Approval or Authorization for the Facility, including for any of its ash ponds, embankments, or impoundments, issued by any federal, state, or local governmental agency.

5.2.5. A certified survey or plat of the Facility identifying:

5.2.5.a. The perimeter of the real property of the Facility.

5.2.5.b. Cooling towers.

5.2.5.c. Chimney stacks.

5.2.5.d. Generating units.

5.2.5.e. Ash ponds, embankments, and impoundments.

5.2.5.f. Transmission lines.

5.2.5.g. Railroad tracks.

5.2.5.h. Barge loading and unloading facilities.

5.2.5.i. Natural gas or oil pipelines.

5.2.5.j. Above-ground storage tanks.

5.2.5.k. Below-ground storage tanks.

5.2.5.l. Coal stockpiles.

5.2.5.m. Coal conveyors.

5.2.5.n. Electrical transformers.

5.2.5.o. Areas where chemicals, pollutants, or other hazardous materials are stored, located, or have been discharged.

5.2.5.p. Any other improvement, attachment, fixture, or structure, whether above-ground or below-ground, necessary for the operation of the Facility.

5.2.6. A detailed description of the planned decommissioning or deconstruction activities to be performed at the Facility, including, but not limited to:

5.2.6.a. Planned decommissioning or deconstruction activities and whether those activities will be performed by the Owner, Operator, or third-party.

5.2.6.b. Waste processing, storage, and disposal activities, including the removal of hazardous waste from the Facility.

5.2.6.c. Site security, surveillance, and maintenance activities, including the provision of security and surveillance services; the erection of fences, access gates, and intrusion detection systems; and routine maintenance, grounds keeping activities, road upkeep, and flood controls.

5.2.6.d. Site restoration and environmental remediation activities, which shall include the removal and remediation of all ash ponds, embankments, or impoundments, the removal of contaminated soil or groundwater, reclamation to prevent erosion, and the placement of permanent markers to identify buried foundations, pipelines, or conduit.

5.2.6.e. A cost estimate for the completion of the decommissioning or deconstruction activities of the Facility, including an itemization of the estimated cost of compliance with each of the individual activities listed in 5.2.6. and an estimated timeline for the completion of each of the activities listed in 5.2.6.

5.2.7. Copies of all federal, state, and local safety and environmental inspection reports, findings, violations, and notices for the previous five (5) years.

5.2.8. Copies of all currently binding, pending, or unresolved consent orders, orders of compliance, citations, violations, or penalties issued to the Facility by any federal, state, or local governmental entity.

5.2.9. Copies of the most current and accurate appraisal of the Facility.

5.2.10. A detailed list of the upgrades made to the Facility since its original construction, including, but not limited to, the purpose of the upgrade, the date the upgrade was completed, and the cost of the completed upgrade.

5.3. Without prior approval from the Authority, a petition shall not exceed five (5) pages, not including attached exhibits listed in section 5.2. of this rule.

5.3.1. Text exceeding the five (5) page limit will not be considered.

5.3.2. Petitions shall be signed and verified by the Petitioner and third-party evaluator.

5.3.3. Eight (8) copies of the Petition shall be filed with the Authority.

§53-5-6. Format and filing requirements.

6.1. These format requirements apply to all Notices, Petitions, and Public Comments.

6.1.1. All filings shall be double spaced.

6.1.2. All filings shall be in 12-point, Times New Roman font.

6.1.3. All filings shall be justified and use 1-inch margins.

6.2. All Notices and Petitions shall be filed with the Authority via hand delivery or mail service to: Chairman of the Public Energy Authority, 1900 Kanawha Boulevard East, Building 3, Suite 800, Charleston, WV 25305.

6.2.1. All Notices and Petitions filed with the Authority shall include an electronic PDF version saved to a USB flash drive, submitted simultaneously with the filed paper copies of the Notice or Petition.

6.3. A copy of all Notices shall also be served upon:

6.3.1. The mayor of the city, town, or village where the Facility is located.

6.3.2. The county commission where the Facility is located.

6.3.3. The West Virginia State Tax Commissioner.

6.3.4. The Chairman of the West Virginia Public Service Commission.

6.4. Certification of service to the entities listed in section 8.3 of this rule shall be attached to the Notice filed with the Authority.

6.4.1. A signed written statement certifying service is sufficient to satisfy this requirement.

6.5. The format requirements in section 6.1. of this rule do not apply to exhibits attached to the Petition or Public Comments submitted electronically.

§53-5-7. Public comment.

7.1 A public comment period shall be a part of the petition process.

7.2. All public comments shall be filed within thirty (30) days of the date the Petition was published on the Authority's website.

7.3. Public comments may be filed by any interested person but shall prominently identify and be signed by the comment's proponent.

7.4. Public Comments shall relate only to the social, environmental, and economic impact of decommissioning or deconstruction activities.

7.5. Public Comments may be filed in the same manner as Notices and Petitions, as set forth in section 6.2. of this rule, or Public Comments may be filed electronically on the Authority's website.

7.5.1. For Public Comments filed under section 6.2. of this rule, one (1) copy of the Public Comment shall be filed with the Authority.

§53-5-8. Approval or denial of the Petition.

8.1. Prior to the Authority rendering its decision on the Petition, the Chair may request additional information from the Petitioner, any person or entity served a copy of the Notice under section 6.3. of this rule, or any other person or entity the Chair believes may have interest, information, or expertise related to the Petition.

8.1.1. The Chair shall request additional information on the Authority's behalf, including seeking an outside review of information submitted in the Petition.

8.1.2. The Authority's request for additional information will be published on the Authority's website.

8.1.3. The Petitioner is entitled to receive a copy of the additional information requested by the Authority, and the Authority will provide Petitioner with a copy of that information.

8.2. The Authority will approve the Petition if, in the Authority's discretion, based on the facts and circumstances presented in the Petition and the public comments, it would be unreasonable to withhold approval of the proposed decommissioning or deconstruction activities.

8.2.1. The decommissioning or deconstruction activities shall be carried out in compliance with the decommissioning or deconstruction plan submitted to the Authority.

8.2.2. All environmental liabilities shall be remediated by a specific date determined by the Authority and agreed to by the Petitioner as part of the decommissioning or deconstruction plan.

8.3. If the Authority, in its discretion, denies the Petition, the Petitioner is entitled to resubmit the Petition within ninety (90) days to address the problems identified by the Authority when it denied the Petition.

8.3.1. If the Authority, after considering the facts and circumstances presented in the Petition, denies the Petition, it will explain the reasons for its decision and why approval of decommissioning or deconstruction activities was not unreasonably withheld.

§53-5-9. Public document.

9.1. All documents filed with the Authority for purposes governed by this rule are public documents, and Petitions will be published on the Authority's website.

9.2. If a Petitioner believes that its filing contains confidential or proprietary information, it shall include with the Petition a letter describing the information believed to be confidential or proprietary and identify the specific West Virginia Freedom of Information Act exemption(s) believed to apply to the information, see W. Va. Code §29B-1-4.

9.2.1. The Chair shall determine what information is exempt from public disclosure and shall make any necessary redactions, prior to publishing the Petition on the Authority's website.