WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2003

HOUSE BILL NO. 2870

(By Mr. Speaker, Mr. Kiss, and Delegate Trump)
[By Request of the Executive]

Passed March 5, 2003

In Effect Ninety Days from Passage
AN ACT to amend and reenact section one, article two, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto a new section, designated section eleven-c, all relating to specifying the jurisdiction of the public service commission over, and the application of said chapter twenty-four to, owners or operators of, and persons, corporations or other entities that intend to construct or construct and operate, certain described electric generating facilities, the output of which is not sold directly to retail customers in West Virginia; and requiring persons, corporations and other entities that intend to construct or construct and operate such electric generating facilities, or that intend to make or construct a material modification thereof, to obtain from the public service commission a siting certificate, in lieu of a certificate of public convenience and necessity, for each such facility or material modification thereof pursuant and subject to certain new provisions and requirements which, among other things, allow the public service commission, under specified circumstances, to seek the imposition of civil or criminal penalties, or both such civil and criminal penalties; and providing that
the public service commission may promulgate rules relating to siting certificates.

Be it enacted by the Legislature of West Virginia:

That section one, article two, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section eleven-c, all to read as follows:

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-1. Jurisdiction of commission; waiver of jurisdiction.

(a) The jurisdiction of the commission shall extend to all public utilities in this state, and shall include any utility engaged in any of the following public services:

- Common carriage of passengers or goods, whether by air, railroad, street railroad, motor or otherwise, by express or otherwise, by land, water or air, whether wholly or partly by land, water or air; transportation of oil, gas or water by pipeline; transportation of coal and its derivatives and all mixtures and combinations thereof with other substances by pipeline; sleeping car or parlor car services; transmission of messages by telephone, telegraph or radio; generation and transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through a distributing utility; supplying water, gas or electricity, by municipalities or others; sewer systems servicing twenty-five or more persons or firms other than the owner of the sewer systems; any public service district created under the provisions of article thirteen-a, chapter sixteen of this code; toll bridges, wharves, ferries; solid waste facilities; and any other public service. Provided, That natural gas producers who provide natural gas service to not more than twenty-five residential customers are exempt from the jurisdiction of the commission with regard to the provisions of such residential service. Provided, however, That upon request of any
of the customers of such natural gas producers, the commission
may, upon good cause being shown, exercise such authority as
the commission may deem appropriate over the operation, rates
and charges of such producer and for such length of time as the
commission may consider to be proper: Provided further, That
the jurisdiction the commission may exercise over the rates and
charges of municipally operated public utilities is limited to that
authority granted the commission in section four-b of this
article: And provided further, That the decision-making author-
ity granted to the commission in sections four and four-a of this
article shall, in respect to an application filed by a public service
district, be delegated to a single hearing examiner appointed
from the commission staff, which hearing examiner shall be
authorized to carry out all decision-making duties assigned to
the commission by said sections, and to issue orders having the
full force and effect of orders of the commission.

(b) The commission may, upon application, waive its
jurisdiction and allow a utility operating in an adjoining state to
provide service in West Virginia when:

(1) An area of West Virginia cannot be practically and
economically served by a utility licensed to operate within the
state of West Virginia;

(2) Said area can be provided with utility service by a utility
which operates in a state adjoining West Virginia;

(3) The utility operating in the adjoining state is regulated
by a regulatory agency or commission of the adjoining state;
and

(4) The number of customers to be served is not substantial.
The rates the out-of-state utility charges West Virginia custom-
ers shall be the same as the rate the utility is duly authorized to
charge in the adjoining jurisdiction. The commission, in the case
of any such utility, may revoke its waiver of jurisdiction for
good cause.
(c) Any other provisions of this chapter to the contrary notwithstanding:

(1) An owner or operator of an electric generating facility located or to be located in this state that has been designated as an exempt wholesale generator under applicable federal law, or will be so designated prior to commercial operation of the facility, and for which such facility the owner or operator holds a certificate of public convenience and necessity issued by the commission on or before the first day of July, two thousand three, shall be subject to subsections (e), (f), (g), (h), (i) and (j), section eleven-c of this article as if the certificate of public convenience and necessity for such facility were a siting certificate issued under said section eleven-c and shall not otherwise be subject to the jurisdiction of the commission or to the provisions of this chapter with respect to such facility except for the making or constructing of a material modification thereof as provided in subdivision (5) of this subsection.

(2) Any person, corporation or other entity that intends to construct or construct and operate an electric generating facility to be located in this state that has been designated as an exempt wholesale generator under applicable federal law, or will be so designated prior to commercial operation of the facility, and for which facility the owner or operator does not hold a certificate of public convenience and necessity issued by the commission on or before the first day of July, two thousand three, shall, prior to commencement of construction of the facility, obtain a siting certificate from the commission pursuant to the provisions of section eleven-c of this article in lieu of a certificate of public convenience and necessity pursuant to the provisions of section eleven of this article. An owner or operator of an electric generating facility as is described in this subdivision for which a siting certificate has been issued by the commission shall be subject to subsections (e), (f), (g), (h), (i) and (j), section eleven-c of this article and shall not otherwise be subject to the jurisdiction of the commission or to the provisions of this chapter with respect to such facility except for the making or constructing of
(3) An owner or operator of an electric generating facility located in this state that had not been designated as an exempt wholesale generator under applicable federal law prior to commercial operation of the facility, that generates electric energy solely for sale at retail outside this state or solely for sale at wholesale in accordance with any applicable federal law that preempts state law or solely for both such sales at retail and such sales at wholesale, and that had been constructed and had engaged in commercial operation on or before the first day of July, two thousand three, shall not be subject to the jurisdiction of the commission or to the provisions of this chapter with respect to such facility, regardless of whether such facility subsequent to its construction has been or will be designated as an exempt wholesale generator under applicable federal law: Provided, That such owner or operator shall be subject to subdivision (5) of this subsection if a material modification of such facility is made or constructed.

(4) Any person, corporation or other entity that intends to construct or construct and operate an electric generating facility to be located in this state that has not been or will not be designated as an exempt wholesale generator under applicable federal law prior to commercial operation of the facility, that will generate electric energy solely for sale at retail outside this state or solely for sale at wholesale in accordance with any applicable federal law that preempts state law or solely for both such sales at retail and such sales at wholesale, and that had not been constructed and had not been engaged in commercial operation on or before the first day of July, two thousand three, shall, prior to commencement of construction of the facility, obtain a siting certificate from the commission pursuant to the provisions of section eleven-c of this article in lieu of a certificate of public convenience and necessity pursuant to the provisions of section eleven of this article. An owner or operator of an electric generating facility as is described in this subd...
sion for which a siting certificate has been issued by the commission shall be subject to subsections (e), (f), (g), (h), (i) and (j), section eleven-c of this article and shall not otherwise be subject to the jurisdiction of the commission or to the provisions of this chapter with respect to such facility except for the making or constructing of a material modification thereof as provided in subdivision (5) of this subsection.

(5) An owner or operator of an electric generating facility described in this subsection shall, before making or constructing a material modification of the facility that is not within the terms of any certificate of public convenience and necessity or siting certificate previously issued for the facility or an earlier material modification thereof, obtain a siting certificate for the modification from the commission pursuant to the provisions of section eleven-c of this article in lieu of a certificate of public convenience and necessity for the modification pursuant to the provisions of section eleven of this article and, except for the provisions of section eleven-c of this article, shall not otherwise be subject to the jurisdiction of the commission or to the provisions of this chapter with respect to such modification.

(6) The commission shall consider an application for a certificate of public convenience and necessity filed pursuant to section eleven of this article to construct an electric generating facility described in this subsection or to make or construct a material modification of such electric generating facility as an application for a siting certificate pursuant to section eleven-c of this article if the application for the certificate of public convenience and necessity was filed with the commission prior to the first day of July, two thousand three, and if the commission has not issued a final order thereon as of that date.

(7) The limitations on the jurisdiction of the commission over, and on the applicability of the provisions of this chapter to, the owner or operator of an electric generating facility as imposed by, and described in this subsection, shall not be deemed to affect or limit the commission's jurisdiction over contracts or arrangements between the owner or operator of
such facility and any affiliated public utility subject to the provisions of this chapter.

§24-2-11c. Siting certificates for certain electric generating facilities or material modifications thereof.

(a) Notice of an application for a siting certificate required under the provisions of subdivisions (1), (2), (3), (4) and (5), subsection (c), section one of this article 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 all or a portion of the facility is located or to be located. Such notice shall also be published as a Class I legal advertisement in a newspaper published each weekday in Kanawha County and circulated both within and outside of Kanawha County. If no substantial protest is received within thirty days after the publication of notice, the commission may waive formal hearing on the application.

(b) The commission shall render its decision within three hundred days of the date of filing of an application for a siting certificate or within four hundred days of the filing of an application for a certificate of public convenience and necessity pursuant to section eleven of this article if the application is considered as an application for a siting certificate pursuant to this section as provided in subdivision (6), subsection (c), section one of this article. If no decision is rendered within such time period, the commission shall issue a siting certificate as applied for.

(c) In deciding whether to issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate, the commission shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant. The commission may issue a siting certificate only if it determines that the terms and conditions of any public funding or any agreement relating to the abatement of property taxes do not offend the public interest, and the construction of the facility or material modification of the
facility will result in a substantial positive impact on the local economy and local employment. The commission shall issue an order that includes appropriate findings of fact and conclusions of law that address each factor specified in this subsection. All material terms, conditions and limitations applicable to the construction and operation of the proposed facility or material modification of the facility shall be specifically set forth in the commission order.

(d) The commission may require an applicant for a siting certificate to provide such documents and other information as the commission deems necessary for its consideration of the application.

(e) If the commission issues the siting certificate, the commission shall have continuing jurisdiction over the holder of the siting certificate for the limited purposes of: (1) Considering future requests by the holder for modifications of or amendments to the siting certificate; (2) considering and resolving complaints related to the holder’s compliance with the material terms and conditions of the commission order issuing the siting certificate, whether or not the complainant was a party to the case in which the siting certificate was issued, which complaints shall be filed, answered, and resolved in accordance with the commission’s procedures for resolving formal complaints; and (3) enforcing the material terms and conditions of a commission order as provided in subsection (f) of this section.

(f) If the commission determines, in a proceeding instituted on its own motion or on the motion of any person, that the holder of a siting certificate has failed without reasonable justification to comply with any of the material terms and conditions of a commission order issuing a siting certificate, modifying or amending a siting certificate, or resolving a complaint related to compliance of the holder with the material terms and conditions of a siting certificate, the commission may enforce the material terms and conditions of the commission order: (1) By requiring the holder to show cause why it should
not be required so to comply; (2) through a proceeding seeking
the imposition of a civil penalty not to exceed five thousand
dollars or criminal penalties as provided in section four, article
four of this chapter, or both such civil and criminal penalties,
and the imposition of either or both such civil penalty and
criminal penalties shall be subject to the provisions of section
eight, article four, of this chapter; (3) by mandamus or injunc-
tion as provided in section two of this article; or (4) prior to the
completion of construction of the proposed facility or prior to
the completion of construction of a material modification of the
facility, by the suspension or revocation of the siting certificate,
including the preliminary suspension of the siting certificate
under the standards applicable to circuit courts of this state for
the issuance of preliminary injunctions.

(g) Any person may seek to compel compliance with the
material terms and conditions of a commission order issuing,
modifying or amending a siting certificate, or resolving a
complaint related to the holder’s compliance with the material
terms and conditions a siting certificate through appropriate
proceedings in any circuit court having jurisdiction.

(h) The material terms and conditions of a commission
order issuing, modifying or amending a siting certificate or
resolving a complaint related to the holder’s compliance with
the material terms and conditions of a commission order issuing
a siting certificate shall continue to apply to any transferee of
the siting certificate or to any transferee of all or a portion of the
ownership interest in an electric generating facility for which a
siting certificate has been issued. In either case, the transferee or
original holder of the siting certificate shall be subject to the
continuing jurisdiction of the commission to the extent provided
in subsections (e) and (f) of this section.

(i) Any party feeling aggrieved by a final order of the
commission under this section may petition for a review thereof
by the supreme court of appeals pursuant to section one, article
five of this chapter.
(j) The commission may prescribe such rules as may be necessary to carry out the provisions of this section in accordance with the provisions of section seven, article one of this chapter. Such rules may include and provide for an application fee to be charged an applicant for a siting certificate, or for a modification of, or amendment to, a siting certificate previously issued, under the provisions of this section, which fee shall be paid into the state treasury and kept in a special fund designated public service commission fund as established in subsection (a), section six, article three of this chapter, to be used for the purposes set forth in that subsection.
That Joint Committee on Enrolled Bills hereby certifies that the
foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 18th

Governor