

# **WEST VIRGINIA LEGISLATURE**

## **2021 REGULAR SESSION**

**Introduced**

### **Senate Bill 542**

BY SENATORS PHILLIPS AND CAPUTO

[Introduced March 3, 2021; referred  
to the Committee on Energy, Industry, and Mining;  
and then to the Committee on the Judiciary]

1 A BILL to amend and reenact §5D-1-2 and §5D-1-5 of the Code of West Virginia, 1931, as  
 2 amended; and to amend said code by adding thereto a new section, designated §24-2-  
 3 20, all relating to the Public Energy Authority Act of West Virginia; providing procedures  
 4 to ensure that no more coal-fired plants close, and long-term state prosperity is  
 5 maintained; providing legislative findings; requiring notice for coal-related proceedings  
 6 and hearings before the West Virginia Public Service Commission; requiring the  
 7 commission to consider all economics related to decisions involving public utility energy  
 8 plants; and providing for advance notification before coal-fired plants or utilities are closed  
 9 or idled.

*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.**

1 The Legislature finds and declares that:

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

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

6 (c) ~~That~~ The economy of the state of West Virginia needs a reliable and dependable  
 7 market for the state's coal, natural gas and other natural resources and the by-products thereof;

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

10 (e) ~~That~~ With all due regard to the protection of the environment and husbandry of the  
 11 natural resources of this state, the health, happiness, safety, right of gainful employment and  
 12 general welfare of the citizens of this state will be promoted by the establishment and operation

13 of coal-fired electric generating plants and transmission facilities and the establishment and  
14 operation of natural gas transmission projects and/or other energy projects; and

15 (f) ~~That~~ The means and measures herein authorized for the financing, building, and  
16 operation of the facilities described in subsection (e) are, as a matter of public policy, for the public  
17 purpose of the state.

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

19 (h) Eighteen coal-fired electric units within West Virginia's borders have been forced to  
20 close;

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

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

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

30 (l) Throughout the past decade, No one group has been hit harder with the decline of coal  
31 than West Virginia's coalminers and coalmining families. Many miners are struggling to make  
32 ends meet and to provide for their families;

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

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

38 (o) West Virginia's access to coal reserves has provided the citizens of the state with

39 access to an energy resource that is affordable and accessible to coal-fired power plants in West  
40 Virginia;

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

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

47 (r) Efforts to comply with environmental regulatory mandates owned by electric utilities  
48 used to generate coal-based electricity in the state involve the investment of capital and the  
49 incurrence of associated incremental costs. Because the utilities are required to install  
50 environmental pollution control equipment to comply with federal and state environmental  
51 regulations, the electric utilities should be permitted to recover the incremental rate of  
52 return, including related income taxes, depreciation and property taxes associated with the  
53 environmental control equipment that the utilities are required to install on power plants without  
54 waiting for a full base rate tariff filing;

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

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

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

64 (v) West Virginia's coal fleet, comprised of nine individual plants and 25 units, is fueled on

65 average by a total of 25 million tons annually and accounts for over \$2 billion of economic activity  
66 and sustains 3,500 mining jobs, 2,000 plant worker jobs, thousands of downstream and indirect  
67 local and surrounding County jobs and hundreds of millions of dollars of payroll and tax  
68 dollars locally; and,

69 (w) The role of West Virginia and West Virginia coal in regional homeland security is of  
70 paramount importance today as heretofore, thus, it is incumbent for our state to continue to  
71 provide leadership in this increasingly critical area in order to sustain and protect our regional  
72 electric supplies.

73 (x) Legislative purpose:

74 (1) To encourage in-state power producers to maintain 2019 levels of coal consumed by  
75 their West Virginia fleet of coal plants;

76 (2) Provide upgrade cost recovery measures and incentives for in-state power producers  
77 to upgrade existing plants to ensure optimal efficiencies, environmental controls, and extended  
78 operational plant life with improved heat rates, better emission controls and improved overall  
79 performance.

80 (3) Compel in-state power producers to file compliance plans every three years with  
81 the Public Energy Authority pursuant to §5D-1-1 et seq. of this code which shall specify their fuel  
82 supply and total distribution of electricity, how 2019 coal consumption levels will be maintained,  
83 all necessary upgrades to be made in next three-year cycle; status of all upgrades completed,  
84 announced or previously incorporated into the plan for the previous cycle or cycles, an accounting  
85 of all expenditures or cost which have been recovered pursuant to this section, which may be  
86 incorporated into “Integrated Resource Plans”;

87 (4) Compel in-state power producers to maintain a 90-day “base fuel” supply for  
88 generation resiliency on site;

89 (5) Empower the Public Energy Authority pursuant to §5D-1-1 et seq. of this code to  
90 enforce the provisions of this section and to monitor in-state public electric utilities and generally

91 oversee the implementation of this article.

92 Accordingly, the Public Energy Authority created herein ~~shall be authorized to~~ may initiate  
93 such directives and take such measures as may be necessary to effectuate the public purpose of  
94 this chapter.

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

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

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

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

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

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

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

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

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

20 (8) Acquire, whether by purchase, construction, gift, lease, lease-purchase or otherwise,

21 any electric power project or natural gas transmission project. In the event that an electric power  
22 project to be constructed pursuant to this article is designed to utilize coal wastes for the  
23 generation of electricity or the production of other energy, such project shall also be capable of  
24 using coal as its primary energy input: *Provided*, That it shall be demonstrated to the authority's  
25 satisfaction that quantities of coal wastes exist in amounts sufficient to provide energy input for  
26 such project for the term of the bonds or notes issued by the authority to finance the project and  
27 are accessible to the project.

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

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

35 (11) Issue bonds for the purpose of financing the cost of acquisition and construction of  
36 one or more electric power projects or natural gas transmission projects or any additions,  
37 extensions, or improvements thereto which will be sold, leased with an option by the lessee to  
38 purchase, leased or otherwise disposed of to persons other than governmental agencies or for  
39 the purpose of loaning the proceeds thereof to persons other than governmental agencies for the  
40 acquisition and construction of said projects or both. ~~Such~~ The bonds shall be issued and the  
41 payment of such bonds secured in the manner provided by the applicable provisions of §13-2C-  
42 7 through §13-2C-13 and §13-2C-17 of this code: *Provided*, That the principal and interest on  
43 such bonds shall be payable out of the revenues derived from the lease, lease with an option by  
44 the lessee to purchase, sale or other disposition of or from loan payments in connection with the  
45 electric power project or natural gas transmission project for which the bonds are issued, or any  
46 other revenue derived from such electric power project or natural gas transmission project.

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

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

57           (14) Acquire in the name of the State, by purchase or otherwise, on such terms and in  
58 such manner as it deems proper, or by the exercise of the right of eminent domain in the manner  
59 provided in Chapter 54 of this code, such real property or parts thereof or rights therein, rights-of-  
60 way, property, rights, easements and interests it ~~deems~~ considers necessary for carrying out the  
61 provisions of this article and compensation shall be paid for public or private lands so taken; and  
62 the authority may sell any of the real property or parts thereof or rights therein, rights-of-way,  
63 property, rights, easements and interests acquired hereunder in such manner and upon such  
64 terms and conditions as the authority ~~deems~~ considers proper: *Provided*, That if the authority  
65 determines that land or an interest therein acquired by the authority through the exercise of the  
66 power of eminent domain for the purpose of this article is no longer necessary or useful for such  
67 purposes, and if the authority desires to sell ~~such~~ the land or interest therein, the authority shall  
68 first offer to sell ~~such~~ the land or interest to the owner or owners from whom it was acquired, at a  
69 price equal to its fair market value: *Provided, however*, That if the prior owner or owners shall  
70 decline to reacquire the land or interest therein, the authority ~~shall be authorized to~~ may dispose  
71 of ~~such~~ the property by direct sale, auction or competitive bidding. In no case shall may ~~such~~ the  
72 land or an interest therein acquired under this subdivision be sold for less than its fair market



73 value. This article does not authorize the authority to take or disturb property or facilities belonging  
74 to any public utility or to a common carrier, which property or facilities are required for the proper  
75 and convenient operation of such public utility or common carrier, except for the acquisition of  
76 easements or rights-of-way which will not unreasonably interfere with the operation of the property  
77 or facilities of such public utility or common carrier, and ~~in the event of the~~ there is a taking or  
78 disturbance of property or facilities of public utility or common carrier, provision shall be made for  
79 the restoration, relocation, or duplication of such property or facilities elsewhere at the sole cost  
80 of the authority.

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

88 For the purposes of this section, fair market value shall be determined by an appraisal  
89 made by an independent person or firm chosen by the authority. The appraisal shall be performed  
90 using the principles contained in the Uniform Appraisal Standards for Federal Land Acquisitions  
91 published under the auspices of the Interagency Land Acquisition Conference, United States  
92 Government Printing Office, 1972.

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

99 bids for the construction of such a project.

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

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

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

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

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

123 (21) When the electric power project is owned and operated by the authority, charge  
124 reasonable fees in connection with the making and providing of electric power and the sale thereof

125 to corporations, states, municipalities or other entities in the furtherance of the purposes of this  
126 article.

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

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

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

134 (25) Make and enter into joint ownership agreements.

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

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

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

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

151 such lands, waters and premises as a result of ~~such~~ those activities.

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

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

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

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

170 (34) The authority shall, after consultation with other agencies of state government having  
171 environmental regulatory functions, promulgate legislative rules pursuant to §29A-3-1 *et seq.* of  
172 this code, to establish standards and principles to be applied to all projects in assessing the effects  
173 of projects on the environment: *Provided*, That when a proposed project requires an  
174 environmental impact statement pursuant to the National Environmental Policy Act of 1969, a  
175 copy of the environmental impact statement shall be filed with the authority and be made available  
176 prior to any final decision or final approval of any project and prior to the conducting of any public

177 hearings regarding the project, and in any such case, no assessment pursuant to the legislative  
178 rule need be made.

179 (35) To coordinate with the Public Service Commission of West Virginia for the review of  
180 “Integrated Resource Plans” pursuant to §24-2-19 of this code and other reports and information  
181 required under and pursuant to §24-2-20 of this code.

## CHAPTER 24. PUBLIC SERVICE COMMISSION.

### ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

**§24-2-20. Required notice for coal-related proceedings before the commission;  
commission to consider all economics related to decisions involving public utility  
electric plants; findings; and required advance notification before coal-fired plant  
is closed or idled.**

1 (a) The Legislature hereby finds that:

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

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

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

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

14 (5) West Virginia coal and electricity generated in West Virginia are relied upon throughout

15 an 18-state region thus playing a vital role in regional homeland security;

16 (6) West Virginia's coal fleet, comprised of nine individual plants and 25 units, is fueled  
17 on average by a total of 28 million tons annually and accounts for over \$2 billion of economic  
18 activity and sustains 3,500 mining jobs, 2,000 plant worker jobs and hundreds of millions of dollars  
19 of payroll and tax dollars locally; and,

20 (7) The role of West Virginia and West Virginia coal in regional homeland security is as  
21 important today as heretofore, thus, it is incumbent for our state to continue to provide leadership  
22 in this increasingly critical area in order to sustain and protect our regional electric supplies.

23 (b) The commission shall adhere to the open governmental meetings act and publicly  
24 announce all hearings, meetings or negotiations impacting West Virginia's coal industry or any  
25 utility regulated by the commission that utilizes coal-based, electric generation facilities.

26 (c) In any proceeding or matter related to a utility that utilizes coal-based, electric  
27 generation facilities, the commission shall consider the overall economic impact of its decision on  
28 West Virginia's coal industry or any utility regulated by the commission that utilizes coal-based,  
29 electric generation facilities. The overall economic impact includes, but is not limited to, coal and  
30 plant related employment, related transportation jobs, and the expected fiscal impact on the local  
31 community including retailers and businesses.

32 (d) Before any public utility announces the retirement of a coal-fired unit, the proposed  
33 shutdown of a coal-fired unit, the closure of a coal-fired plant, or the proposed sale of a plant to  
34 another operator, the plant operator or public utility shall give notice to the West Virginia Office of  
35 Homeland Security and Emergency Management, West Virginia Public Energy Authority, West  
36 Virginia Public Service Commission and the Legislature's Joint Committee on Government and  
37 Finance. Following such notice, the plant operator or public utility shall receive unanimous  
38 permission from the West Virginia Office of Homeland Security and Emergency Management,  
39 West Virginia Public Energy Authority and West Virginia Public Service  
40 Commission: *Provided*, That any matter before the Public Service Commission or subject to a

41 final order therefrom that involves a coal plant closure occurring within 180 days of the effective  
42 date of this section shall be reviewed to ensure consistency within this section and if found to be  
43 inconsistent, shall be modified to ensure consistency. Nothing in this subsection applies where a  
44 plant requires emergency deenergization or a shut down for imminent danger or public safety.

NOTE: The purpose of this bill is to provide procedures to ensure that no more coal-fired plants close, and long-term state prosperity is maintained. The bill requires notice for coal-related proceedings and hearings before the West Virginia Public Service Commission; includes legislative findings; requires the commission to consider all economics related to and involved with decisions involving public utility energy plants; and requires advance notification before coal-fired plants or utilities are closed or idled.

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