# WEST VIRGINIA LEGISLATURE

## 2024 REGULAR SESSION

## Introduced

# House Bill 5372

By Delegate Rohrbach, Akers, Forsht, Hornby, T. Clark, Smith, Stephens, Mallow, Sheedy, and Hanshaw (Mr. Speaker)

[Introduced January 30, 2024; Referred to the Committee on the Judiciary]

A BILL to repeal §1-2-4 of the Code of West Virginia, 1931, as amended, to repeal §1-5-5 of said code; to amend and reenact §4-1-20 of said code; to repeal §1-2-4 of said code; to repeal §1-5-5 of said code; to repeal §4-1-20 of said code; to repeal §4-2-12 of said code; to repeal §4-7-11 of said code; to repeal §5-6-15 of said code; to repeal §5-10A-10 of said code; to amend and reenact §5-10D-11 of said code; to repeal §5-11-15 of said code; to repeal §5-11A-19 of said code; to repeal §5-27-1 of said code; to amend and reenact §5B-1-9 of said code; to repeal §5D-1-23 of said code; to repeal §5F-3-3 of said code; to repeal §6A-1-13 of said code; to repeal §7-7-21 of said code; to repeal §7-11-6 of said code; to repeal §7-12-16 of said code; to repeal §7-13-12 of said code; to repeal §7-14-21 of said code; to repeal §7-14B-23 of said code; to repeal §7-16-8 of said code; to repeal §7-20-24 of said code; to repeal §7-27-45 of said code; to amend and reenact §8-13C-10 of said code; to repeal §8-36-1 of said code; to repeal §9-7-9 of said code; to repeal §11-1C-13 of said code; to repeal §11-6B-11 of said code; to amend and reenact §11-8-6e of said code; to repeal §11-8-6f of said code; to amend and reenact §11-8-6g of said code; to repeal §11-9-17 of said code; to repeal §11-10-21 of said code; to repeal §11-11-42 of said code; to repeal §11-12-17 of said code; to repeal §11-12-25 of said code; to repeal §11-12B-17 of said code; to repeal §11-12C-12 of said code; to repeal §11-13-26 of said code; to repeal §11-13A-21 of said code; to repeal §11-13C-13 of said code; to repeal §11-13D-9 of said code; to repeal §11-13E-7 of said code; to repeal §11-13Q-17 of said code; to repeal §11-13EE-15 of said code; to repeal §11-13GG-19 of said code; to repeal §11-13KK-16 of said code; to repeal §11-13MM-9 of said code; to repeal §11-14-29 of said code; to repeal §11-14A-26 of said code; to amend and reenact §11-15-31 of said code; to amend and reenact §11-15B-31 of said code; to repeal §11-16-29 of said code; to repeal §11-17-21 of said code; to amend and reenact §11-21-94 of said code; to repeal §11-23-22 of said code; to amend and reenact §11-24-40 of said code; to repeal §11-25-10 of said code; to repeal §11-27-34 of said code; to repeal §11A-3-74 of said code; to repeal §12-4B-4 of said code;

to repeal §12-8-16 of said code; to repeal §13-2C-18 of said code; to repeal §13-2D-16 of said code; to repeal §13-2E-15 of said code; to repeal §14-2-29 of said code; to repeal §15-5-23 of said code; to repeal §15-5A-8 of said code; to repeal §15-7-13 of said code; to repeal §15A-10-24 of said code; to amend and reenact §16-3-4b of said code; to repeal §16-5J-9 of said code; to repeal §16-5L-22 of said code; to amend and reenact §16-9B-4 of said code; to amend and reenact §16-9D-9 of said code; to repeal §16-22-5 of said code; to repeal §16-29D-9 of said code; to repeal §16-30C-16 of said code; to repeal §17-16A-28 of said code; to repeal §17-16F-34 of said code; to repeal §17-23-13 of said code; to repeal §17-25-10 of said code; to repeal §17-28-12 of said code; to amend and reenact §17A-6A-15a of said code; to repeal §17A-12-1 of said code; to amend and reenact §17C-15-46 of said code; to repeal §18-11C-9 of said code; to amend and reenact §18-31-13 of said code; to repeal §18-32-1 of said code; to repeal §18A-1-3 of said code; to repeal §18B-12-9 of said code; to repeal §18B-15-1 of said code; to repeal §19-2B-12 of said code; to repeal §19-2E-7 of said code; to repeal §19-5A-12 of said code; to repeal §19-12-17 of said code; to repeal §19-13-12 of said code; to repeal §19-23-29 of said code; to amend and reenact §20-8-3 of said code; to repeal §21-1A-8 of said code; to repeal §21-5B-6 of said code; to repeal §21-5C-11 of said code; to amend and reenact §21-5G-7 of said code; to repeal §21-5I-6 of said code; to repeal §21A-10-15 of said code; to amend and reenact §22-2-10 of said code; to repeal §22A-2-79 of said code; to amend and reenact §22C-9-7a of said code; to amend and reenact §23-4-2 of said code; to repeal §23-4-21 of said code; to amend and reenact §23-4-23 of said code; to repeal §23-6-1 of said code; to amend and reenact §24-2-4e of said code; to repeal §24-2-4f of said code; to amend and reenact §24-2-4h of said code; to amend and reenact §24-3-3a of said code; to repeal §27-13-2 of said code; to repeal §29-5A-26 of said code; to repeal §29-22-28 of said code; to repeal §29-22A-18 of said code; to amend and reenact §29A-7-4 of said code; to repeal §30-21-15 of said code; to amend and reenact §30-26-20 of said code; to repeal §31-2A-7 of said code;

to repeal §31-14-16 of said code; to repeal §31-15-32 of said code; to repeal §31-17-19 of said code; to repeal §31-17A-19 of said code; to repeal §31-18-25 of said code; to repeal §31-18A-11 of said code; to repeal §31-19-21 of said code; to repeal §31G-4-6 of said code; to repeal §32B-4-1 of said code; to repeal §33-4-10 of said code; to repeal §33-6B-7 of said code; to repeal §33-11-10 of said code; to amend and reenact §33-11B-1 of said code; to repeal §33-12-36 of said code; to repeal §33-15A-7 of said code; to amend and reenact §33-16-3d of said code; to repeal §33-26-19 of said code; to amend and reenact §33-28-5b of said code; to repeal §33-40B-10 of said code; to repeal §36A-8-3 of said code; to repeal §37B-1-7 of said code; to repeal §37B-2-8 of said code; to repeal §38-1A-13 of said code; to repeal §39A-2-12 of said code; to repeal §39A-3-5 of said code; to repeal §46A-6I-7 of said code; to repeal §46A-8-102 of said code; to repeal §47-2-18 of said code; to amend and reenact §47-9A-7 of said code; to repeal §47-11B-16 of said code; to repeal §47-14-14 of said code; to repeal §47-15-6 of said code; to repeal §47-18-23 of said code; to repeal §47-20-30 of said code; to repeal §47-21-29 of said code; to repeal §47-23-12 of said code; to repeal §51-9-16 of said code; to repeal §51-11-13 of said code; to repeal §53-4A-11 of said code; to amend and reenact §55-7-13d of said code; to repeal §55-7B-11 of said code; to repeal §55-12A-10 of said code; to repeal §55-19-8 of said code; to repeal §59-3-9 of said code; to amend and reenact §60-3A-31 of said code; to repeal §60-7-16 of said code; to repeal §61-3C-21 of said code; to repeal §61-5A-11 of said code; to repeal §62-1-12 of said code; to repeal §62-1A-9 of said code; to repeal §62-1B-4 of said code; to repeal §62-1C-19 of said code; to repeal §62-1D-16 of said code; to repeal §62-6-7 of said code, all relating to removing redundant severability clauses from the code.

*Be it enacted by the Legislature of West Virginia:*

# CHAPTER 1. THE STATE AND ITS SUBDIVISIONS.

**ARTICLE 2. APPORTIONMENT OF REPRESENTATION.**

**§1-2-4. Severability of provisions of article.**

[Repealed].

**ARTICLE 5. ACQUISITION AND DISPOSITION OF REAL PROPERTY BY AND BETWEEN PUBLIC BODIES.**

**§1-5-5. Severability.**

[Repealed].

## CHAPTER 4. THE LEGISLATURE.

**ARTICLE 1. OFFICERS, MEMBERS AND EMPLOYEES; APPROPRIATIONS; INVESTIGATIONS; DISPLAY OF FLAGS; RECORDS; USE OF CAPITOL BUILDING; PREFILING OF BILLS AND RESOLUTIONS; STANDING COMMITTEES; INTERIM MEETINGS; NEXT MEETING OF THE SENATE.**

**§4-1-20. Legislative findings; space in the capitol building for use by Legislature.**

(a) The Legislature hereby recognizes that in December, one thousand nine hundred sixty-eight, the Citizens Advisory Commission on the Legislature of West Virginia concluded its study for strengthening the West Virginia Legislature; that such commission recommended that the capitol building be utilized primarily for the space needs of the Legislature and that certain executive department offices be moved outside of the capitol building as necessary to provide the Legislature with the space it requires; and that these recommendations were based upon the following observations and conclusions of such commission: (1) There are fifteen committees in the Senate which consider legislation and twelve committees in the House of Delegates which consider legislation, (2) the rules committee of the Senate meets in the office of the President of the Senate and rules committee of the House of Delegates meets in the office of the Speaker of the House of Delegates, (3) the remaining fourteen committees of the Senate share three permanent committee rooms, (4) the remaining eleven committees of the House of Delegates

share five permanent committee rooms, (5) the Legislature does not have a hearing room or a committee room large enough to accommodate large public hearings, (6) when any large public hearing is held, the chamber of the Senate or the House of Delegates must be used, thereby eliminating the desks of the members on the floor of the chamber as work space for members not involved in the public hearing, (7) there are no rooms available in which individual members of the Legislature may talk with their constituents, (8) that at the very least offices should be provided for individual members of the Legislature to be used on a shared basis, (9) there is a pressing need for additional permanent committee rooms, with the view that in time all legislative committees which consider legislation would be assigned individual committee rooms, (10) that at least during legislative sessions, all committee chairmen should be provided, if possible, with a private office, and if not possible, with offices on a shared basis, (11) there should be adequate office space for the staff of the Senate and House of Delegates, and (12) the Legislature should have at least one hearing room, sufficiently large to seat one hundred fifty persons in addition to a legislative committee of twenty-five persons. The Legislature hereby determines and finds that the recommendations of the Citizens Advisory Commission on the Legislature of West Virginia with respect to the space needs of the Legislature and the observations and conclusions of such commission upon which such recommendations were based are correct and proper. The remainder of this section is enacted to implement the recommendations of the commission in this regard.

(b) The Legislature shall continue to have the exclusive use of all of the space in the main unit of the capitol building above the ground floor, the main unit being that portion of the capitol building connecting the east and west wings. In addition, the following space in the capitol building is assigned to and set aside for the exclusive use of the Legislature, with the use therefore to be determined by the Joint Committee on Government and Finance:

(1) All of the space on the second floor of the east wing of the capitol building; and

(2) All of the space on the second floor of the west wing of the capitol building, except that

room designated and numbered W-212 and the large vault used and occupied by the land division of the State Auditor's office, which said room W-212 and said vault shall continue to be used and occupied by the office of the State Auditor. The additional space for the Legislature provided for in subdivisions (1) and (2) of this subsection shall be made available to the Legislature as soon as possible, but shall in any event be made available for occupancy by the Legislature not later than July 1, one thousand nine hundred seventy-two.

(c) As soon as the additional space provided for in subsection (b) of this section is made available for occupancy by the Legislature, then (1) the rooms designated and numbered E-126, E-128, E-130, E-132, E-134, E-136 and E-138 on the ground floor of the east wing of the capitol building and the rooms designated and numbered E-140, 28, 30 and 32 on the ground floor of the main unit of the capitol building and occupied by the office of legislative services on the effective date of this section shall be relinquished by the Legislature for occupancy by the executive branch of the state government, and (2) as a substitute for the space on the second floor of the west wing vacated by the State Auditor, and in order to insure adequate space for the Office of the State Auditor, a constitutional officer, all of the ground floor of the west wing of the capitol building (except the rooms designated and numbered W-129, W-131, W-133, W-135, W-137, W-139, W-141, W-148, W-150, W-152, W-154, W-156 and W-158 and except for the space occupied on the effective date of this section by the Office of the Department of Public Institutions) shall be assigned to and set aside for the exclusive use of the State Auditor.

~~(d) If any provision of this section or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or applications of the section, and to this end the provisions of this section are declared to be severable.~~

**ARTICLE 2. LEGISLATIVE AUDITOR; POWERS; FUNCTIONS; DUTIES; COMPENSATION.**

**§4-2-12. Severability.**

[Repealed].

**ARTICLE 7. LEGISLATIVE BUILDING COMMISSION.**

**§4-7-11. Severability.**

[Repealed].

# CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS, OFFICES, PROGRAMS, ETC.

**ARTICLE 6. STATE BUILDINGS.**

**§5-6-15. Severability.**

[Repealed].

**ARTICLE 10A. DISQUALIFICATION FOR PUBLIC RETIREMENT PLAN BENEFITS.**

**§5-10A-10. Severability.**

[Repealed].

**ARTICLE 10D. CONSOLIDATED PUBLIC RETIREMENT BOARD.**

**§5-10D-11. Liability of participating public employer for delinquent retirement contributions; liability of participating public employer's successor for delinquent retirement contributions; lien for delinquent contributions; collection by suit.**

(a) A participating public employer of a public retirement system administered pursuant to this article that fails, for a period of sixty days, to pay: (i) An employee retirement contribution; (ii) an employer retirement contribution; (iii) a delinquency fee; (iv) any other fees, charges or costs related to the public retirement system; or (v) any combination of subdivisions (i) through (iv) of this subsection, is liable for the amount pursuant to this article.

(b) If a participating public employer of a public retirement system administered pursuant to this article: (i) Sells all or substantially all of its stock or assets; (ii) merges with another entity; (iii) dissolves its business; or (iv) participates, voluntarily or involuntarily, in an event which causes its business to terminate, all unpaid employee retirement contributions, employer retirement contributions, delinquency fees and other fees, charges, or costs related to the public retirement system shall be paid within thirty days of the date of applicable event identified in subdivision (i) through (iv) of this subsection.

(c) A transferee, successor or assignee of a participating public employer of a public retirement system administered pursuant to this article is liable for the payment of all employee retirement contributions, employer retirement contributions, delinquency fees and other fees, charges or costs related to the public retirement system, if the participating public employer does not pay those amounts as provided in subsection (b) of this section.

(d) All amounts due to the Consolidated Public Retirement Board from a participating public employer under this article is a debt owed to the Consolidated Public Retirement Board enforceable by a lien on all assets of a participating public employer, or its transferee, successor or assignee within this state. The lien attaches to all assets of a participating public employer within this state, or all assets of its transferee, successor or assignee on the date that any amount owed to the Consolidated Public Retirement Board is due. If a participating public employer, or its transferee, successor or assignee fails to pay an amount owed to the Consolidated Public Retirement Board under this article for a period of more than sixty days, the Consolidated Public Retirement Board may enforce the lien against the participating public employer, or its transferee, successor or assignee by instituting an action in the Circuit Court of Kanawha County. In the event that the Consolidated Public Retirement Board institutes an action against a participating public employer, or its transferee, successor or assignee to enforce a lien, the Consolidated Public Retirement Board is entitled to recover the amounts identified in subsection (a) of this section and in addition to those amounts, is entitled to recover all fees and costs incurred by the Consolidated

Public Retirement Board during the pendency of the action, including, without limitation, accrued interest, expert witness costs, filing fees, deposition costs and reasonable attorney fees.

~~(e) If a section, subsection, subdivision, provision, clause or phrase of this article or its application to any person or circumstance is held unconstitutional or invalid, the unconstitutionality or invalidity does not affect other sections, subsections, subdivisions, provisions, clauses or phrases or applications of the article, and to this end each and every section, subsection, subdivision, provision, clause and phrase of this article are declared to be severable. The Legislature declares that it would have enacted the remaining sections, subsections, subdivisions, provisions, clauses and phrases of this article even if it had known that any sections, subsections, subdivisions, provisions, clauses and phrases of this article would be declared to be unconstitutional or invalid, and that it would have enacted this article even if it had known that its application to any person or circumstance would be held to be unconstitutional or invalid.~~

**ARTICLE 11. HUMAN RIGHTS COMMISSION.**

**§5-11-15. Construction; severability.**

[Repealed].

**ARTICLE 11A. WEST VIRGINIA FAIR HOUSING ACT.**

**§5-11A-19. Severability of provisions.**

[Repealed].

**ARTICLE 27. SEVERABILITY.**

**§5-27-1. Severability.**

[Repealed].

## CHAPTER 5B. ECONOMIC DEVELOPMENT ACT OF 1985.

**ARTICLE 1. DEPARTMENT OF COMMERCE.**

**§5B-1-9. Authority to assist qualifying tourism development projects and tourism development expansion projects; legislative findings.**

(a) The Department of Commerce may assist qualifying tourism development projects and tourism development expansion projects by approved companies pursuant to §5B-2E-1 *et seq.* of this code which are located in, or partially in, municipalities with a population of 2,000 or less, effective as of the effective date of the most recent census, as specified in §8-1-4 of this code relating to the creation of tourism development districts.

(b) The Legislature finds and declares that the general welfare and material well-being of the citizens of the state depend, in large measure, upon the development and expansion of tourism in the state, and that, beyond the creation and expansion of tourism development projects and tourism development expansion projects, it is in the best interest of the state to induce and assist in tourism development in small municipalities through the creation of tourism development districts, in order to advance the public purposes of relieving unemployment by preserving and creating jobs, and preserving and creating new and greater sources of revenues for the support of public services provided by the state and local government; and that tourism development districts are of paramount importance to the state and its economy and for the state's contribution to the national economy.

It is the intent of the Legislature to occupy the whole field of the creation and regulation of tourism development districts. The stated purpose of this section is to promote uniform and consistent application of the act within the state.

(c) This section prohibits:

(1) Certain municipalities, whether by ordinance, resolution, administrative act, or otherwise, from enacting, adopting, implementing, or enforcing ordinances, regulations, or rules which limit, in any way, the creation of, and acquisition, construction, equipping, development, expansion, and operation of any tourism development project or tourism development expansion project in a tourism development district; and

(2) Certain municipalities from imposing or enforcing local laws and ordinances concerning the creation or regulation of any tourism development district and any tourism development project

or tourism development expansion project therein.

(d) Any developer or owner of a tourism development project or tourism development expansion project which has been determined by the West Virginia Development Office, pursuant to §5B-2E-1 *et seq.* of this code, to be an approved company and which has entered into an agreement with the development office pursuant to §5B-2E-6 of this code to provide the approved company with a credit against the West Virginia consumers sales and service tax imposed by §11-15-1 *et seq.* of this code may apply to the development office for designation of a tourism development district encompassing the area where the tourism development project or the tourism development expansion project is to be acquired, constructed, equipped, developed, expanded, and operated: *Provided,* That notwithstanding any provision of §5B-2E-5(c)(2) of this code to the contrary, only tourism development projects and tourism development expansion projects with aggregate projected costs of construction, reconstruction, restoration, rehabilitation, or upgrading of not less than $25 million shall be eligible for designation as a tourism development district.

(e) Applicants for the creation of a tourism development district shall demonstrate that the district, when designated, will create significant economic development activity:

(1) Applicants shall submit a development plan that provides specific details on proposed financial investment, direct and indirect jobs to be created, and the viability of the proposed tourism development district; and

(2) The applicant shall own, control, or have the right of use to all real property within the proposed tourism development district and shall provide evidence of such ownership, control, or right of use in the application to the development office.

(f) The proposed district shall be entirely or partially within the corporate limits of a municipality which has a population of 2,000 or less as of the effective date of the most recent census, as specified in §8-1-4 of this code.

(g) All costs for the application shall be borne by the applicant.

(h) The application submitted by the applicant to the development office pursuant to §5B-2E-1 *et seq.* of this code may be considered by the development office to be sufficient to meet some of the requirements of this section.

(i) The decision of the development office to designate a tourism development district shall be final.

(j) The total number of approved tourism development districts may not exceed five. When the total number of designated tourism development districts equals five, no further designations may be approved by the development office.

(k) Each tourism development district shall terminate by operation of law 99 years from the date approved by the development office, unless a shorter time period for termination is agreed to by the applicant and the development office. The development office may terminate a tourism development district if the development office determines that the tourism development project or tourism development expansion project has been abandoned or ceased operations for five consecutive years.

(l) In accordance with subsections (b) and (c) of this section, and notwithstanding any provision of this code to the contrary, or any municipality's home rule powers with respect to ordinances and ordinance procedures, including any authority pursuant to the Municipal Home Rule Program under §8-1-5a of this code, designated tourism development districts, and the tourism development projects or tourism development expansion projects therein, may not be subject to the following:

(1) Municipal zoning, historic preservation, horticultural, noise, viewshed, lighting, development, or land use ordinances, restrictions, limitations, or approvals;

(2) Municipal regulation of the sale of alcoholic liquor, nonintoxicating beer, or wine for consumption within the tourism development district;

(3) Municipal building permitting, inspection, or code enforcement;

(4) Municipal license requirements;

(5) The legal jurisdiction of the municipality in which the tourism development district is entirely or partially located, except as specifically provided in this article;

(6) The implementation of any tax, fee, or charge by the municipality, except as specifically provided in this section; or

(7) Any requirement under state law for the consent or approval of the municipality in which the tourism development district is entirely or partially located of any state or county action pursuant to this code, specifically including, but not limited to, §7-11B-1 *et seq.* of this code, for formal consent of the governing body of a municipality for county or state action regarding the establishment of tax increment financing development or redevelopment districts or the approval of tax increment financing development or redevelopment plans.

(m) Notwithstanding the creation of the tourism development district, the owner, operator, or manager, as applicable, and all concessions and licensees thereof, of the tourism development project or tourism development expansion project located therein shall:

(1) Pay business and occupation tax, if applicable, pursuant to §8-13-5 of this code, to the municipality in the same manner as any other business or commercial venture located within the municipality;

(2) Collect and remit municipal sales and service tax and municipal use tax, if applicable, pursuant to §8-1-5a, §8-13C-4, and §8-13C-5 of this code, to the municipality in the same manner as any other business or commercial venture located within the municipality;

(3) Pay ad valorem real and personal property tax pursuant to the same millage rates as any other business or commercial venture located within the municipality;

(4) Collect and remit hotel occupancy tax, if applicable, to the municipality or county in accordance with §7-18-1 of this code;

(5) Pay all municipal service fees enacted pursuant to §8-13-13 of this code, including, but not limited to, fire, police, sanitation, or city service fees;

(6) Pay all municipal utility rates, fees, and charges for utilities used or consumed during

construction and operation of premises within the tourism development district, including, but not limited to, water, sewer, stormwater, and garbage and recycling collection: *Provided,* That (i) The rates, fees, and charges for such services shall be based on the cost of providing such service and the municipality shall enter into a contract for each such service with the developer and any contracts for water service or sewer service with the municipality shall be subject to review and approval by the Public Service Commission of West Virginia; and (ii) the developer shall only be required to pay any capacity improvement fee or impact fee to the extent that capital additions, betterments, and improvements must be designed, acquired, constructed, and equipped by the municipality to provide such service to the project and any such capacity improvement fee or impact fee for water or sewer service shall be subject to review and approval by the Public Service Commission of West Virginia;

(7) Comply with state laws, regulations, and licensure requirements concerning state control of alcoholic liquors pursuant to chapter 60 of this code and control of nonintoxicating beer pursuant to §11-16-1 *et seq.* of this code;

(8) Be entitled to municipal police protection and municipal fire protection, if available, in the same manner as any other business or commercial venture located within the municipality;

(9) Design, acquire, construct, and equip the tourism development project or the tourism development expansion project pursuant to the State Building Code in accordance with §8-12-13 of this code and corresponding State Rule 87 CSR 4; and

(10) Provide for inspection of the design, acquisition, construction, and equipping, and any subsequent expansion of the tourism development project or the tourism development expansion project pursuant to standards approved by the West Virginia Development Office.

(n) The West Virginia Department of Transportation may take actions necessary in support of the development of any tourism development project or tourism development expansion project in a tourism development district specifically, including, but not limited to, the development or improvement of such highways, roads, thoroughfares, and sidewalks within the municipality in

which the tourism development district is partially or entirely located.

(o) Failure of the Legislature to renew the Tourism Development Act, §5B-2E-1 *et seq.* of this code, may not, in any way, modify or alter the designation and vested rights of any tourism development district created prior to the failure of the Legislature to renew the Tourism Development Act and any such tourism development district shall continue to exist beyond the termination of the Tourism Development Act.

(p) The development office shall propose rules for legislative approval in accordance with §29A-3-1 *et seq*. of this code to implement this section, and the rules shall include, but not be limited to:

(1) The application and timeline process;

(2) A nonbinding review of the existing planning and zoning ordinances of any municipality in which the tourism development district is located;

(3) Notice provisions;

(4) The method and timeline for receiving statements of support or opposition from any municipality within or partially within the tourism development district;

(5) Additional application consideration criteria; and

(6) Application fees sufficient to cover the costs of consideration of an application.

(q) The development office shall promulgate emergency rules pursuant to §29A-3-15 of this code by July 1, 2020, to facilitate the implementation of this section.

~~(r) Pursuant to §2-2-10 of this code, if any provision of this section or the application thereof to any person or circumstance is held unconstitutional or invalid, the unconstitutionality or invalidity shall not affect other provisions or applications of this section, and to this end the provisions of this section are declared to be severable.~~

# CHAPTER 5D. PUBLIC ENERGY AUTHORITY ACT.

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

**§5D-1-23. Severability.**

[Repealed].

# CHAPTER 5F. REORGANIZATION OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT.

## ARTICLE 3. FUTURE REORGANIZATION; SEVERABILITY.

**§5F-3-3. Severability.**

[Repealed].

# CHAPTER 6A. EXECUTIVE AND JUDICIAL SUCCESSION.

## ARTICLE 1. EXECUTIVE AND JUDICIAL SUCCESSION.

**§6A-1-13. Separability.**

[Repealed].

# CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.

## ARTICLE 7. COMPENSATION OF ELECTED COUNTY OFFICIALS.

**§7-7-21. Severability.**

[Repealed].

## ARTICLE 11. COUNTY PARKS AND RECREATION COMMISSIONS.

**§7-11-6. Severability.**

[Repealed].

## ARTICLE 12. COUNTY AND MUNICIPAL DEVELOPMENT AUTHORITIES.

**§7-12-16. Provisions severable.**

[Repealed].

## ARTICLE 13. ECONOMIC OPPORTUNITY PROGRAMS.

**§7-13-12. Severability.**

[Repealed].

**ARTICLE 14. CIVIL SERVICE FOR DEPUTY SHERIFFS.**

**§7-14-21. Severability.**

[Repealed].

**ARTICLE 14B. CIVIL SERVICE FOR CORRECTIONAL OFFICERS.**

**§7-14B-23. Severability.**

[Repealed].

**ARTICLE 16. COUNTY SOLID WASTE AUTHORITIES.**

**§7-16-8. Provisions severable.**

[Repealed].

**ARTICLE 20. FEES AND EXPENDITURES FOR COUNTY DEVELOPMENT.**

**§7-20-24. Severability.**

[Repealed].

**ARTICLE 27. LETTING OUR COUNTIES ACT LOCALLY ACT**

**§7-27-45. Severability.**

[Repealed].

# CHAPTER 8. MUNICIPAL CORPORATIONS.

## ARTICLE 13C. MUNICIPAL TAX IN LIEU OF BUSINESS AND OCCUPATION TAX; AND MUNICIPAL TAXES APPLICABLE TO PENSION FUNDS; ADDITIONAL AUTHORITIES RELATING TO PENSIONS AND BOND ISSUANCE.

**§8-13C-10. Conflict.**

(a) If a court of competent jurisdiction finds that the provisions of this article and the provisions of articles fifteen, fifteen-a and fifteen-b, chapter eleven of this code conflict and cannot be harmonized, then the provisions of said articles shall control.

~~(b) If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, that decision does not~~

~~affect the validity of the remaining portions of this article or any part thereof: *Provided,* That if this article is held to be unconstitutional under section thirty-nine, article VI of the Constitution of West Virginia this severability clause shall not apply.~~

### ARTICLE 36. CONSTITUTIONALITY AND SEVERABILITY.

#### §8-36-1. Constitutionality and severability.

[Repealed].

## CHAPTER 9. HUMAN SERVICES.

### ARTICLE 7. FRAUD AND ABUSE IN THE MEDICAID PROGRAM.

#### §9-7-9. Severability.

[Repealed].

## CHAPTER 11. TAXATION.

### ARTICLE 1C. FAIR AND EQUITABLE PROPERTY VALUATION.

#### §11-1C-13. Severability.

[Repealed].

### ARTICLE 6B. HOMESTEAD PROPERTY TAX EXEMPTION.

#### §11-6B-11. Severability.

[Repealed].

### ARTICLE 8. LEVIES.

#### §11-8-6e. Effect on regular levy rate when appraisal results in tax increase; public hearings.

(a) Notwithstanding any other provision of law, where any annual appraisal, triennial appraisal or general valuation of property would produce an assessment that would cause an increase of one percent or more in the total projected property tax revenues that would be realized were the then current regular levy rates by the county commission and the municipalities to be imposed, the rate of levy shall be reduced proportionately as between the county commission and the municipalities and for all classes of property for the forthcoming tax year so as to cause such

rate of levy to produce no more than one hundred one percent of the previous year's projected property tax revenues from extending the county commission and municipality levy rates, unless there has been compliance with subsection (c) of this section.

An additional appraisal or valuation due to new construction or improvements to existing real property, including beginning recovery of natural resources, and newly acquired personal property shall not be an annual appraisal or general valuation within the meaning of this section, nor shall the assessed value of such improvements be included in calculating the new tax levy for purposes of this section. Special levies shall not be included in the reduced levy calculation set forth in subsection (b) of this section.

(b) The reduced rates of levy shall be calculated in the following manner:

(1) The total assessed value of each class of property as it is defined by section five, article eight of this chapter for the assessment period just concluded shall be reduced by deducting the total assessed value of newly created properties not assessed in the previous year's tax book for each class of property;

(2) The resulting net assessed value of Class I property shall be multiplied by .01; the value of Class II by .02; and the values of Class III and IV, each by .04;

(3) Total the current year's property tax revenue resulting from regular levies for each county commission and municipality and multiply the resulting sum by one hundred one percent: *Provided,* That the one hundred one percent figure shall be increased by the amount the county's or municipality's increased levy provided for in subsection (b), section eight, article one-c of this chapter;

(4) Divide the total regular levy tax revenues, thus increased in subdivision (3) of this subsection, by the total weighted net assessed value as calculated in subdivision (2) of this subsection and multiply the resulting product by one hundred; the resulting number is the Class I regular levy rate, stated as cents-per-one hundred dollars of assessed value;

(5) The Class II rate is two times the Class I rate; Classes III and IV, four times the Class I

rate as calculated in the preceding subdivision.

(c) The governing body of a county or municipality may, after conducting a public hearing, which may be held at the same time and place as the annual budget hearing, increase the rate above the reduced rate required in this section if any such increase is deemed to be necessary by such governing body: *Provided,* That in no event shall the governing body of a county or municipality increase the rate above the reduced rate required by subsection (b) of this section for any single year in a manner which would cause total property tax revenues accruing to the governing body of the county or municipality, excepting additional revenue attributable to assessed valuations of newly created properties not assessed in the previous year's tax book for each class of property, to exceed by more than ten percent those property tax revenues received by the governing body of the county or municipality for the next preceding year: *Provided, however,* That this provision shall not restrict the ability of a county or municipality to enact excess levies as authorized under existing statutory or constitutional provisions: *Provided further,* That this provision does not restrict the ability of a county or municipality to issue bonds and enact sufficient levies to pay for such bonds pursuant to article one, chapter thirteen of this code when such issuance has been approved by an election administered pursuant to that article.

Notice of the public hearing and the meeting in which the levy rate shall be on the agenda shall be given at least seven days before the date for each public hearing by the publication of a notice in at least one newspaper of general circulation in such county or municipality: *Provided,* That a Class IV town or village as defined in section two, article one, chapter eight of this code, in lieu of the publication notice required by this subsection, may post no less than four notices of each public hearing, which posted notices shall contain the information required by the publication notice and which shall be in available, visible locations including the town hall. The notice shall be at least the size of one-eighth page of a standard size newspaper or one-fourth page of a tabloid-size newspaper and the headline in the advertisement shall be in a type no smaller than twenty-four point. The publication notice shall be placed outside that portion, if any, of the newspaper

reserved for legal notices and classified advertisements and shall also be published as a Class II-O legal advertisement in accordance with the provisions of article three, chapter fifty-nine of this code. The publication area is the county. The notice shall be in the following form and contain the following information, in addition to such other information as the local governing body may elect to include:

NOTICE OF PROPOSED TAX INCREASE.

The (name of the county or municipality) proposes to increase property tax levies.

1. Appraisal/Assessment Increase: Total assessed value of property, excluding additional assessments due to new or improved property, exceeds last year's total assessed value of property by ..... percent.

2. Lowered Rate Necessary to Offset Increased Assessment: The tax rate which would levy the same amount of property tax as last year, when multiplied by the new total assessed value of property with the exclusions mentioned above, would be $..... per $100 of assessed value for Class I property, $..... per $100 of assessed value for Class II property, $..... per $100 of assessed value for Class III and $..... per $100 of assessed value for Class IV property. These rates will be known as the "lowered tax rates".

3. Effective Rate Increase: The (name of the county or municipality) proposes to adopt a tax rate of $..... per $100 of assessed value for Class I property, $..... per $100 of assessed value for Class II property, $..... per $100 of assessed value for Class III property and $..... per $100 of assessed value for Class IV property. The difference between the lowered tax rates and the proposed rates would be $..... per $100, or ..... percent for Class I; $..... per $100, or ..... percent for Class II; $..... per $100, or ..... percent for Class III and $..... per $100, or ..... percent for Class IV. These differences will be known as the "effective tax rate increases".

Individual property taxes may, however, increase at a percentage greater than or less than the above percentage.

4. Revenue produced last year: $.....

5. Revenue projected under the effective rate increases: $.....

6. Revenue projected from new property or improvements: $.....

7. General areas in which new revenue is to be allocated: A public hearing on the increases will be held on (date and time) at (meeting place). A decision regarding the rate increase will be made on (date and time) at (meeting place).

(d) All hearings are open to the public. The governing body shall permit persons desiring to be heard an opportunity to present oral testimony within such reasonable time limits as are determined by the governing body.

(e) This section shall be effective as to any regular levy rate imposed by the county commission or a municipality for taxes due and payable on or after July 1, 1991. ~~If any provision of this section is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or its application and to this end the provisions of this section are declared to be severable.~~

**§11-8-6f. Regular school board levy rate; creation and implementation of Growth County School Facilities Act; creation of Growth County School Facilities Act Fund.**

(a) Notwithstanding any other provision of law, where any annual appraisal, triennial appraisal or general valuation of property would produce a statewide aggregate assessment that would cause an increase of two percent or more in the total property tax revenues that would be realized were the then current regular levy rates of the county boards of education to be imposed, the rate of levy for county boards of education shall be reduced uniformly statewide and proportionately for all classes of property for the forthcoming tax year so as to cause the rate of levy to produce no more than one hundred two percent of the previous year's projected statewide aggregate property tax revenues from extending the county board of education levy rate, unless subsection (b) of this section is complied with. The reduced rates of levy shall be calculated in the following manner: (1) The total assessed value of each class of property as it is defined by section five of this article for the assessment period just concluded shall be reduced by deducting the total

assessed value of newly created properties not assessed in the previous year's tax book for each class of property; (2) the resulting net assessed value of Class I property shall be multiplied by .01; the value of Class II by .02; and the values of Classes III and IV, each by .04; (3) total the current year's property tax revenue resulting from regular levies for the boards of education throughout this state and multiply the resulting sum by one hundred two percent: *Provided,* That the one hundred two percent figure shall be increased by the amount the boards of education's increased levy provided for in subsection (b), section eight, article one-c of this chapter; (4) divide the total regular levy tax revenues, thus increased in subdivision (3) of this subsection, by the total weighted net assessed value as calculated in subdivision (2) of this subsection and multiply the resulting product by one hundred; the resulting number is the Class I regular levy rate, stated as cents-per-one hundred dollars of assessed value; and (5) the Class II rate is two times the Class I rate; Classes III and IV, four times the Class I rate as calculated in the preceding subdivision.

An additional appraisal or valuation due to new construction or improvements, including beginning recovery of natural resources, to existing real property or newly acquired personal property shall not be an annual appraisal or general valuation within the meaning of this section, nor shall the assessed value of the improvements be included in calculating the new tax levy for purposes of this section. Special levies shall not be included in any calculations under this section.

(b) After conducting a public hearing, the Legislature may, by act, increase the rate above the reduced rate required in subsection (a) of this section if an increase is determined to be necessary.

(c) The State Tax Commissioner shall report to the Joint Committee on Government and Finance and the Legislative Oversight Commission on Education Accountability by March 1 of each year on the progress of assessors in each county in assessing properties at the Constitutionally required sixty percent of market value and the effects of increasing the limit on the increase in total property tax revenues set forth in this section to two percent.

(d) *Growth County School Facilities Act. — Legislative findings*. —

The Legislature finds and declares that there has been, overall, a statewide decline in enrollment in the public schools of this state; due to this decline, most public schools have ample space for students, teachers and administrators; however, some counties of this state have experienced significant increases in enrollment due to significant growth in those counties; that those counties experiencing significant increases do not have adequate facilities to accommodate students, teachers and administrators. Therefore, the Legislature finds that county boards of education in those high-growth counties should have the authority to designate revenues generated from the application of the regular school board levy due to new construction or improvements placed in a Growth County School Facilities Act Fund be used for school facilities in those counties to promote the best interests of this state's students.

(1) For the purposes of this subsection, "growth county" means any county that has experienced an increase in second month net enrollment of fifty or more during any three of the last five years, as determined by the state Department of Education.

(2) The provisions of this subsection shall only apply to any growth county, as defined in subdivision (1) of this subsection, that, by resolution of its county board of education, chooses to use the provisions of this subsection.

(3) For any growth county, as defined in subdivision (1) of this subsection, that adopts a resolution choosing to use the provisions of this subsection, pursuant to subdivision (2) of this subsection, assessed values resulting from additional appraisal or valuation due to new construction or improvements to existing real property shall be designated as new property values and identified by the county assessor. The statewide regular school board levy rate as established by the Legislature shall be applied to the assessed value designated as new property values and the resulting property tax revenues collected from application of the regular school board levy rate shall be placed in a separate account designated as the Growth County School Facilities Act Fund. Revenues deposited in the Growth County School Facilities Act Fund shall be appropriated by the county board of education for construction, maintenance or repair of school facilities.

Revenues in the fund may be carried over for an indefinite length of time and may be used as matching funds for the purpose of obtaining funds from the School Building Authority or for the payment of bonded indebtedness incurred for school facilities. For any growth county choosing to use the provisions of this subsection, estimated school board revenues generated from application of the regular school board levy rate to new property values are not to be considered as local funds for purposes of the computation of local share under the provisions of section eleven, article nine-a, chapter eighteen of this code.

(e) This section, as amended during the legislative session in the year 2004, shall be effective as to any regular levy rate imposed for the county boards of education for taxes due and payable on or after July 1, 2004. ~~If any provision of this section is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or its application and to this end the provisions of this section are declared to be severable.~~

**§11-8-6g. Effect on special levy rates when appraisal results in tax revenue increase; public hearings.**

(a) Until July 1, 1995, as to any special levy in effect prior to that date, and notwithstanding any other provision of law to the contrary, where any annual appraisal, triennial appraisal or general valuation of property would produce an assessment that would cause an increase of four percent or more in the total projected property tax revenues that would be realized were the special levy rates then in effect by the county commission, the municipalities or the county board of education to be imposed, the local levying body shall comply with subsection (b) of this section and may reduce the rate of special levy in accordance with the provisions of subsection (d) of this section until July 1, 1995. After July 1, 1995, each levying body shall adopt only the levy rate which is specified and approved in the levy ballot: *Provided,* That if the special levy ballot provision authorizes the levying body to reduce the rate of special levy, such rate may be reduced in accordance with the special levy ballot provision.

An additional appraisal or valuation due to new construction or improvements to existing real property, including beginning recovery of natural resources, and newly acquired personal property shall not be an annual appraisal or general valuation within the meaning of this section, nor shall the assessed value of such improvements be included in calculating the new tax levy for purposes of this section.

(b) Any local levying body projected to realize such increase greater than four percent shall conduct a public hearing no later than March 20 in the years 1994 and 1995, which hearing may be held at the same time and place as the annual budget hearing. Notice of the public hearing and the meeting in which the levy rate shall be on the agenda shall be given at least seven days before the date for each public hearing by the publication of a notice in at least one newspaper of general circulation in such county or municipality: *Provided,* That a Class IV town or village as defined in section two, article one, chapter eight of this code, in lieu of the publication notice required by this subsection, may post no less than four notices of each public hearing, which posted notices shall contain the information required by the publication notice and which shall be in available, visible locations including the town hall. The notice shall be at least the size of one-eighth page of a standard size newspaper or one-fourth page of a tabloid size newspaper, and the headline in the advertisement shall be in a type no smaller than twenty-four point. The publication notice shall be placed outside that portion, if any, of the newspaper reserved for legal notices and classified advertisements and shall also be published as a Class II-O legal advertisement in accordance with the provisions of article three, chapter fifty-nine of this code. The publication area is the county. The notice shall be in the following form and contain the following information, in addition to such other information as the local governing body may elect to include:

HEARING REGARDING SPECIAL LEVY RATES

The (name of the local levying body) hereby gives notice that the special levy rate imposed by the (local levying body) causes an increase in property tax revenues due to increased valuations.

1. Appraisal/Assessment Increase: Total assessed value of property, excluding additional assessments due to new or improved property, exceeds last year's total assessed value of property by ..... percent.

2. Current Year's Revenue Produced Under Special Levy:

3. Projected Revenue Under Special Levy for Next Tax Year:

4. Revenue Projected from New Property or Improvements: $.....

5. General areas in which new revenue is to be allocated:

A public hearing on the issue of special levy rates will be held on (date and time) at (meeting place). A decision regarding the special levy rate will be made on (date and time) at (meeting place).

Notwithstanding any other provision of this subsection to the contrary, for the year 1993 only, any local levying body required to conduct a public hearing due to a four-percent increase as set forth in this subsection projected for the next fiscal year shall hold the public hearing prior to May 6, shall only be required to publish a Class I legal advertisement in accordance with the provisions of article three, chapter fifty-nine of this code, and need not provide such notice at least seven days before the date of the hearing as required in this subsection: *Provided,* That a Class IV town or village may provide notice as otherwise set forth in this subsection: *Provided, however,* That any public hearings held pursuant to the provisions of this section in the year 1993 prior to the effective date of this section are hereby ratified and confirmed as having full force and effect: *Provided further,* That no county commission or municipality shall be required to hold a public hearing as required by this section during the year 1993 for the fiscal year 1994.

(c) All hearings are open to the public, and the local levying body shall permit persons desiring to be heard an opportunity to present oral testimony within such reasonable time limits as are determined by the governing body. A decision regarding the special levy rate shall be made within ten days of the hearing.

(d) For the fiscal years beginning on July 1, 1993, 1994 and 1995, as to any special levy in

effect prior to July 1, 1995, a local levying body may reduce the rate of the special levy for all classes of property for the forthcoming tax year so as to cause such rate of special levy to produce no more than one hundred four percent of the previous year's projected property tax revenues from extending such special levy rates or such lesser reduction the local levying body considers adequate: *Provided,* That no levying body shall reduce any special levy if such levy rate has been covenanted or otherwise dedicated and is necessary to the payment of bonds or other obligations existing as of the effective date of this section: *Provided, however,* That nothing contained in this subsection shall be construed to limit the reduction of the levy rate when the terms of the special levy permit a lower reduction: *Provided further,* That this provision shall not restrict the ability of a local levying body to enact excess levies as authorized under existing statutory or Constitutional provisions.

~~(e) If any provision of this section is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or its application and to this end the provisions of this section are declared to be severable.~~

## ARTICLE 9. CRIMES AND PENALTIES.

### §11-9-17. Severability.

[Repealed].

## ARTICLE 10. WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT.

### §11-10-21. Severability.

[Repealed].

## ARTICLE 11. ESTATE TAXES.

### §11-11-42. Severability.

[Repealed].

## ARTICLE 12. BUSINESS REGISTRATION TAX.

### §11-12-17. Severability of provisions.

[Repealed].

**§11-12-25. Severability.**

[Repealed].

**ARTICLE 12B. MINIMUM SEVERANCE TAX ON COAL.**

**§11-12B-17. Severability.**

[Repealed].

**ARTICLE 12C. CORPORATE LICENSE TAX.**

**§11-12C-12. Severability.**

[Repealed].

**ARTICLE 13. BUSINESS AND OCCUPATION TAX.**

**§11-13-26. Severability.**

[Repealed].

**ARTICLE 13A. SEVERANCE AND BUSINESS PRIVILEGE TAX ACT.**

**§11-13A-21. Severability.**

[Repealed].

**ARTICLE 13C. BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT.**

**§11-13C-13. Severability.**

[Repealed].

**ARTICLE 13D. TAX CREDITS FOR INDUSTRIAL EXPANSION AND REVITALIZATION, RESEARCH AND DEVELOPMENT PROJECTS, CERTAIN HOUSING DEVELOPMENT PROJECTS, MANAGEMENT INFORMATION SERVICES FACILITIES, INDUSTRIAL FACILITIES PRODUCING COAL-BASED LIQUIDS USED TO PRODUCE SYNTHETIC FUELS, AND AEROSPACE INDUSTRIAL FACILITY INVESTMENTS.**

**§11-13D-9. Severability.**

[Repealed].

## ARTICLE 13E. BUSINESS AND OCCUPATION TAX CREDIT FOR COAL LOADING FACILITIES.

### §11-13E-7. Severability.

[Repealed].

## ARTICLE 13Q. ECONOMIC OPPORTUNITY TAX CREDIT.

### §11-13Q-17. Severability.

[Repealed].

## ARTICLE 13EE. COAL SEVERANCE TAX REBATE.

### §11-13EE-15. Severability.

[Repealed].

## ARTICLE 13GG. DOWNSTREAM NATURAL GAS MANUFACTURING INVESTMENT TAX CREDIT OF 2020.

### §11-13GG-19. Severability.

[Repealed].

## ARTICLE 13KK. WEST VIRGINIA TAX CREDIT FOR FEDERAL EXCISE TAX IMPOSED UPON SMALL ARMS AND AMMUNITION MANUFACTURERS.

### §11-13KK-16. Severability.

[Repealed].

## ARTICLE 13MM. WEST VIRGINIA PROPERTY TAX ADJUSTMENT ACT.

### §11-13MM-9. Severability.

[Repealed].

## ARTICLE 14. GASOLINE AND SPECIAL FUEL EXCISE TAX.

**§11-14-29. Severability.**

[Repealed].

## ARTICLE 14A. MOTOR CARRIER ROAD TAX.

**§11-14A-26. Severability.**

[Repealed].

## ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.

**§11-15-31. Construction ~~and severability~~.**

(a) *Construction.* –- If a court of competent jurisdiction finds that the provisions of this article and of article fifteen-b of this chapter conflict and cannot be harmonized, then the provisions of article fifteen-b shall control.

~~(b) *Severability*. –- If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, that decision may not affect the validity of the remaining portions of this article or any part thereof.~~

## ARTICLE 15B. STREAMLINED SALES AND USE TAXES.

**§11-15B-31. Conflict; ~~partial unconstitutionality~~.**

(a) *Conflict*. -– If a court of competent jurisdiction finds that the provisions of this article and of article fifteen-a of this chapter conflict and cannot be harmonized, then the provisions of this article shall control.

~~(b) *Severability*. –- If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, that decision does not affect the validity of the remaining portions of this article or any part thereof.~~

## ARTICLE 16. NONINTOXICATING BEER.

**§11-16-29. Severability.**

The provisions of subdivision (cc), section ten, article two, chapter two of this code shall apply to the provisions of this article to the same extent as if the same were set forth in extenso

herein ~~and to the extent therein provided the provisions of this article are declared to be severable.~~

## ARTICLE 17. TOBACCO PRODUCTS EXCISE TAX ACT.

**§11-17-21. Severability.**

[Repealed].

## ARTICLE 21. PERSONAL INCOME TAX.

**§11-21-94. Effective date; ~~severability~~.**

(a) Effective date. -- The provisions of this article shall take effect immediately. Such provisions shall apply to all taxable years ending on or after December 31, 1961, and to the entirety of each such year, including that part which has elapsed prior to the effective date of this article. Such provisions shall also apply to taxable years beginning prior to and ending in the year 1961, but the tax imposed for any such year shall be one twelfth of a tax for the full year multiplied by the number of months elapsed from January 1, 1961, until the end of the taxable year.

~~(b) Severability. -- If any provision of this article or the application thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.~~

## ARTICLE 23. BUSINESS FRANCHISE TAX.

**§11-23-22. Severability.**

[Repealed].

## ARTICLE 24. CORPORATION NET INCOME TAX.

**§11-24-40. Effective date; ~~severability~~.**

~~(a)~~ Effective date. -- The provisions of this article shall take effect on July 1, 1967.

~~(b) Severability. -- If any provision of this article or the application thereof shall for any~~

~~reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to other persons or circumstances shall not be affected thereby.~~

**ARTICLE 25. TAX RELIEF FOR ELDERLY HOMEOWNERS AND RENTERS.**

**§11-25-10. Severability.**

[Repealed].

**ARTICLE 27. HEALTH CARE PROVIDER TAXES.**

**§11-27-34. Severability.**

[Repealed].

# CHAPTER 11A. COLLECTION AND ENFORCEMENT OF PROPERTY TAXES.

**ARTICLE 3. SALE OF TAX LIENS AND NONENTERED, ESCHEATED AND WASTE AND UNAPPROPRIATED LANDS.**

**§11A-3-74. Severability.**

[Repealed].

# CHAPTER 12. PUBLIC MONEYS AND SECURITIES.

**ARTICLE 4B. COMPUTER DONATION PROGRAM.**

**§12-4B-4. Severability.**

[Repealed].

**ARTICLE 8. PENSION LIABILITY REDEMPTION.**

**§12-8-16. Severability.**

[Repealed].

## CHAPTER 13. PUBLIC BONDED INDEBTEDNESS.

### ARTICLE 2C. INDUSTRIAL DEVELOPMENT AND COMMERCIAL DEVELOPMENT BOND ACT.

**§13-2C-18. Severability.**

[Repealed].

### ARTICLE 2D. AIRPORT DEVELOPMENT BOND ACT.

**§13-2D-16. Severability.**

[Repealed].

### ARTICLE 2E. REVENUE BOND REFUNDING ACT.

**§13-2E-15. Severability.**

[Repealed].

## CHAPTER 14. CLAIMS DUE AND AGAINST THE STATE.

### ARTICLE 2. CLAIMS AGAINST THE STATE.

**§14-2-29. Severability.**

[Repealed].

## CHAPTER 15. PUBLIC SAFETY.

### ARTICLE 5. DIVISION OF HOMELAND SECURITY AND EMERGENCY MANAGEMENT.

**§15-5-23. Severability; conflicts.**

[Repealed].

### ARTICLE 5A. WEST VIRGINIA EMERGENCY RESPONSE AND COMMUNITY RIGHT-TO-KNOW ACT.

**§15-5A-8. Severability.**

[Repealed].

### ARTICLE 7. EMERGENCY INTERIM LEGISLATIVE SUCCESSION ACT.

**§15-7-13. Separability of provisions.**

[Repealed].

## CHAPTER 15A. DEPARTMENT OF HOMELAND SECURITY.

### ARTICLE 10. FIRE MARSHAL.

**§15A-10-24. Severability.**

[Repealed].

## CHAPTER 16. PUBLIC HEALTH.

### ARTICLE 3. PREVENTION AND CONTROL OF COMMUNICABLE AND OTHER INFECTIOUS DISEASES.

**§16-3-4b. Required exemptions to compulsory immunization against COVID-19 as a condition of employment; effective date.**

(a) A covered employer, as defined in this section, that requires as a condition of continued employment or as a condition of hiring an individual for employment, that such person receive a COVID-19 immunization or present documentation of immunization from COVID-19, shall exempt current or prospective employees from such immunization requirements upon the presentation of one of the following certifications:

(1) A certification presented to the covered employer, signed by a licensed physician or a licensed advanced practice registered nurse who has conducted an in-person examination of the employee or prospective employee, stating that the physical condition of the current or prospective employee is such that a COVID-19 immunization is contraindicated; there exists a specific precaution to the mandated vaccine; or the current or prospective employee has developed COVID-19 antibodies from being exposed to the COVID-19 virus, or suffered from and has recovered from the COVID-19 virus; or

(2) A notarized certification executed by the employee or prospective employee that is

presented to the covered employer by the current or prospective employee that he or she has sincerely held religious beliefs that prevent the current or prospective employee from taking the COVID-19 immunization.

(b) A covered employer may not be permitted to penalize or discriminate against current or prospective employees for exercising exemption rights provided in this section by practices including, but not limited to, benefits decisions, hiring, firing, or withholding bonuses, pay raises, or promotions.

(c) As used in this section, the following terms shall have the following meaning:

"Covered employer" means:

(1) The State of West Virginia, including any department, division, agency, bureau, board, commission, office, or authority thereof, or any political subdivision of the State of West Virginia including, but not limited to, any county, municipality, or school district;

(2) A business entity, including without limitation any individual, firm, partnership, joint venture, association, corporation, company, estate, trust, business trust, receiver, syndicate, club, society, or other group or combination acting as a unit, engaged in any business activity in this state, including for-profit or not-for-profit activity, that has employees;

(3) "Covered employer" does not include any Medicare or Medicaid-certified facilities which are subject to enforceable federal regulations contrary to the requirements of this section;

(4) "COVID-19" means the same as that term is defined in §55-19-3 of this code; or

(5) "Immunization" means any federally authorized immunization for COVID-19, whether fully approved or approved under an emergency use authorization.

(d) The provisions of this section are inapplicable to employees of covered employers who are required to work in Medicare or Medicaid-certified facilities which are subject to enforceable federal regulations contrary to the requirements of this section.

(e) Any person or entity harmed by a violation of this section may seek injunctive relief in a court of competent jurisdiction.

(f) The provisions of this section shall become effective immediately.

~~(g) Pursuant to §2-2-10 of this code, if any provision of this section or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or applications of the section, and to this end the provisions of this section are declared to be severable.~~

## ARTICLE 5J. CLINICAL LABORATORIES QUALITY ASSURANCE ACT.

**§16-5J-9. Interpretation of article; severability.**

[Repealed].

## ARTICLE 5L. LONG-TERM CARE OMBUDSMAN PROGRAM.

**§16-5L-22. Severability.**

[Repealed].

## ARTICLE 9B. IMPLEMENTING TOBACCO MASTER

**§16-9B-4. ~~Special severability rule; implementation date.~~ Implementation date.**

~~(a) *Section three severability rule*. —~~

~~(1) If the act amending section three of this article in the year two thousand three, or any portion of the amendment to paragraph (B), subdivision (2), subsection (b), section three of this article, made by that act, is held by a court of competent jurisdiction to be unconstitutional, then such paragraph (B) shall be deemed to be repealed in its entirety.~~

~~(2) If after application of subsection (a) of this section, a court of competent jurisdiction thereafter holds subdivision (2), subsection (b) of said section three to be unconstitutional, then section three as amended in the year two thousand three shall be deleted in its entirety and section three as enacted in the year one thousand nine hundred ninety-nine, shall be restored as if no amendments had been made to section three in the year two thousand three. Neither any holding of unconstitutionality nor the repeal of paragraph (B), subdivision (2), subsection (b), section three of this article shall affect, impair or invalidate any other portion of section three, or the~~

~~application of section three to any other person or circumstance, and such remaining portions of section three shall at all times continue in full force and effect.~~

*Implementation date*. -— The amendments to section three of this article in the year two thousand three shall not take effect until thirty days after the earlier of:

(1) All states that share a common border with this state enacting similar amendments to their laws implementing the master tobacco settlement agreement; or

(2) Thirty-three states, including this state, enacting similar amendments to their laws implementing the master tobacco settlement agreement.

## ARTICLE 9D. ENFORCEMENT OF STATUTES IMPLEMENTING TOBACCO MASTER SETTLEMENT AGREEMENT.

### §16-9D-9. Miscellaneous provisions.

(a) *Notice and review of determination*. -— A determination of the commissioner or the Attorney General to not include or to remove from the directory a brand family or tobacco product manufacturer is subject to review in the manner prescribed by article ten-a, chapter eleven of this code, by filing a petition for review with the office of tax appeals within thirty days of receipt of the commissioner's written determination to not include or to remove the brand family or tobacco product manufacturer from the directory. A determination not to list in, or to remove from, the directory any brand family or tobacco product manufacturer shall not be stayed during the pendency of appeal procedure.

(b) *Applicants for business registration certificate*. -— No person shall be issued a business registration certificate under article twelve, chapter eleven of this code or granted a renewal of its business registration certificate to act as a distributor or stamping agent unless the person has certified in writing, under penalty of perjury, that the person will comply fully with this article.

(c) *Promulgation of rules*. -— The commissioner and the Attorney General may separately promulgate any procedural, interpretive and legislative rules in the manner provided in article

three, chapter twenty-nine-a of this code, each considers necessary to effect the purposes of this article.

(d) *Recovery of costs and fees by Attorney General*. -– In any action brought by the state to enforce this article, the state is entitled to recover the costs of investigation, expert witness fees, costs of the action and reasonable attorney fees.

(e) *Disgorgement of profits for violations of this article*. -– If a court determines that a person has violated this article, the court shall order any profits, gain, gross receipts or other benefit from the violation to be disgorged and paid to the State Treasurer for deposit in the "tobacco control special fund", which is created in the State Treasury. Expenditures from the fund are to be made in accordance with appropriation by the Legislature and in accordance with the provisions of article three, chapter twelve of this code and upon the fulfillment of the provisions set forth in article two, chapter five-a of this code. Unless otherwise expressly provided, the remedies or penalties provided by this article are cumulative to each other and to the remedies or penalties available under all other laws of this state.

(f) *Construction ~~and severability~~*. --

(A) If a court of competent jurisdiction finds that the provisions of this article and of article nine-b of this chapter conflict and cannot be harmonized, then the provisions of article nine-b control.

(B) If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article causes article nine-b of this chapter to no longer constitute a qualifying or model statute, as those terms are defined in the master settlement agreement, then that portion of this article is not valid.

~~(C) If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this article is for any reason held to be invalid, unlawful or unconstitutional, that decision shall not affect the validity of the remaining portions of this article or any part thereof.~~

**ARTICLE 22. DETECTION AND CONTROL OF PHENYLKETONURIA,**

**GALACTOSEMIA, HYPOTHYROIDISM, AND CERTAIN OTHER DISEASES IN NEWBORN CHILDREN.**

**§16-22-5. Severability.**

[Repealed].

**ARTICLE 29D. STATE HEALTH CARE.**

**§16-29D-9. Severability; supersedes other provisions.**

[Repealed].

**ARTICLE 30C. DO NOT RESUSCITATE ACT.**

**§16-30C-16. Severability.**

[Repealed].

## CHAPTER 17. ROADS AND HIGHWAYS.

**ARTICLE 16A. WEST VIRGINIA PARKWAYS AUTHORITY.**

**§17-16A-28. Severability.**

[Repealed].

**ARTICLE 16F. WEST VIRGINIA DIVISION OF MULTIMODAL TRANSPORTATION FACILITIES.**

**§17-16F-34. Severability.**

[Repealed].

**ARTICLE 23. SALVAGE YARDS.**

**§17-23-13. Severability.**

[Repealed].

**ARTICLE 25. THE WEST VIRGINIA INDUSTRIAL ROAD PARTNERSHIP ACT OF 1989.**

**§17-25-10. ~~Severability clause; interpretation.~~ Interpretation.**

~~The provisions of this article are severable and if any of its provisions shall be held unconstitutional, the decision of the court shall not impair the remaining provisions of this article.~~ This article shall be construed liberally.

## ARTICLE 28. WEST VIRGINIA COMMUNITY EMPOWERMENT TRANSPORTATION ACT.

### §17-28-12. Severability.

[Repealed].

# CHAPTER 17A. MOTOR VEHICLE ADMINISTRATION, REGISTRATION, CERTIFICATE OF TITLE, AND ANTITHEFT PROVISIONS.

## ARTICLE 6A. MOTOR VEHICLE DEALERS, DISTRIBUTORS, WHOLESALERS AND MANUFACTURERS.

### §17A-6A-15a. Dealer data, obligation of manufacturer, vendors, suppliers and others; consent to access dealership information; unlawful activities; indemnification of dealer.

(a) Except as expressly authorized in this section, a manufacturer or distributor cannot require a motor vehicle dealer to provide its customer information to the manufacturer or distributor unless necessary for the sale and delivery of a new motor vehicle to a consumer, to validate and pay consumer or dealer incentives, for manufacturer's marketing purposes, for evaluation of dealer performance, for analytics, or to support claims submitted by the new motor vehicle dealer for reimbursement for warranty parts or repairs. Nothing in this section shall limit the manufacturer's ability to require or use customer information to satisfy any safety or recall notice obligation or other legal obligation.

(b) The dealer is only required to provide the customer information to the extent lawfully permissible, and to the extent the requested information relates solely to specific program requirements or goals associated with the manufacturer's or distributor's own vehicle makes. A

manufacturer, factory branch, distributor, distributor branch, dealer, data systems vendor, or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer or data systems vendor may not prohibit a dealer from providing a means to regularly and continually monitor, or conduct an audit of, the specific data accessed from or written to the dealer's data systems and from complying with applicable state and federal laws and any rules or regulations promulgated thereunder. These provisions do not impose an obligation on a manufacturer, factory branch, distributor, distributor branch, dealer, vendor, or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch, dealer, or data systems vendor to provide that capability.

(c) A manufacturer, factory branch, distributor, distributor branch, dealer, data systems vendor, or any third party acting on behalf of any manufacturer, factory branch, distributor, distributor branch or dealer, or data systems vendor, may not provide access to customer or dealership information maintained in a dealer data systems used by a motor vehicle dealer located in this state, other than a subsidiary or affiliate of the manufacturer factory branch, distributor or distributor branch without first obtaining the dealer's prior express written consent and agreement, revocable by the dealer upon 10 business days written notice, to provide the access.

(d) Upon a written request from a motor vehicle dealer, the manufacturer, factory branch, distributor, distributor branch, dealer, or data systems vendor, or any third party acting on behalf of or through any manufacturer, factory branch, distributor, distributor branch or dealer data systems vendor shall provide to the dealer a written list of all specific third parties other than a subsidiary or affiliate of the manufacturer, factory branch, distributor or distributor branch to whom any data obtained from the dealer has actually been provided within the 12 month period prior to date of dealer's written request. If requested by the dealer, the list shall further describe the scope and specific fields of the data provided. The consent does not change the person's obligations to comply with the terms of this section and any additional state or federal laws, and any rules or regulations promulgated thereunder, applicable to them with respect to the access.

(e) A manufacturer, factory branch, distributor, distributor branch, dealer, data systems vendor, or any third party acting on behalf of or through any dealer, or data systems vendor, having electronic access to customer or motor vehicle dealer data in a dealership data system used by a motor vehicle dealer located in this state shall provide notice in a reasonable timely manner to the dealer of any security breach of dealership or customer data obtained through the access.

(f) A manufacturer or distributor or a third party acting on behalf of a manufacturer or distributor may not require a dealer to provide any customer information: Any individual who is not a customer of such manufacturer's or distributor's own vehicle makes; for any purpose other than for reasonable marketing purposes on behalf of that dealer, market research, consumer surveys, market analysis, or dealership performance analysis; if sharing that information would not be permissible under local, state, or federal law; except to the extent the requested information relates solely to specific program requirements or goals associated with such manufacturer's or distributor's own vehicle makes; that is general customer information or other information related to the dealer, unless the requested information can be provided in a manner consistent with dealer's current privacy policies and Gramm-Leach-Bliley Act privacy notice, a dealer may not be required to amend that notice to accommodate data sharing with the manufacturer or distributor.

(g) As used in this section:

(1) "Authorized Integrator" means any third party with whom a dealer has entered into a written contract to perform a specific function for a dealer that permits the third party to access protected dealer data and/or to write data to a dealer data system to carry out the specified function (the "authorized integrator contract").

(2) "Dealer" means a new motor vehicle dealer as defined by §17A-6A-3(11) of this code and any authorized dealer personnel.

(3) "Dealer data system" means any software, hardware, or firmware used by a dealer in its business operations to store, process, or maintain protected dealer data.

(4) "Dealer data systems vendor" means any dealer management system provider,

customer relationship management system provider, or other vendor that permissibly stores protected dealer data pursuant to a written contract with the dealer ("dealer data systems vendor contract").

(5) "Data access overcharge" means any charge to a dealer or authorized integrator for integration beyond reimbursement for any direct costs incurred by the dealer data systems vendor for such Integration. If a dealer data systems vendor chooses to seek reimbursement from any dealer or authorized integrator for such direct costs, the direct costs must be disclosed to the dealer, and justified by documentary evidence of the costs associated with such Integration or it will be considered a data access overcharge.

(6) "Integration" means access to protected dealer data in a dealer’s dealer data system by an authorized integrator, or an authorized integrator writing data to a dealer’s dealer data system. Integration does not require access to any copyrighted material but must allow for access to all protected dealer data. Integration may be accomplished by any commercially reasonable means that do not violate this section, but all dealer data vendors must include an option to integrate via a secure open application programming interface (API), which must be made available to dealers and authorized integrators. In the event that APIs are no longer the reasonable commercial or technical standard for secure data integration, a similar open access integration method may be provided, to the extent it provides the same or better secure access to dealers and authorized Integrators as an API.

(7) "Prior express written consent" means written consent provided by the dealer that is contained in a document separate from any other consent, contract, franchise agreement, or other writing that specifically outlines the dealer’s consent for the authorized Integrator to obtain the dealer data, as well as the scope and duration of that consent. This consent may be unilaterally revoked by the dealer: (A) without cause, upon 30 days’ notice, and (B) immediately for cause.

(8) "Protected dealer data" means any of the following data that is stored in a dealer data system:

(A) Personal, financial, or other data pertaining to a consumer, or a consumer's vehicle that is provided to a dealer by a consumer or otherwise obtained by a dealer: *Provided*, That this subdivision does not give a new motor vehicle dealer any ownership or rights to share or use the motor vehicle diagnostic data beyond what is necessary to fulfill a dealer's obligation to provide warranty, repair, or service work to its customers; or

(B) Any other data regarding a dealer's business operations in that dealer's dealer data system:

(9) "Secure open API" means an application programming interface that allows authorized integrators to integrate with dealer data systems remotely and securely. The APIs must be "open" in that all required information to Integrate via the API (software development toolkit and any other necessary technical or other information) must be made available by a dealer data systems vendor to any authorized integrator upon request by a dealer. The secure open API must include all relevant endpoints to allow for access to all protected dealer data, or as are needed to integrate with protected dealer data, and must provide granularity and control necessary for dealers and authorized integrators to Integrate the data necessary under the authorized integrator contract. "Open" does not mean that the API must be available publicly or at no cost to an authorized integrator, however no data access overcharge may be assessed in connection with a secure open API.

(10) "Third party" includes service providers, vendors, including dealer data systems vendors and authorized integrators, and any other individual or entity other than the dealer. Third party does not include any manufacturer, factory branch, distributor, distributor branch or governmental entity acting pursuant to federal, state, or local law, or any third party acting pursuant to a valid court order.

(h) Prohibited Action

1. A third party may not:

(A) Access, share, sell, copy, use, or transmit protected dealer data from a dealer data

system without the express written consent of a dealer;

(B) Take any action, by contract, by technical means, or otherwise, that would prohibit or limit a dealer's ability to protect, store, copy, share, or use any protected dealer data. This includes, but is not limited to:

(i) Imposing any data access overcharges or other restrictions of any kind on the dealer or any authorized integrator for integration;

(ii) Prohibiting any third party that the dealer has identified as one of its authorized integrators from integrating with that dealer's dealer data system;

(iii) Place unreasonable restrictions on integration by any authorized integrator or other third party that the dealer wishes to be an authorized integrator. Examples of unreasonable restrictions include, but are not limited to:

(I) Unreasonable restrictions on the scope or nature of the data shared with an authorized integrator;

(II) Unreasonable restrictions on the ability of the authorized integrator to write data to a dealer data system;

(III) Unreasonable restrictions or conditions on a third party accessing or sharing protected dealer data, or writing data to a dealer data system; and

(IV) Requiring unreasonable access to sensitive, competitive, or other confidential business information of a third party as a condition for access to protected dealer data or sharing protected dealer data with an authorized integrator;

(iv) Prohibiting or limiting a dealer's ability to store, copy, securely share or use protected dealer data outside the dealer data system in any manner and for any reason; or

(v) Permitting access to or accessing protected dealer data without express written consent by the dealer.

(i) Nothing in this section shall be interpreted to prevent any dealer or third party from discharging its obligations as a service provider under an agreement or otherwise under federal,

state, or local law to protect and secure protected dealer data, or to otherwise limit those responsibilities.

(j) A dealer data systems vendor or authorized integrator is not responsible for any action taken directly by the dealer, or for any action it takes in appropriately following the written instructions of the dealer, to the extent that such action prevents it from meeting any legal obligation regarding the protection of protected dealer data or results in any liability as a consequence of such actions by the dealer.

(k) A dealer is not responsible for any action taken directly by any of its dealer data systems vendors or authorized integrators, or for any action it takes in appropriately following the written instructions of any of its dealer data systems vendors or authorized integrators, to the extent that such action prevents it from meeting any legal obligation regarding the protection of protected dealer data or results in any liability as a consequence of such actions by the dealer data systems vendor or authorized integrator.

(l) Additional responsibilities and restrictions

(1) All dealer data systems vendors must adopt and make available a standardized Integration framework (use of the STAR Standards or a standard compatible with the STAR standards shall be deemed to be in compliance with this requirement) and allow for integration via secure open APIs to authorized integrators. In the event that APIs are no longer the reasonable commercial or technical standard for secure data integration, a similar open access integration method may be provided, to the extent it provides the same or better secure Integration to dealers and authorized integrators as a secure open API.

(2) All dealer data systems vendors and authorized integrators:

(A) May Integrate, or otherwise access, use, store, or share protected dealer data, only as outlined in, and to the extent permitted by their dealer data systems vendor contract or authorized integrator contract;

(B) Must make any dealer data systems vendor contract or authorized integrator contract

terminable upon no more than 90 days notice from the dealer;

(C) Must, upon notice of the dealer's intent to terminate its dealer data systems vendor contract or authorized integrator contract, in order to prevent any risk of consumer harm or inconvenience, work to ensure a secure transition of all protected dealer data to a successor dealer data systems vendor or authorized integrator. This includes, but is not limited to:

(i) Providing unrestricted access to all protected dealer data and all other data stored in the dealer data system in a commercially reasonable time and format that a successor dealer data systems vendor or authorized integrator can access and use; and

(ii) Deleting or returning to the dealer all protected dealer data prior to termination of the contract pursuant to any written directions of the dealer;

(iii) Providing a dealer, upon request, with a listing of all entities with whom it is sharing or has shared protected dealer data, or with whom it has allowed access to protected dealer data; and

(iv) Allowing a dealer to audit the dealer data systems vendor or authorized integrator's access to and use of any protected dealer data.

(m) Notwithstanding the terms or conditions of any consent, authorization, release, novation, franchise, or other contract or agreement, every manufacturer, factory branch, distributor, distributor branch, dealer, data systems vendor, or any third party acting on behalf of or through a manufacturer, factory branch, distributor, distributor branch or dealer, data systems vendor shall fully indemnify, defend, and hold harmless any dealer or manufacturer, factory branch, distributor or distributor branch from all damages, attorney fees, and costs, other costs and expenses incurred by the dealer from complaints, claims, or actions arising out of manufacturer's, factory's branch, distributor's, distributor's branch, dealer data systems vendors, or any third party for its willful, negligent, or impermissible use or disclosure of dealer data or customer data or other sensitive information in the dealer's data system. The indemnification includes, but is not limited to, judgments, settlements, fines, penalties, litigation costs, defense

costs, court costs, costs related to the disclosure of security breaches, and attorneys' fees arising out of complaints, claims, civil, or administrative actions.

(n) The rights conferred on motor vehicle dealers in this section are not waivable and may not be reduced or otherwise modified by any contract or agreement.

(o) This section applies to contracts entered into after the effective date of this section.

(p) ~~If any provision of this section or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.~~

A manufacturer, factory branch, distributor, distributor branch, dealer, data management computer systems vendor, or any third party acting on behalf of itself, or through a manufacturer, factory branch, distributor, distributor branch, or dealer data management computer system vendor shall not take an act prejudicial against a new motor vehicle dealer because of a new motor vehicle dealer exercising its rights under this section.

### ARTICLE 12. SEVERABILITY AND EFFECT OF CHAPTER.

#### §17A-12-1. Severability.

[Repealed].

## CHAPTER 17C. TRAFFIC REGULATIONS AND LAWS OF THE ROAD.

### ARTICLE 15. EQUIPMENT.

#### §17C-15-46. Child passenger safety devices required; child safety seats and booster seats.

Every driver who transports a child under the age of eight years in a passenger automobile, van or pickup truck other than one operated for hire shall, while the motor vehicle is in motion and operated on a street or highway of this state, provide for the protection of the child by properly placing, maintaining and securing the child in a child passenger safety device system meeting applicable federal motor vehicle safety standards*: Provided,* That if a child is under the age of eight

years and at least four feet nine inches tall, a safety belt shall be sufficient to meet the requirements of this section.

Any person who violates any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $10 nor more than $20.

A violation of this section does not by virtue of the violation constitute evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages.

~~If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity may not affect other provisions or applications of this section and to this end the subsections of this section are declared to be severable.~~

If all seat belts in a vehicle are being used at the time of examination by a law officer and the vehicle contains more passengers than the total number of seat belts or other safety devices as installed in compliance with federal motor vehicle safety standards, the driver may not be considered in violation of this section.

# CHAPTER 18. EDUCATION.

## ARTICLE 11C. WEST VIRGINIA UNIVERSITY HOSPITAL AND WEST VIRGINIA HEALTH SYSTEM.

### §18-11C-9. Sections and provisions severable.

[Repealed].

## ARTICLE 31. HOPE SCHOLARSHIP PROGRAM.

### §18-31-13. Legal proceedings~~; severability~~.

(a) No liability arises on the part of the board or the state or of any county school district based on the award or use of a Hope Scholarship awarded pursuant to this article.

(b) It is the intention of the Legislature in the enactment of this article that if any part of this article is challenged in court as violating either the state or federal constitution, the parents of

eligible Hope Scholarship students should be deemed to have standing to be parties to such litigation, and should be permitted by the court to intervene if they are not already parties to such litigation.

~~(c) If any provision of this article or the application of any such provision of this article to any person or circumstance is held invalid by a court of competent jurisdiction, the remainder of this article or the application of its provisions to persons or circumstances other than those to which it is held invalid is not affected thereby.~~

### ARTICLE 32. SEVERABILITY.

#### §18-32-1. Severability.

[Repealed].

## CHAPTER 18A. SCHOOL PERSONNEL.

### ARTICLE 1. GENERAL PROVISIONS.

#### §18A-1-3. Constitutionality and severability.

[Repealed].

### ARTICLE 7. SEVERABILITY.

#### 18A-7-1. Severability.

[Repealed].

## CHAPTER 18B. HIGHER EDUCATION.

### ARTICLE 12. RESEARCH AND DEVELOPMENT AGREEMENTS FOR STATE INSTITUTIONS OF HIGHER EDUCATION.

#### §18B-12-9. Sections and provisions severable.

[Repealed].

### ARTICLE 15. SEVERABILITY.

#### §18B-15-1. Severability.

[Repealed].

# CHAPTER 19. AGRICULTURE.

## ARTICLE 2B. INSPECTION OF MEAT AND POULTRY.

### §19-2B-12. Severability.

1 [Repealed].

## ARTICLE 2E. HUMANE SLAUGHTER OF LIVESTOCK.

### §19-2E-7. Severability.

1 [Repealed].

## ARTICLE 5A. CONTROLLED ATMOSPHERE STORAGE OF FRESH FRUITS AND VEGETABLES.

### §19-5A-12. Article cumulative and nonexclusive; severability.

1 [Repealed].

## ARTICLE 12. INSECT PESTS, PLANT DISEASES AND NOXIOUS WEEDS.

### §19-12-17. Severability.

1 [Repealed].

## ARTICLE 13. INSPECTION AND PROTECTION OF AGRICULTURE.

### §19-13-12. Severability.

1 [Repealed].

## ARTICLE 23. HORSE AND DOG RACING

PART XV. SEVERABILITY

### §19-23-29. Severability.

1 [Repealed].

# CHAPTER 20. NATURAL RESOURCES.

## ARTICLE 8. GENERAL AND MISCELLANEOUS PROVISIONS.

### §20-8-3. Construction of chapter~~; severability~~.

The provisions of this chapter shall be liberally construed to effect the objects and purposes hereof. ~~The provisions of the chapter shall be construed to be separable and severable and in the event any clause, sentence or provision hereof shall for any reason be construed or held to be unconstitutional or invalid, such unconstitutionality or invalidity shall not affect or impair the remaining provisions hereof.~~

# CHAPTER 21. LABOR

## ARTICLE 1A. LABOR-MANAGEMENT RELATIONS ACT FOR THE PRIVATE SECTOR.

### §21-1A-8. Severability.

[Repealed].

## ARTICLE 5B. EQUAL PAY FOR EQUAL WORK.

### §21-5B-6. Provisions of article severable.

[Repealed].

## ARTICLE 5C. MINIMUM WAGE AND MAXIMUM HOURS STANDARDS FOR EMPLOYEES.

### §21-5C-11. Severability.

[Repealed].

## ARTICLE 5G. WEST VIRGINIA WORKPLACE FREEDOM ACT.

### §21-5G-7. Applicability~~; severability~~.

(a) *Applicability.* — This article applies to any written or oral contract or agreement entered into, modified, renewed or extended on or after July 1, 2016: *Provided,* That the provisions of this article do not otherwise apply to or abrogate a written or oral contract or agreement in effect on or before June 30, 2016.

~~(b) *Severability.* — If any provision of this article or the application of any such provision of this article to any person or circumstance is held invalid by a court of competent jurisdiction, the~~

~~remainder of this article or the application of its provisions to persons or circumstances other than those to which it is held invalid is not affected thereby.~~

### ARTICLE 5I. WEST VIRGINIA EMPLOYMENT LAW WORKER CLASSIFICATION ACT.

#### §21-5I-6. Severability.

[Repealed].

## CHAPTER 21A. UNEMPLOYMENT COMPENSATION.

### ARTICLE 10. GENERAL PROVISIONS.

#### §21A-10-15. Severability.

[Repealed].

## CHAPTER 22. ENVIRONMENTAL RESOURCES.

### ARTICLE 2. ABANDONED MINE LANDS AND RECLAMATION ACT.

#### §22-2-10. Benefits derived from substances separated by treatment of pollution from mine drainage in the waters of the state; public policy; legislative findings, intent, and purpose~~; severability~~.

(a) Public Policy. It is the long-standing public policy of the State of West Virginia, pursuant to § 22-11-1 *et seq*. of this code, the Water Pollution Control Act, that the state is compelled to maintain reasonable standards of purity and quality of the waters of the state which are consistent with public health and the protection of all forms of life. It is also the long-standing public policy of this state, pursuant to § 20-2-1 *et seq*. of this code, that wildlife resources in this state shall be held as a public trust by the state and protected for the use and enjoyment of its citizens.

(b) Legislative Findings, Intent, and Purpose. The Legislature finds that treatment of mine drainage reduces environmental harm by reducing toxic substances and pollution in the waters of the state. The Legislature finds that the necessary and expensive treatment of mine drainage to remove pollution from the waters of the state, and disposal of the same, may produce materials that contain valuable concentrations of rare earth elements, critical materials, and other

substances which may be utilized for commercial gain. The Legislature finds that these materials found within the waters of the state are part of the water and can only be separated from the water with expensive and continuing investments of resources which may last for decades. The Legislature enacts this section with the intent of fulfilling the state's obligations to maintain reasonable standards of purity and quality of the waters of the state, consistent with public health and the protection of all forms of life, by encouraging investments into the treatment of mine drainage.

(c) Notwithstanding any provision of this code or common law to the contrary, all chemical compounds, elements, and other potentially toxic materials which are found within the waters of this state, which are derived from the treatment of mine drainage, and which have economic value, may be used, sold, or transferred by the Department of Environmental Protection, or its designee, for commercial gain and benefit. All funds received by the department shall be deposited at the discretion of the secretary into the Special Reclamation Water Trust Fund or the Acid Mine Drainage Set-Aside Fund, and used by the department to fulfill its obligations under this code: *Provided*, That nothing in this subsection shall be construed to interfere with any existing contract or the ability of the department to enter into an agreement with private parties with respect to the removal, sale, or transfer of said chemical compounds, elements, and other potentially toxic materials.

(d) Notwithstanding any provision of this code or common law to the contrary, all chemical compounds, elements, and other potentially toxic materials which are found within the waters of this state which are derived from the treatment of mine drainage, and which have economic value, may be used, sold, or transferred by any party, other than the department, who successfully removes said chemical compounds, elements, and other potentially toxic materials from the waters of this state for commercial gain and benefit: *Provided*, That nothing in this subsection shall be construed to interfere with any existing contract or the ability of parties to enter into an agreement with respect to the removal, sale, or transfer of said chemical compounds, elements,

and other potentially toxic materials.

~~(e) The provisions of this section are severable, and if any part of this section is adjudged to be unconstitutional, unenforceable, or invalid, that determination does not affect the continuing validity of the remaining provisions of this section.~~

# CHAPTER 22A. MINERS' HEALTH, SAFETY AND TRAINING.

## ARTICLE 2. UNDERGROUND MINES.

### §22A-2-79. Provisions of article severable.

[Repealed].

# CHAPTER 22C. ENVIRONMENTAL RESOURCES; BOARDS, AUTHORITIES, COMMISSIONS AND COMPACTS.

## ARTICLE 9. OIL AND GAS CONSERVATION.

### §22C-9-7a. Unitization of interests in horizontal well drilling units.

(a) *Declaration of public policy; legislative findings regarding unitization for all horizontal wells*. —

The Legislature finds that horizontal drilling is a technique that effectively and efficiently recovers natural resources and should be encouraged as a means of production of oil and gas and it is hereby declared to be the public policy of this state and in the public interest to:

(1) Foster, encourage, and promote exploration for and development, production, utilization, and conservation of oil and gas resources by horizontal drilling in deep and shallow formations;

(2) Prohibit waste of oil and gas resources and unnecessary surface loss of oil and gas and their constituents;

(3) Encourage the maximum recovery of oil and gas; and

(4) Safeguard, protect, and enforce the correlative rights of operators and royalty owners of oil and gas in a horizontal well unit to the end that each such operator and royalty owner may

obtain his or her just and equitable share of production from that pool, horizontal well unit or unconventional reservoir of oil or gas; and

(5) Safeguard, protect, and enforce the property rights and interests of surface owners and the owners and agricultural users of other interests in the land.

(b) *Definitions*. — Unless the context in which used clearly requires a different meaning, as used in this section:

(1) "Bonded operator" means a person that has posted a bond under §22-6-1 *et seq*. or §22-6A-1 *et seq*. of this code; is registered as an oil and gas well operator with the West Virginia Department of Environmental Protection, Office of Oil and Gas; and operates eight or more oil and gas wells, as defined in §22-6-1 *et seq*. or §22-6A-1 *et seq.* of this code, in West Virginia that are active, producing oil and gas wells;

(2) "Executive interest" and "executory interest" means the interest entitling the owner to lease the oil and gas estate or amend an existing oil and gas lease. For purposes of this section, the owner of the executive interest is considered to be the royalty owner and interested party for purposes of notice and participation in proceedings here in this article, and all horizontal well unit orders are binding on the owners of executive interests and non-executive interests in a horizontal well unit. The owners of the executive interest and the associated non-executive interest owners are considered to be the same interest for purposes of computing percentages pursuant to §22C-9-7a(c)(2)(A) and §22C-9-7a(c)(2)(B) of this code;

(3) "Horizontal well unit" means an area in which horizontal drilling may occur, and that is designated for the allocation of production from one or more horizontal wells drilled in the unit to oil and gas tracts, or portions of the tracts, included in the unit for production of oil and gas and payment of royalty and proceeds of production regardless of the tract or tracts in which the horizontal well is drilled or completed, and the corresponding authorization to drill and produce oil and gas from that area as a unit, notwithstanding the lack of adequate consensual rights allowing pooling or unitization of oil and gas or allowing drilling horizontally across tract lines. When a

horizontal well unit is formed, that portion of the production allocated to each tract or portion of the unit included in the horizontal well unit shall, when produced, be considered for all purposes to have been actually produced from the tract by an oil and gas well drilled, completed and producing on the tract;

(4) "Lateral" means the portion of a well bore that deviates from approximate vertical orientation to approximate horizontal orientation and all wellbore beyond the initial deviation to total depth or terminus of the wellbore;

(5) "Overriding royalty" means an interest carved out of the leasehold or out of the working interest and is not included within the meaning of royalty;

(6) "Royalty owner" means any owner of oil and gas in place, or oil and gas rights, to the extent that the owner is not an operator as defined in §22C-9-2(a) of this code. A royalty owner does not include a person whose interest is limited to: (A) A working interest in a wellbore only; (B) overriding royalties; (C) non-participating royalty interests; (D) non-executive mineral interests; or (E) net profits interests;

(7) "Target formation" means the primary geologic formation from which oil or gas is intended to be produced from a horizontal drilling operation and, where completions can reasonably be expected to produce from formations above or below the target formation, includes the formations from which production can reasonably be expected;

(8) "Unitization" means the combination of two or more tracts of oil and gas, or portions thereof, or leases, for drilling of horizontal wells and production of oil and gas from the unit with allocation of production to the net acreage of each tract included in the unit to operate as a consolidated horizontal well unit;

(9) "Unitization consideration" means consideration provided as set forth in subsection (f) of this section. Unitization consideration relates to the net acreage of the non-consenting royalty owner included in a horizontal well unit;

(10) "Unknown and unlocatable interest owner" means a royalty owner, executive interest

owner, operator, or other person vested with an interest in oil and gas in the target formation to be included in a horizontal well unit, whose present identity or location cannot be determined from:

(A) A reasonable review of the records of the clerk of the county commission for the county or counties where the oil and gas is located and any immediately adjacent counties within this state;

(B) Diligent inquiry to known interest owners in the same tract;

(C) Inquiry to the sheriff's and assessor's offices of the county or counties in which the oil and gas interest is located;

(D) A reasonable inquiry utilizing available internet resources that could reasonably lead to the identification of the person; and

(E) A mailing to the last known address, if available, of the person as reflected in the records of the sheriff's or assessor's office, and includes the unknown heirs, representatives, successors, and assigns of the person.

(11) "Weighted average sales price" means a weighted average sales price obtained each month for amounts received at the applicant's various delivery points to unaffiliated, third-party purchasers accessible by the owner's production, without deduction of post-production, third-party costs and expenses charged to or incurred by applicant and/or its affiliates other than costs and expenses charged to or incurred by applicant and/or its affiliates after the first liquid trading point or, if the production does not undergo processing, after delivery to the first interstate pipeline.

(c) *Applicability*. —

(1) For all horizontal wells, including shallow horizontal wells and deep horizontal wells, the commission may unitize tracts, or portions of tracts, in a horizontal well unit established under this section upon the filing of an application with the commission by a person that controls the horizontal well unit and upon the issuance of a horizontal well unit order pursuant to this section.

(2) Before filing an application under this section, an applicant must have:

(A) With respect to the royalty interest, for shallow horizontal wells and deep horizontal

wells, obtained by ownership, lease, lease amendment, assignment, farmout, compliance with §37B-1-1, *et seq*. of this code with respect to unknown or unlocatable interest owners defined in §37B-1-3 of this code only, contract or other agreement the right, consent or agreement to pool or unitize the acreage to be included in the horizontal well unit from executory interest royalty owners of 75 percent or more of the net acreage in the target formation proposed to be included in the horizontal well unit, as provided and determined in subdivision (3) of this subsection; and

(B) With respect to the operator interest:

(i) For shallow horizontal wells, obtained by ownership, lease, lease amendment, assignment, farmout, contract or other agreement the right, consent or agreement to pool or unitize as to 55 percent or more of the net acreage in the target formation proposed to be included in the horizontal well unit owned, leased, or operated by operators and the applicant, collectively, by ownership, lease, farmout, assignment, contract or other agreement, as provided and determined in subdivision (3) of this subsection; or

(ii) For deep horizontal wells, obtained by ownership, lease, lease amendment, assignment, farmout, compliance with §37B-1-1, *et seq*. of this code with respect to unknown or unlocatable interest owners defined in §37B-1-3 of this code only, contract or other agreement the right, consent or agreement to develop the acreage to be included in the horizontal well unit from executory interest royalty owners of 55 percent or more of the net acreage in the target formation proposed to be included in the horizontal well unit, as provided and determined in subdivision (3) of this subsection;

(C) (i) Made good-faith offers to consent or agree to pool or unitize, and has negotiated in good faith with, all known and locatable royalty owners having executory interests in the oil and gas in the target formation within the acreage to be included in the proposed horizontal well unit who have not previously consented or agreed to the pooling or unitization of the interests and whose interests are not subject to development under §37B-1-1, *et seq*. of this code; and

(ii) Made good-faith offers to participate or consent or agree to the proposed horizontal well

unit, and has negotiated in good faith with, all known and locatable operators who have not previously agreed to participate or consent or agree to pool or unitize the acreage to be included in a proposed horizontal well unit.

(iii) A person who satisfies the conditions of paragraphs (A) through (C) of this subdivision is referred to in this section as a person that controls the horizontal well unit.

(3) For purposes of determining whether a person has obtained the requisite control of the proposed horizontal well unit, the commission may not include overriding royalty owners, non-executive interest royalty owners or acreage owned or otherwise held by unleased unknown and unlocatable interest owners whose acreage is not subject to development pursuant to §37B-1-1, *et seq*. of this code, or acreage owned or otherwise held by operators who are not bonded operators, unless such operators have consented or otherwise agreed to develop their operator interest in the net acreage in the target formation proposed to be included in the horizontal well unit. Furthermore, for purposes of determining whether a person has the requisite control of the proposed horizontal well unit, the identity and rights of royalty owners and operators shall be determined as of the date on which the application for a horizontal well unit is filed.

(4) If the applicant has not met all the provisions of this subsection, the application shall be dismissed without prejudice.

(5) If the applicant meets all of the provisions of this subsection, the commission shall authorize unitization of tracts, or portions of the tracts, as to all interests in oil and gas in the target formation acreage proposed to be unitized for horizontal drilling, including interests of unknown and unlocatable interest owners, for production of oil and gas from the target formation as a horizontal well unit, and shall issue a horizontal well unit order in accordance with this section.

(d) *Application requirements*. —

(1) An applicant who is a person that controls the horizontal well unit proposed for a horizontal well unit order and has drilled or plans to drill one or more horizontal wells in the proposed horizontal well unit may file an application with the commission for a horizontal well unit

order. The application shall contain:

(A) A description of the proposed horizontal well unit and identification of the target formation or formations;

(B) A statement of the nature of the operations contemplated;

(C) A plat that depicts the boundaries and acreage of the proposed horizontal well unit, the tracts in the horizontal well unit, the surface tax map and parcel numbers of the surface tracts above the tracts to be included in the horizontal well unit in accordance with county assessor's records, and the district(s) and county or counties where the proposed horizontal well unit is located. The plat shall show the surface location of the vertical borehole of the horizontal well(s) to be included in the proposed horizontal well unit determined by survey, the courses, and distances of the surface location from two permanent points or landmarks on those tracts, the deviation from vertical, and also the proposed horizontal lateral portion of each proposed horizontal well to be included in the proposed horizontal well unit. The plat shall show the proposed horizontal well unit name, the proposed horizontal well names, and if known, the well number of each horizontal well to be drilled in the horizontal well unit. The plat shall also show the location of each permitted, active oil and gas well located in the horizontal well unit, and the name of the operator of the well as shown by the records of the Department of Environmental Protection, Office of Oil and Gas: *Provided,* That the applicant is not required to depict or identify any abandoned or plugged well that is not required to be depicted or identified on the plat required by §22-6A-5(a)(6) of this code;

(D) A listing of all oil and gas tracts, or portions thereof, within the proposed horizontal well unit, the size of each tract, and the extent to which each tract is leased;

(E) The names and last known addresses of royalty owners of the target formation of each tract within the proposed horizontal well unit, specifying:

(i) Which, if any, of them are unknown and unlocatable;

(ii) Which of them hold executive rights; and

(iii) With respect to owners of an executory interest, whether they have consented to

pooling or unitization of the acreage proposed to be included in the horizontal well unit;

(F) The names and last known addresses of operators of proposed horizontal well unit target formation acreage whose interest is of record in the county where the property is located, specifying:

(i) Which, if any, of them are unknown and unlocatable; and

(ii) Which, if any of them, are bonded operators, and if a bonded operator, whether he or she has consented to pooling or unitization as to the acreage proposed to be included in the horizontal well unit;

(G) Information regarding the applicant's actions to identify and locate unknown and unlocatable interest owners of target formation acreage to be included in the horizontal well unit;

(H) The percentage of the net acreage in the proposed horizontal well unit owned by executory interest target formation royalty owners who have consented to pooling or unitization;

(I) The percentage of the net acreage in the proposed horizontal well unit held by bonded operators and the applicant, collectively, as to which consent or agreement to pool or unitize has been granted;

(J) A percentage allocation to the separately owned tracts, or portions thereof, in the proposed horizontal well unit of the oil and gas that will be produced from the horizontal well unit as determined by the proportion that each tract's net acreage within the horizontal well unit bears to the total net acreage in the horizontal well unit;

(K) A certification that the applicant meets the requirements of subsection (c) of this section with respect to the proposed horizontal well unit, a list of the instruments granting the control and a certification that the applicant has mailed a copy of the application to all known and locatable interested parties by United States certified mail, return receipt requested, to their last known address and to the most current address filed with the West Virginia Department of Environmental Protection, Office of Oil and Gas, if any;

(L) A statement whether the applicant has submitted, either previously or

contemporaneously with the application filed pursuant to this section, an application for a well work permit with the Department of Environmental Protection for one or more horizontal wells to be completed within the boundaries of the proposed horizontal well unit; and

(M) A proposed joint operating agreement that will govern the contractual relationship between the applicant and any unleased royalty owners following an election by the executive interest owners to participate in the drilling in the horizontal well unit on a carried basis under §22C-9-7a(f)(9) of this code.

(2) Upon the filing of an application for a horizontal well unit order, the commission shall provide notice of a hearing to all interested parties, as defined in this section, in accordance with §22C-9-5 of this code and subsection (g) of this section.

(e) *Standard of review*. —

(1) The commission shall evaluate the application and shall consider:

(A) The ownership and control of the tracts, or portions of the tracts, in the proposed horizontal well unit;

(B) Whether the tracts, or portions of the tracts, proposed to be made subject to a horizontal well unit order are owned, in whole or in part, by unknown and unlocatable interest owners;

(C) Information regarding the applicant’s actions to locate unknown and unlocatable interest owners for the tracts, or portions of the tracts, sought to be included in the horizontal well unit;

(D) The percentage of executory interest royalty owner target formation acreage to be included in the horizontal well unit as to which consent or agreement for pooling or unitization has been granted;

(E) The percentage of proposed horizontal well unit target formation acreage held, collectively, by the applicant and bonded operators who have consented or agreed to the unit in accordance with subsection (c) of this section;

(F) Whether the applicant is a person that controls the horizontal well unit proposed for unitization;

(G) The area to be drained by well(s) completed or to be completed in the horizontal well unit;

(H) Correlative rights;

(I) The extent to which the application will prevent waste including the stranding of acreage of oil and gas formations between units that would be uneconomical to produce;

(J) Whether the applicant has complied with subsection (c) of this section;

(K) Whether notice has been provided in accordance with this section; and

(L) Whether the applicant demonstrates the intent and ability to drill all the wells proposed in the unit.

(2) The commission may not issue a horizontal well unit order pursuant to this section unless it finds that the applicant has before the filing of the application met the requirements of subsection (c) of this section.

(3) The commission may not change the operator of an existing well drilled in the proposed horizontal well unit, or a well actually being drilled within the proposed horizontal well unit as of the date the application is filed under this section and shall consider and protect the interests of owners of the well when issuing a horizontal well unit order.

(f) *Horizontal well unit orders*. —

(1) A horizontal well unit order under this section shall specify:

(A) The size and boundaries of the horizontal well unit giving due regard for maximization of the amount of oil and gas produced to prevent waste and protect correlative rights: *Provided*, That a horizontal well unit's size may not exceed 640 acres: *Provided, however*, That the commission may exceed the acreage limitation if the applicant demonstrates that the proposed horizontal well unit area would be drained efficiently and economically by a larger horizontal well unit: *Provided further*, That a horizontal well unit containing one or more horizontal wells may not

contain more than 128 net acres controlled by non-consenting royalty owners determined as of the date that the application for the horizontal well unit application is filed.

(B) The horizontal wells which may be drilled in the horizontal well unit, and whether the horizontal wells to be drilled are shallow or deep;

(C) If there are vertical wells completed in the target formation in the horizontal well unit, the area where a horizontal well may not be completed;

(D) The target formation or target formations to which the horizontal well unit applies; and

(E) Any unitization consideration due.

(2) An order authorizing unitization of tracts with unknown and unlocatable interest owners shall contain a finding that identifies the persons as unknown and unlocatable.

(3) An order shall specify that the allocation of the percentage of production of the horizontal wells drilled in the horizontal well unit to the separately owned tracts, or portions of the tracts, included within the horizontal well unit shall be in the proportion that each tract's net acreage within the horizontal well unit bears to the total net acreage within the horizontal well unit.

(4) A horizontal well unit order shall authorize and perfect unitization of all interests in the target formation as to the tracts, or portions of the tracts, included in the horizontal well unit.

(5) If the applicant is a person that controls the horizontal well unit proposed for a horizontal well unit order under this section, the commission shall form a horizontal well unit pursuant to this section and authorize the drilling and operation of one or more horizontal wells in the unit for the production of oil or gas from the target formation from any tract within the horizontal well unit.

(6) With respect to royalty owners of leased tracts who have not consented to pooling or unitization, the commission shall require that unitization consideration be paid to executive interest royalty owners in an amount equal to 25 percent of the weighted average monetary bonus amount on a net mineral acre basis and a production royalty percentage equal to 80 percent of the weighted average production royalty percentage rounded to the nearest one tenth of one percent paid to other executive interest owners of leased tracts in the unit in the same target formation:

*Provided*, That the weighted average calculation shall not include any fixed amounts paid to royalty owners or payments made on any basis other than a net mineral acre basis. Further, the royalty percentage cannot be less than the production royalty percentage in the existing lease or 12 and one-half percent for a flat rate lease. The applicant, all royalty owners, and owners of leasehold, working interest, overriding royalty interest and other interests in the oil and gas are bound by the order and the remaining lease terms, including other terms related to the payment of royalties. Unitization consideration shall be paid by the participating operators, including the applicant, to the extent of their interest in the horizontal well unit.

(7) With respect to interests in oil and gas as to which there is no lease in existence:

(A) Executive interest owners may elect to surrender the oil and gas underlying the tract to the participating operators, including the applicant, to the extent of their interest in the horizontal well unit for consideration, which if not agreed upon, shall be an amount equal to the weighted average amount paid, per net mineral acre, by the applicant to executive interest owners in bona fide, third-party transactions for the acquisition of the oil and gas mineral estate in the same target formation underlying the horizontal well unit: *Provided*, That the weighted average calculation shall not include any fixed amounts paid to royalty owners or payments made on any basis other than a net mineral acre basis; or

(B) Executive interest owners may make an election for unitization consideration, and if the executive interest owner elects unitization consideration, the interests of the executive interest owner and the associated nonexecutive interest owners shall be considered leased to the participating operators, including the applicant, to the extent of their interest in the horizontal well unit on terms which, if not agreed upon, shall consist of the following:

(i) A bonus payment per net mineral acre equal to the weighted average monetary bonus paid, per net mineral acre, to executive interest owners by the applicant in connection with other leases in the same target formation controlled by the applicant within the horizontal well unit: *Provided*, That the weighted average calculation shall not include any fixed amounts paid as

bonus payments to executive interest owners or payments made on any basis other than a net mineral acre basis; and

(ii) A production royalty for the natural gas, oil and natural gas liquids produced and sold equal to the highest production royalty percentage in connection with other leases in the same target formation controlled by the applicant within the horizontal well unit and dated within the 24 months preceding the application date. Executive interest owners may make a one-time election prior to the issuance of a horizontal well unit order by the commission to be paid production royalties for natural gas based on either: (a) An index price in effect at the beginning of each calendar month, as published in an independent, third-party publication reflecting arm's-length, market-based sales, for natural gas applicable to the first interstate pipeline into which the natural gas is delivered, and shall not be reduced by post-production expenses; or (b) the weighted average sales price.

Production royalties for natural gas liquids will be calculated using the sum of the proceeds received at the tailgate of the processing facility for each natural gas liquid product during each month divided by the volume of such natural gas liquid product that was sold during such month and shall not be reduced by post-production expenses. If an executive interest owner does not make the one-time election regarding the price on which royalties for natural gas shall be paid prior to the issuance of a horizontal well unit order by the commission, the applicant shall determine whether it will pay royalties to the executive interest owner and the associated nonexecutive interest owners based on either the index price described in this subparagraph or the weighted average sales price, and such determination shall be binding on the applicant, operators, executive interest owners and the associated non-executive interest owners for the term of the lease. The applicant and all royalty owners and owners of leasehold, working interest, overriding royalty interest and other interests in the associated unleased oil and gas shall be bound by the order. Nothing contained in paragraph (B) applies to any lease in this state now in existence or entered into in the future, or to any award of unitization consideration made by the commission

other than unitization consideration awarded to an executive interest owner of an unleased tract who elects to be considered leased pursuant to this paragraph; or

(C) Executive interest owners may make an election to participate in a horizontal well unit consistent with §22C-9-7a(f)(9) and §22C-9-7a(f)(10) of this code.

(D) Owners of oil and gas interests as to which there is no lease in existence who do not elect (A), (B) or (C) of this subdivision shall be considered to have made an election to receive unitization consideration and lease their interest in the oil and gas mineral estate in the target formation to the applicant pursuant to §22C-9-7a(f)(7)(B) of this code.

(8) No unitization consideration may be required to be paid to any royalty owner who has consented or agreed to pooling or unitization by virtue of the terms contained in an oil and gas lease, or other agreement which permits pooling or unitization.

(9) An operator may elect to consent to and participate in a horizontal well unit after an application is filed. Subject to subdivision (7) of this subsection, when the commission issues a horizontal well unit order pursuant to this section, the commission shall consider each nonconsenting operator, who does not elect to participate in the risk and cost of drilling in the horizontal well unit through a voluntary agreement with the applicant, to participate in the drilling in the horizontal well unit on a carried basis on terms and conditions which, if not agreed upon, shall be consistent with the terms and conditions contained in the proposed joint operating agreement submitted by the applicant in accordance with §22C-9-7a(d)(1)(M) of this code: *Provided*, That the commission determines that the proposed terms and conditions of the joint operating agreement are consistent with terms typically found in other similarly situated, arm’s-length joint operating agreements within the horizontal well unit that were entered into by the applicant for the same target formation prior to the filing of the application for the horizontal well unit.

(10) If a non-consenting operator participates in the drilling in the horizontal well unit on a carried basis under the horizontal well unit order and an owner of any operating interest in any portion of the horizontal well unit drills and operates, or pays the costs of drilling, completing,

equipping, and operating a horizontal well for the benefit of a non-consenting operator as provided in the horizontal well unit order, then the operating owner is entitled to the share of production from the tracts or portions thereof subject to the horizontal well unit order accruing to the interest of the non-consenting operator, exclusive of any unitization consideration, and royalty and overriding royalty reserved in any leases, assignments thereof or agreements relating thereto, of the tracts or portions of the tracts, until the net revenue from the non-consenting operator's share of the production, exclusive of the unitization consideration, royalty and overriding royalty, equals double the share of the costs payable by or charged to the interest of the non-consenting operator, as set forth in the accounting procedures included within the joint operating agreement submitted by the applicant in accordance with §22C-9-7a(d)(1)(M) of this code.

(11) If all wells proposed in a horizontal well unit approved by the commission are not drilled and completed as approved in the horizontal well unit order, the applicant shall file a request to modify the horizontal well unit with the commission within 60 days from the later of: Completion of all drilling activities within the horizontal well unit; or the date that is five years after the most recent drilling activity in the horizontal well unit occurs.

(12) Any interested party may file an application to correct a clerical error in a horizontal well unit order at any time.

(13) The applicant may file a request to modify a horizontal well unit order at any time.

(14) If an operator has not drilled and completed a well in a horizontal well unit formed by the commission within three years after the latter of either the drilling and completion of the initial horizontal well in the horizontal well unit or the drilling and completion of the most recent horizontal well within the horizontal well unit, as the case may be, an interested party may file a request to modify the horizontal well unit, and the commission may modify the horizontal well unit. Upon the modification of the horizontal well unit, the commission shall recalculate the allocation of production from the tracts in the modified horizontal well unit from and after the modification order date and the modification order shall be binding on the property subject to the horizontal well unit

order, and all owners thereof, their heirs, representatives, successors, and assigns for so long as the horizontal well unit order remains in effect. Following the entry of a modified horizontal well unit order containing the commission's recalculation of the allocation of production from the tracts in the modified horizontal well unit order, the applicant and all other operators shall have no liability whatsoever to pay royalty in any manner other than that set forth in the modified horizontal well unit order.

(15) All operations, including, but not limited to, the commencement, drilling, or operation of a horizontal well upon any portion of a horizontal well unit for which a unit order has been entered pursuant to this section, shall be considered for all purposes the conduct of the operations upon each separate tract or portion of the tract in the horizontal well unit. That portion of the production allocated to each tract or portion of the tract included in a horizontal well unit shall, when produced, be considered for all purposes to have been actually produced from the tract by an oil and gas well drilled, completed, and producing on the tract.

(16) Subject to the provisions of subsection (o) of this section, where the commission finds that the interest of one or more unknown and unlocatable interest owners are included in the horizontal well unit, the horizontal well unit operator shall deposit the moneys payable to unknown and unlocatable interest owners into an escrow account bearing a market rate of interest to be held, administered, and disbursed in accordance with an order of the commission and this section.

(17) A horizontal well unit order under this section shall expire if a horizontal well has not been drilled in the horizontal well unit within three years of the date the order is final and is nonappealable, unless the commission extends the order for good cause, and if a well has been drilled within three years the horizontal well unit shall continue in force and effect until the last producing horizontal well in the horizontal well unit is no longer capable of producing oil and gas.

(18) So long as the order remains in effect, a horizontal well unit order shall be binding on the property subject to the horizontal well order and all owners of the property and their heirs, representatives, successors, and assigns.

(g) *Notice, timelines, hearings, and orders. —*

(1)(A) For purposes of this section and the West Virginia Administrative Procedures Act, "interested parties" and "parties" mean owners of the executive interest in the oil and gas in the target formation within the horizontal well unit, including the unknown and unlocatable interest owner of the executive interest in the tracts, or portions of the tracts, to be included in the horizontal well unit subject to an application for a horizontal well unit order; owners of unleased oil and gas to be included in the horizontal well unit; operators of all target formation acreage in the horizontal well unit; and operators of all oil and gas wells located in the unit that have been drilled to or through the target formation.

(B) Bonded operators of wells drilled to or through the target formation that are not within the horizontal well unit but are located within 500 feet of a proposed horizontal well unit boundary and executive interest owners owning an interest in the target formation that is not located within the horizontal well unit but is located within 500 feet of a proposed horizontal well unit boundary may submit written comments regarding the horizontal well unit application at any time before the start of any hearing regarding the application, but are not interested parties and may not participate in the hearing nor have the right to appeal the commission’s decision regarding the application.

(2) Each notice issued in accordance with this section shall describe the area for which a horizontal well unit order is proposed in recognizable, narrative terms and contain such other information as is essential to the giving of proper notice, including the time and date and place of a hearing. As soon as practicable the commission shall establish a website. Within three business days of the filing of an application under this section, the commission shall publish on its website a copy of: (i) The horizontal well unit application notice required to be published pursuant to this section and section five of this article; and (ii) the proposed horizontal well unit plat filed with the application, both identified as a horizontal well unit application and indexed by county and district where the majority of the acreage to be included in the proposed horizontal well unit is located, so

that the plat and notice of the application are readily accessible. Timely publication on the website for a period of 10 business days shall be notice to all operators.

(3) Upon request of any interested party or the commission, the commission shall conduct a hearing and receive evidence regarding the application. All interested parties may participate in any hearing. If a hearing has been held regarding an application, the order shall be a final order. If no hearing has been requested by the commission or an interested party within 15 days after notice of the application is posted on the commission website in accordance with subdivision (2) of this subsection, the commission may issue a proposed order and provide a copy of the proposed order, together with notice of the right to appeal to the commission and request a hearing, to all interested parties. Any interested party aggrieved by the proposed order may appeal the proposed order to the commission and request a hearing. Notice of appeal and request for hearing shall be made within 15 days of entry of the proposed order. If no appeal and request for hearing have been received within 15 days, the proposed order shall become final. If a hearing is requested, the hearing shall commence within 45 days of issuance of the initial notice. The commission may, upon written request, extend the date for the hearing: *Provided*, That the hearing must be convened within 45 days of the initial notice issued by the commission. The commission shall, within 20 days of the hearing, enter an order authorizing the unit, dismiss the application, or for good cause continue the process.

(4) At least 10 days prior to a hearing to consider an application for a horizontal well unit order, the applicant shall file with an independent, third-party attorney, or accountant selected by the chair of the commission a summary of:

(A) The prevailing economic terms of the leases within the proposed horizontal well unit relating to the target formation where the applicant is the operator, including the bonus payment per net mineral acre and production royalty rate, including whether the production royalty is subject to reduction for post-production expenses; and

(B) The prevailing amounts paid to the executive interest royalty owners, per net mineral

acre, for the modification of leases relating to the target formation within the proposed unit where the applicant is the operator to allow the lessee to unitize the leased tract with other tracts for purposes of drilling horizontal wells.

(C) The independent, third party selected by the chair of the commission shall review the economic information filed by the applicant to determine its accuracy and, upon completion of his or her review, shall submit a report to the commission specifying the following information for inclusion by the commission in the horizontal well unit order:

(i) The weighted average monetary bonus paid, per net mineral acre, to executive interest owners by the applicant in connection with other leases in the same target formation controlled by the applicant within the horizontal well unit, as provided in §22C-9-7a(f)(6) and §22C-9-7a(f)(7)(B)(ii) of this code;

(ii) The weighted average production and highest royalty percentage, calculated on a net mineral acre basis, of the leases in the same target formation controlled by the applicant within the horizontal well unit, as provided in §22C-9-7a(f)(6) of this code; and

(iii) The highest production royalty percentage in the unit in connection with other leases in the same target formation controlled by the applicant within the horizontal well until and dated within the 24 months preceding the application date, as provided in §22C-9-7a(f)(7)(B)(ii) of this code.

(D) The reasonable fees and expenses of the independent, third party selected by the chair of the commission to review the information filed by the applicant and render his or her report to the commission pursuant to this subsection shall be paid by the applicant.

(E) When filing information with the independent third party selected by the chair of the commission, the applicant may mark the summary of the prevailing economic terms of leases and amounts paid for lease modifications, and any associated documents or information, as "CONFIDENTIAL" to the extent that the documents contain confidential, commercial information. Any information marked "CONFIDENTIAL" may only be used by the independent third-party

selected by the chair of the commission for the purpose of performing his or her review and preparation and submission of his or her report to the commission, and by the court for the purpose of any appeal pursuant to §22C-9-7a(g)(5) of this code. All information marked "CONFIDENTIAL" pursuant to this subdivision shall retain that character in any court of competent jurisdiction on appeal, and the applicant may file a motion with the court seeking to have the documents sealed and withheld from the public record throughout the appeal from a final order of the commission pertaining to a horizontal well unit order. Furthermore, any information marked "CONFIDENTIAL" pursuant to this subdivision is exempt from disclosure under §29B-1-1 *et seq*. of this code.

(5) An order establishing a horizontal well drilling unit or dismissing an application shall be a final order. Any interested party aggrieved by the order may seek judicial review pursuant to section eleven of this article. Notice of appeal shall be made in accordance with §22C-9-11 of this code within 15 days of entry of the order. If no appeal has been received within 15 days, the order shall become final.

(h) *Unit order does not grant surface rights*. — A horizontal well unit order under this section does not grant or otherwise affect surface use rights: *Provided*, That without limiting the foregoing, in no event shall drilling be initiated upon, or other surface disturbance occur upon, the surface of or above a tract of minerals that was forced into the unit pursuant to this section without the owner’s consent.

(i) *Commission approval required for certain additional drilling*. — After the filing of an application for a horizontal well unit order, no well may be drilled or completed to or through the target formation of the proposed horizontal well unit unless authorized by the commission.

(j) *Contemporaneous permit applications authorized*.— Notwithstanding anything to the contrary in §22-6A-1 *et seq*. of this code, upon the filing of an application for a horizontal well unit order pursuant to this section, an applicant may file an application for a well work permit under §22-6A-1 *et seq*. of this code for any proposed development within the horizontal well unit for which the unit order is sought.

(k) *A party may appear in person*. — At any hearing an interested party may represent themselves or be represented by an attorney-at-law.

(l) No provision of this section alters the common law of this state regarding the deduction of post-production expenses for the purpose of calculating royalty.

(m) *Conflict resolution*. — After the effective date of this section, all applications requesting unitization for horizontal wells shall be filed pursuant to this section. Deep well horizontal unit applications filed before the effective date of this section shall continue to proceed under and be governed by the provisions of section seven of this article. With respect to horizontal well unit applications filed after the effective date of this section, if this section conflicts with section seven of this article, the provisions of this section shall prevail. When considering an application pursuant to this section, rules regarding deep wells promulgated before the effective date of this section shall not apply.

(n) *Unknown and unlocatable interest owners*. — Notwithstanding the existence of unknown and unlocatable interest owners, a horizontal well unit order may be entered and development, drilling, and production may occur in the horizontal well unit. Unknown and unlocatable interest owners of oil and gas in place not subject to lease shall be considered to have made an election to receive unitization consideration and lease their interest in the oil and gas mineral estate in the target formation to the applicant pursuant to §22C-9-7a(f)(7)(B) of this code. Unknown and unlocatable interest owners of working interest in property subject to lease before an application for a horizontal well unit is filed pursuant to this section shall be considered to have elected to participate in the drilling in the horizontal well unit on a carried basis pursuant to §22C-9-7a(f)(9) and §22c-9-7a(f)(10) of this code.

(o) *Opportunity of surface owners to acquire interests of unknown and unlocatable interest owners in oil and gas underlying horizontal well unit*. —

(1) When the interests of unknown and unlocatable interest owners' property is included in a horizontal well unit, if the applicant has not filed a proceeding pursuant to §55-12A-1 *et seq*. of

this code (entitled Lease and Conveyance of Mineral Interests Owned by Missing or Unknown Owners or Abandoning Owners) with respect to the interest of an unknown and unlocatable interest owner in the horizontal well unit, and taxes on the unknown and unlocatable interest owners' property are not delinquent, then, after a horizontal well unit order is entered by the commission, the applicant shall inform the parties paying taxes on the surface overlying that portion of the oil and gas included in the horizontal well unit that the surface owner(s) (TSO) may acquire the underlying interest of the unknown and unlocatable interest owners in the horizontal well unit in a proceeding pursuant to this subsection and that information about the interest may be obtained from the applicant. Upon written request to the applicant by any TSO, the applicant shall, to the extent practicable under the circumstances, furnish the requesting TSO the following information: *Provided*, That applicant is not required to provide confidential, trade secret, attorney client communications or attorney work product:

(A) An identification of the last known owner, and information in the possession of the applicant regarding the last known identity and address of, the interest believed to be held by unknown and unlocatable interest owners.

(B) The efforts to locate unknown and unlocatable interest owners.

(C) Such other information known to the applicant which might be helpful in identifying or locating the present owners thereof.

(D) A copy of the most recent recorded instrument embracing the interest of the unknown and unlocatable interest owners as necessary to show the vesting of title to the minerals in the last record owner of the title to the minerals.

(E) The acreage of the tract and the net acreage of the unknown or unlocatable mineral owner or owners in the tract.

(F) The amount of money at any point to which the surface owners would be entitled upon written request.

(2) When an unknown and unlocatable interest in oil and gas is included in a horizontal well

unit an owner of the surface overlying the interest may file a verified petition with respect to all the interests of unknown and unlocatable interest owners included in a horizontal well unit and underlying the surface owner's property. The circuit court in which the majority of the property subject to the petition authorized by this subsection is located has jurisdiction of the proceeding. The petition shall refer to this subsection and identify the oil and gas property subject to the petition. The prayer in any such petition shall be for the court to order, in the case of any defendant or heir, successor, or assign of any defendant who does not appear to claim ownership of the defendant's interest for five years after the date the unit order is filed, a conveyance of the defendants' oil and gas mineral interest under this subsection, subject to the horizontal well unit order and lease terms approved by the commission, to the petitioners.

(3) In any proceeding authorized in this subsection the circuit court in which the petition is filed shall consider the property subject to the petition leased to the participating operators in the horizontal well unit on the terms determined by the commission.

(4) The person filing a petition under this subsection shall join as defendants to the action all unknown and unlocatable interest owners having record title to the particular oil and gas minerals subject to the petition, and the unknown heirs, successors, and assigns of all such owners not known to be alive. All persons not in being who might have some contingent or future interest therein, and all persons whether in being or not in being, having any interest, present, future or contingent, in the mineral interests subject to the petition, shall be fully bound by the proceedings under this subsection.

(5) Any other owner of an overlying surface tract shall be joined as a petitioner in the proceeding. Any other person purporting to be the unknown and unlocatable interest owner, or any heir, successor, or assign of an unknown and unlocatable interest owner, may appear as a matter of right at any time prior to the entry of judgment confirming the deed authorized by this subsection, for the purpose of establishing his or her title to a mineral interest subject to the petition. If the appearing unknown and unlocatable interest owner's claim is established to the

satisfaction of the court, the court shall dismiss the action as to the appearing owner's interest without cost, fees, or damages: *Provided,* That if the appearance of the formerly unknown and unlocatable interest owner was as a result of the filing of the petition by the surface owner pursuant to this subsection, then the court may order the petitioner's reasonable proportionate attorneys' fees and costs to be paid to the petitioner out of the amounts payable to the formerly unknown and unlocatable interest owner.

(6) The court may appoint a special commissioner at any time to deliver a deed to the petitioners in the form provided herein five years after first production reported to the state occurs or one year after the first publication service of a petition under this subsection is made, whichever is later. The special commissioner shall be an attorney duly admitted to practice before the West Virginia Supreme Court of Appeals and in good standing, but may not be required to give bond. If the petitioners do not agree as to the interest each is to acquire by the deed contemplated herein, or the division of any moneys associated therewith, the court shall equitably determine the interests of the petitioners.

(7) In any action under this subsection, if personal service of process is possible, it shall be made as provided by the West Virginia Rules of Civil Procedure. In addition, immediately upon the filing of the petition, the petitioner shall: (1) Publish a Class II legal advertisement in compliance with the provisions of §59-3-1 *et seq*. of this code, and in the county wherein any part of the oil and gas mineral estate described in the petition lies and any immediately adjacent counties; and (2) no later than the first day of publication, file a lis pendens notice in the county clerk's office of the county where the petition is filed and the county wherein the larger part of the oil and gas mineral estate described in the petition lies. Both the advertisement and the lis pendens notice shall set forth: (1) The names of the petitioner and the defendants, as they are known to be by the exercise of reasonable diligence by the petitioner, and their last known addresses; (2) the date and record data of the instrument or other conveyance which immediately created the oil and gas mineral interest; (3) an adequate description of the land as contained therein; (4) the source of title of the

last known owners of the oil and gas mineral interests; and (5) a statement that the action is brought for the purpose of authorizing payments from a horizontal well unit, and thereafter, in the case of any defendant or heir, successor, or assign of any defendant who does not appear to claim ownership of the defendant's interest within five years after the date of the court ordering a conveyance of the defendant's oil and gas mineral interest under this subsection, subject to the lease terms determined by the commission and horizontal well unit order, to the owners of the surface overlying the oil and gas mineral interest. In addition, the petitioner shall send notice by certified mail, return receipt requested, to the last known address, if there is one, of all named defendants. In addition, the court may order advertisement elsewhere or by additional means if there is reason to believe that additional advertisement might result in identifying and locating the unknown and unlocatable interest owners.

(8) Upon a finding by the court of the present ownership of the petitioners of the surface estate, the court shall order the special commissioner to convey to the proven surface owners, subject to the horizontal well unit order and lease terms approved by the commission, the mineral interest specified in the petition authorized herein, by a deed substantially in the form as follows:

This deed, made the _____day of _____, 20___, between _____, special commissioner, grantor and _____, grantee,

Witnesseth, that whereas, grantor, in pursuance of the authority vested in him or her by an order of the circuit court of _____ county, West Virginia, entered on the _____day of _____, 20___, in civil action no. _____ therein pending, to convey the mineral interest more particularly described below to the grantee,

Now, therefore, this deed witnesseth: That grantor grants unto grantee, subject to the provisions of the horizontal well unit order of the Oil and Gas Conservation Commission in _____ and lease terms provided therein, and further subject to all other liens and encumbrances of record, that certain oil and gas mineral interest in _____ County,

West Virginia, more particularly described in the cited order of the circuit court as follows: (here insert the description in the order).

Witness the following signature.

_____

Special Commissioner

(9) Prior to the delivery of the special commissioner's deed, no deed from owners of the surface to another party shall sever any benefits from this subsection from ownership of the surface. A deed doing so is void and unenforceable.

(10) After the date of the special commissioner's deed authorized herein, the surface owner grantee is entitled to receive all proceeds due and payable under a horizontal well unit order attributable to the mineral interests specified in the special commissioner's deed accruing before and after the date of the special commissioner's deed.

(11) The applicant may not be joined as a party, but shall be served with copies of all pleadings and other papers filed in the proceeding, and may intervene at any time. A surface owner must provide a copy of the recorded special commissioner deed to the applicant and any other necessary information reasonably requested by the applicant before the applicant or any other operator has an obligation to provide payment to the surface owner.

(12) Payment by the applicant shall relieve the participating operators of all liability whatsoever that the participating operators may have had to any unknown and unlocatable interest owners, their heirs, successors, and assigns with respect to the payment and all operations in the horizontal well unit, all operations therein and all production from the operations.

(13) If a surface owner does not file a petition pursuant to this subsection within six years of the date notice is given to a TSO as provided herein, amounts payable with respect to the unknown and unlocatable interest owners' interests included in a horizontal well unit shall be paid to the Oil and Gas Reclamation Fund established pursuant to §22-6-29 of this code, and the payment shall relieve the participating operators of all liability of the participating operators with

respect to the horizontal well unit and all operations therein and production therefrom to any unknown and unlocatable interest owners, their heirs, successors, and assigns and to any owners of surface overlying the unknown and unlocatable interest owners' interest, their heirs, successors, and assigns, with respect to the payment.

(14) After the recording of the special commissioner's deed, no action may be brought by any unknown and unlocatable interest owner or any heir, successor, or assign thereof either to recover any past or future proceeds accrued or to be accrued from the property subject to the deed, or to recover any right, title or interest in and to the mineral interest subject to the deed.

(15) If any unknown and unlocatable interest owner or heir, successor, or assign thereof appears in the proceeding in circuit court, the unknown and unlocatable interest owner, if he or she establishes his or her claim to the satisfaction of the circuit court, shall only be entitled to receive amounts payable in connection with the horizontal well unit or production therefrom after the date of appearance in the proceeding. Further, the participating operators and the petitioning surface owners shall have no liability to the unknown and unlocatable interest owner or their heirs, successors, or assigns for any amount paid with respect to the unknown and unlocatable interest or the horizontal well unit or production therefrom paid in accordance with this subsection.

~~(p) If any part of this section is adjudged to be unconstitutional or invalid, the invalidation shall not affect the validity of the remaining parts of this section; and to this end, the provisions of this section are hereby declared to be severable.~~

# CHAPTER 23. WORKERS' COMPENSATION.

## ARTICLE 4. DISABILITY AND DEATH BENEFITS.

### §23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer; legislative declarations and findings; "deliberate intention" defined.

(a) Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum under the provisions of this chapter on account of any

personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: *Provided,* That the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury:

(1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood; or

(2) If there was, at the time of the blood test, evidence of either on or off the job use of a nonprescribed controlled substance as defined in the West Virginia Uniform Controlled Substances Act, West Virginia Code §60A-2-201, *et seq*., Schedules I, II, III, IV and V.

(b) For the purpose of this chapter, the commission may cooperate with the Office of Miners' Health, Safety and Training and the State Division of Labor in promoting general safety programs and in formulating rules to govern hazardous employments.

(c) If injury results to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, or, if the employee has been found to be incompetent, his or her conservator or guardian, may recover under this chapter and bring a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter. If death results to any employee from the deliberate intention of his or her employer to produce the injury or death, the representative of the estate may recover under this chapter and bring a cause of action, pursuant

to section six, article seven of chapter fifty-five of this code, against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter. To recover under this section, the employee, the employee's representative or dependent, as defined under this chapter, must, unless good cause is shown, have filed a claim for benefits under this chapter.

(d)(1) It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a co-employee; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

(2) The immunity from suit provided under this section and under sections six and six-a, article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

(A) It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury

or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct; or

(B) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(i) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(ii) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition.

(I) In every case actual knowledge must specifically be proven by the employee or other person(s) seeking to recover under this section, and shall not be deemed or presumed: *Provided,* That actual knowledge may be shown by evidence of intentional and deliberate failure to conduct an inspection, audit or assessment required by state or federal statute or regulation and such inspection, audit or assessment is specifically intended to identify each alleged specific unsafe working condition.

(II) Actual knowledge is not established by proof of what an employee's immediate supervisor or management personnel should have known had they exercised reasonable care or been more diligent.

(III) Any proof of the immediate supervisor or management personnel's knowledge of prior accidents, near misses, safety complaints or citations from regulatory agencies must be proven by documentary or other credible evidence.

(iii) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety

standard within the industry or business of the employer.

(I) If the specific unsafe working condition relates to a violation of a commonly accepted and well-known safety standard within the industry or business of the employer, that safety standard must be a consensus written rule or standard promulgated by the industry or business of the employer, such as an organization comprised of industry members: *Provided,* That the National Fire Protection Association Codes and Standards or any other industry standards for Volunteer Fire Departments shall not be cited as an industry standard for Volunteer Fire Departments, Municipal Fire Departments and Emergency Medical Response Personnel as an unsafe working condition as long as the Volunteer Fire Departments, Municipal Fire Departments and the Emergency Medical Response Personnel have followed the Rules that have been promulgated by the Fire Commission.

(II) If the specific unsafe working condition relates to a violation of a state or federal safety statute, rule or regulation that statute, rule or regulation:

(a) Must be specifically applicable to the work and working condition involved as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(b) Must be intended to address the specific hazard(s) presented by the alleged specific unsafe working condition; and,

(c) The applicability of any such state or federal safety statute, rule or regulation is a matter of law for judicial determination.

(iv) That notwithstanding the existence of the facts set forth in subparagraphs (i) through (iii), inclusive, of this paragraph, the person or persons alleged to have actual knowledge under subparagraph (ii) nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(v) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three as a direct and proximate result

of the specific unsafe working condition. For the purposes of this section, serious compensable injury may only be established by one of the following four methods:

(I) It is shown that the injury, independent of any preexisting impairment:

(a) Results in a permanent physical or combination of physical and psychological injury rated at a total whole person impairment level of at least thirteen percent (13%) as a final award in the employees workers' compensation claim; and

(b) Is a personal injury which causes permanent serious disfigurement, causes permanent loss or significant impairment of function of any bodily organ or system, or results in objectively verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no objective medical evidence to support a diagnosis; or

(II) Written certification by a licensed physician that the employee is suffering from an injury or condition that is caused by the alleged unsafe working condition and is likely to result in death within eighteen (18) months or less from the date of the filing of the complaint. The certifying physician must be engaged or qualified in a medical field in which the employee has been treated, or have training and/or experience in diagnosing or treating injuries or conditions similar to those of the employee and must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed.

(III) If the employee suffers from an injury for which no impairment rating may be determined pursuant to the rule or regulation then in effect which governs impairment evaluations pursuant to this chapter, serious compensable injury may be established if the injury meets the definition in subclause (I)(*b*).

(IV) If the employee suffers from an occupational pneumoconiosis, the employee must submit written certification by a board certified pulmonologist that the employee is suffering from complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods

utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%) as confirmed by valid and reproducible ventilatory testing. The certifying pulmonologist must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed: *Provided*, That any cause of action based upon this clause must be filed within one year of the date the employee meets the requirements of the same.

(C) In cases alleging liability under the provisions of paragraph (B) of this subdivision:

(i) The employee, the employee's guardian or conservator, or the representative of the employee's estate shall serve with the complaint a verified statement from a person with knowledge and expertise of the workplace safety statutes, rules, regulations and consensus industry safety standards specifically applicable to the industry and workplace involved in the employee's injury, setting forth opinions and information on:

(I) The person's knowledge and expertise of the applicable workplace safety statutes, rules, regulations and/or written consensus industry safety standards;

(II) The specific unsafe working condition(s) that were the cause of the injury that is the basis of the complaint; and

(III) The specific statutes, rules, regulations or written consensus industry safety standards violated by the employer that are directly related to the specific unsafe working conditions: *Provided, however,* That this verified statement shall not be admissible at the trial of the action and the Court, pursuant to the Rules of Evidence, common law and subclause two-c, subparagraph (iii), paragraph (B), subdivision (2), subsection (d), section two, article four, chapter twenty-three of this code, retains responsibility to determine and interpret the applicable law and admissibility of expert opinions.

(ii) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

(iii) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from

litigation under this chapter, the employer may request and the court shall give due consideration to the bifurcation of discovery in any action brought under the provisions of subparagraphs (i) through (v), of paragraph (B) such that the discovery related to liability issues be completed before discovery related to damage issues. The court shall dismiss the action upon motion for summary judgment if it finds pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision; and

~~(iv) The provisions of this paragraph and of each subparagraph thereof are severable from the provisions of each other subparagraph, subsection, section, article or chapter of this code so that if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this act and this code remain valid.~~

(e) Any cause of action brought pursuant to this section shall be brought either in the circuit court of the county in which the alleged injury occurred or the circuit court of the county of the employer's principal place of business. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

(f) The reenactment of this section in the regular session of the Legislature during the year 2015 does not in any way affect the right of any person to bring an action with respect to or upon any cause of action which arose or accrued prior to the effective date of the reenactment.

(g) The amendments to this section enacted during the 2015 session of the Legislature shall apply to all injuries occurring on or after July 1, 2015.

**§23-4-21. Severability.**

[Repealed].

**§23-4-23. Permanent total disability benefits; reduction of disability benefits; reduction of benefits; application of section~~; severability~~.**

(a) This section is applicable whenever benefits are being paid for permanent total disability benefits arising under subdivision (d), (m) or (n), section six of this article or under section eight-c of this article. This section is not applicable to the receipt of temporary total disability benefits, the receipt of permanent partial disability benefits, the receipt of benefits by partially or wholly dependent persons or to the receipt of benefits pursuant to the provisions of subsection (e), section ten of this article. This section is not applicable to the receipt of medical benefits or the payment for medical benefits.

(b) Whenever applicable benefits are paid to a beneficiary with respect to the same time period for which payments under a self-insurance plan, a wage continuation plan or a disability insurance policy provided by an employer are also received or being received by the beneficiary, the applicable benefits shall be reduced by these amounts:

(1) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan or under a disability insurance policy provided by an employer if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy; or

(2) The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by an employer if the employee did contribute directly to the payment of premiums regarding the disability insurance policy: *Provided,* That in no event shall applicable benefits be reduced below the minimum weekly benefits as provided for in subdivisions (b) and (d), section six of this article.

(c) This section applies to awards of permanent total disability made after the effective date of this section.

(d) The board of managers shall promulgate the appropriate rules for the interpretation, processing and enforcement of this section.

~~(e) If any portion of this section or any application of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of this section or the applications of the section that are not unconstitutional or in violation.~~

## ARTICLE 6. SEVERABILITY; LEGISLATIVE INTENT; OPERATIVE DATE.

### §23-6-1. Severability.

[Repealed].

# CHAPTER 24. PUBLIC SERVICE COMMISSION.

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

### §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.

(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 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 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.

(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 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 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 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

(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*. -–

(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 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 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 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.

(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 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 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 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 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.~~

**§24-2-4f. Consumer rate relief bonds.**

(a) *Legislative findings*. - The Legislature hereby finds and declares as follows:

(1) That some electric utilities in the state have experienced expanded net energy costs of

a magnitude problematic to recover from their customers through the commission's traditional cost recovery mechanisms, which have resulted in unusually large under-recoveries;

(2) That the financing costs of carrying such under-recovery balances and projected costs can be considerable;

(3) That the use of traditional utility financing mechanisms to finance or refinance the recovery of such under-recovery balances and projected costs may result in considerable additional costs to be reflected in the approved rates of electric utility customers;

(4) That customers of electric utilities in the state have an interest in the electric utilities financing the costs of such under-recovery balances and projected costs at a lower cost than would be afforded by traditional utility financing mechanisms;

(5) That alternative financing mechanisms exist which can result in lower costs and mitigate rate impacts to customers and the use of these mechanisms can prove highly beneficial to such customers; and

(6) 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, determines 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 electric utilities to finance or refinance expanded net energy costs at the lowest reasonably practical cost under certain conditions and to empower the commission to review and approve alternative financing mechanisms when it determines that such approval is in 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 adjustments to consumer rate relief charges to correct for over-collection or under-collection of such charges or otherwise to ensure the timely and complete payment and recovery of such charges and financing costs. The adjustment mechanism shall accommodate: (i) Standard adjustments to consumer rate relief charges that are limited to relatively stable conditions of operations; and (ii) nonstandard

adjustments to consumer rate relief charges that are necessary to reflect significant changes from historical conditions of operations, such as the loss of significant electrical load. The adjustment mechanism is not to be used as a means to authorize the issuance of consumer rate relief bonds in a principal amount greater, or the payment or recovery of expanded net energy costs in an amount greater, than that which was authorized in the financing order which established the adjustment mechanism.

(2) "Ancillary agreement" means a 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 consumer rate relief 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 a person, corporation, limited liability company, trust, partnership or other entity to which an interest in consumer rate relief property is assigned, sold or transferred, other than as security. The term also includes any entity to which an assignee assigns, sells or transfers, other than as security, the assignee's interest in or right to consumer rate relief property.

(4) "Bond" includes debentures, notes, certificates of participation, certificates of beneficial interest, certificates of ownership or other evidences of indebtedness or ownership that are issued by an electric utility or an assignee under a final financing order, the proceeds of which are used directly or indirectly to recover, finance, or refinance expanded net energy costs and that are secured by or payable from revenues from consumer rate relief charges.

(5) "Bondholder" means any holder or owner of a consumer rate relief bond.

(6) "Commission" means the Public Service Commission of West Virginia, as it may be constituted from time to time, and any successor agency exercising functions similar in purpose thereto. (7) "Consumer rate relief charges" means the amounts which are authorized by the commission in a financing order to be collected from a qualifying utility's customers in order to pay and secure the debt service payments of consumer rate relief bonds and associated financing

costs.

(8) "Consumer rate relief costs" means those costs, including financing costs, which are to be defrayed through consumer rate relief charges.

(9) "Consumer rate relief property" means the property, rights, and interests of a qualifying utility or an assignee under a final financing order, including the right to impose, charge, and collect the consumer rate relief charges that shall be used to pay and secure the payment of consumer rate relief bonds and financing costs, and including the right to obtain adjustments to those charges, and any revenues, receipts, collections, rights to payment, payments, moneys, claims, or other proceeds arising from the rights and interests created under the final financing order.

(10) "Expanded net energy costs" means historical and, if deemed appropriate by the commission, projected costs, inclusive of carrying charges on under-recovery balances authorized by the commission, including costs incurred prior to the effective date of this statute, adjudicated pursuant to the commission's expanded net energy cost proceedings, which have been authorized for recovery by an order of the commission, whether or not subject to judicial appeal.

(11) "Financing costs" means any of the following:

(A) Principal, interest and redemption premiums that are payable on consumer rate relief bonds;

(B) A payment required under an ancillary agreement;

(C) An amount required to fund or replenish a reserve account or another account established under an indenture, ancillary agreement or other financing document relating to consumer rate relief bonds or the payment of any return on the capital contribution approved by the commission to be made by a qualifying utility to an assignee;

(D) Costs of retiring or refunding an existing debt and equity securities of a qualifying utility in connection with the issuance of consumer rate relief bonds but only to the extent the securities were issued for the purpose of financing expanded net energy costs;

(E) Costs incurred by a qualifying utility to obtain modifications of or amendments to an indenture, financing agreement, security agreement, or similar agreement or instrument relating to an existing secured or unsecured obligation of the utility in connection with the issuance of consumer rate relief bonds;

(F) Costs incurred by a qualifying utility to obtain a consent, release, waiver, or approval from a holder of an obligation described in subparagraph (E) of this subdivision that are necessary to be incurred for the utility to issue or cause the issuance of consumer rate relief bonds;

(G) Taxes, franchise fees or license fees imposed on consumer rate relief charges;

(H) Costs related to issuing or servicing consumer rate relief bonds or related to obtaining a financing order, including servicing fees and expenses, trustee fees and expenses, legal fees and expenses, administrative fees, placement fees, underwriting fees, capitalized interest and equity, rating-agency fees and other related costs authorized by the commission in a financing order; and

(I) Costs that are incurred by the commission for a financial adviser with respect to consumer rate relief bonds.

(12) "Financing order" means an order issued by the commission under subsection (e) of this section that authorizes a qualifying utility to issue consumer rate relief bonds and recover consumer rate relief charges. 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.

(13) "Final financing order" means a financing order that has become final and has taken effect as provided in subdivision (10) of subsection (e) of this section.

(14) "Financing party" means either of the following:

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

(B) A party to an ancillary agreement, the rights and obligations of which relate to or depend upon the existence of consumer rate relief property, the enforcement and priority of a security interest in consumer rate relief property, the timely collection and payment of consumer

rate relief charges or a combination of these factors.

(15) "Financing statement" has the same meaning as in section one-hundred-two, article nine, chapter forty-six of this code.(16) "Investment grade" means, with respect to the unsecured debt obligations of a 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.

(17) "Nonbypassable" means that the payment of consumer rate relief charges may not be avoided by any West Virginia retail customer of a qualifying utility or its successors and must be paid by any such customer that receives electric delivery service from such utility or its successors for as long as the consumer rate relief bonds are outstanding.

(18) "Nonutility affiliate" means, with respect to any utility, a person that: (i) Is an affiliate of the utility as defined in 42 U.S.C.§16451(1); 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.

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

(20) "Qualifying utility" means a public utility engaged in the sale of electric service to retail customers in West Virginia which has applied for and received from the commission a final financing order under this section, including an affiliated electric public utility which has applied jointly for and received such an order.

(21) "Registered holding company" means, with respect to a utility, a person that is: (i) A registered holding company as defined in 42 U.S.C.§16451(8); and (ii) an affiliate of the utility as defined in 42 U.S.C.§16451(1).

(22) "Regulatory sanctions" means, under the circumstances presented, a 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 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 penalties pursuant to article four of this chapter; and (iii) a proceeding by mandamus, injunction or other appropriate proceeding as provided in section two of this article.

(23) "Successor" means, with respect to an entity, another 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, regardless of whether any of these occur as a result of a restructuring of the electric power industry or otherwise.

(c) *Application for financing order.*

(1) If an electric utility or affiliate obtains from the commission an authorization or waiver required by any other provision of this chapter or by commission order with respect to the underlying expanded net energy costs proposed to be financed through the mechanism of consumer rate relief bonds, an electric utility, or two or more affiliated electric utilities engaged in the delivery of electric service to customers in this state, may apply to the commission for a financing order that authorizes the following:

(A) The issuance of consumer rate relief bonds, in one or more series, to recover only those expanded net energy costs that could result in an under-recovery;

(B) The imposition, charging, and collection of consumer rate relief charges, in accordance with the adjustment mechanism approved by the commission under subparagraph (E), subdivision (6), subsection (e) of this section to recover sufficient amounts to pay and secure the debt service payments of consumer rate relief bonds and associated financing costs; and

(C) The creation of consumer rate relief property under the financing order.

(2) The commission may only consider applications made pursuant to this subsection for the recovery of underlying expanded net energy costs that would be reflected in schedules of rates

filed in calendar year 2012.

(d) *Information required in application for financing order.*

The application shall include all of the following:

(1) A description and quantification of the uncollected expanded net energy costs that the electric utility seeks to recover through the issuance of consumer rate relief bonds;

(2) An estimate of the date each series of consumer rate relief bonds is expected to be issued;

(3) The expected term during which the consumer rate relief costs for each series of consumer rate relief bonds are expected to be recovered;

(4) An estimate of the financing costs associated with the issuance of each series of consumer rate relief bonds;

(5) An estimate of the amount of consumer rate relief charges necessary to recover the consumer rate relief costs set forth in the application and the calculation for that estimate, which calculation shall take into account the estimated date or dates of issuance and the estimated principal amount of each series of consumer rate relief bonds;

(6) A proposed methodology for allocating consumer rate relief charges between and within tariff schedules and to special contract customers;

(7) A description of a proposed adjustment mechanism, reflecting the allocation methodology in subdivision (6) of this subsection;

(8) A description of the benefits to the qualifying utility's customers that are expected to result from the issuance of the consumer rate relief bonds, including a demonstration that the bonds and their financing costs are just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the electric utility; and

(9) Other information required by commission rules.

(e) *Issuance of financing order.*

(1) Except as otherwise provided in this section, proceedings on an application submitted by an electric utility under subsection (c) of this section are governed by the commission's standard procedural rules. Any party that participated in a proceeding in which the subject expanded net energy costs were authorized or approved automatically has standing to participate in the financing order proceedings and the commission shall determine the standing or lack of standing of any other petitioner for party status.

(2) Within thirty days after the filing of an application under subsection (c) of this section, the commission shall issue a scheduling order for the proceeding.

(3) At the conclusion of proceedings on an application submitted by an electric utility under subsection (c) of this section, the commission shall issue either a financing order, granting the application, in whole or with modifications, or an order denying the application.

(4) The commission may issue a financing order under this subsection if the commission finds that the issuance of the consumer rate relief bonds and the consumer rate relief charges authorized by the order are just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the electric utility.

(5) The commission shall include all of the following in a financing order issued under this subsection:

(A) A determination of the maximum amount and a description of the expanded net energy costs that may be recovered through consumer rate relief bonds issued under the financing order;

(B) A description of consumer rate relief property, the creation of which is authorized by the financing order;

(C) A description of the financing costs that may be recovered through consumer rate relief charges and the period over which those costs may be recovered;

(D) A description of the methodology and calculation for allocating consumer rate relief charges between and within tariff schedules and to special contract customers;

(E) A description and approval of the adjustment mechanism for use in the imposition, charging, and collection of the consumer rate relief charges, including: (i) The allocation referred to in paragraph (D) of this subdivision and (ii) any specific requirements for adjusting and reconciling consumer rate relief charges for standard adjustments that are limited to relatively stable conditions of operations and nonstandard adjustments that are necessary to reflect significant changes from historical conditions of operations, such as the loss of substantial electrical load, so long as each and every application of the adjustment mechanism is designed to assure the full and timely payment of consumer rate relief bonds and associated financing costs;

(F) The maximum term of the consumer rate relief bonds;

(G) A finding that the issuance of the consumer rate relief bonds, including financing costs, is just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the electric utility; and

(H) Any other provision the commission considers appropriate to ensure the full and timely imposition, charging, collection and adjustment, pursuant to an approved adjustment mechanism, of the consumer rate relief charges.

(6) To the extent the commission deems appropriate and compatible with the issuance advice letter procedure under subdivision (9) of this subsection, the commission, in a financing order, shall afford the electric utility flexibility in establishing the terms and conditions for the consumer rate relief bonds to accommodate changes in market conditions, including repayment schedules, interest rates, financing costs, collateral requirements, required debt service and other reserves, and the ability of the qualifying utility, at its option, to effect a series of issuances of consumer rate relief bonds and correlated assignments, sales, pledges, or other transfers of

consumer rate relief property. Any changes made under this subdivision to terms and conditions for the consumer rate relief bonds shall be in conformance with the financing order.

(7) A financing order shall provide that the creation of consumer rate relief property shall be simultaneous with the sale of that property to an assignee as provided in the application and the pledge of the property to secure consumer rate relief bonds.

(8) The commission, in a financing order, shall require that, after the final terms of each issuance of consumer rate relief bonds have been established, and prior to the issuance of those bonds, the qualifying utility shall determine the resulting initial consumer rate relief charges in accordance with the adjustment mechanism described in the financing order. These consumer rate relief charges shall be final and effective upon the issuance of the consumer rate relief bonds, without further commission action.

(9) Because the actual structure and pricing of the consumer rate relief bonds will not be known at the time the financing order is issued, in the case of every securitization approved by the commission, the qualifying utility which intends to cause the issuance of such bonds will provide to the commission and the commission's financial adviser, if any, prior to the issuance of the bonds, an issuance advice letter following the determination of the final terms of the bonds. The issuance advice letter shall indicate the final structure of the consumer rate relief bonds and provide the best available estimate of total ongoing costs. The issuance advice letter should report the initial consumer rate relief charges and other information specific to the consumer rate relief bonds to be issued, as the financing order may require. The qualifying utility may proceed with the issuance of the consumer rate relief bonds unless, prior to noon on the fourth business day after the commission receives the issuance advice letter, the commission issues a disapproval letter directing that the bonds as proposed shall not be issued and the basis for that disapproval. The financing order may provide such additional provisions relating to the issuance advice letter process as the commission deems appropriate.

(10) An order of the commission issued pursuant to this subsection 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 a 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.

(11) The financing order shall also provide for a procedure requiring the qualifying utility to adjust its rates or provide credits in a manner that would return to customers any overpayments resulting from the securitization for the expanded net energy costs in excess of actual prudently incurred costs as subsequently determined by the commission. The adjustment mechanism may not affect or impair the consumer rate relief property or the right to impose, collect, or adjust the consumer rate relief charges under this section.

(12) 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 (3), subsection (g) 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 consumer rate relief bonds issued pursuant to the financing order are outstanding, in addition to any other obligation either may have under this code or federal law. Without first obtaining the prior consent and approval of the commission, the qualifying utility will not:

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

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

(13) A financing order may require the qualifying utility to file with the commission a periodic report showing the receipt and disbursement of proceeds of consumer rate relief bonds and consumer rate relief charges. 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 such proceeds. The provisions of this subdivision do not 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.

(14) In the case of two or more affiliated 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 utility to impose consumer rate relief charges on its customers and to cause to be issued consumer rate relief bonds and to receive and use the proceeds which it receives with respect thereto as provided in subdivision (1), subsection (j) of this section.

(15) The commission, in its discretion, may engage the services of a financial adviser for the purpose of assisting the commission in its consideration of an application for a financing order and a subsequent issuance of consumer rate relief bonds pursuant to a financing order.

(f) *Allowed disposition of consumer rate relief property.*

(1) The consumer rate relief property created in a final financing order may be transferred, sold, conveyed or assigned to any affiliate of the qualifying utility created for the limited purpose of acquiring, owning or administering that property, issuing consumer rate relief bonds under the final financing order or a combination of these purposes.

(2) All or any portion of the consumer rate relief property may be pledged to secure the payment of consumer rate relief bonds, amounts payable to financing parties and bondholders, amounts payable under any ancillary agreement and other financing costs.

(3) A transfer, sale, conveyance, assignment, grant of a security interest in or pledge of consumer rate relief property by a qualifying utility to an affiliate of the 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) The consumer rate relief property constitutes an existing, present property right, notwithstanding any requirement that the imposition, charging, and collection of consumer rate relief charges depend on the qualifying utility continuing to deliver retail electric service or continuing to perform its servicing functions relating to the billing and collection of consumer rate

relief charges or on the level of future energy consumption. That property exists regardless of whether the consumer rate relief charges have been billed, have accrued or have been collected and notwithstanding any requirement that the value or amount of the property is dependent on the future provision of service to customers by the qualifying utility.

(5) All such consumer rate relief property continues to exist until the consumer rate relief bonds issued under the final financing order are paid in full and all financing costs relating to the bonds have been paid in full.

(g) *Final financing order to remain in effect.*

(1) A final financing order remains in effect until the consumer rate relief bonds issued under the final financing order and all financing costs related to the bonds have been paid in full.

(2) A final financing order remains in effect and unabated, notwithstanding the bankruptcy, reorganization or insolvency of the qualifying utility, or any affiliate of the qualifying utility, or the commencement of any judicial or nonjudicial proceeding on the final financing order.

(3) A final financing order is irrevocable and the commission may not reduce, impair, postpone or terminate the consumer rate relief charges authorized in the final financing order or impair the property or the collection or recovery of consumer rate relief costs.

(h) *Subsequent commission proceeding.*

Upon petition, or upon its own motion, the commission may commence a proceeding and issue a subsequent financing order that provides for retiring and refunding consumer rate relief bonds issued under the final financing order if the commission finds that the subsequent financing order satisfies all of the requirements of subsection (e) of this section. Effective on retirement of the refunded consumer rate relief bonds and the issuance of new consumer rate relief bonds, the commission shall adjust the related consumer rate relief charges accordingly.

*(i) Limits on commission authority.*

(1) The commission, in exercising its powers and carrying out its duties regarding regulation and ratemaking, may not do any of the following:

(A) Consider consumer rate relief bonds issued under a final financing order to be the debt of the qualifying utility;

(B) Consider the consumer rate relief charges imposed, charged or collected under a final financing order to be revenue of the qualifying utility; or

(C) Consider the consumer rate relief costs or financing costs authorized under a final financing order to be costs of the qualifying utility.

(2) The commission may not order or otherwise require, directly or indirectly, an electric utility to use consumer rate relief bonds to finance the recovery of expanded net energy costs.

(3) The commission may not refuse to allow the recovery of expanded net energy costs solely because an electric utility has elected or may elect to finance those costs through a financing mechanism other than the issuance of consumer rate relief bonds.

(4) If a qualifying utility elects not to finance such costs through the issuance of consumer rate relief bonds as authorized in a final financing order, those costs shall be recovered as authorized by the commission previously or in subsequent proceedings.

(j) *Duties of qualifying utility.*

(1) A qualifying utility shall cause the proceeds which it receives with respect to consumer rate relief bonds issued pursuant to a financing order to be used for the recovery of the expanded net energy costs which occasioned the issuance of the bonds, including the retirement of debt and/or equity of the qualifying utility which was incurred to finance or refinance such costs and for no other purpose.

(2) A qualifying utility shall annually provide a plain-English explanation of the consumer rate relief charges approved in the financing order, as modified by subsequent issuances of consumer rate relief bonds authorized under the financing order, if any, and by application of the adjustment mechanism as provided in subsection (k) of this section. These explanations may be made by bill inserts, website information or other appropriate means as required, or approved if proposed by the qualifying utility, by the commission.

(3) Collected consumer rate relief charges shall be applied solely to the repayment of consumer rate relief bonds and other financing costs.

(4) The failure of a qualifying utility to apply the proceeds which it receives with respect to an issuance of consumer rate relief bonds in a reasonable, prudent and appropriate manner or otherwise comply with any provision of this section does not invalidate, impair or affect any financing order, consumer rate relief property, consumer rate relief charges or consumer rate relief bonds. Subject to the limitations set forth in subsection (g) of this section, nothing in this subdivision prevents or precludes 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.

(k) *Application of adjustment mechanism; filing of schedules with commission.*

(1) A qualifying utility shall file with the commission, and the commission shall approve, with or without such modification as is allowed under this subsection, at least annually, or more frequently as provided in the final financing order, a schedule applying the approved adjustment mechanism to the consumer rate relief charges authorized under the final financing order, based on estimates of demand and consumption for each tariff schedule and special contract customer and other mathematical factors. The qualifying utility shall submit with the schedule a request for approval to make the adjustments to the consumer rate relief charges in accordance with the schedule.

(2) On the same day a 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 general circulation published each weekday in Kanawha County. This publication is only required if the calculation of the adjustment filed by the utility with the commission would result in an increase in the amount of the consumer rate relief charges.

(3) The commission's review of a request for a standard adjustment is limited to a

determination of whether there is a mathematical error in the application of the adjustment mechanism to the consumer rate relief charges. No hearing is required for such an adjustment. Each standard adjustment to the consumer rate relief charges, in an amount as calculated by the qualifying utility but incorporating any correction for a mathematical error as determined by the commission, automatically becomes effective fifteen days following the date on which the qualifying utility files with the commission its calculation of the standard adjustment.

(4) If the commission authorizes a nonstandard adjustment procedure in the financing order, and the qualifying utility files for such an adjustment, the commission shall allow interested parties thirty days from the date the qualifying utility filed the calculation of a nonstandard adjustment to make comments. The commission's review of the total amount required for a nonstandard adjustment shall be limited to the mathematical accuracy of the total adjustment needed to assure the full and timely payment of all debt service costs and related financing costs of the consumer rate relief bonds. The commission may also determine the proper allocation of those costs within and between classes of customers and to special contract customers, the proper design of the consumer rate relief charges and the appropriate application of those charges under the methodology set forth in the formula-based adjustment mechanism approved in the financing order. 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 nonstandard adjustment. The nonstandard adjustment, as modified by the commission, if necessary, shall be approved by the commission within sixty days and the commission may shorten the filing and hearing periods above in the financing order to ensure this result. Any procedure for a nonstandard adjustment must be consistent with assuring the full and timely payment of debt service of the consumer rate relief bonds and associated financing costs.

(5) No adjustment approved or deemed approved under this section affects the irrevocability of the final financing order as specified in subdivision (3) of subsection (g) of this section.

(l) *Nonbypassability of consumer rate relief charges.*

(1) As long as consumer rate relief bonds issued under a final financing order are outstanding, the consumer rate relief charges authorized under the final financing order are nonbypassable and apply to all existing or future West Virginia retail customers of a qualifying utility or its successors and must be paid by any customer that receives electric delivery service from the utility or its successors.

(2) The consumer rate relief charges shall be collected by the qualifying utility or the qualifying utility's successors or assignees, or a collection agent, in full through a charge that is separate and apart from the qualifying utility's base rates.

(m) *Utility default.*

(1) If a qualifying utility defaults on a required payment of consumer rate relief charges collected, a court, upon application by an interested party, or the commission, upon application to the commission or upon its own motion, and without limiting any other remedies available to the applying party, shall order the sequestration and payment of the consumer rate relief charges collected for the benefit of bondholders, assignees and financing parties. The order remains in full force and effect notwithstanding a bankruptcy, reorganization or other insolvency proceedings with respect to the qualifying utility or any affiliate thereof.

(2) Customers of a qualifying utility shall be held harmless by the qualifying utility for its failure to remit any required payment of consumer rate relief charges collected but such failure does not affect the consumer rate relief property or the rights to impose, collect and adjust the consumer rate relief charges under this section.

(3) Consumer rate relief property under a final financing order and the interests of an assignee, bondholder or financing party in that property under a financing agreement are not subject to set off, counterclaim, surcharge or defense by the qualifying utility or other person, including as a result of the qualifying utility's failure to provide past, present, or future services, or in connection with the bankruptcy, reorganization, or other insolvency proceeding of the qualifying

utility, any affiliate, or any other entity.

(n) *Successors to qualifying utility.*

A successor to a qualifying utility is bound by the requirements of this section. The successor shall perform and satisfy all obligations of the electric utility under the final financing order in the same manner and to the same extent as the qualifying utility including the obligation to collect and pay consumer rate relief charges to the person(s) entitled to receive them. The successor has the same rights as the qualifying utility under the final financing order in the same manner and to the same extent as the qualifying utility.

(o) *Security interest in consumer rate relief property.*

(1) Except as provided in subdivisions (3) through (5) of this subsection, the creation, perfection and enforcement of a security interest in consumer rate relief property under a final financing order to secure the repayment of the principal of and interest on consumer rate relief bonds, amounts payable under any ancillary agreement and other financing costs are governed by this section and not article nine of chapter forty-six of this code.

(2) The description of the consumer rate relief property in a transfer or security agreement and a financing statement is sufficient only if the description refers to this section and the final financing order creating the property. This section applies to all purported transfers of, and all purported grants of, liens on or security interests in that 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.

(3) A security interest in consumer rate relief property under a final financing order is created, valid and binding at the latest of the date that the security agreement is executed and delivered or the date that value is received for the consumer rate relief bonds.

(4) The security interest attaches without any physical delivery of collateral or other act and upon the filing of the financing statement with the Office of the Secretary of State. The lien of the security interest is 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 the parties have notice of the lien. Also upon this filing, a transfer of an interest in the consumer rate relief property is perfected against all parties having claims of any kind, 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 property previously perfected in accordance with this subsection.

(5) The Secretary of State shall maintain any financing statement filed under this subsection in the same manner that the secretary maintains financing statements filed by utilities under article nine of chapter forty-six of this code. The filing of a financing statement under this subsection is governed by the provisions regarding the filing of financing statements in article nine of chapter forty-six of this code. However, a person filing a financing statement under this subsection is not required to file any continuation statements to preserve the perfected status of its security interest.

(6) A security interest in consumer rate relief property under a final financing order is a continuously perfected security interest and has priority over any other lien, created by operation of law or otherwise, that may subsequently attach to that property or those rights or interests unless the holder of any such lien has agreed in writing otherwise.

(7) The priority of a security interest in consumer rate relief property is not affected by the commingling of collected consumer rate relief charges with other amounts. Any pledged or secured party has a perfected security interest in the amount of all consumer rate relief charges collected that are deposited in a cash or deposit account of the qualifying utility in which such collected charges have been commingled with other funds. Any other security interest that may apply to those funds shall be terminated when the funds are transferred to a segregated account for an assignee or a financing party.

(8) No application of the adjustment mechanism as described in subsection (k) of this section affects the validity, perfection or priority of a security interest in or the transfer of consumer

rate relief property under the final financing order.

(p) *Transfer, sale, etc. of consumer rate relief property.*

(1) A sale, assignment or transfer of consumer rate relief property under a final financing order is 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 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 that property may be created only when all of the following have occurred:

(A) The financing order has become final and taken effect;

(B) The documents evidencing the transfer of the property have been executed and delivered to the assignee; and

(C) Value has been received for the property.

(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 be effective and perfected against all third parties and is not affected or impaired by, among other things, the occurrence of any of the following:

(A) Commingling of collected consumer rate relief charges with other amounts;

(B) The retention by the seller of any of the following:

(i) A partial or residual interest, including an equity interest, in the consumer rate relief property, whether direct or indirect, or whether subordinate or otherwise;

(ii) The right to recover costs associated with taxes, franchise fees or license fees imposed on the collection of consumer rate relief charges;

(iii) Any recourse that the purchaser or any assignee may have against the seller;

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

(v) The obligation of the seller to collect consumer rate relief charges on behalf of an assignee;

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

(vii) Any application of the adjustment mechanism under the final financing order.

(q) *Taxation of consumer rate relief charges; consumer rate relief bonds not debt of governmental entities or a pledge of taxing powers.*

(1) The imposition, billing, collection and receipt of consumer rate relief charges under this section are exempt from state income, sales, franchise, gross receipts, business and occupation and other taxes or similar charges: *Provided,* That neither this exemption nor any other provision of this subsection shall preclude any municipality from taxing consumer rate relief charges under the authority granted to municipalities pursuant to sections five and five-a of article thirteen in chapter eight of this code.

(2) Consumer rate relief bonds issued under a final financing order do 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 have no right to have taxes levied by this state or the taxing authority of any county, municipality or any other political subdivision of this state for the payment of the principal of or interest on the bonds. The issuance of consumer rate relief bonds does not, directly, indirectly or contingently, obligate this state or a county, municipality or political subdivision of this state to levy a tax or make an appropriation for payment of the principal of or interest on the bonds.

(r) *Consumer rate relief 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 consumer rate relief 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.

(s) *Pledge of state.*

(1) The state pledges to and agrees with the bondholders, assignees and financing parties under a final financing order that the state will not take or permit any action that impairs the value of consumer rate relief property under the final financing order or revises the consumer rate relief costs for which recovery is authorized under the final financing order or, except as allowed under subsection (k) of this section, reduce, alter or impair consumer rate relief charges that are imposed, charged, collected or remitted for the benefit of the bondholders, assignees and financing parties, until any principal, interest and redemption premium in respect of consumer rate relief 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) A person who issues consumer rate relief bonds is permitted to include the pledge specified in subdivision (1) of this subsection in the consumer rate relief bonds, ancillary agreements and documentation related to the issuance and marketing of the consumer rate relief bonds.

(t) *West Virginia law governs; this section controls.*

(1) The law governing the validity, enforceability, attachment, perfection, priority and exercise of remedies with respect to the transfer of consumer rate relief property under a final financing order, the creation of a security interest in any such property, consumer rate relief charges or final financing order are the laws of this state as set forth in this section.

(2) This section controls in the event of a conflict between its provisions and any other law regarding the attachment, assignment, or perfection, the effect of perfection or priority of any

security interest in or transfer of consumer rate relief property under a final financing order.

(u) ~~*Severability.*~~

~~If any provision 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 does not affect the Constitutionality or validity of any other provision 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 consumer rate relief bonds, the imposition of consumer rate relief charges, the transfer or assignment of consumer rate relief property or the collection and recovery of consumer rate relief charges. 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 provision of this section held to be unconstitutional or invalid had not been included in this section.~~

~~(v)~~ *Non-utility status.*

An assignee or financing party is not an electric public utility or person providing electric service by virtue of engaging in the transactions with respect to consumer rate relief bonds.

**§24-2-4h. Utility consumer rate relief bonds.**

(a) Legislative findings. — The Legislature hereby finds and declares as follows:

(1) That alternative financing mechanisms, as authorized in §24-2-4e and §22-2-4f of this code have heretofore been narrow exceptions to the general rate-making mechanisms available to the commission in carrying out the regulation of public utilities subject to its jurisdiction.

(2) That in 2005, the Legislature authorized an exception applicable to environmental control bonds, which was strictly limited to financing the construction and installation of emission control equipment at electric-generating facilities in the state under certain specific conditions.

(3) That in 2012, the Legislature authorized an exception applicable to consumer rate relief bonds, which was strictly limited to financing or refinancing expanded net energy costs of electric

utilities under certain specific conditions.

(4) That the alternative financing arrangements approved by the commission and implemented pursuant to §24-2-4e and §24-2-4f of this code have proven to be highly effective in mitigating the rate impacts upon affected utility customers in the limited situations previously authorized.

(5) That, since the value of alternative financing mechanisms and the benefits which they can provide to the consumers of public utility services in the state have been demonstrated, the commission should be empowered to employ alternative financing mechanisms for an expanded set of eligible costs to be securitized, subject to the procedural protections provided herein.

(b) Definitions. — As used in this section:

(1) "Adjustment mechanism" means a formula-based mechanism for making adjustments to consumer rate relief charges to correct for over-collection or under-collection of such charges or otherwise to ensure the timely and complete payment and recovery of such charges and financing costs. The adjustment mechanism shall accommodate: (i) Standard adjustments to consumer rate relief charges that are limited to relatively stable conditions of operations; and (ii) nonstandard adjustments to consumer rate relief charges that are necessary to reflect significant changes from historical conditions of operations, such as the loss of significant electrical load. The adjustment mechanism is not to be used as a means to authorize the issuance of consumer rate relief bonds in a principal amount greater, or the payment or recovery of eligible costs to be securitized in an amount greater, than that which was authorized in the financing order which established the adjustment mechanism.

(2) "Ancillary agreement" means a 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 consumer rate relief 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 a person, corporation, limited liability company, trust, partnership or other entity to which an interest in consumer rate relief property is assigned, sold, or transferred, other than as security. The term also includes any entity to which an assignee assigns, sells, or transfers, other than as security, the assignee's interest in or right to consumer rate relief property.

(4) "Bond" includes debentures, notes, certificates of participation, certificates of beneficial interest, certificates of ownership, or other evidences of indebtedness or ownership that are issued by an electric utility or an assignee under a final financing order, the proceeds of which are used directly or indirectly to recover, finance, or refinance eligible costs to be securitized and that are secured by or payable from revenues from consumer rate relief charges.

(5) "Bondholder" means any holder or owner of a consumer rate relief bond.

(6) "Commission" means the Public Service Commission of West Virginia, as it may be constituted from time to time, and any successor agency exercising functions similar in purpose thereto.

(7) "Consumer rate relief charges" means the amounts which are authorized by the commission in a financing order to be collected from a qualifying utility's customers in order to pay and secure the debt service payments of consumer rate relief bonds and associated financing costs.

(8) "Consumer rate relief costs" means those costs, including financing costs, which are to be defrayed through consumer rate relief charges.

(9) "Consumer rate relief property" means the property, rights, and interests of a qualifying utility or an assignee under a final financing order, including the right to impose, charge, and collect the consumer rate relief charges that shall be used to pay and secure the payment of consumer rate relief bonds and financing costs, and including the right to obtain adjustments to those charges, and any revenues, receipts, collections, rights to payment, payments, moneys, claims, or other proceeds arising from the rights and interests created under the final financing order.

(10) "Eligible costs to be securitized" means historical and, if deemed appropriate by the

commission, projected costs and investments, including financing costs, carrying charges on under-recovery balances, and costs incurred prior to the effective date of this section, which have been authorized for recovery by an order of the commission, whether or not subject to judicial appeal, relating to: (i) environmental control costs; (ii) expanded net energy costs; (iii) storm recovery costs; and (iv) undepreciated generation utility plant balances, as such terms are defined in this section.

(11) "Environmental control costs" means costs and investments incurred or expected to be incurred by a qualifying utility to comply with the Coal Combustion Rule and the Electric Effluent Limitation Guidelines established by the United States Environmental Protection Agency.

(12) "Expanded net energy costs" means costs and investments incurred or expected to be incurred by a qualifying utility and adjudicated pursuant to the commission's expanded net energy cost proceedings.

(13) "Financing costs" means any of the following:

(A) Principal, interest, and redemption premiums that are payable on consumer rate relief bonds;

(B) A payment required under an ancillary agreement;

(C) An amount required to fund or replenish a reserve account or another account established under an indenture, ancillary agreement, or other financing document relating to consumer rate relief bonds or the payment of any return on the capital contribution approved by the commission to be made by a qualifying utility to an assignee;

(D) Costs of retiring or refunding an existing debt and equity securities of a qualifying utility in connection with the issuance of consumer rate relief bonds but only to the extent the securities were issued for the purpose of financing eligible costs to be securitized;

(E) Costs incurred by a qualifying utility to obtain modifications of or amendments to an indenture, financing agreement, security agreement, or similar agreement or instrument relating to an existing secured or unsecured obligation of the utility in connection with the issuance of

consumer rate relief bonds;

(F) Costs incurred by a qualifying utility to obtain a consent, release, waiver, or approval from a holder of an obligation described in paragraph (E) of this subdivision that are necessary to be incurred for the utility to issue or cause the issuance of consumer rate relief bonds;

(G) Taxes, franchise fees, or license fees imposed on consumer rate relief charges;

(H) Costs related to issuing or servicing consumer rate relief bonds or related to obtaining a financing order, including servicing fees and expenses, trustee fees and expenses, legal fees and expenses, administrative fees, placement fees, underwriting fees, capitalized interest and equity, rating-agency fees, and other related costs authorized by the commission in a financing order; and

(I) Costs that are incurred by the commission for a financial adviser with respect to consumer rate relief bonds.

(14) "Financing order" means an order issued by the commission under subsection (e) of this section that authorizes a qualifying utility to issue consumer rate relief bonds and recover consumer rate relief charges. 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.

(15) "Final financing order" means a financing order that has become final and has taken effect as provided in subdivision (10), subsection (e) of this section.

(16) "Financing party" means either of the following:

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

(B) A party to an ancillary agreement, the rights and obligations of which relate to or depend upon the existence of consumer rate relief property, the enforcement and priority of a security interest in consumer rate relief property, the timely collection and payment of consumer rate relief charges or a combination of these factors.

(17) "Financing statement" has the same meaning as in §46-9-102 of this code.

(18) "Nonbypassable" means that the payment of consumer rate relief charges as

authorized by the commission for each customer, customer class, and special contract customer may not be avoided by any West Virginia retail customer of a qualifying utility or its successors and must be paid by any such customer that receives service from such utility or its successors for as long as the consumer rate relief bonds are outstanding.

(19) "Nonutility affiliate" means, with respect to any utility, a person that: (i) Is an affiliate of the utility as defined in 42 U.S.C.§16451(1); and (ii) is not a public utility that provides retail utility service to customers in the state within the meaning of §24-1-2 of this code.

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

(21) "Qualifying utility" means a public utility engaged in the sale of electric service to retail customers in West Virginia which has applied for and received from the commission a final financing order under this section, including an affiliated electric utility which has applied jointly for and received such an order.

(22) "Registered holding company" means, with respect to a utility, a person that is: (i) A registered holding company as defined in 42 U.S.C.§16451(8); and (ii) an affiliate of the utility as defined in 42 U.S.C.§16451(1).

(23) "Regulatory sanctions" means, under the circumstances presented, a 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 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 penalties pursuant to §24-4-1, *et seq*. of this code; and (iii) a proceeding by mandamus, injunction, or other appropriate proceeding as provided in §24-2-2 of this code.

(24) "Storm recovery costs" means expenses and investments incurred by a qualifying

utility arising from or related to any major storm, extraordinary weather-related event or natural disaster, including costs of mobilization, staging, construction, reconstruction, repair, or replacement of production, generation, transport, transmission, distribution, or general facilities.

(25) "Successor" means, with respect to an entity, another 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, regardless of whether any of these occur as a result of a restructuring of the electric power industry or otherwise.

(26) "Undepreciated generation utility plant balances" means any unrecovered capitalized costs of or undepreciated investments in one or more fossil-fired electric generating plants having nameplate capacity in excess of 1,000 megawatts each, and related supply, transmission, equipment, and fixtures. Undepreciated generation utility plant balances shall include (i) the net book value of assets on the qualifying utility's balance sheet related to such generating plants and related infrastructure, and (ii) carrying costs authorized by the commission: *Provided*, That (A) all costs of removing retired generating plant assets; (B) all capitalized costs and investments in fossil-fired electric generating plants and related supply, transmission, equipment, and fixtures incurred or made by a qualifying utility on or after December 31, 2022; and (C) all non-cash asset retirement obligation assets and related accumulated depreciation, shall each be specifically excluded from the calculation of undepreciated generation utility plant balances.

(c) Application for financing order.

(1) If a public utility or affiliate obtains from the commission an authorization or waiver required by any other provision of this chapter or by commission order with respect to eligible costs to be securitized, a utility, or two or more affiliated utilities engaged in the delivery of utility service to customers in this state, may apply to the commission for a financing order that authorizes the following:

(A) The issuance of consumer rate relief bonds, in one or more series, to recover only

those eligible costs to be securitized;

(B) The imposition, charging, and collection of consumer rate relief charges, in accordance with the adjustment mechanism approved by the commission under §24-2-4h(e)(5)(E) of this code, to recover sufficient amounts to pay and secure the debt service payments of consumer rate relief bonds and associated financing costs; and

(C) The creation of consumer rate relief property under the financing order.

(2) No utility shall be required to file an application for a financing order under this section or otherwise utilize the alternative financing mechanisms authorized by this section.

(d) Information required in application for financing order.

The application shall include all of the following:

(1) A description and quantification of the eligible costs to be securitized that the utility seeks to recover through the issuance of consumer rate relief bonds;

(2) An estimate of the date each series of consumer rate relief bonds is expected to be issued;

(3) The expected term during which the consumer rate relief costs for each series of consumer rate relief bonds are expected to be recovered;

(4) An estimate of the financing costs associated with the issuance of each series of consumer rate relief bonds;

(5) An estimate of the amount of consumer rate relief charges necessary to recover the consumer rate relief costs set forth in the application and the calculation for that estimate, which calculation shall take into account the estimated date or dates of issuance and the estimated principal amount of each series of consumer rate relief bonds;

(6) A proposed methodology for allocating consumer rate relief charges between and within tariff schedules and to special contract customers;

(7) A description of a proposed adjustment mechanism, reflecting the allocation methodology in subdivision (6) of this subsection;

(8) A description of the benefits to the qualifying utility's customers that are expected to result from the issuance of the consumer rate relief bonds, including a demonstration that the bonds and their financing costs are just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the qualifying utility; and

(9) Other information required by commission rules.

(e) Issuance of financing order.

(1) Except as otherwise provided in this section, proceedings on an application submitted by a utility under subsection (c) of this section are governed by the commission's standard procedural rules. Any party that participated in a proceeding in which the subject eligible costs to be securitized were authorized or approved automatically has standing to participate in the financing order proceedings and the commission shall determine the standing or lack of standing of any other petitioner for party status.

(2) Within 30 days after the filing of an application under subsection (c) of this section, the commission shall issue a scheduling order for the proceeding.

(3) At the conclusion of proceedings on an application submitted by a utility under subsection (c) of this section, the commission shall issue either a financing order granting the application, in whole or with modifications, or an order denying the application.

(4) The commission may issue a financing order under this subsection if the commission finds that the issuance of the consumer rate relief bonds and the consumer rate relief charges authorized by the order are just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the qualifying utility.

(5) The commission shall include all of the following in a financing order issued under this

subsection:

(A) A determination of the maximum amount and a description of the eligible costs to be securitized that may be recovered through consumer rate relief bonds issued under the financing order;

(B) A description of consumer rate relief property, the creation of which is authorized by the financing order;

(C) A description of the financing costs that may be recovered through consumer rate relief charges and the period over which those costs may be recovered;

(D) A description of the methodology and calculation for allocating consumer rate relief charges between and within tariff schedules and to special contract customers;

(E) A description and approval of the adjustment mechanism for use in the imposition, charging, and collection of the consumer rate relief charges, including: (i) The allocation referred to in paragraph (D) of this subdivision; and (ii) any specific requirements for adjusting and reconciling consumer rate relief charges for standard adjustments that are limited to relatively stable conditions of operations and nonstandard adjustments that are necessary to reflect significant changes from historical conditions of operations, such as the loss of substantial utility load, so long as each and every application of the adjustment mechanism is designed to assure the full and timely payment of consumer rate relief bonds and associated financing costs;

(F) The maximum term of the consumer rate relief bonds;

(G) A finding that the issuance of the consumer rate relief bonds, including financing costs, is just and reasonable and are reasonably expected to achieve the lowest reasonably attainable cost in order to produce cost savings to customers and to mitigate rate impacts on customers, as compared to traditional financing mechanisms or traditional cost-recovery methods available to the qualifying utility; and

(H) Any other provision the commission considers appropriate to ensure the full and timely imposition, charging, collection, and adjustment, pursuant to an approved adjustment mechanism,

of the consumer rate relief charges, including, if applicable, rate adjustments or sur-credits, effective with the implementation of consumer rate relief charges, to reduce tariff rates by the amounts of revenue requirements related to securitized costs that are recovered in current tariff rates but which will be recovered through the securitization approved by the commission.

(6) To the extent the commission deems appropriate and compatible with the issuance advice letter procedure under subdivision (9) of this subsection, the commission, in a financing order, shall afford the qualifying utility flexibility in establishing the terms and conditions for the consumer rate relief bonds to accommodate changes in market conditions, including repayment schedules, interest rates, financing costs, collateral requirements, required debt service and other reserves, and the ability of the qualifying utility, at its option, to effect a series of issuances of consumer rate relief bonds and correlated assignments, sales, pledges, or other transfers of consumer rate relief property. Any changes made under this subdivision to terms and conditions for the consumer rate relief bonds shall be in conformance with the financing order.

(7) A financing order shall provide that the creation of consumer rate relief property shall be simultaneous with the sale of that property to an assignee as provided in the application and the pledge of the property to secure consumer rate relief bonds.

(8) The commission, in a financing order, shall require that, after the final terms of each issuance of consumer rate relief bonds have been established, and prior to the issuance of those bonds, the qualifying utility shall determine the resulting initial consumer rate relief charges in accordance with the adjustment mechanism described in the financing order. These consumer rate relief charges shall be final and effective upon the issuance of the consumer rate relief bonds, without further commission action.

(9) Because the actual structure and pricing of the consumer rate relief bonds will not be known at the time the financing order is issued, in the case of every securitization approved by the commission, the qualifying utility which intends to cause the issuance of such bonds will provide to the commission and the commission's financial adviser, if any, prior to the issuance of the bonds,

an issuance advice letter following the determination of the final terms of the bonds. The issuance advice letter shall indicate the final structure of the consumer rate relief bonds and provide the best available estimate of total ongoing costs. The issuance advice letter should report the initial consumer rate relief charges and other information specific to the consumer rate relief bonds to be issued, as the financing order may require. The qualifying utility may proceed with the issuance of the consumer rate relief bonds unless, prior to noon on the fourth business day after the commission receives the issuance advice letter, the commission issues a disapproval letter directing that the bonds as proposed shall not be issued and the basis for that disapproval. The financing order may provide such additional provisions relating to the issuance advice letter process as the commission deems appropriate.

(10) If a qualified utility issues consumer rate relief bonds pursuant to a financing order from the commission, any determination of the commission made in connection with such financing order issued pursuant to this subsection, including a determination that certain costs constitute eligible costs to be securitized, is binding and 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, but only pursuant to §24-5-1, *et seq*. of this code. In the case of a 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.

(11) The financing order shall also provide for a procedure requiring the qualifying utility to adjust its rates or provide credits in a manner that would return to customers any overpayments resulting from the securitization for the eligible costs to be securitized in excess of actual prudently incurred costs as subsequently determined by the commission. However, the adjustment mechanism may not affect or impair the consumer rate relief property or the right to impose, collect, or adjust the consumer rate relief charges under this section.

(12) 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 (3), subsection (g) 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 consumer rate relief bonds issued pursuant to a financing order are outstanding, in addition to any other obligation either may have under this code or federal law. Without first obtaining the prior consent and approval of the commission, the qualifying utility will not:

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

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

(13) A financing order may require the qualifying utility to file with the commission a periodic report showing the receipt and disbursement of proceeds of consumer rate relief bonds and consumer rate relief charges. 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 such proceeds. The provisions of this subdivision do not 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.

(14) In the case of two or more affiliated 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 utility to impose consumer rate relief charges on its customers and to cause to be issued consumer rate relief bonds and to receive and use the proceeds which it receives with respect thereto as provided in subdivision (1), subsection (j) of this section.

(15) The commission, in its discretion, may engage the services of a financial adviser for the purpose of assisting the commission in its consideration of an application for a financing order and a subsequent issuance of consumer rate relief bonds pursuant to a financing order.

(f) Allowed disposition of consumer rate relief property.

(1) The consumer rate relief property created in a final financing order may be transferred,

sold, conveyed, or assigned to any affiliate of the qualifying utility created for the limited purpose of acquiring, owning, or administering that property, issuing consumer rate relief bonds under the final financing order or a combination of these purposes.

(2) All or any portion of the consumer rate relief property may be pledged to secure the payment of consumer rate relief bonds, amounts payable to financing parties and bondholders, amounts payable under any ancillary agreement and other financing costs.

(3) A transfer, sale, conveyance, assignment, grant of a security interest in or pledge of consumer rate relief property by a qualifying utility to an affiliate of the utility, to the extent previously authorized in a financing order, does not require the prior consent and approval of the commission under §24-2-12 of this code.

(4) The consumer rate relief property constitutes an existing, present property right, notwithstanding that the imposition, charging, and collection of consumer rate relief charges occurs in the future or depends on the qualifying utility or successors continuing to deliver retail electric service or continuing to perform servicing functions relating to the billing and collection of consumer rate relief charges or that the level of future energy consumption may change. That property exists regardless of whether the consumer rate relief charges have been billed, have accrued or have been collected and notwithstanding any requirement that the value or amount of the property is dependent on the future provision of service to customers by the qualifying utility.

(5) All such consumer rate relief property continues to exist until the consumer rate relief bonds issued under the final financing order are paid in full and all financing costs relating to the bonds have been paid in full.

(g) Final financing order to remain in effect.

(1) A final financing order remains in effect until the consumer rate relief bonds issued under the final financing order and all financing costs related to the bonds have been paid in full.

(2) A final financing order remains in effect and unabated, notwithstanding the bankruptcy, reorganization or insolvency of the qualifying utility, or any affiliate of the qualifying utility, or the

commencement of any judicial or nonjudicial proceeding on the final financing order.

(3) A final financing order is irrevocable and the commission may not impair, postpone, or terminate the consumer rate relief charges authorized in the final financing order or impair the property or the collection or recovery of consumer rate relief costs.

(h) Subsequent commission proceeding.

Upon petition, or upon its own motion, the commission may commence a proceeding and issue a subsequent financing order that provides for retiring and refunding consumer rate relief bonds issued under the final financing order if the commission finds that the subsequent financing order satisfies all of the requirements of subsection (e) of this section and does not violate the terms of the consumer rate relief bonds issued under the prior financing order. Effective on retirement of the refunded consumer rate relief bonds and the issuance of new consumer rate relief bonds, the commission shall adjust the related consumer rate relief charges accordingly.

(i) Limits on commission authority.

(1) The commission, in exercising its powers and carrying out its duties regarding regulation and ratemaking, may not do any of the following:

(A) Consider consumer rate relief bonds issued under a final financing order to be the debt of the qualifying utility;

(B) Consider the consumer rate relief charges imposed, charged or collected under a final financing order to be revenue of the qualifying utility; or

(C) Consider the consumer rate relief costs or financing costs authorized under a final financing order to be costs of the qualifying utility.

(2) The commission may not order or otherwise require, directly or indirectly, a qualifying utility to use consumer rate relief bonds to finance the recovery of eligible costs to be securitized.

(3) The commission may not refuse to allow the recovery of eligible costs to be securitized solely because a utility has elected or may elect to finance those costs through a financing mechanism other than the issuance of consumer rate relief bonds.

(4) If a qualifying utility elects not to finance such costs through the issuance of consumer rate relief bonds as authorized in a final financing order, those costs may be recovered as authorized by the commission previously or in subsequent proceedings: *Provided*, That previous findings and determinations made by the commission in a financing order related to those costs are not binding on the commission in such subsequent proceeding.

(5) Notwithstanding the foregoing, but without limiting the final and binding nature of any financing order of the commission issued pursuant to this subsection, nothing herein restricts the authority of the commission to limit cost recovery to just and reasonable costs that are prudently incurred, to require deferral of regulatory assets, and/or to determine capital structure and costs as the commission determines are prudent, just, and reasonable.

(j) Duties of qualifying utility.

(1) A qualifying utility shall cause the proceeds which it receives with respect to consumer rate relief bonds issued pursuant to a financing order to be used for the recovery of the eligible costs to be securitized which occasioned the issuance of the bonds, including the retirement of debt and/or equity of the qualifying utility which was incurred to finance or refinance such costs and for no other purpose.

(2) A qualifying utility shall annually provide a plain-English explanation of the consumer rate relief charges approved in the financing order, as modified by subsequent issuances of consumer rate relief bonds authorized under the financing order, if any, and by application of the adjustment mechanism as provided in subsection (k) of this section. These explanations may be made by bill inserts, website information or other appropriate means as required, or as approved if proposed by the qualifying utility, by the commission.

(3) Collected consumer rate relief charges shall be applied solely to the repayment of consumer rate relief bonds and other financing costs.

(4) The failure of a qualifying utility to apply the proceeds which it receives with respect to an issuance of consumer rate relief bonds in a reasonable, prudent and appropriate manner or

otherwise comply with any provision of this section does not invalidate, impair, or affect any financing order, consumer rate relief property, consumer rate relief charges, or consumer rate relief bonds. Subject to the limitations set forth in subsection (g) of this section, nothing in this subdivision prevents or precludes 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.

(k) Application of adjustment mechanism; filing of schedules with commission.

(1) A qualifying utility shall file with the commission, and the commission shall approve, with or without such modification as is allowed under this subsection, at least annually, or more frequently as provided in the final financing order, a schedule applying the approved adjustment mechanism to the consumer rate relief charges authorized under the final financing order, based on estimates of demand and consumption for each tariff schedule and special contract customer and other mathematical factors. The qualifying utility shall submit with the schedule a request for approval to make the adjustments to the consumer rate relief charges in accordance with the schedule.

(2) On the same day a 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 §59-3-1, *et seq*. of this code in a newspaper of general circulation published each weekday in Kanawha County. This publication is only required if the calculation of the adjustment filed by the utility with the commission would result in an increase in the amount of the consumer rate relief charges.

(3) The commission's review of a request for a standard adjustment is limited to a determination of whether there is a mathematical error in the application of the adjustment mechanism to the consumer rate relief charges. No hearing is required for such an adjustment. Each standard adjustment to the consumer rate relief charges, in an amount as calculated by the qualifying utility but incorporating any correction for a mathematical error as determined by the

commission, automatically becomes effective 15 days following the date on which the qualifying utility files with the commission its calculation of the standard adjustment.

(4) If the commission authorizes a nonstandard adjustment procedure in the financing order, and the qualifying utility files for such an adjustment, the commission shall allow interested parties 30 days from the date the qualifying utility filed the calculation of a nonstandard adjustment to make comments. The commission's review of the total amount required for a nonstandard adjustment shall be limited to the mathematical accuracy of the total adjustment needed to assure the full and timely payment of all debt service costs and related financing costs of the consumer rate relief bonds. The commission may also determine the proper allocation of those costs within and between classes of customers and to special contract customers, the proper design of the consumer rate relief charges and the appropriate application of those charges under the methodology set forth in the formula-based adjustment mechanism approved in the financing order. If the commission determines that a hearing is necessary, the commission shall hold a hearing on the comments within 40 days of the date the qualifying utility filed the calculation of the nonstandard adjustment. The nonstandard adjustment, as modified by the commission, if necessary, shall be approved by the commission within 60 days and the commission may shorten the filing and hearing periods above in the financing order to ensure this result. Any procedure for a nonstandard adjustment must be consistent with assuring the full and timely payment of debt service of the consumer rate relief bonds and associated financing costs.

(5) No adjustment approved or deemed approved under this section affects the irrevocability of the final financing order as specified in subdivision (3), subsection (g) of this section.

(l) Nonbypassability of consumer rate relief charges.

(1) As long as consumer rate relief bonds issued under a final financing order are outstanding, the consumer rate relief charges authorized under the final financing order are nonbypassable and apply to and must be paid by all existing and future customers that receive

electric service within the qualifying utility's geographic service territory notwithstanding any change in West Virginia law regarding the ability of retail customers of an electric utility to choose a provider of generation or transmission service from a party other than the qualifying utility in the future.

(2) The consumer rate relief charges shall be collected by the qualifying utility or the qualifying utility's successors, or a collection agent, in full through a charge that is separate and apart from the qualifying utility's base rates.

(m) Utility default.

(1) If a qualifying utility defaults on a required payment of consumer rate relief charges collected, a court, upon application by an interested party, or the commission, upon application to the commission or upon its own motion, and without limiting any other remedies available to the applying party, shall order the sequestration and payment of the consumer rate relief charges collected for the benefit of bondholders, assignees and financing parties. The order remains in full force and effect notwithstanding a bankruptcy, reorganization, or other insolvency proceedings with respect to the qualifying utility or any affiliate thereof.

(2) Customers of a qualifying utility shall be held harmless by the qualifying utility for its failure to remit any required payment of consumer rate relief charges collected but such failure does not affect the consumer rate relief property or the rights to impose, collect, and adjust the consumer rate relief charges under this section.

(3) Consumer rate relief property under a final financing order and the interests of an assignee, bondholder, or financing party in that property under a financing agreement are not subject to set off, counterclaim, surcharge, or defense by the qualifying utility or other person, including as a result of the qualifying utility's failure to provide past, present, or future services, or in connection with the bankruptcy, reorganization, or other insolvency proceeding of the qualifying utility, any affiliate, or any other entity.

(n) Successors to qualifying utility.

A successor to a qualifying utility is bound by the requirements of this section. The successor shall perform and satisfy all obligations of the electric utility under the final financing order in the same manner and to the same extent as the qualifying utility including the obligation to collect and pay consumer rate relief charges to the person(s) entitled to receive them. The successor has the same rights as the qualifying utility under the final financing order in the same manner and to the same extent as the qualifying utility.

(o) Security interest in consumer rate relief property.

(1) Except as provided in subdivisions (3) through (5) of this subsection, the creation, perfection, priority and, to the extent set forth herein, enforcement of a security interest or lien in consumer rate relief property, including to secure the repayment of the principal of and interest on consumer rate relief bonds, amounts payable under any ancillary agreement and other financing costs, are governed by this section and not §46-9-1, *et seq*. of this code or other law.

(2) The description of the consumer rate relief property in a transfer or security agreement and a financing statement is sufficient only if the description refers to this section and the final financing order creating the property. This section applies to all purported transfers of, and all purported grants of liens on or security interests in, that 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.

(3) A security interest in consumer rate relief property under a final financing order is created, valid, and binding when the applicable security agreement is executed and delivered and value is received for the consumer rate relief bonds.

(4) The security interest attaches without any physical delivery of collateral or other act and upon the filing of the financing statement with the Office of the Secretary of State. The security interest is valid, binding, and perfected against all parties, including those having claims of any kind in tort, contract, or otherwise against the person granting the security interest, regardless of whether the parties have notice of the lien. Also upon this filing, a transfer of an interest in the

consumer rate relief property is perfected against, absolute and free from the claims of all parties having competing claims of any kind, including claims of other lien creditors or claims of the seller or creditors of the seller, whether or not supported by any prior judicial or other lien, other than creditors holding a prior security interest, ownership interest, or assignment in the property previously perfected in accordance with this subsection.

(5) The Secretary of State shall maintain any financing statement filed under this subsection in the same manner that the secretary maintains financing statements filed by utilities under §49-9-1, *et seq*. of this code. The filing of a financing statement under this subsection is governed by the provisions regarding the filing of financing statements in §46-9-1, *et seq*. of this code. However, a person filing a financing statement under this subsection is not required to file any continuation statements to preserve the perfected status of its security interest.

(6) A security interest in consumer rate relief property under a final financing order is a continuously perfected security interest and has priority over any other security interest or lien, created by operation of law, contract or otherwise, that may by agreement of the holder of such security interest in consumer rate relief property or otherwise purportedly subsequently attach to that property or those rights or interests, unless the holder of any such security interest has agreed in writing otherwise.

(7) The priority of a security interest in consumer rate relief property is not affected by commingling with other amounts, and continues when any consumer rate relief property is collected and deposited in a cash or deposit account of the qualifying utility or other deposit account that contains other funds. Any other security interest that may by agreement of the holder of the security interest in consumer rate relief property apply to such consumer rate relief property shall be terminated when the funds are transferred to a segregated account for an assignee or a financing party with respect to such consumer rate relief property.

(8) No application of the adjustment mechanism as described in subsection (k) of this section affects the creation, validity, perfection, or priority of a security interest in or the transfer of

consumer rate relief property under the final financing order.

(p) Transfer, sale, or assignment of consumer rate relief property.

(1) A sale, assignment or transfer of consumer rate relief property under a final financing order is 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 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 that property may be created only when all of the following have occurred:

(A) The financing order has become final and taken effect;

(B) The documents evidencing the transfer of the property have been executed and delivered to the assignee; and

(C) Value has been received for the property.

(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 be effective and perfected against all third parties and is not affected or impaired by, among other things, the occurrence of any of the following:

(A) Commingling of collected consumer rate relief charges with other amounts;

(B) The retention by the seller of any of the following:

(i) A partial or residual interest, including an equity interest, in the consumer rate relief property, whether direct or indirect, or whether subordinate or otherwise;

(ii) The right to recover costs associated with taxes, franchise fees or license fees imposed on the collection of consumer rate relief charges;

(iii) Any recourse that the purchaser or any assignee may have against the seller;

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

(v) The obligation of the seller to collect consumer rate relief charges on behalf of an assignee;

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

(vii) Any application of the adjustment mechanism under the final financing order.

(q) Taxation of consumer rate relief charges; consumer rate relief bonds not debt of governmental entities or a pledge of taxing powers.

(1) The imposition, billing, collection, and receipt of consumer rate relief charges under this section are exempt from state income, sales, franchise, gross receipts, business and occupation, and other taxes or similar charges: *Provided*, That neither this exemption nor any other provision of this subsection shall preclude any municipality from taxing consumer rate relief charges under the authority granted to municipalities pursuant to §8-13-5 and §8-13-5a of this code.

(2) Consumer rate relief bonds issued under a final financing order do 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 have no right to have taxes levied by this state or the taxing authority of any county, municipality, or any other political subdivision of this state for the payment of the principal of or interest on the bonds. The issuance of consumer rate relief bonds does not, directly, indirectly, or contingently, obligate this state or a county, municipality, or political subdivision of this state to levy a tax or make an appropriation for payment of the principal of or interest on the bonds.

(r) Consumer rate relief 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 consumer rate relief 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.

This subsection shall not limit other persons authorized to invest in consumer rate relief bonds from making such investments.

(s) Pledge of state.

(1) The state pledges to and agrees with the bondholders, assignees, and financing parties under a final financing order that the state will not take or permit any action that impairs the value of consumer rate relief property under the final financing order or revises the consumer rate relief costs for which recovery is authorized under the final financing order or, except as allowed under subsection (k) of this section, reduce, alter, or impair consumer rate relief charges that are imposed, charged, collected, or remitted for the benefit of the bondholders, assignees and financing parties, until any principal, interest and redemption premium in respect of consumer rate relief 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) A person who issues consumer rate relief bonds is permitted to include the pledge specified in subdivision (1) of this subsection in the consumer rate relief bonds, ancillary agreements, and documentation related to the issuance and marketing of the consumer rate relief bonds.

(t) West Virginia law governs; this section controls.

(1) The law governing the validity, enforceability, attachment, perfection, priority, and exercise of remedies with respect to the transfer of consumer rate relief property under a final financing order, the creation of a security interest in any such property, consumer rate relief charges, or final financing order are the laws of this state as set forth in this section.

(2) This section controls in the event of a conflict between its provisions and any other law

regarding the attachment, assignment, or perfection, the effect of perfection or priority of any security interest in or transfer of consumer rate relief property under a final financing order.

(u) ~~Severability.~~

~~If any provision 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 does not affect the Constitutionality or validity of any other provision 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 consumer rate relief bonds, the imposition of consumer rate relief charges, the transfer or assignment of consumer rate relief property or the collection and recovery of consumer rate relief charges. 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 provision of this section held to be unconstitutional or invalid had not been included in this section.~~

~~(v)~~ Non-utility status.

An assignee or financing party is not a public utility or person providing utility service by virtue of engaging in the transactions with respect to consumer rate relief bonds.

~~(w)~~ (v) Continuing validity of consumer rate relief bonds issued pursuant to §24-2-4f of this code and related matters.

Notwithstanding any provisions of this section to the contrary, all consumer rate relief bonds issued pursuant to §24-2-4f of this code shall remain in full force and effect according to their terms and in accordance with the final financing order pursuant to which such bonds were issued and the laws of this state in existence at the time such bonds were issued. Further, all consumer rate relief charges and consumer rate relief property associated with any consumer rate relief bonds issued pursuant to §24-2-4f of this code shall not be affected by any provision of this section and all such consumer rate relief charges and consumer rate relief property shall be

governed by the applicable final financing order pursuant to which the corresponding consumer rate relief bonds were issued and the law of this state in existence at the time such bonds were issued. No provision of this section shall affect any interest in the consumer rate relief property or the continuing validity of a security interest in consumer rate relief property associated with any consumer rate relief bonds issued pursuant to §24-2-4f of this code.

## ARTICLE 3. DUTIES AND PRIVILEGES OF PUBLIC UTILITIES SUBJECT TO REGULATIONS OF COMMISSION.

### §24-3-3a. Gas utility pipelines declared as common carriers; commission approval of certain transportation.

(a) As used in this section or in section eleven, article two of this chapter:

(1) "Intrastate pipeline" means (i) any utility or (ii) any other person, firm or corporation engaged in natural gas transportation in intrastate commerce to or for another person, firm or corporation for compensation.

(2) "Interstate pipeline" means any person, firm or corporation engaged in natural gas transportation subject to the jurisdiction of the FERC under the Natural Gas Act or the Natural Gas Policy Act of 1978.

(3) "Local distribution company" means any person, other than any interstate pipeline or any intrastate pipeline, engaged in transportation or local distribution of natural gas and the sale of natural gas for ultimate consumption.

(4) "Intrastate commerce" includes the production, gathering, treatment, processing, transportation and delivery of natural gas entirely within this state.

(5) "Transportation" includes exchange, backhaul, displacement or other means of transportation.

(6) "FERC" means the Federal Energy Regulatory Commission.

(b) The commission may by rule or order, authorize and require the transportation of

natural gas in intrastate commerce by intrastate pipelines, by interstate pipelines with unused or excess capacity not needed to meet interstate commerce demands or by local distribution companies for any person for one or more uses, as defined, by rule, by the commission in the case of:

(1) Natural gas sold by a producer, pipeline or other seller to such person; or

(2) Natural gas produced by such person.

(c) For reasons of safety, deliverability or operational efficiency the commission may, in its discretion, by rule or order, exclude from the requirements of this section any part of any pipeline solely dedicated to storage, or gathering, or low pressure distribution of natural gas.

(d) (1) The rates and charges of any interstate pipeline with respect to any transportation authorized and required under subsection (b) of this section shall be just and reasonable and computed by the Public Service Commission in accordance with the guidelines set forth by the FERC and in effect upon the date of application by the commission for the transportation of natural gas by any interstate pipeline on behalf of any intrastate pipeline or any local distribution company.

(2) The rates and charges of any intrastate pipeline with respect to any transportation authorized and required under subsection (b) of this section shall be fair and reasonable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service. The computation of such rates and charges by the Public Service Commission shall be in accordance with the guidelines set forth by the FERC and in effect upon the date of application by the commission for the transportation of natural gas by any intrastate pipeline in behalf of any interstate pipeline or any local distribution company served by any interstate pipeline.

~~(e) The provisions of this article and each section, subsection, subdivision, paragraph and subparagraph thereof shall be severable from the provisions of each other subparagraph, paragraph, subdivision, subsection, section, article or chapter of this code so that if any provision of this article be held void, the remaining provisions of this act and this code shall remain valid.~~

# CHAPTER 27. MENTALLY ILL PERSONS.

## ARTICLE 13. LAWS REPEALED; SEVERABILITY.

### §27-13-2. Severability.

[Repealed].

# CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

## ARTICLE 5A. STATE ATHLETIC COMMISSION.

### §29-5A-26. Severability.

[Repealed].

## ARTICLE 22. STATE LOTTERY ACT.

### §29-22-28. Severability.

[Repealed].

## ARTICLE 22A. RACETRACK VIDEO LOTTERY.

### §29-22A-18. Severability.

[Repealed].

# CHAPTER 29A. STATE ADMINISTRATIVE PROCEDURES ACT.

## ARTICLE 7. GENERAL PROVISIONS.

### §29A-7-4. Construction and effect~~; severability of provisions~~.

Nothing in this chapter shall be held to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of this chapter.~~ If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or its application, and to this end the provisions of this chapter are declared to be severable.~~

# CHAPTER 30. PROFESSIONS AND OCCUPATIONS.

## ARTICLE 21. PSYCHOLOGISTS; SCHOOL PSYCHOLOGISTS.

### §30-21-15. Severability.

[Repealed].

## ARTICLE 26. HEARING-AID DEALERS AND FITTERS.

### §30-26-20. Construction ~~and severability~~.

The provisions of this article and the regulations promulgated thereunder shall be liberally construed so as to carry into effect its purposes and to protect the health, safety and welfare of the public.

~~If any provision of this article or the application thereof to any person or circumstance shall be held invalid, the remainder of the article and the application of such provision to other persons or circumstances shall not be affected thereby.~~

# CHAPTER 31. CORPORATIONS.

## ARTICLE 2A. RAILROAD CROSSING.

### §31-2A-7. Severability.

[Repealed].

## ARTICLE 14. WEST VIRGINIA BUSINESS DEVELOPMENT CORPORATIONS.

### §31-14-16. Severability of provisions.

[Repealed].

## ARTICLE 15. WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY.

### §31-15-32. Severability.

[Repealed].

## ARTICLE 17. WEST VIRGINIA RESIDENTIAL MORTGAGE LENDER, BROKER AND SERVICER ACT.

**§31-17-19. Severability.**

1 [Repealed].

**ARTICLE 17A. WEST VIRGINIA SAFE MORTGAGE LICENSING ACT.**

**§31-17A-19. Severability.**

1 [Repealed].

**ARTICLE 18. WEST VIRGINIA HOUSING DEVELOPMENT FUND.**

**§31-18-25. Severability clause.**

1 [Repealed].

**ARTICLE 18A. WEST VIRGINIA ENERGY CONSERVATION REVOLVING LOAN FUND.**

**§31-18A-11. Severability clause.**

1 [Repealed].

**ARTICLE 19. WEST VIRGINIA COMMUNITY INFRASTRUCTURE AUTHORITY.**

**§31-19-21. Severability.**

1 [Repealed].

## CHAPTER 31G. BROADBAND ENHANCEMENT AND EXPANSION POLICIES.

**ARTICLE 4. MAKE-READY POLE ACCESS.**

1 **§31G-4-6. Severability.**

1 [Repealed].

## CHAPTER 32B. THE WEST VIRGINIA COMMODITIES ACT.

**ARTICLE 4. SEVERABILITY AND SAVING PROVISIONS.**

**§32B-4-1. Severability of provisions.**

1 [Repealed].

# CHAPTER 33. INSURANCE.

## ARTICLE 4. GENERAL PROVISIONS.

### §33-4-10. Severability.

[Repealed].

## ARTICLE 6B. DECLINATION OF AUTOMOBILE LIABILITY INSURANCE.

### §33-6B-7. Severability.

[Repealed].

## ARTICLE 11. UNFAIR TRADE PRACTICES.

### §33-11-10. Severability.

[Repealed].

## ARTICLE 11B. WEST VIRGINIA AIR AMBULANCE PATIENT PROTECTION ACT.

### §33-11B-1. Air ambulance membership products as insurance.

(a) An air ambulance service provider or any affiliated entity who solicits air ambulance membership subscriptions, accepts membership applications, or charges membership fees, is deemed to be engaged in the business of insurance to the extent that it contracts, promises, guarantees, or in any other way portends to pay, reimburse, or indemnify the copayments, deductibles, or other cost-sharing amounts of a patient relating to the air ambulance transport as determined or set by the patient's health insurance provider, health care provider, or other third parties, or any post-service payment of costs to third parties relating to the transport.

(b) An air ambulance membership agreement or subscription for air ambulance services under subsection (a) of this section is insurance and may be considered secondary insurance coverage or a supplement to any insurance coverage, and shall by subject to regulation by the commissioner pursuant to the provisions of this chapter.

(c) To the extent that activity falls within the business of insurance as described in subsection (a) of this section, no person or entity, whether directly or indirectly through an affiliated

entity, agreement with a third party, or otherwise, may solicit or sell air ambulance membership agreements or subscriptions, accept membership applications, or charge membership fees except as authorized by a valid license issued by the commissioner pursuant to the provisions of this chapter.

(d)The commissioner may promulgate rules in accordance with §29A-3-1 *et seq*. of this code to effectuate the provisions of this section.

~~(e) If any provision of this section is held invalid by a court of competent jurisdiction, the invalidity shall not affect other provisions of this section, and to this end the provisions of this section are declared to be severable.~~

## ARTICLE 12. INSURANCE PRODUCERS AND SOLICITORS.

### §33-12-36. Severability.

[Repealed].

## ARTICLE 15A. WEST VIRGINIA LONG-TERM CARE INSURANCE ACT.

### §33-15A-7. Severability.

[Repealed].

## ARTICLE 16. GROUP ACCIDENT AND SICKNESS INSURANCE.

### §33-16-3d. Medicare supplement insurance.

(a) *Definitions.* --

(1) "Applicant" means, in the case of a group Medicare supplement policy or subscriber contract, the proposed certificate holder.

(2) "Certificate" means, for the purposes of this section, any certificate issued under a group Medicare supplement policy, which policy has been delivered or issued for delivery in this state.

(3) "Medicare supplement policy" means a group or individual policy of accident and sickness insurance or a subscriber contract of hospital and medical service corporations or health

maintenance organizations, other than a policy issued pursuant to a contract under Section 1876 of the federal Social Security Act (42 U.S.C. §1395, et seq.) or an issued policy under a demonstration project specified pursuant to amendments to the federal Social Security Act in 42 U.S.C. §1395ss(g)(1), which is advertised, marketed or designed primarily as a supplement to reimbursements under Medicare for the hospital, medical or surgical expenses of persons eligible for Medicare. Such term does not include:

(A) A policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations;

(B) Medicare advantage plans established under Medicare Part C, outpatient prescription drug plans established under Medicare Part D, or any health care prepayment plan (HCPP) that provides benefits pursuant to an agreement under Section 1833(a)(1)(A) of the Social Security Act.

(4) "Medicare" means the Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965, as then constituted or later amended.

(b) *Standards for policy provisions.* --

(1) The commissioner shall issue reasonable rules to establish specific standards for policy provisions of Medicare supplement policies. Such standards shall be in addition to and in accordance with the applicable laws of this state and may cover, but shall not be limited to:

(A) Terms of renewability;

(B) Initial and subsequent conditions of eligibility;

(C) Nonduplication of coverage;

(D) Probationary period;

(E) Benefit limitations, exceptions and reductions;

(F) Elimination period;

(G) Requirements for replacement;

(H) Recurrent conditions; and

(I) Definitions of terms.

(2) The commissioner may issue reasonable rules that specify prohibited policy provisions not otherwise specifically authorized by statute which, in the opinion of the commissioner, are unjust, unfair or unfairly discriminatory to any person insured or proposed for coverage under a Medicare supplement policy.

(3) Notwithstanding any other provisions of the law, a Medicare supplement policy may not deny a claim for losses incurred more than six months from the effective date of coverage for a preexisting condition. The policy may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the effective date of coverage.

(c) *Minimum standards for benefits.* -- The commissioner shall issue reasonable rules to establish minimum standards for benefits under Medicare supplement policies.

(d) *Loss ratio standards.* -- Medicare supplement policies shall be expected to return to policyholders benefits which are reasonable in relation to the premium charge. The commissioner shall issue reasonable rules to establish minimum standards for loss ratios and for Medicare supplement policies on the basis of incurred claims experience and earned premiums for the entire period for which rates are computed to provide coverage and in accordance with accepted actuarial principles and practices. For purposes of rules issued pursuant to this subsection, Medicare supplement policies issued as a result of solicitations of individuals through the mail or mass media advertising, including both print and broadcast advertising, shall be treated as individual policies.

(e) *Disclosure standards.* --

(1) In order to provide for full and fair disclosure in the sale of accident and sickness policies, to persons eligible for Medicare, the commissioner may require by rule that no policy of

accident and sickness insurance may be issued for delivery in this state and no certificate may be delivered pursuant to such a policy unless an outline of coverage is delivered to the applicant at the time application is made.

(2) The commissioner shall prescribe the format and content of the outline of coverage required by subdivision (1) above. For purposes of this subdivision, "format" means style, arrangements and overall appearance, including such items as size, color and prominence of type and the arrangement of text and captions. Such outline of coverage shall include:

(A) A description of the principal benefits and coverage provided in the policy;

(B) A statement of the exceptions, reductions and limitations contained in the policy;

(C) A statement of the renewal provisions including any reservation by the insurer of the right to change premiums and disclosure of the existence of any automatic renewal premium increases based on the policyholder's age;

(D) A statement that the outline of coverage is a summary of the policy issued or applied for and that the policy should be consulted to determine governing contractual provisions.

(3) The commissioner may prescribe by rule a standard form and the contents of an informational brochure for persons eligible for Medicare, which is intended to improve the buyer's ability to select the most appropriate coverage and improve the buyer's understanding of Medicare. Except in the case of direct response insurance policies, the commissioner may require by rule that the information brochure be provided to any prospective insureds eligible for Medicare concurrently with delivery of the outline of coverage. With respect to direct response insurance policies, the commissioner may require by rule that the prescribed brochure be provided upon request to any prospective insureds eligible for Medicare, but in no event later than the time of policy delivery.

(4) The commissioner may further promulgate reasonable rules to govern the full and fair disclosure of the information in connection with the replacement of accident and sickness policies, subscriber contracts or certificates by persons eligible for Medicare.

(f) *Notice of free examination.* -- Medicare supplement policies or certificates, other than those issued pursuant to direct response solicitation, shall have a notice prominently printed on the first page of the policy or attached thereto stating in substance that the applicant shall have the right to return the policy or certificate within thirty days from its delivery and have the premium refunded if, after examination of the policy or certificate, the applicant is not satisfied for any reason. Any refund made pursuant to this section shall be paid directly to the applicant by the issuer in a timely manner. Medicare supplement policies or certificates issued pursuant to a direct response solicitation to persons eligible for Medicare shall have a notice prominently printed on the first page or attached thereto stating in substance that the applicant shall have the right to return the policy or certificate within thirty days of its delivery and to have the premium refunded if, after examination, the applicant is not satisfied for any reason. Any refund made pursuant to this section shall be paid directly to the applicant by the issuer in a timely manner.

(g) *Administrative procedures.* -- Rules promulgated pursuant to this section shall be subject to the provisions of chapter twenty-nine-a (the West Virginia Administrative Procedures Act) of this code.

~~(h) *Severability.* -- If any provision of this section or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.~~

## ARTICLE 26. WEST VIRGINIA GUARANTY ASSOCIATION ACT.

### §33-26-19. Severability.

[Repealed].

## ARTICLE 28. INDIVIDUAL ACCIDENT AND SICKNESS INSURANCE MINIMUM STANDARDS.

### §33-28-5b. Medicare supplement insurance.

(a) *Definitions.* --

(1) "Applicant" means, in the case of an individual Medicare supplement policy or subscriber contract, the person who seeks to contract for insurance benefits.

(2) "Medicare supplement policy" means an individual policy of accident and sickness insurance or a subscriber contract (of hospital and medical service corporations or health maintenance organizations), other than a policy issued pursuant to a contract under Section 1876 of the federal Social Security Act (42 U.S.C. Section 1395 et seq.), or an issued policy under a demonstration project specified in 42 U.S.C. §1395ss(g)1), which is advertised, marketed or designed primarily as a supplement to reimbursements under Medicare for the hospital, medical or surgical expenses of persons eligible for Medicare. Such term does not include:

(A) A policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or a combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations; or

(B) A policy or contract of any professional, trade or occupational association for its members or former or retired members, or combination thereof, if such association is composed of individuals all of whom are actively engaged in the same profession, trade or occupation; has been maintained in good faith for purposes other than obtaining insurance; and has been in existence for at least two years prior to the date of its initial offering of such policy or plan to its members; or

(C) Individual policies or contracts issued pursuant to a conversion privilege under a policy or contract of group or individual insurance when such group or individual policy or contract includes provisions which are inconsistent with the requirements of this section.

(3) "Medicare" means the Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965, as then constituted or later amended.

(b) *Standards for policy provisions.* --

(1) The commissioner shall issue reasonable rules to establish specific standards for policy provisions of Medicare supplement policies. Such standards shall be in addition to and in

accordance with the applicable laws of this state and may cover, but shall not be limited to:

(A) Terms of renewability;

(B) Initial and subsequent conditions of eligibility;

(C) Nonduplication of coverage;

(D) Probationary period;

(E) Benefit limitations, exceptions and reductions;

(F) Elimination period;

(G) Requirements for replacement;

(H) Recurrent conditions; and

(I) Definitions of terms.

(2) The commissioner may issue reasonable rules that specify prohibited policy provisions not otherwise specifically authorized by statute which, in the opinion of the commissioner, are unjust, unfair or unfairly discriminatory to any person insured or proposed for coverage under a Medicare supplement policy.

(3) Notwithstanding any other provisions of the law, a Medicare supplement policy may not deny a claim for losses incurred more than six months from the effective date of coverage for a preexisting condition. The policy may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the effective date of coverage.

(c) *Minimum standards for benefits.* -- The commissioner shall issue reasonable rules to establish minimum standards for benefits under Medicare supplement policies.

(d) *Loss ratio standards.* -- Medicare supplement policies shall be expected to return to policyholders benefits which are reasonable in relation to the premium charge. The commissioner shall issue reasonable rules to establish minimum standards for loss ratios for Medicare supplement policies on the basis of incurred claims experience and earned premiums for the entire period for which rates are computed to provide coverage and in accordance with accepted

actuarial principles and practices. For purposes of rules issued pursuant to this subsection, Medicare supplement policies issued as a result of solicitations of individuals through the mail or mass media advertising, including both print and broadcast advertising, shall be treated as individual policies.

(e) *Disclosure standards.* --

(1) In order to provide for full and fair disclosure in the sale of accident and sickness policies, to persons eligible for Medicare, the commissioner may require by rule that no policy of accident and sickness insurance may be issued for delivery in this state and no certificate may be delivered pursuant to such a policy unless an outline of coverage is delivered to the applicant at the time application is made.

(2) The commissioner shall prescribe the format and content of the outline of coverage required by subdivision (1) of this subsection. For purposes of this subdivision, "format" means style, arrangements and overall appearance, including such items as size, color and prominence of type and the arrangement of text and captions. Such outline of coverage shall include:

(A) A description of the principal benefits and coverage provided in the policy;

(B) A statement of the exceptions, reductions and limitations contained in the policy;

(C) A statement of the renewal provisions including any reservation by the insurer of the right to change premiums and disclosure of the existence of any automatic renewal premium increases based on the policyholder's age;

(D) A statement that the outline of coverage is a summary of the policy issued or applied for and that the policy should be consulted to determine governing contractual provisions.

(3) The commissioner may prescribe by rule a standard form and the contents of an informational brochure for persons eligible for Medicare, which is intended to improve the buyer's ability to select the most appropriate coverage and improve the buyer's understanding of Medicare. Except in the case of direct response insurance policies, the commissioner may require by rule that the information brochure be provided to any prospective insureds eligible for Medicare

concurrently with delivery of the outline of coverage. With respect to direct response insurance policies, the commissioner may require by rule that the prescribed brochure be provided upon request to any prospective insureds eligible for Medicare, but in no event later than the time of policy delivery.

(4) The commissioner may further promulgate reasonable rules to govern the full and fair disclosure of the information in connection with the replacement of accident and sickness policies, subscriber contracts or certificates by persons eligible for Medicare.

(f) *Notice of free examination.* -- Medicare supplement policies or certificates, other than those issued pursuant to direct response solicitation, shall have a notice prominently printed on the first page of the policy or attached thereto stating in substance that the applicant shall have the right to return the policy or certificate within thirty days from its delivery and have the premium refunded if, after examination of the policy or certificate, the applicant is not satisfied for any reason. Any refund made pursuant to this section shall be paid directly to the applicant by the issuer in a timely manner. Medicare supplement policies or certificates issued pursuant to a direct response solicitation to persons eligible for Medicare shall have a notice prominently printed on the first page or attached thereto stating in substance that the applicant shall have the right to return the policy or certificate within thirty days of its delivery and to have the premium refunded if, after examination, the applicant is not satisfied for any reason. Any refund made pursuant to this section shall be paid directly to the applicant by the issuer in a timely manner.

(g) *Administrative procedures.* -- Rules promulgated pursuant to this section shall be subject to the provisions of chapter twenty-nine-a (the West Virginia Administrative Procedures Act) of this code.

~~(h) *Severability.* -- If any provision of this section or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.~~

**ARTICLE 40B. RISK MANAGEMENT AND OWN RISK AND SOLVENCY**

**ASSESSMENT ACT.**

**§33-40B-10. Severability.**

1 [Repealed].

## CHAPTER 36A. CONDOMINIUMS AND UNIT PROPERTY.

### ARTICLE 8. MISCELLANEOUS.

**§36A-8-3. Severability.**

1 [Repealed].

## CHAPTER 37B. MINERAL DEVELOPMENT.

### ARTICLE 1. MINERAL DEVELOPMENT BY A MAJORITY OF COTENANTS.

1 **§37B-1-7. Severability.**

1 [Repealed].

### ARTICLE 2. UNKNOWN AND UNLOCATABLE INTEREST OWNERS ACT.

1 **§37B-2-8. Severability clause.**

1 [Repealed].

## CHAPTER 38. LIENS.

### ARTICLE 1A. TRUSTEES OF SECURITY TRUSTS.

**§38-1A-13. Provisions of article severable and remedial.**

1 [Repealed].

## CHAPTER 39A. ELECTRONIC COMMERCE.

### ARTICLE 2. CONSUMER PROTECTIONS AND RESPONSIBILITIES IN ELECTRONIC TRANSACTIONS.

**§39A-2-12. Severability.**

1 [Repealed].

### ARTICLE 3. DIGITAL SIGNATURES; STATE ELECTRONIC RECORDS AND

### TRANSACTIONS.

**§39A-3-5. Severability.**

[Repealed].

## CHAPTER 46A. WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT.

### ARTICLE 6I. CONSUMER PROTECTIONS IN ELECTRONIC TRANSACTIONS.

**§46A-6I-7. Severability.**

[Repealed].

### ARTICLE 8. OPERATIVE DATE AND PROVISIONS FOR TRANSITION.

**§46A-8-102. Severability.**

[Repealed].

## CHAPTER 47. REGULATION OF TRADE.

### ARTICLE 2. TRADEMARKS IN GENERAL.

**§47-2-18. Severability.**

[Repealed].

### ARTICLE 9A. VOLUNTARY ASSOCIATIONS AND BUSINESS TRUSTS.

**§47-9A-7. Repeal of conflicting acts~~; severability~~.**

All acts or parts of acts in conflict with this article are hereby repealed.

~~The provisions of this article shall be construed to be severable and if any are held unconstitutional or otherwise invalid, such invalidity or unconstitutionality shall not affect the operation of the remaining provisions.~~

### ARTICLE 11B. CLOSING-OUT SALES, FIRE SALES AND DEFUNCT BUSINESS SALES.

**§47-11B-16. Severability.**

[Repealed].

### ARTICLE 14. PRENEED FUNERAL CONTRACTS.

#### §47-14-14. Severability.

[Repealed].

### ARTICLE 15. PYRAMID PROMOTIONAL SCHEME.

#### §47-15-6. Severability.

[Repealed].

### ARTICLE 18. ANTITRUST ACT; RESTRAINT OF TRADE.

#### §47-18-23. Severability.

[Repealed].

### ARTICLE 20. CHARITABLE BINGO.

#### §47-20-30. Severability.

[Repealed].

### ARTICLE 21. CHARITABLE RAFFLES.

#### §47-21-29. Severability.

[Repealed].

### ARTICLE 23. CHARITABLE RAFFLE BOARDS AND GAMES.

#### §47-23-12. Severability.

[Repealed].

## CHAPTER 51. COURTS AND THEIR OFFICERS.

### ARTICLE 9. RETIREMENT SYSTEM FOR JUDGES OF COURTS OF RECORD.

#### §51-9-16. Severability of article and amendments thereto.

[Repealed].

### ARTICLE 11. THE WEST VIRGINIA APPELLATE REORGANIZATION ACT.

#### §51-11-13. Severability.

[Repealed].

# CHAPTER 53. EXTRAORDINARY REMEDIES.

## ARTICLE 4A. POST-CONVICTION HABEAS CORPUS.

### §53-4A-11. Severability.

[Repealed].

# CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

## ARTICLE 7. ACTIONS FOR INJURIES.

### §55-7-13d. Determination of fault; imputed fault; when plaintiff's criminal conduct bars recovery; burden of proof; damages; stay of action; limitations; applicability~~; severability~~.

(a) Determination of fault of parties and nonparties. —

(1) In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit;

(2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;

(3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather

than by the amount of the nonparty's or party's settlement;

(4) Nothing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein;

(5) Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action; and

(6) In all actions involving fault of more than one person, unless otherwise agreed by all parties to the action, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating the percentage of the total fault that is allocated to each party and nonparty pursuant to this article. For this purpose, the court may determine that two or more persons are to be treated as a single person.

(b) Imputed fault. — Nothing in this section may be construed as precluding a person from being held liable for the portion of comparative fault assessed against another person who was acting as an agent or servant of such person, or if the fault of the other person is otherwise imputed or attributed to such person by statute or common law. In any action where any party seeks to impute fault to another, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, on the issue of imputed fault.

(c) When plaintiff's criminal conduct bars recovery. — In any civil action, a person or person's legal representative who asserts a claim for damages may not recover if:

(1) Such damages arise out of the person's commission, attempted commission, or immediate flight from the commission or attempted commission of a felony; and (2) That the person's damages were suffered as a proximate result of the commission, attempted commission, or immediate flight from the commission or attempted commission of a felony.

(d) Burden of proof. — The burden of alleging and proving comparative fault shall be upon the person who seeks to establish such fault. The burden of alleging and proving the defense set

forth in subsection (c) of this section shall be upon the person who seeks to assert such defense: Provided, That in any civil action in which a person has been convicted or pleaded guilty or no contest to a felony, the claim shall be dismissed if the court determines as a matter of law that the person's damages were suffered as a proximate result of the felonious conduct to which the person pleaded guilty or no contest, or upon which the person was convicted.

(e) Damages. — For purposes of this section, "damages" includes all damages which may be recoverable for personal injury, death, or loss of or damage to property, including those recoverable in a wrongful death action.

(f) Stay of action. — Any civil action in which the defense set forth in subsection (c) of this section is asserted shall be stayed by the court on the motion of the defendant during the pendency of any criminal action which forms the basis of the defense, including appeals, unless the court finds that a conviction in the criminal action would not constitute a valid defense under said subsection.

(g) Limitations. — Nothing in this section creates a cause of action. Nothing in this section alters, in any way, the immunity of any person as established by statute or common law.

(h) Applicability. — This section applies to all causes of action arising or accruing on or after the effective date of its enactment. The amendments to this section enacted during the 2016 regular session of the Legislature shall apply to all causes of action accruing on or after the effective date of those amendments.

~~(i) Severability. — The provisions of this section are severable from one another, so that if any provision of this section is held void, the remaining provisions of this section shall remain valid.~~

## ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

### §55-7B-11. Severability.

[Repealed].

## ARTICLE 12A. LEASE AND CONVEYANCE OF MINERAL INTERESTS OWNED BY

### MISSING OR UNKNOWN OWNERS OR ABANDONING OWNERS.

**§55-12A-10. Severability.**

[Repealed].

### ARTICLE 19. COVID-19 JOBS PROTECTION ACT.

**§55-19-8. Severability.**

[Repealed].

## CHAPTER 59. FEES, ALLOWANCES AND COSTS; NEWSPAPERS; LEGAL ADVERTISEMENTS.

### ARTICLE 3. NEWSPAPERS AND LEGAL ADVERTISEMENTS.

**§59-3-9. Severability.**

[Repealed].

## CHAPTER 60. STATE CONTROL OF ALCOHOLIC LIQUORS.

### ARTICLE 3A. SALES BY RETAIL LIQUOR LICENSEES.

**§60-3A-31. Rules of construction~~; severability~~.**

(a) Nothing contained in this article shall be construed to modify the provisions of article five of this chapter relating to local option elections, except that the references to sales of liquor by the commissioner shall be deemed to refer to sales of liquor by retail licensees.

(b) ~~If any section, subsection, subdivision, provision, clause or phrase of this article or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, subsections, subdivisions, provisions, clauses or phrases or applications of the article, and to this end each and every section, subsection, subdivision, provision, clause and phrase of this article is declared to be severable. The Legislature hereby declares that it would have enacted the remaining sections, subsections, provisions, clauses and phrases of this article even if it had known that any sections,~~

~~subsections, subdivisions, provisions, clauses and phrases thereof would be declared to be unconstitutional or invalid, and that it would have enacted this article even if it had known that the application thereof to any person or circumstance would be held to be unconstitutional or invalid.~~

~~(c) The provisions of subsection (b) of this section shall be fully applicable to all future amendments or additions to this article, with like effect as if the provisions of said subsection (b) were set forth in extenso in every such amendment or addition and were reenacted as a part thereof.~~

~~(d)~~ In the event of any conflict between any provision of this article and any other provision of this code, any such other provision shall be construed and applied so as to enable the board and commissioner to implement and make effective the provisions of this article.

### ARTICLE 7. LICENSES TO PRIVATE CLUBS.

#### §60-7-16. Severability.

[Repealed].

## CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

### ARTICLE 3C. WEST VIRGINIA COMPUTER CRIME AND ABUSE ACT.

#### §61-3C-21. Severability.

[Repealed].

### ARTICLE 5A. BRIBERY AND CORRUPT PRACTICES.

#### §61-5A-11. Severability.

[Repealed].

## CHAPTER 62. CRIMINAL PROCEDURE.

### ARTICLE 1. PRELIMINARY PROCEDURE.

#### §62-1-12. Severability.

[Repealed].

### ARTICLE 1A. SEARCH AND SEIZURE.

### §62-1A-9. Severability.

1 [Repealed].

## ARTICLE 1B. DISCOVERY.

### §62-1B-4. Severability.

1 [Repealed].

## ARTICLE 1C. BAIL.

### §62-1C-19. Severability.

1 [Repealed].

## ARTICLE 1D. WIRETAPPING AND ELECTRONIC SURVEILLANCE ACT.

### §62-1D-16. Severability of provisions.

1 [Repealed].

## ARTICLE 6. MISCELLANEOUS PROVISIONS CONCERNING CRIMINAL PROCEDURES.

### §62-6-7. Severability.

1 [Repealed].

NOTE: The purpose of this bill is to remove multiple severability clauses in the West Virginia Code.

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