WEST VIRGINIA LEGISLATURE

REGULAR SESSION. 1995

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ENROLLED

Com. Jnl. for

HOUSE BILL No. 2267

(P) Delegate Mr. Speaker, My Chambers,
+ Delegates Ashley, Staton, Moss,
Browning, Wallace + Ryan

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Passed ........................................ March 11, 1995

In Effect ..................................... Passage
AN ACT to amend and reenact sections two, two-d, two-e, two-m and two-n, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article by adding thereto a new section, designated section two-o, all relating to the business of gas storage; providing effective date; notice of retirement from service; changing the business and occupation tax on the business of generating or producing electricity on and after the first day of June, one thousand nine hundred ninety-five, by replacing the kilowatt hour generating tax with a capacity utilization tax; providing transition rules for taxpayers subject to gross receipts tax during the year one thousand nine hundred ninety-four; providing definitions of terms; establishing rate of tax imposed upon taxable generating capacity of each generating unit; establishing rate of tax for each generating unit which has installed a flue gas desulfurization system; providing certain exceptions for large users; providing for the taxation of electricity not generated or produced in this state but sold in this state; providing rules relating to retirement of units, transfer of units,
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placing units in inactive reserve, new units and peaking units; requiring rules pertaining to proration and allocation issues; confirming related provisions in business and occupation tax and industrial expansion and revitalization credit and business and occupation tax credit against business franchise tax; and providing effective date.

Be it enacted by the Legislature of West Virginia:

That sections two, two-d, two-e, two-m and two-n, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said article be further amended by adding thereto a new section, designated section two-o, all to read as follows:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§11-13-2. Imposition of privilege tax.

1 (a) Periods before July 1, 1987. — For taxable years or months thereof ending prior to the first day of July, one thousand nine hundred thirty-one, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-m, both inclusive, of this article and the application of the surtax rate against gross income as set forth in section two-k: Provided, That on the first day of July, one thousand nine hundred eighty-five, the taxes imposed by this section, at the rates set forth in sections two-b through two-m, both inclusive, of this article, and in effect on the first day of January, one thousand nine hundred eighty-five, exclusive of any surtaxes, shall be reduced by five percent for taxable months beginning on and after said first day of July: Provided, however, That on and after the first day of July, one thousand nine hundred eighty-five, the rate of tax under section two-b of this article shall not be less than eight tenths of one percent: Provided further, That there shall be no such reduction of the rates set forth in section two-a or two-l of this article.
(b) Periods after June 30, 1987. — For taxable years or months beginning after the thirtieth day of June, one thousand nine hundred eighty-seven, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amount to be determined by the application of rates against values or gross income as set forth in sections two-d and two-m of this article: Provided, That on and after the first day of July, one thousand nine hundred eighty-seven, the rates applicable to the privileges exercised in sections two-d and two-m of this article shall be restored and returned to those which were in effect as to such privileges on the first day of January, one thousand nine hundred eighty-five: Provided, however, That for taxable months or taxable years beginning after the twenty-eighth day of February, one thousand nine hundred eighty-nine, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amount to be determined by the application of rates against the measure of the tax as set forth in sections two-d, two-e, two-m and two-n of this article: Provided further, That for taxable months or taxable years beginning after the thirty-first day of May, one thousand nine hundred ninety-five, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amount to be determined by the application of rates against the measure of the tax as set forth in sections two-d, two-e, two-m, two-n and two-o of this article.

(c) If any person liable for any tax under section two-m shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in such section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules
(d) In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

§11-13-2d. Public service or utility business.

(a) Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, the tax imposed by section two of this article shall be equal to the gross income of the business derived from such activity or activities multiplied by the respective rates as follows:

(1) Street and interurban and electric railways, one and four-tenths percent;

(2) Water companies, four and four-tenths percent, except as to income received by municipally owned water plants;

(3) Electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, and except as to income received by municipally owned plants producing or purchasing electricity and distributing same: Provided, That electric light and power companies which engage in the supplying of public service but which do not generate or produce in this state the electric power they supply
shall be taxed on the gross income derived from sales of power which they do not generate in this state at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: Provided, however, That the sale of electric power under this section shall be taxed at the rate of two percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage of such plant location exceeds two hundred thousand kilowatts per hour in a year: Provided further, That the sale of electric power under this section shall be exempt from the tax imposed by this section and section two of this article if it is separately metered and consumed in an electrolytic process for the manufacture of chlorine in this state, or is separately metered and consumed in the manufacture of ferroalloy in this state, and the rate reduction herein provided to the taxpayer shall be passed on to the manufacturer of the chlorine or ferroalloy. As used in this section, the term "ferroalloy" means any of various alloys of iron and one or more other elements used as a raw material in the production of steel: And provided further, That the term does not include the final production of steel;

(4) Natural gas companies, four and twenty-nine hundredths percent on the gross income: Provided, That the sale of natural gas under this section shall be exempt from the tax imposed by this section and section two of this article to the extent that the natural gas is separately metered and is gas from which the purchaser derives hydrogen and carbon monoxide for use in the manufacture of chemicals in this state, and the full economic benefit of the exception herein provided to the taxpayer shall be passed on to such purchaser of the natural gas: Provided, however, That there shall be no exemption for the sale of any natural gas from which the purchaser derives carbon mon-
oxide or hydrogen for the purpose of resale;

(5) Toll bridge companies, four and twenty-nine hundredths percent; and

(6) Upon all other public service or utility business, two and eighty-six hundredths percent.

(b) The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public service. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon such other activity by the appropriate section or sections of this article.

(c) Beginning the first day of March, one thousand nine hundred eighty-nine, electric light and power companies shall determine their liability for payment of tax under this section and sections two-m and two-n of this article. If for taxable months beginning on or after the first day of March, one thousand nine hundred eighty-nine, liability for tax under section two-n of this article is equal to or greater than the sum of the power company's liability for payment of tax under subdivision (3), subsection (a) of this section and section two-m of this article, then the company shall pay the tax due under section two-n of this article and not the tax due under subdivision (3), subsection (a) of this section and section two-m of this article. If tax liability under section two-n is less, then tax shall be paid under subdivision (3), subsection (a) of this section and section two-m of this article and the tax due under section two-n shall not be paid. The provisions of subdivision (3), subsection (a) of this section shall expire and become null and void for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-eight.

(d) Notwithstanding the provisions of subsection (c) of this section, beginning the first day of June, one thou-
sand nine hundred ninety-five, electric light and power
companies that actually paid tax based on the provisions
of subdivision (3), subsection (a) of this section or section
two-m of this article for every taxable month in
one-thousand nine hundred ninety-four shall determine
their liability for payment of tax under this article in ac-
cordance with subdivision (1) of this subsection. All other
electric light and power companies shall determine their
liability for payment of tax under this article exclusively
under section two-o of this article.

(1) If for taxable months beginning on or after the
first day of June, one thousand nine hundred ninety-five,
liability for tax under section two-o of this article is equal
to or greater than the sum of the power company’s liability
for payment of tax under subdivision (3), subsection (a)
of this section and section two-m of this article, then the
company shall pay the tax due under section two-o of this
article and not the tax due under subdivision (3) subsec-
tion (a) of this section and section two-m of this article. If
tax liability under section two-o is less, then the tax shall
be paid under subdivision (3), subsection (a) of this sec-
tion and section two-m of this article and the tax due un-
der section two-o shall not be paid.

(2) The provisions of subdivision (3), subsection (a)
of this section shall expire and become null and void for
taxable years beginning on or after the first day of Janu-
ary, one thousand nine hundred ninety-eight.

§11-13-2e. Business of gas storage; effective date.

(a) Rate of tax. — Upon every person engaging or
continuing within this state in any gas storage business
utilizing one or more gas storage reservoirs located within
this state, the tax imposed by section two of this article
shall be equal to five cents multiplied by the sum of either
(1) the net number of dekatherms of gas injected into
such a gas storage reservoir during a tax month or (2) the
net number of dekatherms of gas withdrawn from such a
gas storage reservoir during a tax month, whichever is
applicable for that month, whether or not such gas is owned by, or is injected or withdrawn for, the storage operator or any other person. Fractional parts of dekatherms shall be included in the measure of tax as provided in regulations promulgated by the tax commissioner: Provided, That effective the first day of July, one thousand nine hundred ninety-five, the net number of dekatherms of gas injected or the net number of dekatherms withdrawn shall not exceed the storage utilization index as defined in this subsection. For purposes of this section, the term "storage utilization index" means the utilization of storage reservoir, through the operation of existing and functional facilities available for storage use during the five year base period ending the thirty-first day of December, one thousand nine hundred ninety-four, and the storage utilization index shall be the five year average of taxable dekatherms as determined for each taxable period of the stated base period.

(b) Effective date. — The measure of tax under this section shall include gas injected into, or withdrawn from, a gas storage reservoir after the twenty-eighth day of February, one thousand nine hundred eighty-nine.

(c) Administration; installment payments. — The tax due under this section shall be administered, collected and enforced as provided in this article and articles nine and ten of this chapter. The tax due under this section shall be remitted in periodic installments as provided in section four of this article, except that such periodic installment payments shall be remitted on or before the twentieth day of the month following the month or quarter in which the tax accrues.

(d) Notice of retirement from service. — A taxpayer subject to the tax due under this section shall provide written notice to the joint committee on government and finance and the department of tax and revenue eighteen months prior to the retirement from service of a storage reservoir.
§11-13-2m. Business of generating or producing electric power exception; rates.

(a) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(b) The measure of this tax shall be the value of all electric power generated or produced in this state for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this state: Provided, That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article.

(c) Beginning the first day of March, one thousand nine hundred eighty-nine, every person taxable under this section shall determine their liability for payment of tax under this section and under subdivision (3), subsection (a), section two-d of this article and section two-n of this article. If for taxable months beginning on or after the first day of March, one thousand nine hundred eighty-nine such person's liability for payment of tax under this section and subdivision (3), subsection (a), section two-d of this article is less than the amount of such person's liability for payment of tax under section two-n of this article, then such person shall pay the tax due under section two-n and not the sum of the amount of tax
due under this section and under subdivision (3), subsection (a), section two-d of this article. If the tax due under section two-n of this article is less, then the amount of tax due under this section and subdivision (3), subsection (a), section two-d of this article shall be paid. The provisions of this section shall expire and become null and void for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-eight.

(d) Beginning the first day of June, one thousand nine hundred ninety-five, electric light and power companies that actually paid tax based on the provisions of subdivision (3), subsection (a), section two-d of this article or this section for every taxable month in one-thousand nine hundred ninety-four shall determine their liability for payment of tax under this article in accordance with subdivision (1) of this subsection. All other electric light and power companies shall determine their liability for payment of tax under this article exclusively under section two-o of this article.

(1) If for taxable months beginning on or after the first day of June, one thousand nine hundred ninety-five, liability for tax under section two-o of this article is equal to or greater than the sum of the power company's liability for payment of tax under subdivision (3), subsection (a), section two-d of this article and this section, then the company shall pay the tax due under section two-o of this article and not the tax due under subdivision (3), subsection (a), section two-d of this article and this section. If tax liability under section two-o is less, then the tax shall be paid under subdivision (3), subsection (a), section two-d of this article and this section and the tax due under section two-o shall not be paid.

(2) The provisions of this section shall expire and become null and void for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-eight. Notwithstanding this subsection or any other provision of this chapter to the contrary, an electric light and power company that generates and produces power in
this state shall continue to be deemed to be an "industrial taxpayer" for purposes of subdivision (8), subsection (b), section two, article thirteen-d of this chapter, and gross income of an electric light and power company from the generation and production of power in this state and sales and demand charges for electric power sold in this state shall continue to be deemed "gross income of the business subject to tax under article thirteen of this chapter" for purposes of subsection (b), section seventeen, article twenty-three of this chapter all to the extent of and in accordance with the law in effect immediately preceding the effective date of this section as amended in one thousand nine hundred ninety-five.

§11-13-2n. Business of generating or producing or selling electric power; exemptions; rates.

(a) Rate of tax. — Upon every person engaging or continuing within this state in the business of generating or producing electricity for sale, profit or commercial use, either directly or indirectly through the activity of others, in whole or in part, or in the business of selling electricity to consumers, or in both businesses, the tax imposed by section two of this article shall be equal to:

(1) Twenty-six hundredths of one cent times the kilowatt hours of net generation available for sale that was generated or produced in this state by the taxpayer during the taxable year, except that this rate shall be five hundredths of one cent times the kilowatt hours of net generation available for sale that was generated or produced in this state by the taxpayer and sold to a plant location of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year: Provided, That in order to encourage the development of industry to improve the environment of this state, the tax imposed by this section on any person generating or producing electric power and an alternative form of energy at a facility located within this state sub-
stentially from gob or other mine refuse shall be equal to
five hundredths of one cent times the kilowatt hours of net
generation or production available for sale. The measure
of tax under this paragraph shall be equal to the total
kilowatt hours of net generation available for sale that was
generated or produced in this state by the taxpayer during
the taxable year, regardless of the place of sale or use, or
the fact that transmission may be made to points outside
this state.

(2) Nineteen hundredths of one cent times the kilowatt
hours of electricity sold to consumers in this state that
were not generated or produced in this state by the tax-
payer, except that the rate shall be five hundredths of one
cent times the kilowatt hours of electricity not generated
or produced in this state by the taxpayer which is sold to a
plant location in this state of a customer engaged in manu-
facturing activity if the contract demand at such plant
location exceeds two hundred thousand kilowatts per hour
per year or if the usage at such plant location exceeds two
hundred thousand kilowatts per hour in a year. The mea-
sure of tax under this paragraph shall be equal to the total
kilowatt hours of electricity sold to consumers in this state
during the taxable year, that were not generated or pro-
duced in this state by the taxpayer, to be determined by
subtracting from the total kilowatt hours of electricity sold
to consumers in the state the net kilowatt hours of electric-
ity generated or produced in the state by the taxpayer
during the taxable year.

The West Virginia public service commission shall,
upon application of a public utility, allow an immediate
pass-through to the utility's customers in this state in the
form of a rate surcharge the increase enacted by the Leg-
islature during its third extraordinary session, one thou-
sand nine hundred ninety, in the tax imposed by this
article upon electricity generated or produced in this state
and sold to consumers in this state and upon electricity not
generated or produced in this state that is sold to consum-
ers in this state.
(b) Exemptions. — The provisions of this section shall not apply to:

1. Kilowatt hours of electricity generated and sold, or purchased and resold, by a municipally owned plant.

2. Kilowatt hours of electric power that are separately metered and consumed in an electrolytic process for the manufacture of chlorine.

3. Kilowatt hours of electric power that are separately metered and consumed in the manufacture of ferroalloy. As used in this paragraph, the term "ferroalloy" means any of the various alloys of iron and one or more other elements used as a raw material in the production of steel but shall not include electric power used in the production of steel.

4. The full economic benefits provided to the taxpayer by subdivisions (2) and (3) of this subsection shall be passed on to the manufacturer of the chlorine or ferroalloy.

(c) Credit. — Any person taxable under subdivision (2), subsection (a) of this section shall be allowed a credit against the amount of tax due under that paragraph for any electric power generation taxes paid by the taxpayer with respect to such electric power to the state in which such power was generated or produced. The amount of credit allowed shall not exceed the tax liability arising under subdivision (2), subsection (a) of this section with respect to the sale of such power.

(d) Transition rule. — Beginning the first day of March, one thousand nine hundred eighty-nine, electric light and power companies shall determine their liability for payment of tax under this section and sections two-d and two-m of this article. If for taxable months beginning on or after the first day of March, one thousand nine hundred eighty-nine, liability for tax under section two-n of this article is equal to or greater than the sum of the power company's liability for payment of tax under subdivision
(3), subsection (a), section two-d and section two-m of this article, then the company shall pay the tax due under section two-n of this article and not the tax due under subdivision (3), subsection (a) of section two-d and section two-m of this article. If tax liability under section two-n is less, then tax shall be paid under paragraph (3), subsection (a), section two-d and section two-m of this article and the tax due under section two-n shall not be paid. The provisions of this subsection (d) shall expire and become null and void for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-eight.

(e) Effective date. — The amendments to this section made in the year one thousand nine hundred ninety shall take effect on the first day of October, one thousand nine hundred ninety: Provided, That as to calendar months ending before such date, the tax rates specified in this section, as then in effect shall be fully and completely preserved.

(f) Beginning the first day of June, one thousand nine hundred ninety-five and thereafter, electric light and power companies shall not determine their tax liability under this section.

§11-13-20. Business of generating or producing or selling electricity on and after the first day of June, one thousand nine hundred ninety-five; definitions; rate of tax; exemptions; effective date.

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

(1) "Average four-year generation" is computed by dividing by four the sum of a generating unit's net generation, expressed in kilowatt hours, for calendar years one thousand nine hundred ninety-one, one thousand nine hundred ninety-two, one thousand nine hundred ninety-three, and one thousand nine hundred ninety-four. For any generating unit which was newly installed and placed into commercial operation after the first day of January, one thousand nine hundred ninety-one and prior to the effective date of this section, "average four-year
"generation" is computed by dividing such unit's net generation for the period beginning with the month in which the unit was placed into commercial operation and ending with the month preceding the effective date of this section by the number of months in such period and multiplying the resulting amount by twelve with the result being a representative twelve-month average of the unit's net generation while in an operational status.

(2) "Capacity factor" means a fraction, the numerator of which is average four-year generation and the denominator of which is the maximum possible annual generation.

(3) "Generating unit" means a mechanical apparatus or structure which through the operation of its component parts is capable of generating or producing electricity and is regularly used for this purpose.

(4) "Inactive reserve" means the removal of a generating unit from commercial service for a period of not less than twelve consecutive months as a result of lack of need for generation from the generating unit or as a result of the requirements of state or federal law or the removal of a generating unit from commercial service for any period as a result of any physical exigency which is beyond the reasonable control of the taxpayer.

(5) "Maximum possible annual generation" means the product, expressed in kilowatt hours, of official capability times eight thousand seven hundred sixty hours.

(6) "Official capability" means the nameplate capacity rating of a generating unit expressed in kilowatts.

(7) "Peaking unit" means a generating unit designed for the limited purpose of meeting peak demands for electricity or filling emergency electricity requirements.

(8) "Retired from service" means the removal of a generating unit from commercial service for a period of at least twelve consecutive months with the intent that the unit
will not thereafter be returned to active service.

(9) "Taxable generating capacity" means the product, expressed in kilowatts, of the capacity factor times the official capability of a generating unit, subject to the modifications set forth in subdivisions (2) and (3), subsection (c) of this section.

(10) "Net generation" for a period means the kilowatt hours of net generation available for sale generated or produced by the generating unit in this state during such period less the following:

(A) Twenty-one twenty-sixths of the kilowatt hours of electricity generated at the generating unit and sold during such period to a plant location of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour in a year or where the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year;

(B) Twenty-one twenty-sixths of the kilowatt hours of electricity produced or generated at the generating unit during such period by any person producing electric power and an alternative form of energy at a facility located in this state substantially from gob or other mine refuse;

(C) The total kilowatt hours of electricity generated at the generating unit exempted from tax during such period by subsection (b), section two-n of this article.

(b) Rate of tax. — Upon every person engaging or continuing within this state in the business of generating or producing electricity for sale, profit or commercial use, either directly or indirectly through the activity of others, in whole or in part, or in the business of selling electricity to consumers, or in both businesses, the tax imposed by section two of this article shall be equal to:

(1) For taxpayers who generate or produce electricity
for sale, profit or commercial use, the product of twenty-two dollars and seventy-eight cents multiplied by the taxable generating capacity of each generating unit in this state owned or leased by the taxpayer, subject to the modifications set forth in subsection (c) of this section: 

Provided, That with respect to each generating unit in this state which has installed a flue gas desulfurization system, the tax imposed by section two of this article shall, on and after the thirty-first day of January, one thousand nine hundred ninety-six, be equal to the product of twenty dollars and seventy cents multiplied by the taxable generating capacity of the units, subject to the modifications set forth in subsection (c) of this section: Provided, however, That with respect to kilowatt hours sold to or used by a plant location engaged in manufacturing activity in which the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year, in no event shall the tax imposed by this article with respect to the sale or use of such electricity exceed five hundredths of one cent times the kilowatt hours sold to or used by a plant engaged in such a manufacturing activity; and,

(2) For taxpayers who sell electricity to consumers in this state that is not generated or produced in this state by the taxpayer, nineteen hundredths of one cent times the kilowatt hours of electricity sold to consumers in this state that were not generated or produced in this state by the taxpayer, except that the rate shall be five hundredths of one cent times the kilowatt hours of electricity not generated or produced in this state by the taxpayer which is sold to a plant location in this state of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year. The measure of tax under this subdivision (2) shall be equal to the total kilowatt hours of electricity sold to consumers in the state during the taxable year, that were not
generated or produced in this state by the taxpayer, to be
determined by subtracting from the total kilowatt hours of
electricity sold to consumers in the state the net kilowatt
hours of electricity generated or produced in the state by
the taxpayer during the taxable year. The provisions of
this subdivision (2) shall not apply to those kilowatt hours
exempt under subsection (b), section two-n of this article.

Any person taxable under this subdivision (2) shall be
allowed a credit against the amount of tax due under this
subdivision (2) for any electric power generation taxes or
a tax similar to the tax imposed by subdivision (1) of this
subsection (b) paid by the taxpayer with respect to such
electric power to the state in which such power was gener-
ated or produced. The amount of credit allowed shall not
exceed the tax liability arising under this subdivision (2)
with respect to the sale of such power.

(c) The following provisions are applicable to taxpay-
ers subject to tax under subdivision (1), subsection (b) of
this section:

(1) Retired units; inactive reserve. — If a generating
unit is retired from service or placed in inactive reserve, a
taxpayer shall not be liable for tax computed with respect
to the taxable generating capacity of the unit for the peri-
od that the unit is inactive or retired. The taxpayer shall
provide written notice to the joint committee on govern-
ment and finance, as well as to any other entity as may be
otherwise provided by law, eighteen months prior to retir-
ing any generating unit from service in this state.

(2) New generating units. — If a new generating unit,
other than a peaking unit, is placed in initial service on or
after the effective date of this section, the generating unit's
taxable generating capacity shall equal forty percent of
the official capability of the unit.

(3) Peaking units. — If a peaking unit is placed in
initial service on or after the effective date of this section,
the generating unit's taxable generating capacity shall
equal five percent of the official capability of the unit.
Transfers of interests in generating units. — If a taxpayer acquires an interest in a generating unit, the taxpayer shall include the computation of taxable generating capacity of said unit in the determination of the taxpayer's tax liability as of the date of the acquisition. Conversely, if a taxpayer transfers an interest in a generating unit, the taxpayer shall not for periods thereafter be liable for tax computed with respect to the taxable generating capacity of such transferred unit.

Proration, allocation. — The tax commissioner shall promulgate rules in conformity with the provisions of article three, chapter twenty-nine-a of this code to provide for the administration of this section and to equitably prorate taxes for a taxable year in which a generating unit is first placed in service, retired or placed in inactive reserve, or in which a taxpayer acquires or transfers an interest in a generating unit, to equitably allocate and reallocate adjustments to net generation, and to equitably allocate taxes among multiple taxpayers with interests in a single generating unit, it being the intent of the Legislature to prohibit multiple taxation of the same taxable generating capacity.

So as to provide for an orderly transition with respect to the rate making effect of this section, those electric light and power companies which, as of the effective date of this section, are permitted by the West Virginia public service commission to utilize deferred accounting for purposes of recovery from ratepayers of any portion of business and occupation tax expense under this article shall be permitted, until such time that action pursuant to a rate application or order of the commission provides for appropriate alternative rate making treatment for such expense, to recover the tax expense imposed by this section by means of deferred accounting to the extent that the tax expense imposed by this section exceeds the level of business and occupation tax under this article currently allowed in rates.

Electricity generated by manufacturer or affiliate for use in manufacturing activity. — When electricity used
in a manufacturing activity is generated in this state by the person who owns the manufacturing facility in which the electricity is used and the electricity generating unit or units producing the electricity so used are owned by such manufacturer, or by a member of the manufacturer's controlled group, as defined in section 267 of the Internal Revenue Code of 1986, as amended, the generation of the electricity shall not be taxable under this article: Provided, That any electricity generated or produced at the generating unit or units which is sold or used for purposes other than in the manufacturing activity shall be taxed under this section and the amount of tax payable shall be adjusted to be equal to an amount which is proportional to the electricity sold for purposes other than the manufacturing activity. The department of tax and revenue shall promulgate rules in accordance with article three, chapter twenty-nine-a of the code: Provided, That the rules shall be promulgated as emergency rules.

(d) Beginning the first day of June, one thousand nine hundred ninety-five, electric light and power companies that actually paid tax based on the provisions of subdivision (3), subsection (a), section two-d of this article or section two-m of this article for every taxable month in one-thousand nine hundred ninety-four shall determine their liability for payment of tax under this article in accordance with subdivisions (1) and (2) of this subsection. All other electric light and power companies shall determine their liability for payment of tax under this article exclusively under this section beginning the first day of June, one thousand nine hundred ninety-five and thereafter.

(1) If for taxable months beginning on or after the first day of June, one thousand nine hundred ninety-five, liability for tax under section two-o of this article is equal to or greater than the sum of the power company's liability for payment of tax under subdivision (3), subsection (a), section two-d of this article and this section, then the company shall pay the tax due under section two-o of this
article and not the tax due under subdivision (3), subsection (a), section two-d of this article and section two-m of this article. If tax liability under this section is less, then the tax shall be paid under subdivision (3), subsection (a), section two-d of this article and section two-m and the tax due under this section shall not be paid.

(2) Notwithstanding subdivision (1) of this subsection, for taxable years beginning on or after the first day of January, one thousand nine hundred ninety-eight, all electric light and power companies shall determine their liability for payment of tax under this article exclusively under this section.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 24th day of March, 1995.

Governor