WEST virginia legislature

2021 regular session

Committee Substitute

for

Senate Bill 542

By Senator Phillips

[Originating in the Committee on Energy, Industry, and Mining; reported on March 11, 2021]

A BILL to amend and reenact §5D-1-2 and §5D-1-5 of the Code of West Virginia, 1931, as amended; to amend said code by adding thereto two new sections, designated §5D-1-5C and §5D-1-5D; and to amend said code by adding thereto a new section, designated §24-2-21, all relating to the Public Energy Authority Act of West Virginia; providing procedures to ensure that no more coal-fired plants close and long-term state prosperity is maintained; providing legislative findings; establishing additional powers, duties, and responsibilities of the West Virginia Public Energy Authority related to grid stability and homeland security; establishing requirements for public utilities to maintain maximum output, to the extent feasible, and to submit comprehensive operational plans to the West Virginia Public Energy Authority and Public Service Commission of West Virginia; providing for advance notification of retirement, shutdown, or sale of electricity generating units; and providing criteria for the commission to consider in approving retirement, shutdown, or sale of electricity generating units.

Be it enacted by the Legislature of West Virginia:

CHAPTER 5D. PUBLIC ENERGY AUTHORITY ACT.

ARTICLE 1. PUBLIC ENERGY AUTHORITY OF THE STATE OF WEST VIRGINIA.

§5D-1-2. Purpose and intent.

(a)The Legislature finds and declares that:

~~(a) That~~ (1) The long-term health and economy of the United States will depend upon the availability of reliable sources of energy;

~~(b) That~~ (2) The State of West Virginia has abundant reserves of coal, natural gas and other natural resources;

~~(c)~~ T~~hat~~ (3) The economy of the State of West Virginia needs a reliable and dependable market for the state’s coal, natural gas and other natural resources and the by-products thereof;

~~(d) That~~ (4) The State of West Virginia needs to encourage the efficient utilization and disposition of by-products resultant from the production of natural resources;

~~(e) That~~ (5) With all due regard to the protection of the environment and husbandry of the natural resources of this state, the health, happiness, safety, right of gainful employment and general welfare of the citizens of this state will be promoted by the establishment and operation of coal fired electric generating plants and transmission facilities and the establishment and operation of natural gas transmission projects and/or other energy projects; ~~and~~

~~(f)~~ ~~That~~ (6) The means and measures herein authorized for the financing, building and operation of the facilities described in ~~subsection (e)~~ subdivision (a)(5) of this subsection are, as a matter of public policy, for the public purpose of the state;

(7) Over 600 coal-fired electric units nationally have been forced to close;

(8) 18 coal-fired electric units within West Virginia’s borders have been forced to close;

(9) Markets for West Virginia coal have been severely diminished due to the closure of regional coal plants to the point that West Virginia coal shipments have been reduced from 162 coal plants a decade ago to only 43 plants today;

(10) West Virginia coal mines are forced to close, and West Virginia coal miners are forced out of work and homeland security and homeland defense measures are compromised and matters of long-term economic health, grid stability and resiliency are threatened;

(11) It is imperative the State of West Virginia take immediate steps to reverse these undesirable trends to ensure that no more coal-fired plants close, no additional coal jobs are lost, and long-term state prosperity is maintained;

(12) Throughout the past decade, no group has been hit harder by the decline of coal thatn West Virginia’s coal miners and their families. Many coal miners are struggling to make ends meet and provide for their families;

(13) In addition to working towards sustaining coal employment levels and coal-based, electric generation, the State of West Virginia should take immediate steps to provide education and training and retraining opportunities for displaced coal miners and their families;

(14) Coal-fired power plants owned by electric utilities in West Virginia provide electric utility customers in the state with reliable and affordable energy;

(15) West Virginia’s access to coal reserves has provided the citizens of the state with access to an energy resource that is affordable and accessible to coal-fired power plants in West Virginia;

(16) Electric utilities, West Virginia rate-payers, and citizens have made considerable investments in coal-fired power plants to comply with numerous environmental regulations;

(17) Electric utilities in West Virginia continue to modify and install environmental pollution controls on power plants to comply with federal and state environmental regulatory requirements to ensure that those facilities can continue to operate and serve the citizens of the state with reliable and affordable energy;

(18) Efforts by electric utilities to comply with environmental regulatory requirements at facilities used to generate coal-based electricity in this state involve the investment of capital and incurrence of associated incremental costs. Because electric utilities are required to install environmental pollution control equipment to comply with federal and state environmental regulations, the electric utilities should be permitted to recover the incremental rate of return, including related income taxes, depreciation, and property taxes associated with the environmental control equipment that the utilities are required to install on power plant without waiting for a full base-rate tariff filing;

(19) Matters generally related to homeland security and national defense are of paramount importance to West Virginia and its residents and coal-fired power plants provide optimal protection and resiliency toward state security and uninterrupted power supplies for household, industrial, and military applications;

(20) West Virginia coal-fired power plants continue to provide base load generation critical for maintaining slow, steady generation that produces power on a continuous cycle and ensures grid stability and protects against overloads and power shortages;

(21) West Virginia coal and electricity generated in West Virginia are relied upon throughout a multi-state region, thus playing a vital role in regional homeland security;

(22) West Virginia’s coal fleet, comprised of nine individual plants and 25 units, is fueled on average by a total of 25 million tons annually; accounts for over $2 billion of economic activity; and sustains approximately 3,500 mining jobs, 2,00 plant worker jobs, thousands of downstream and indirect local and surrounding-county jobs, and hundreds of millions of dollars of payroll and tax dollars; and

(23) The role of West Virginia and West Virginia coal in regional homeland security is of paramount importance; thus, it is incumbent for our state to continue to provide leadership in this increasingly critical area in order to sustain and protect our regional electric supplies.

(24) Electric utilities in West Virginia should be encouraged, to the extent feasible, to continue to operate their coal-fired plants at maximum reasonable output and for the duration of the expected useful life of the plants.

(b) Legislative purpose:

(1) Provide upgrade cost recovery measures and incentives for in-state power producers to ensure optimal efficiencies, environmental regulatory compliance, and extended operational plant life with improved heat rates, better emission controls, and improved overall performance;

(2) Compel in-state power producers to file compliance plans every three years with the Public Energy Authority, pursuant to §5D-1-1 *et seq*. of this code, which shall specify their fuel supply and total distribution of electricity; all necessary upgrades to be made in the next three-year cycle; status of all upgrades completed, announced, or previously incorporated into the plan for the previous cycle or cycles; and an accounting of all expenditures or costs which have been recovered pursuant to this section, all of which may be incorporated into “Integrated Resource Plans”;

(3) Compel in-state power producers to maintain a 30-day “base fuel” supply on-site for generation resiliency; and

(4) Empower the Public Energy Authority, pursuant to §5D-1-1 *et seq.* of this code, to enforce the provisions of this chapter, monitor in-state public electric utilities, and generally oversee the implementation of this chapter.

 (c) Accordingly, the public energy authority created herein ~~shall be authorized to~~ may initiate such directives and take such measures as may be necessary to effectuate the public purpose of this chapter.

§5D-1-5. Powers, duties and responsibilities of authority generally; termination of certain powers.

(a) The West Virginia Public Energy Authority has and may exercise all powers necessary or appropriate to execute its corporate purpose. The authority may:

(1) Adopt, amend, and repeal bylaws necessary and proper for the regulation of its affairs and the conduct of its business and rules to implement and make effective its powers and duties, such rules to be promulgated in accordance with ~~the provisions of~~ §29A-3-1 *et seq.* of this code.

(2) Adopt and use an official seal and alter the same at pleasure.

(3) Maintain a principal office and, if necessary, regional sub-offices at locations properly designated or provided.

(4) Sue and be sued in its own name and plead and be impleaded in its own name, and particularly to enforce the obligations and covenants made under this article. Any actions against the authority shall be brought in the circuit court of Kanawha County.

(5) Foster, encourage and promote the mineral development industry. The authority is encouraged to maximize the use of the West Virginia mineral development industry but is not prohibited from utilizing nonstate mineral resources.

(6) Represent the state with respect to national initiatives concerning the mineral development industry and international marketing activities affecting the mineral development industry.

(7) Engage in strategic planning to enable the state to cope with changes affecting or which may affect the mineral development industry.

(8) Acquire, whether by purchase, construction, gift, lease, lease-purchase or otherwise, any electric power project or natural gas transmission project. In the event that an electric power project to be constructed pursuant to this article is designed to utilize coal wastes for the generation of electricity or the production of other energy, such project shall also be capable of using coal as its primary energy input: *Provided,* That it shall be demonstrated to the authority’s satisfaction that quantities of coal wastes exist in amounts sufficient to provide energy input for such project for the term of the bonds or notes issued by the authority to finance the project and are accessible to the project.

(9) Lease, lease with an option by the lessee to purchase, sell, by installment sale or otherwise, or otherwise dispose of, to persons other than governmental agencies, any or all of its electric power projects or natural gas transmission projects for such rentals or amounts and upon such terms and conditions as the Public Energy Authority Board may ~~deem~~ consider advisable.

(10) Finance one or more electric power projects or natural gas transmission projects by making secured loans to persons other than governmental agencies to provide funds for the acquisition, by purchase, construction or otherwise, of any such project or projects.

(11) Issue bonds for the purpose of financing the cost of acquisition and construction of one or more electric power projects or natural gas transmission projects or any additions, extensions or improvements thereto which will be sold, leased with an option by the lessee to purchase, leased or otherwise disposed of to persons other than governmental agencies or for the purpose of loaning the proceeds thereof to persons other than governmental agencies for the acquisition and construction of said projects or both. ~~Such~~ The bonds shall be issued and the payment of such bonds secured in the manner provided by the applicable provisions of §13-2C-7 through 13 and §13-2C-17 of this code: *Provided,* That the principal and interest on such bonds shall be payable out of the revenues derived from the lease, lease with an option by the lessee to purchase, sale or other disposition of or from loan payments in connection with the electric power project or natural gas transmission project for which the bonds are issued, or any other revenue derived from such electric power project or natural gas transmission project.

(12) ~~In the event that~~ If the electric power project or natural gas transmission project is to be owned by a governmental agency, apply to the economic development authority for the issuance of bonds payable solely from revenues as provided in §32-15-1 *et seq.* of this code: *Provided,* That the economic development authority shall not issue any such bonds except by an act of general law: *Provided, however,* That the authority shall require that in the construction of any such project, prevailing wages shall be paid as part of a project-specific agreement which also takes into account terms and conditions contained in the West Virginia - Ohio Valley market retention and recovery agreement or a comparable agreement.

(13) Acquire by gift or purchase, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties as set forth in this article.

(14) Acquire in the name of the state, by purchase or otherwise, on such terms and in such manner as it deems proper, or by the exercise of the right of eminent domain in the manner provided in chapter 54 of this code, such real property or parts thereof or rights therein, rights-of-way, property, rights, easements and interests it ~~deems~~ considers necessary for carrying out the provisions of this article and compensation shall be paid for public or private lands so taken; and the authority may sell any of the real property or parts thereof or rights therein, rights-of-way, property, rights, easements and interests acquired hereunder in such manner and upon such terms and conditions as the authority ~~deems~~ considers proper: *Provided,* That if the authority determines that land or an interest therein acquired by the authority through the exercise of the power of eminent domain for the purpose of this article is no longer necessary or useful for such purposes, and if the authority desires to sell ~~such~~ the land or interest therein, the authority shall first offer to sell ~~such~~ the land or interest to the owner or owners from whom it was acquired, at a price equal to its fair market value: *Provided, however,* That if the prior owner or owners shall decline to reacquire the land or interest therein, the authority ~~shall be authorized to~~ may dispose of ~~such~~ the property by direct sale, auction or competitive bidding. In no case ~~shall~~ may ~~such~~ the land or an interest therein acquired under this subdivision be sold for less than its fair market value. This article does not authorize the authority to take or disturb property or facilities belonging to any public utility or to a common carrier, which property or facilities are required for the proper and convenient operation of such public utility or common carrier, except for the acquisition of easements or rights-of-way which will not unreasonably interfere with the operation of the property or facilities of such public utility or common carrier, and ~~in the event of the~~ there is a taking or disturbance of property or facilities of public utility or common carrier, provision shall be made for the restoration, relocation or duplication of such property or facilities elsewhere at the sole cost of the authority.

The term real property as used in this article 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.

For the purposes of this section, fair market value shall be determined by an appraisal made by an independent person or firm chosen by the authority. 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.

(15) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers: *Provided,* That if any electric power project or natural gas transmission project is to be constructed by a person other than a governmental agency, and with whom the authority has contracted to lease, sell or finance such project upon its completion, then the authority ~~shall~~ may not be required to comply with the provisions of §5-22-1 *et seq.* of this code requiring the solicitation of competitive bids for the construction of such a project.

(16) Employ managers, superintendents and other employees, and retain or contract with consulting engineers, financial consultants, accountants, architects, attorneys and such other consultants and independent contractors as are necessary in its judgment to carry out the provisions of this article, and fix the compensation or fees thereof. All expenses thereof shall be payable solely from the proceeds of bonds issued by the economic development authority, from the proceeds of bonds issued by or loan payments, lease payments or other payments received by the authority, from revenues and from funds appropriated for ~~such~~ that purpose by the Legislature.

(17) Receive and accept from any federal agency, or any other source, grants for or in aid of the construction of any project or for research and development with respect to electric power projects, natural gas transmission projects or other energy projects, and receive and accept aid or contribution from any source of money, property, labor or other things of value to be held, used and applied only for the purpose for which such grants and contributions are made.

(18) Purchase property coverage and liability insurance for any electric power project or natural gas transmission project or other energy project and for the principal office and sub offices of the authority, insurance protecting the authority and its officers and employees against liability, if any, for damage to property or injury to or death of persons arising from its operations and any other insurance which may be provided for under a resolution authorizing the issuance of bonds or in any trust agreement securing the same.

(19) Charge, alter and collect transportation fees and other charges for the use or services of any natural gas transmission project as provided in this article.

(20) Charge and collect fees or other charges from any energy project undertaken as a result of this article.

(21) When the electric power project is owned and operated by the authority, charge reasonable fees in connection with the making and providing of electric power and the sale thereof to corporations, states, municipalities or other entities in the furtherance of the purposes of this article.

(22) Purchase and sell electricity or other energy produced by an electric power project in and out of the State of West Virginia.

(23) Enter into wheeling contracts for the transmission of electric power over the authority’s or another party’s lines.

(24) Make and enter into contracts for the construction of a project facility and joint ownership with another utility and the provisions of this article shall not constrain the authority from participating as a joint partner therein.

(25) Make and enter into joint ownership agreements.

(26) Establish or increase reserves from moneys received or to be received by the authority to secure or to pay the principal of and interest on the bonds issued by the economic development authority pursuant to ~~the provisions of~~ §31-15-1 *et seq.* of this code or bonds issued by the authority.

(27) Broker the purchase of natural gas for resale to end-users: *Provided,* That whenever there are local distribution company pipelines already in place the authority shall arrange to transport the gas through such pipelines at the rates approved by the Public Service Commission of West Virginia.

(28) Engage in market research, feasibility studies, commercial research, and other studies and research pertaining to electric power projects and natural gas transmission projects or any other functions of the authority pursuant to this article.

(29) Enter upon any lands, waters and premises in the state for the purpose of making surveys and examinations as it may deem necessary or convenient for the purpose of this article, and such entry ~~shall~~ may not be ~~deemed~~ determined a trespass, nor ~~shall~~ may an entry for such purposes be ~~deemed~~ considered an entry under any condemnation proceedings which may be then pending and the authority shall make reimbursement for any actual damages resulting to such lands, waters and premises as a result of ~~such~~ those activities.

(30) Participate in any reorganization proceeding pending pursuant to the United States Code (being the act of congress establishing a uniform system of bankruptcy throughout the United States, as amended) or any receivership proceeding in a state or federal court for the reorganization or liquidation of a responsible buyer or responsible tenant. The authority may file its claim against any such responsible buyer or responsible tenant in any of the foregoing proceedings, vote upon any question pending therein, which requires the approval of the creditors participating in any reorganization proceeding or receivership, exchange any evidence of such indebtedness for any property, security or evidence of indebtedness offered as a part of the reorganization of such responsible buyer or responsible tenant or of any entity formed to acquire the assets thereof and may compromise or reduce the amount of any indebtedness owing to it as a part of any such reorganization.

(31) Make or enter into management contracts with a second party or parties to operate any electric power project or any gas transmission project and associated facilities, or other related energy project, either during construction or permanent operation.

(32) Do all acts necessary and proper to carry out the powers expressly granted to the authority in this article.

(33) Nothing herein ~~shall~~ may be construed to permit the transportation of gas produced outside of this state through a natural gas transmission project.

(34) The authority shall, after consultation with other agencies of state government having environmental regulatory functions, promulgate legislative rules pursuant to §29A-3-1 *et seq.* of this code, to establish standards and principles to be applied to all projects in assessing the effects of projects on the environment: *Provided,* That when a proposed project requires an environmental impact statement pursuant to the National Environmental Policy Act of 1969, a copy of the environmental impact statement shall be filed with the authority and be made available prior to any final decision or final approval of any project and prior to the conducting of any public hearings regarding the project, and in any such case, no assessment pursuant to the legislative rule need be made.

(35) To coordinate with the Public Service Commission of West Virginia, the review of “Integrated Resource Plans” and other reports and information required under and pursuant to §24-2-19 of this code.

§5D-1-5C. Additional powers, duties, and responsibilities of the Public Energy Authority related to grid stability and homeland security.

The Public Energy Authority has the following powers, duties, and responsibilities to ensure grid stability and homeland security:

(a) Within 90 days of receipt of a Comprehensive Operational Plan submitted by a public electric utility pursuant to this §5D-1-5D of this code, provide the public electric utility with a written response as to the administrative completeness of the Comprehensive Operational Plan.

(b) Within 120 days of receipt of the Comprehensive Operational Plan, issue a written approval or denial of the plan, including any supportive evidence of its decision.

(c) Annually review reports and other information submitted by public electric utilities to:

(1) Ascertain the general condition of each plant;

(2) Ascertain implementation of the Comprehensive Operational Plan;

(3) Consult with the plant operator to solicit any information required to verify progress completed on the previously approved Comprehensive Operational Plan; and

(4) Verify the 30-day base fuel supply as required by §5D-1-5D of this code.

(d) At least annually, submit a report of its findings and overall condition of public utilities operating within the state to the West Virginia Division of Homeland Security and Emergency Management, the Public Service Commission of West Virginia, and the Legislative Joint Committee on Government and Finance.

§5D-1-5D. Requirements of public utilities and Comprehensive Operation Plan.

1. Requirements of public utilities.

(1) All coal-fired utilities shall undertake a comprehensive operational analysis of each coal-fired unit within its plan or system of generators to ascertain feasible and technological upgrades to improve performance and extend efficient plant life cycle.

(2) The utilities shall submit the findings of the comprehensive operational analysis to the Public Service Commission of West Virginia and to the West Virginia Public Energy Authority, pursuant to §5D-1-1 *et seq.* of this code, along with the Comprehensive Operation Plan pursuant to subsection (b) of this section, with the first filing on January 1, 2022 and every three years thereafter;

(3) For fuel and grid resiliency and homeland security, on or before January 1, 2022, all utilities generating electric power for industrial or residential consumption within the state shall establish and maintain a minimum of a 30-day supply of the base fuel used to generate electricity.

(b) Comprehensive Operational Plan; Minimum Requirements.

(1) At a minimum, the Comprehensive Operational Plan shall contain the following:

(A) The plant fuel supply for the generation of electricity;

(B) The total distribution of electricity for each plant;

(C) All necessary plant upgrades to be proposed, started or completed over the ensuing three-year cycle along with all pertinent contractors including a copy of the scope of work and beginning and completion dates;

(D) Status of all upgrades completed, announced or previously incorporated into the plan for the previous cycle or cycles;

(E) A maintenance schedule of all routine, scheduled or planned maintenance along with a record of all nonplanned or nonscheduled events leading to or causing emergency or needed maintenance; and,

(F) An up-to-date accounting of all expenditures or costs which have been recovered or applied for.

CHAPTER 24. PUBLIC SERVICE COMMISSION.

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-21. Required economic considerations for utility actions.

(a) The Legislature hereby finds that:

(1) Coal fired power plants owned by electric utilities in West Virginia provide electric utility customers in the state with reliable and affordable energy;

(2) West Virginia’s access to coal reserves has provided the citizens of the state with access to an energy resource that is affordable and accessible to coal fired power plants in West Virginia;

(3) Matters generally related to homeland security and national defense are of paramount importance to West Virginia and its residents and coal-fired power plants provide optimal protection and resiliency toward state security and uninterrupted power supplies for household, industrial and military applications;

(b) It is the purpose of the Legislature to:

(1) Require the West Virginia Public Services Commission to consider all economics associated with its actions regarding the state’s public utility electric plants, including impacts on local communities and surrounding counties, and all retail and energy jobs;

(2) Require state public electric utilities to provide adequate notice and obtain approval before plant closure or idling.

(c) Before any public utility announces the retirement of an electricity generating unit, the proposed shutdown of an electricity generating unit, or the proposed sale of a generating plant to another operator, the public utility shall give notice to the West Virginia Office of Homeland Security and Emergency Management, West Virginia Public Energy Authority, Public Service Commission of West Virginia, and the Legislature’s Joint Committee on Government and Finance. Following such notice, the public utility shall apply to the Public Service Commission for approval for any shutdown, closure, or sale of an electricity generating unit or plant. No such shutdown, closure, or sale shall be approved by the commission unless the commission finds that it is prudent and not contrary to the public interest. In considering the public interest, the commission shall consider and balance the interests of customers, public utility, and the economy of the state. As part of its consideration and balancing of interests, the commission shall consider coal industry and generation plant related employment, related transportation jobs, and the expected fiscal impact on the state, local government, and business community. Any open cases before the commission as of the effective date of this section that involves an electricity generating plant closure shall be reviewed by the commission subject to this section. Nothing in this subsection applies where an electricity generation unit or plant requires emergency shut down due to imminent danger or public safety.

(e) Nothing in this section shall restrict or impede the commission’s ability to act on future rate cases or other matters coming before the commission that ultimately affect consumer household electrical rate.

NOTE: The purpose of this bill is to encourage continued operation of coal-fired electric plants, and maintain long-term state prosperity. The bill requires the Public Service Commission of West Virginia to consider all economics related to and involved with decisions involving public utility energy plants; and requires advance notification and approval before coal-fired plants or utilities are closed or sold.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.