WEST VIRGINIA CODE: §24-2-4E

§24-2-4e. Environmental control bonds.

(a) Legislative findings. -- The Legislature hereby finds and declares: (i) That electric utilities in the state face the need to install and construct emission control equipment at existing generating facilities in the state in order to meet the requirements of existing and anticipated environmental laws and regulations and otherwise to reduce emissions from those electric generating facilities; (ii) that the capital costs associated with the installation and construction of emission control equipment are considerable; (iii) that the financial condition of some electric utilities may make the use of traditional utility financing mechanisms to finance the construction and installation of emission control equipment difficult or impossible and that this situation may cause such utilities to defer the installation of emission control equipment, to incur higher financing costs, to minimize or eliminate their use of high-sulfur coal mined in the state or to use other financing alternatives that are less favorable to the state and its citizens; (iv) that the construction and installation of emission control equipment by utilities will create public health and economic benefits to the state and its citizens, including, without limitation, emissions reductions, economic development, job growth and retention and the increased use of high-sulfur coal mined in the state; (v) that customers of electric utilities in the state have an interest in the construction and installation of emission control equipment at electric-generating facilities in the state at a lower cost than would be afforded by traditional utility financing mechanisms; (vi) that alternative financing mechanisms exist which can result in lower costs to customers and the use of these mechanisms can ensure that only those costs associated with the construction and installation of emission control equipment at electric-generating facilities located in the state that generate electric energy for their ultimate use will be included in customer rates; and (vii) that in order to use such alternative financing mechanisms, the Commission must be empowered to adopt a financing order that advances these goals. The Legislature, therefore, finds that it is in the interest of the state and its citizens to encourage and facilitate the use of alternative financing mechanisms that will enable certain utilities to finance the construction and installation of emission control equipment at electric-generating facilities in the state under certain conditions and to empower the Commission to review and approve alternative financing mechanisms as being consistent with the public interest, as set forth in this section.

(b) Definitions. --

As used in this section:

(1) "Adjustment mechanism" means a formula-based mechanism for making any adjustments to the amount of the environmental control charges that are necessary to correct for any over-collection or under-collection of the environmental control charges or otherwise to ensure the timely and complete payment and recovery of environmental control costs and financing costs. The adjustment mechanism is not to be used as a means to authorize the

issuance of environmental control bonds in a principal amount greater, or the payment or recovery of environmental control costs in an amount greater, than that which was authorized in the financing order which established the adjustment mechanism.

(2) "Ancillary agreement" means any bond insurance policy, letter of credit, reserve account, surety bond, swap arrangement, hedging arrangement, liquidity or credit support arrangement or other similar agreement or arrangement entered into in connection with the issuance of environmental control bonds that is designed to promote the credit quality and marketability of the bonds or to mitigate the risk of an increase in interest rates.

(3) "Assignee" means any person or legal entity to which an interest in environmental control property is sold, assigned, transferred or conveyed (other than as security) and any successor to or subsequent assignee of such a person or legal entity.

(4) "Bondholder" means any holder or owner of an environmental control bond.

(5) "Environmental control activity" means any of the following:

(A) The construction, installation and placing in operation of environmental control equipment at a qualifying generating facility.

(B) The shutdown or retirement of any existing plant, facility, unit or other property at a qualifying generating facility to reduce, control or eliminate environmental emissions.

(6) "Environmental control bonds" means bonds, debentures, notes, certificates of participation, certificates of beneficial interest, certificates of ownership or other evidences of indebtedness or ownership that are issued by a qualifying utility or an assignee, the proceeds of which are used directly or indirectly to recover, finance, or refinance environmental control costs and financing costs, and that are secured by or payable from environmental control revenues.

(7) "Environmental control charge" means a nonbypassable charge paid by a customer of a qualifying utility for the recovery of environmental control costs and financing costs.

(8) "Environmental control cost" means any cost, including capitalized cost relating to regulatory assets and capitalized cost associated with design and engineering work, incurred or expected to be incurred by a qualifying utility in undertaking an environmental control activity and, with respect to an environmental control activity, includes the unrecovered value of property that is retired, together with any demolition or similar cost that exceeds the salvage value of the property. "Environmental control cost" includes preliminary expenses and investments associated with environmental control activity that are incurred prior to the issuance of a financing order and that are to be reimbursed from the proceeds of environmental control bonds. "Environmental control cost" does not include any monetary penalty, fine or forfeiture assessed against a qualifying utility by a government agency or court under a federal or state environmental statute, rule or regulation.

WV Legislature

(9) "Environmental control equipment" means any device, equipment, structure, process, facility or technology that is designed for the primary purpose of preventing, reducing or remediating environmental emissions and that has been or is to be constructed or installed at a qualifying generating facility.

(10) "Environmental control property" means all of the following:

(A) The rights and interests of a qualifying utility or an assignee under a financing order, including the right to impose, charge, collect and receive environmental control charges in the amount necessary to provide for the full payment and recovery of all environmental control costs and financing costs determined to be recoverable in the financing order and to obtain adjustments to the charges as provided in this section and any interest in the rights and interests.

(B) All revenues, receipts, collections, rights to payment, payments, moneys, claims or other proceeds arising from the rights and interests specified in paragraph (A) of this subdivision.

(11) "Environmental control revenues" means all revenues, receipts, collections, payments, moneys, claims or other proceeds arising from environmental control property.

(12) "Environmental emissions" means the discharge or release of emissions from electric generating facilities into the air, land or waters of the state.

(13) "Equity ratio" means, as of any given time of determination, the common equity of a qualifying utility as calculated pursuant to the uniform system of accounts required to be used in the filings of the qualifying utility with the federal Energy Regulatory Commission. "Equity ratio" shall be calculated excluding the effect of the issuance of environmental control bonds or the write down of discontinued operations.

(14) "Financing cost" means the costs to issue, service, repay, or refinance environmental control bonds, whether incurred or paid upon issuance of the bonds or over the life of the bonds, and approved for recovery by the Commission in a financing order. "Financing cost" may include any of the following:

(A) Principal, interest and redemption premiums that are payable on environmental control bonds.

(B) Any payment required under an ancillary agreement and any amount required to fund or replenish a reserve account or other account established under any indenture, ancillary agreement or other financing document relating to the environmental control bonds.

(C) The cost of retiring or refunding any existing debt and equity securities of a qualifying utility in connection with the issuance of environmental control bonds, but only to the extent the securities were issued for the purpose of financing environmental control costs.

(D) Any costs incurred by or on behalf of or allocated to a qualifying utility to obtain

WV Legislature

modifications of or amendments to any indenture, financing agreement, security agreement or similar agreement or instrument relating to any existing secured or unsecured obligation of a qualifying utility or an affiliate of a qualifying utility, or any costs incurred by or allocated to a qualifying utility to obtain any consent, release, waiver or approval from any holder of such an obligation, that are necessary to be incurred to permit a qualifying utility to issue or cause the issuance of environmental control bonds.

(E) Any taxes, franchise fees or license fees imposed on environmental control revenues.

(F) Any cost related to issuing and servicing environmental control bonds or the application for a financing order, including, without limitation, servicing fees and expenses, trustee fees and expenses, legal fees and expenses, administrative fees, placement fees, capitalized interest, rating agency fees and any other related cost that is approved for recovery in the financing order.

(15) "Financing order" means an order of the Commission pursuant to subsection (d) of this section that grants, in whole or in part, an application filed pursuant to subsection (c) of this section and that authorizes the construction and installation of environmental control equipment, the issuance of environmental control bonds in one or more series, the imposition, charging and collection of environmental control charges, and the creation of environmental control property. A financing order may set forth conditions or contingencies on the effectiveness of the relief authorized therein and may grant relief that is different from that which was requested in the application.

(16) "Financing parties" means:

(A) Any trustee, collateral agent or other person acting for the benefit of any bondholder.

(B) Any party to an ancillary agreement the rights and obligations of which relate to or depend upon the existence of environmental control property, the enforcement and priority of a security interest in environmental control property, the timely collection and payment of environmental control revenues or a combination of these factors.

(17) "Financing statement" means a financing statement as defined in subdivision (39), subsection (a), section one hundred two, article nine, chapter forty-six of this code.

(18) "Investment grade" means, with respect to the unsecured debt obligations of a qualifying utility at any given time of determination, a rating that is within the top four investment rating categories as published by at least one nationally recognized statistical rating organization as recognized by the United States Securities and Exchange Commission.

(19) "Nonbypassable" means that the payment of an environmental control charge may not be avoided by any electric service customer located within a utility service area, and must be paid by any such customer that receives electric delivery service from the qualifying utility

WV Legislature

for as long as the environmental control bonds are outstanding.

(20) "Nonutility affiliate" means, with respect to any qualifying utility, a person that: (i) Is an affiliate of the qualifying utility as defined in 15 U.S.C. §79b(a)(11); and (ii) is not a public utility that provides retail utility service to customers in the state within the meaning of section two, article one of this chapter.

(21) "Parent" means, with respect to any qualifying utility, any registered holding company or other person that holds a majority ownership or membership interest in the qualifying utility.

(22) "Qualifying generating facility" means any electric generating facility that: (i) Has generated electric energy for ultimate sale to customers in the state before the effective date of this section; and (ii) is owned by a qualifying utility or, on the expected date of issuance of the environmental control bonds authorized in a financing order, will be owned by a qualifying utility.

(23) "Qualifying utility" means:

(A) Any public utility that is: (i) Engaged in the delivery of electric energy to customers in this state; and (ii) at any time between the date which is two years immediately preceding the effective date of this section and the date on which an application for a financing order is made, has or had a credit rating on its unsecured debt obligations that is below investment grade.

(B) For so long as environmental control bonds issued pursuant to a financing order are outstanding and the related environmental control costs and financing costs have not been paid in full, the public utility to which the financing order was issued and its successors.

(24) "Registered holding company" means, with respect to a qualifying utility, a person that is: (i) A registered holding company as defined in 15 U.S.C. §79b(a)(12); and (ii) an affiliate of the qualifying utility as defined in 15 U.S.C. §79b(a)(11).

(25) "Regulatory sanctions" means, under the circumstances presented, any regulatory or ratemaking sanction or penalty that the Commission is authorized to impose pursuant to this chapter or any proceeding for the enforcement of any provision of this chapter or any order of the Commission that the Commission is authorized to pursue or conduct pursuant to this chapter, including without limitation: (i) The initiation of any proceeding in which the qualifying utility is required to show cause why it should not be required to comply with the terms and conditions of a financing order or the requirements of this section; (ii) the imposition of civil penalties pursuant to section three, article four of this chapter and the imposition of criminal penalties pursuant to section four of said article, in either case with reference to the provisions of section eight of said article; and (iii) a proceeding by mandamus or injunction as provided in section two of this article.

WV Legislature

(26) "Successor" means, with respect to any legal entity, another legal entity that succeeds by operation of law to the rights and obligations of the first legal entity pursuant to any bankruptcy, reorganization, restructuring or other insolvency proceeding, any merger, acquisition, or consolidation, or any sale or transfer of assets, whether any of these occur as a result of a restructuring of the electric power industry or otherwise.

(27) "Utility service area" means: (i) The geographic area of the state in which a qualifying utility provides electric delivery service to customers at the time of issuance of a financing order; and (ii) for as long as environmental control bonds issued pursuant to a financing order are outstanding, any additions to or enlargements of said geographic area, whether or not approved by the Commission in a formal proceeding.

(c) Application for financing order. --

(1) A qualifying utility, or two or more affiliated qualifying utilities, may apply to the Commission for a financing order under this section.

(2) An application for a financing order under this section shall be filed only as provided in this subdivision.

(A) An application for a financing order under this section shall be filed as part of the application of the qualifying utility or qualifying utilities under section eleven of this article for a certificate of public convenience and necessity to engage in environmental control activities.

(B) If a qualifying utility or qualifying utilities have an application for a certificate of public convenience and necessity to engage in environmental control activities pending before the Commission on the effective date of this section, the qualifying utility or qualifying utilities may file a separate application for a financing order and the Commission shall join or consolidate the application for a financing order with the pending application for a certificate of public convenience and necessity. Notwithstanding any provision of section eleven of this article to the contrary or the total project cost of the proposed environmental control activities, the Commission shall render its final decision on any joined or consolidated proceeding for a certificate of public convenience and necessity and a financing order as described in this paragraph within two hundred seventy days of the filing of the application for the financing order and within ninety days after final submission of the joined or consolidated application for decision following a hearing.

(3) In addition to any other information required by the Commission, an application for a financing order shall include the following information:

(A) Evidence that the applicant is a qualifying utility;

(B) A description of the environmental control activities that the qualifying utility proposes to undertake, including a detailed description of the environmental control equipment to be

WV Legislature

constructed or installed at one or more qualifying generation facilities;

(C) An explanation why the environmental control activities described in the application are necessary in the context of the qualifying utility's operations, current and anticipated environmental regulations, the prospect of enforcement proceedings or litigation against the qualifying utility if the environmental control activities are not undertaken and the utility's long-range environmental compliance plans;

(D) A description of any alternatives to the environmental control activities described in the application that the qualifying utility considered and an explanation of why each alternative either is not feasible or was not selected;

(E) An estimate of the environmental control costs associated with the environmental control activities described in the application, including the estimated cost of the environmental control equipment proposed to be installed;

(F) An estimated schedule for the construction or installation of the environmental control equipment;

(G) An estimate of the date on which the environmental control bonds are expected to be issued and the expected term over which the financing costs associated with the issuance are expected to be recovered, or if the bonds are expected to be issued in more than one series, the estimated issuance date and expected term for each bond issuance;

(H) The portion of the environmental control costs the qualifying utility proposes to finance through the issuance of one or more series of environmental control bonds;

(I) An estimate of the financing costs associated with each series of environmental control bonds proposed to be issued;

(J) An estimate of the amount of the environmental control charges necessary to recover the environmental control costs and financing costs estimated in the application and the proposed calculation thereof, which estimate and calculation should take into account the estimated date of issuance and estimated principal amount of each series of environmental control bonds proposed to be issued;

(K) A proposed methodology for allocating financing costs among customer classes;

(L) A description of the proposed adjustment mechanism; and

(M) A description of the benefits to the customers of the qualifying utility and the state that are expected to result from the financing of the environmental control costs with environmental control bonds as opposed to the use of traditional utility financing mechanisms.

(4) An application for a financing order may restate or incorporate by reference any

WV Legislature

information required pursuant to subdivision (3) of this subsection that the qualifying utility previously filed with the Commission in connection with an application for a certificate of public convenience and necessity under section eleven of this article as described in paragraph (B), subdivision (2) of this subsection.

(d) Issuance of financing order. --

(1) Notice of an application for a financing order shall be given as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, with the publication area being each county in which the environmental control activities are to be undertaken and each county in the state in which the qualifying utility provides service to customers. If no substantial protest is received within thirty days after the publication of notice, the Commission may waive formal hearing on the application.

(2) The Commission shall issue a financing order, or an order rejecting the application for a financing order, as part of its final order on the application of the qualifying utility or qualifying utilities for a certificate of public convenience and necessity to engage in environmental control activities as described in subdivision (2), subsection (c) of this section.

(3) The Commission shall issue a financing order if the Commission finds all of the following:

(A) That the applicant is a qualifying utility;

(B) That the environmental control activities, including the environmental control equipment to be constructed or installed at one or more qualifying generation facilities, are necessary and prudent under the circumstances and are preferable to any alternatives available to the qualifying utility;

(C) That the cost of the environmental control activities, including the environmental control equipment to be constructed or installed at one or more qualifying generation facilities, is reasonable;

(D) That the proposed issuance of environmental control bonds will result in overall costs to customers of the qualifying utility that: (1) Are lower than would result from the use of traditional utility financing mechanisms; and (2) are just and reasonable;

(E) That the financing of the environmental control costs with environmental control bonds will result in benefits to the customers of the qualifying utility and the state; and

(F) That the proposed issuance of environmental control bonds, together with the imposition and collection of the environmental control charges on customers of the qualifying utility, are just and reasonable and are otherwise consistent with the public interest and constitute a prudent, reasonable and appropriate mechanism for the financing of the environmental control activities described in the application.

(4) The Commission shall include the following findings and requirements in a financing

WV Legislature

order:

(A) A determination of the maximum amount of environmental control costs that may be financed from proceeds of environmental control bonds authorized to be issued in the financing order;

(B) A description of the financing costs that may be recovered through environmental control charges and the period over which the costs may be recovered, subject to the application of the adjustment mechanism as provided in subsection (e) of this section. As part of this description, the Commission may include qualitative or quantitative limitations on the financing costs authorized in the financing order;

(C) A description of the adjustment mechanism and a finding that it is just and reasonable; and

(D) A description of the environmental control property that is created and that may be used to pay, and secure the payment of, the environmental control bonds and financing costs authorized to be issued in the financing order.

(5) A financing order may provide that the creation of environmental control property shall be simultaneous with the sale of the environmental control property to an assignee as provided in the application and the pledge of the environmental control property to secure environmental control bonds.

(6) A financing order may authorize the qualifying utility to conduct environmental control activities, including the construction or installation of environmental control equipment, on an estimated schedule approved in the financing order and through the issuance of more than one series of environmental control bonds. In this case, the qualifying utility will not subsequently be required to secure a separate financing order for each issuance of environmental control bonds or for each scheduled phase of the construction or installation of environmental control equipment approved in the financing order.

(7) The Commission may require, as a condition to the effectiveness of the financing order but in every circumstance subject to the limitations set forth in subdivision (1), subsection (f) of this section, that the qualifying utility give appropriate assurances to the Commission that the qualifying utility and its parent will abide by the following conditions during any period in which any environmental control bonds issued pursuant to the financing order are outstanding, in addition to any other obligation either may have under this code or federal law:

(A) Without first obtaining the prior consent and approval of the Commission, the qualifying utility will not:

(1) Lend money, directly or indirectly, to a registered holding company or a nonutility affiliate; or

WV Legislature

(2) Guarantee the obligations of a registered holding company or a nonutility affiliate.

(B) If: (i) For a period of twelve consecutive months immediately preceding the date of determination, the qualifying utility has had an equity ratio of below thirty percent and neither the qualifying utility nor its parent has had a credit rating on its unsecured debt obligations that is investment grade; and (ii) the Commission determines that the present ability of the qualifying utility to meet its public service obligations would be impaired by the payment of dividends, the Commission may order the qualifying utility to limit or cease the payment of dividends for a period not exceeding one hundred eighty days from the date of determination, which order may be extended for one or more additional periods not to exceed one hundred eighty days each if the Commission determines that the conditions set forth in this paragraph continue to exist as of the date of each such determination.

(C) Neither the parent nor a nonutility affiliate will direct or require the qualifying utility to file a voluntary petition in bankruptcy: Provided, That nothing in this paragraph shall preclude the qualifying utility from filing a voluntary petition in bankruptcy if in the determination of the board of directors of the qualifying utility in the exercise of its fiduciary duty, the filing of its own voluntary petition in bankruptcy would be proper under applicable federal statutory and common law.

(8) A financing order may require the qualifying utility to file with the Commission a periodic report showing the receipt and disbursement of proceeds of environmental control bonds. A financing order may authorize the staff of the Commission to review and audit the books and records of the qualifying utility relating to the receipt and disbursement of proceeds of environmental control bonds. The provisions of this subdivision shall not be construed to limit the authority of the Commission under this chapter to investigate the practices of the qualifying utility or to audit the books and records of the qualifying utility.

(9) In the case of two or more affiliated qualifying utilities that have jointly applied for a financing order as provided in subdivision (1), subsection (c) of this section, a financing order may authorize each affiliated qualifying utility:

(A) to impose environmental control charges on its customers, notwithstanding the fact that the qualifying generating facility at which the environmental control activities are to be conducted is owned, or on the expected date of issuance of the environmental control bonds authorized in the financing order will be owned, by fewer than all of the affiliated qualifying utilities; and

(B) To issue environmental control bonds and to receive and use the proceeds thereof as provided in subdivision (1), subsection (j) of this section, notwithstanding the fact that all or a portion of the proceeds are expected to be used for environmental control activities to be conducted at a qualifying generating facility the ownership of which is as specified in paragraph (A) of this subdivision.

(e) Application of adjustment mechanism. --

WV Legislature

(1) If the Commission issues a financing order, the Commission shall periodically approve the application of the adjustment mechanism specified in the financing order to correct for any over-collection or under-collection of the environmental control charges and to provide for timely payment of scheduled principal of and interest on the environmental control bonds and the payment and recovery of other financing costs in accordance with the financing order. Application of the adjustment mechanism shall occur at least annually or more frequently as provided in the financing order.

(2) On the same day the qualifying utility files with the Commission its calculation of the adjustment, it shall cause notice of the filing to be given, in the form specified in the financing order, as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code in a newspaper of statewide circulation published each weekday in Kanawha County: Provided, That this publication shall be made only if the calculation of the adjustment filed by the qualifying utility with the Commission would result in an increase in the amount of the environmental control charge.

(3) The Commission shall allow interested parties thirty days from the date the qualifying utility filed the calculation of the adjustment within which to make comments, which shall be limited to the mathematical accuracy of the calculation and of the amount of the adjustment. If the Commission determines that a hearing is necessary, the Commission shall hold a hearing on the comments within forty days of the date the qualifying utility filed the calculation of the adjustment.

(4) Each adjustment to the environmental control charge, in an amount as calculated by the qualifying utility but incorporating any correction for mathematical inaccuracy as determined by the Commission at or after the hearing, shall automatically become effective: (i) Sixty days following the date on which the qualifying utility files with the Commission its calculation of the adjustment; or (ii) on any earlier date specified in an order of the Commission approving the application of the adjustment.

(5) No adjustment pursuant to this subsection, and no proceeding held pursuant to this subsection, shall in any way affect the irrevocability of the financing order as specified in subsection (f) of this section.

(f) Irrevocability of financing order. --

(1) A financing order is irrevocable and the Commission may not reduce, impair, postpone or terminate the environmental control charges approved in the financing order or impair the environmental control property or the collection or recovery of environmental control revenues.

(2) A financing order may be subsequently amended on or after the date of issuance of environmental control bonds authorized thereunder only: (A) At the request of the qualifying utility; (B) in accordance with any restrictions and limitations on amendment set forth in the financing order; and (C) subject to the limitations set forth in subdivision (1) of this

WV Legislature

subsection.

(3) No change in the credit rating on the unsecured obligations of a qualifying utility from the credit rating that supported the determination by the Commission required in paragraph (A), subdivision (3), subsection (d) of this section shall impair the irrevocability of the financing order specified in subdivision (1) of this subsection.

(g) Judicial review. -– An order of the Commission issued pursuant to subdivision (2), subsection (d) of this section is a final order of the Commission. Any party aggrieved by the issuance of any such order may petition for suspension and review thereof by the Supreme Court of Appeals pursuant to section one, article five of this chapter. In the case of any petition for suspension and review, the Supreme Court of Appeals shall proceed to hear and determine the action as expeditiously as practicable and give the action precedence over other matters not accorded similar precedence by law.

(h) Effect of financing order. -–

(1) A financing order shall remain in effect until the environmental control bonds issued pursuant to the financing order have been paid in full and all financing costs relating to the environmental control bonds have been paid in full.

(2) A financing order shall remain in effect and unabated notwithstanding the bankruptcy, reorganization or insolvency of the qualifying utility or any affiliate thereof or the commencement of any judicial or nonjudicial proceeding therefor.

(3) For so long as environmental control bonds issued pursuant to a financing order are outstanding and the related environmental control costs and financing costs have not been paid in full, the environmental control charges authorized to be imposed in the financing order shall be nonbypassable and shall apply to:

(A) All customers of the qualifying utility located within the utility service area, whether or not the customers may become entitled by law to purchase electric generation services from a provider of electric generation services other than a qualifying utility; and

(B) Any person or legal entity located within the utility service area that may subsequently receive electric delivery service from another public utility operating in the same service area.

(i) Limitations on jurisdiction of Commission. -–

(1) If the Commission issues a financing order, the Commission may not, in exercising its powers and carrying out its duties regarding regulation and ratemaking, consider environmental control bonds issued pursuant to the financing order to be the debt of the qualifying utility, the environmental control charges paid under the financing order to be revenue of the qualifying utility, or the environmental control costs or financing costs specified in the financing order to be the costs of the qualifying utility, nor may the

WV Legislature

Commission determine that any action taken by a qualifying utility that is consistent with the financing order is unjust or unreasonable from a regulatory or ratemaking perspective: Provided, That subject to the limitations set forth in subsection (f) of this section, nothing in this subdivision shall: (i) Affect the authority of the Commission to apply the adjustment mechanism as provided in subsection (e) of this section; (ii) prevent or preclude the Commission from investigating the compliance of a qualifying utility with the terms and conditions of a financing order and requiring compliance therewith; or (iii) prevent or preclude the Commission from imposing regulatory sanctions against a qualifying utility for failure to comply with the terms and conditions of a financing order or the requirements of this section.

(2) The Commission may not order or otherwise require, directly or indirectly, any public utility to use environmental control bonds to finance any project, addition, plant, facility, extension, capital improvement, environmental control equipment or any other expenditure.

(3) The Commission may not refuse to allow the recovery of any costs associated with the performance of environmental control activities by a public utility solely because the public utility has elected or may elect to finance the performance of those activities through a financing mechanism other than the issuance of environmental control bonds.

(j) Duties of qualifying utility. --

(1) A qualifying utility for which a financing order has been issued shall cause the proceeds of any environmental control bonds issued pursuant to a financing order to be placed in a separate account. A qualifying utility may use the proceeds of the issuance of environmental control bonds for paying environmental control costs and financing costs and for no other purpose.

(2) A qualifying utility for which a financing order has been issued shall annually provide to its customers a concise explanation of the environmental control charges approved in a financing order, as modified by subsequent issuances of environmental control bonds authorized under a financing order, if any, and by application of the adjustment mechanism as provided in subsection (e) of this section. These explanations may be made by bill inserts, website information or other appropriate means.

(3) Environmental control revenues shall be applied solely to the repayment of environmental control bonds and other financing costs.

(4) The failure of a qualifying utility to apply the proceeds of an issuance of environmental control bonds in a reasonable, prudent and appropriate manner or otherwise comply with any provision of this section shall not invalidate, impair or affect any financing order, environmental control property, environmental control charge or environmental control bonds: Provided, That subject to the limitations set forth in subsection (f) of this section, nothing in this subdivision shall prevent or preclude the Commission from imposing regulatory sanctions against a qualifying utility for failure to comply with the terms and

WV Legislature

conditions of a financing order or the requirements of this section.

(k) Environmental control property. --

(1) Environmental control property that is specified in a financing order shall constitute an existing, present property right, notwithstanding the fact that the imposition and collection of environmental control charges depend on the qualifying utility continuing to provide electric energy or continuing to perform its servicing functions relating to the collection of environmental control charges or on the level of future energy consumption. Environmental control property shall exist whether or not the environmental control revenues have been billed, have accrued or have been collected and notwithstanding the fact that the value or amount of the environmental control property is dependent on the future provision of service to customers by the qualifying utility. (2) All environmental control property specified in a financing order shall continue to exist until the environmental control bonds issued pursuant to a financing order are paid in full and all financing costs relating to the bonds have been paid in full.

(3) All or any portion of environmental control property may be transferred, sold, conveyed or assigned to any person or entity not affiliated with the qualifying utility or to any affiliate of the qualifying utility created for the limited purposes of acquiring, owning or administering environmental control property or issuing environmental control bonds under the financing order or a combination of these purposes. All or any portion of environmental control property may be pledged to secure the payment of environmental control bonds, amounts payable to financing parties and bondholders, amounts payable under any ancillary agreement and other financing costs. Any transfer, sale, conveyance, assignment, grant of a security interest in or pledge of environmental control property by a qualifying utility or affiliate of a qualifying utility to an affiliate of the qualifying utility, to the extent previously authorized in a financing order, does not require the prior consent and approval of the Commission under section twelve of this article.

(4) If a qualifying utility defaults on any required payment of environmental control revenues, a court, upon application by an interested party and without limiting any other remedies available to the applying party, shall order the sequestration and payment of the environmental control revenues for the benefit of bondholders, any assignee and any financing parties. The order shall remain in full force and effect notwithstanding any bankruptcy, reorganization, or other insolvency proceedings with respect to the qualifying utility or any affiliate thereof.

(5) Environmental control property and environmental control revenues, and the interests of an assignee, bondholder or financing party in environmental control property and environmental control revenues, are not subject to setoff, counterclaim, surcharge or defense by the qualifying utility or any other person or in connection with the bankruptcy, reorganization or other insolvency proceeding of the qualifying utility, any affiliate thereof or any other entity.

WV Legislature

(6) Any successor to a qualifying utility shall be bound by the requirements of this section and shall perform and satisfy all obligations of, and have the same rights under a financing order as, the qualifying utility under the financing order in the same manner and to the same extent as the qualifying utility, including, without limitation, the obligation to collect and pay to the person entitled to receive them environmental control revenues.

(l) Security interests. -– Except as otherwise provided in this subsection, the creation, perfection and enforcement of any security interest in environmental control property to secure the repayment of the principal of and interest on environmental control bonds, amounts payable under any ancillary agreement and other financing costs are governed by this subsection and not the provisions of chapter forty-six of this code. All of the following shall apply:

(1) The description or indication of environmental control property in a transfer or security agreement and a financing statement is sufficient only if the description or indication refers to this section and the financing order creating the environmental control property. This subdivision applies to all purported transfers of, and all purported grants of liens on or security interests in, environmental control property, regardless of whether the related transfer or security agreement was entered into, or the related financing statement was filed, before or after the effective date of this section.

(2) A security interest in environmental control property is created, valid, and binding at the later of the time: (i) The financing order is issued; (ii) a security agreement is executed and delivered; and (iii) value is received for the environmental control bonds. The security interest attaches without any physical delivery of collateral or other act and the lien of the security interest shall be valid, binding and perfected against all parties having claims of any kind in tort, contract or otherwise against the person granting the security interest, regardless of whether such parties have notice of the lien, upon the filing of a financing statement with the office of the Secretary of State. The office of the Secretary of State shall maintain any such financing statement in the same manner and in the same record-keeping system it maintains for financing statements filed pursuant to article nine, chapter forty-six of this code. The filing of any financing statement under this subdivision shall be governed by the provisions regarding the filing of financing statements in said article.

(3) A security interest in environmental control property is a continuously perfected security interest and has priority over any other lien, created by operation of law or otherwise, which may subsequently attach to the environmental control property unless the holder of any such lien has agreed in writing otherwise.

(4) The priority of a security interest in environmental control property is not affected by the commingling of environmental control revenues with other amounts. Any pledgee or secured party shall have a perfected security interest in the amount of all environmental control revenues that are deposited in any cash or deposit account of the qualifying utility in which environmental control revenues have been commingled with other funds and any other security interest that may apply to those funds shall be terminated when they are

WV Legislature

transferred to a segregated account for the assignee or a financing party.

(5) No subsequent order of the Commission amending a financing order pursuant to subdivision (2), subsection (f) of this section, and no application of the adjustment mechanism as provided in subsection (e) of this section, will affect the validity, perfection or priority of a security interest in or transfer of environmental control property.

(m) Sales of environmental control property. --

(1) Any sale, assignment or transfer of environmental control property shall be an absolute transfer and true sale of, and not a pledge of or secured transaction relating to, the seller's right, title and interest in, to and under the environmental control property if the documents governing the transaction expressly state that the transaction is a sale or other absolute transfer. A transfer of an interest in environmental control property may be created only when all of the following have occurred: (i) The financing order creating the environmental control property has become effective; (ii) the documents evidencing the transfer of environmental control property have been executed and delivered to the assignee; and (iii) value is received. Upon the filing of a financing statement with the office of the Secretary of State, a transfer of an interest in environmental control property shall be perfected against all third persons, including any judicial lien or other lien creditors or any claims of the seller or creditors of the seller, other than creditors holding a prior security interest, ownership interest or assignment in the environmental control property previously perfected in accordance with this subdivision or subdivision (2), subsection (l) of this section. The office of the Secretary of State shall maintain any such financing statement in the same manner and in the same record-keeping system it maintains for financing statements filed pursuant to article nine, chapter forty-six of this code.

(2) The characterization of the sale, assignment or transfer as an absolute transfer and true sale and the corresponding characterization of the property interest of the purchaser, shall not be affected or impaired by, among other things, the occurrence of any of the following factors:

(A) Commingling of environmental control revenues with other amounts;

(B) The retention by the seller of: (i) A partial or residual interest, including an equity interest, in the environmental control property, whether direct or indirect, or whether subordinate or otherwise; or (ii) the right to recover costs associated with taxes, franchise fees or license fees imposed on the collection of environmental control revenues;

(C) Any recourse that the purchaser may have against the seller;

(D) Any indemnification rights, obligations or repurchase rights made or provided by the seller;

(E) The obligation of the seller to collect environmental control revenues on behalf of an

WV Legislature

assignee;

(F) The treatment of the sale, assignment or transfer for tax, financial reporting or other purposes;

(G) Any subsequent order of the Commission amending a financing order pursuant to subdivision (2), subsection (f) of this section; or

(H) Any application of the adjustment mechanism as provided in subsection (e) of this section.

(n) Exemption from municipal taxation. -– The imposition, collection and receipt of environmental control revenues are not subject to taxation by any municipality of the state under the authority granted to municipalities in sections five and five-a, article thirteen, chapter eight of this code.

(o) Environmental control bonds not public debt. -– Environmental control bonds issued pursuant to a financing order and the provisions of this section shall not constitute a debt or a pledge of the faith and credit or taxing power of this state or of any county, municipality or any other political subdivision of this state. Bondholders shall have no right to have taxes levied by the Legislature or the taxing authority of any county, municipality or any other political subdivision of this state for the payment of the principal thereof or interest thereon. The issuance of environmental control bonds does not, directly or indirectly or contingently, obligate the state or a political subdivision of the state to levy any tax or make any appropriation for payment of the principal of or interest on the bonds.

(p) Environmental control bonds as legal investments. -– Any of the following may legally invest any sinking funds, moneys or other funds belonging to them or under their control in environmental control bonds:

(1) The state, the West Virginia Investment Management Board, the West Virginia Housing Development Fund, municipal corporations, political subdivisions, public bodies and public officers except for members of the Public Service Commission.

(2) Banks and bankers, savings and loan associations, credit unions, trust companies, building and loan associations, savings banks and institutions, deposit guarantee associations, investment companies, insurance companies and associations and other persons carrying on a banking or insurance business, including domestic for life and domestic not for life insurance companies; and

(3) Personal representatives, guardians, trustees and other fiduciaries.

(q) State pledge. -–

(1) The state pledges to and agrees with the bondholders, any assignee and any financing parties that the state will not take or permit any action that impairs the value of

WV Legislature

environmental control property or, except as allowed under subsection (e) of this section, reduce, alter or impair environmental control charges that are imposed, collected and remitted for the benefit of the bondholders, any assignee, and any financing parties, until any principal, interest and redemption premium in respect of environmental control bonds, all financing costs and all amounts to be paid to an assignee or financing party under an ancillary agreement are paid or performed in full.

(2) Any person who issues environmental control bonds is permitted to include the pledge specified in subdivision (1) of this subsection in the environmental control bonds, ancillary agreements and documentation related to the issuance and marketing of the environmental control bonds.

(r) Choice of law. -- The law governing the validity, enforceability, attachment, perfection, priority and exercise of remedies with respect to the transfer of an interest or right or creation of a security interest in any environmental control property, environmental control charge or financing order shall be the laws of the State of West Virginia as set forth in this section and article nine, chapter forty-six of this code.

(s) Conflicts. -- In the event of conflict between this section and any other law regarding the attachment, assignment or perfection, or the effect of perfection, or priority of any security interest in or transfer of environmental control property, this section shall govern to the extent of the conflict.

(t) Effect of invalidity on actions. -- Effective on the date that environmental control bonds are first issued under this section, if any provision of this section is held to be invalid or is invalidated, superseded, replaced, repealed or expires for any reason, that occurrence shall not affect any action allowed under this section that is taken by the Commission, a qualifying utility, an assignee, a collection agent, a financing party, a bondholder, or a party to an ancillary agreement and any such action shall remain in full force and effect.

(u) Effectiveness of section. -- No qualifying utility may make initial application for a financing order after the date which is five years after the effective date of this section. This subsection shall not be construed to preclude any qualifying utility for which the Commission has initially issued a financing order from applying to the Commission: (i) For a subsequent order amending the financing order pursuant to subdivision (2), subsection (f) of this section; or (ii) for approval of the issuance of environmental control bonds to refund all or a portion of an outstanding series of environmental control bonds.

(v) Severability. -- If any subsection, subdivision, paragraph or subparagraph of this section or the application thereof to any person, circumstance or transaction is held by a court of competent jurisdiction to be unconstitutional or invalid, the unconstitutionality or invalidity shall not affect the Constitutionality or validity of any other subsection, subdivision, paragraph or subparagraph of this section or its application or validity to any person, circumstance or transaction, including, without limitation, the irrevocability of a financing order issued pursuant to this section, the validity of the issuance of environmental control

WV Legislature

bonds, the imposition of environmental control charges, the transfer or assignment of environmental control property or the collection and recovery of environmental control revenues. To these ends, the Legislature hereby declares that the provisions of this section are intended to be severable and that the Legislature would have enacted this section even if any subsection, subdivision, paragraph or subparagraph of this section held to be unconstitutional or invalid had not been included in this section.

WV Legislature