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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1996

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ENROLLED

HOUSE BILL No. H834

(By Delegates Kiss, Clement, Compton,
Farris, Talbott, Miller and Walters)

— • —

Passed March 9, 1996

In Effect From Passage

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H. B. 4834

(BY DELEGATES KISS, CLEMENTS, COMPTON,
FARRIS, TALBOTT, MILLER AND WALTERS)

[Passed March 9, 1996; in effect from passage.]

AN ACT to amend and reenact section two-o, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, providing for an exemption from the business and occupation tax for municipally owned hydro-electric or wood-waste generating units.

Be it enacted by the Legislature of West Virginia:

That section two-o, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§11-13-2o. 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.

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

2 (1) "Average four-year generation" is computed by
3 dividing by four the sum of a generating unit's net genera-
4 tion, expressed in kilowatt hours, for calendar years one
5 thousand nine hundred ninety-one, one thousand nine
6 hundred ninety-two, one thousand nine hundred
7 ninety-three, and one thousand nine hundred ninety-four.
8 For any generating unit which was newly installed and
9 placed into commercial operation after the first day of
10 January, one thousand nine hundred ninety-one and prior
11 to the effective date of this section, "average four-year

12 generation" is computed by dividing such unit's net gener-
13 ation for the period beginning with the month in which
14 the unit was placed into commercial operation and ending
15 with the month preceding the effective date of this section
16 by the number of months in such period and multiplying
17 the resulting amount by twelve with the result being a
18 representative twelve-month average of the unit's net gen-
19 eration while in an operational status.

20 (2) "Capacity factor" means a fraction, the numerator
21 of which is average four-year generation and the denomi-
22 nator of which is the maximum possible annual genera-
23 tion.

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

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

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

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

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

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

48 (9) "Taxable generating capacity" means the product,
49 expressed in kilowatts, of the capacity factor times the
50 official capability of a generating unit, subject to the mod-

51 ifications set forth in subdivisions (2) and (3), subsection
52 (c) of this section.

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

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

65 (B) Twenty-one twenty-sixths of the kilowatt hours of
66 electricity produced or generated at the generating unit
67 during such period by any person producing electric
68 power and an alternative form of energy at a facility locat-
69 ed in this state substantially from gob or other mine re-
70 fuse;

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

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

81 (1) For taxpayers who generate or produce electricity
82 for sale, profit or commercial use, the product of
83 twenty-two dollars and seventy-eight cents multiplied by
84 the taxable generating capacity of each generating unit in
85 this state owned or leased by the taxpayer, subject to the
86 modifications set forth in subsection (c) of this section:
87 *Provided*, That with respect to each generating unit in this
88 state which has installed a flue gas desulfurization system,
89 the tax imposed by section two of this article shall, on and
90 after the thirty-first day of January, one thousand nine

91 hundred ninety-six, be equal to the product of twenty
92 dollars and seventy cents multiplied by the taxable gener-
93 ating capacity of the units, subject to the modifications set
94 forth in subsection (c) of this section: *Provided, however,*
95 That with respect to kilowatt hours sold to or used by a
96 plant location engaged in manufacturing activity in which
97 the contract demand at such plant location exceeds two
98 hundred thousand kilowatts per hour per year or if the
99 usage at such plant location exceeds two hundred thou-
100 sand kilowatts per hour in a year, in no event shall the tax
101 imposed by this article with respect to the sale or use of
102 such electricity exceed five hundredths of one cent times
103 the kilowatt hours sold to or used by a plant engaged in
104 such a manufacturing activity; and,

105 (2) For taxpayers who sell electricity to consumers in
106 this state that is not generated or produced in this state by
107 the taxpayer, nineteen hundredths of one cent times the
108 kilowatt hours of electricity sold to consumers in this state
109 that were not generated or produced in this state by the
110 taxpayer, except that the rate shall be five hundredths of
111 one cent times the kilowatt hours of electricity not gener-
112 ated or produced in this state by the taxpayer which is sold
113 to a plant location in this state of a customer engaged in
114 manufacturing activity if the contract demand at such
115 plant location exceeds two hundred thousand kilowatts per
116 hour per year or if the usage at such plant location ex-
117 ceeds two hundred thousand kilowatts per hour in a year.
118 The measure of tax under this subdivision (2) shall be
119 equal to the total kilowatt hours of electricity sold to con-
120 sumers in the state during the taxable year, that were not
121 generated or produced in this state by the taxpayer, to be
122 determined by subtracting from the total kilowatt hours of
123 electricity sold to consumers in the state the net kilowatt
124 hours of electricity generated or produced in the state by
125 the taxpayer during the taxable year. The provisions of
126 this subdivision (2) shall not apply to those kilowatt hours
127 exempt under subsection (b), section two-n of this article.
128 Any person taxable under this subdivision (2) shall be
129 allowed a credit against the amount of tax due under this
130 subdivision (2) for any electric power generation taxes or
131 a tax similar to the tax imposed by subdivision (1) of this
132 subsection (b) paid by the taxpayer with respect to such
133 electric power to the state in which such power was gener-

134 ated or produced. The amount of credit allowed shall not
135 exceed the tax liability arising under this subdivision (2)
136 with respect to the sale of such power.

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

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

149 (2) *New generating units.* — If a new generating unit,
150 other than a peaking unit, is placed in initial service on or
151 after the effective date of this section, the generating unit's
152 taxable generating capacity shall equal forty percent of
153 the official capability of the unit: *Provided,* That the tax-
154 able generating capacity of a municipally-owned wood-
155 waste fired generating unit and of a municipally-owned
156 hydro-electric generating unit shall equal zero percent of
157 the official capability of the unit.

158 (3) *Peaking units.* — If a peaking unit is placed in
159 initial service on or after the effective date of this section,
160 the generating unit's taxable generating capacity shall
161 equal five percent of the official capability of the unit:
162 *Provided,* That the taxable generating capacity of a mu-
163 nicipally owned hydro-electric generating plant shall
164 equal zero percent of the official capability of the unit.

165 (4) *Transfers of interests in generating units.* — If a
166 taxpayer acquires an interest in a generating unit, the tax-
167 payer shall include the computation of taxable generating
168 capacity of said unit in the determination of the taxpayer's
169 tax liability as of the date of the acquisition. Conversely,
170 if a taxpayer transfers an interest in a generating unit, the
171 taxpayer shall not for periods thereafter be liable for tax
172 computed with respect to the taxable generating capacity
173 of such transferred unit.

174 (5) *Proration, allocation.* — The tax commissioner

174 shall promulgate rules in conformity with the provisions
175 of article three, chapter twenty-nine-a of this code to pro-
176 vide for the administration of this section and to equitably
177 prorate taxes for a taxable year in which a generating unit
178 is first placed in service, retired or placed in inactive re-
179 serve, or in which a taxpayer acquires or transfers an inter-
180 est in a generating unit, to equitably allocate and reallocate
181 adjustments to net generation, and to equitably allocate
182 taxes among multiple taxpayers with interests in a single
183 generating unit, it being the intent of the Legislature to
184 prohibit multiple taxation of the same taxable generating
185 capacity.

186 So as to provide for an orderly transition with respect
187 to the rate making effect of this section, those electric light
188 and power companies which, as of the effective date of this
189 section, are permitted by the West Virginia public service
190 commission to utilize deferred accounting for purposes of
191 recovery from ratepayers of any portion of business and
192 occupation tax expense under this article shall be permit-
193 ted, until such time that action pursuant to a rate applica-
194 tion or order of the commission provides for appropriate
195 alternative rate making treatment for such expense, to
196 recover the tax expense imposed by this section by means
197 of deferred accounting to the extent that the tax expense
198 imposed by this section exceeds the level of business and
199 occupation tax under this article currently allowed in rates.

200 (6) *Electricity generated by manufacturer or affiliate*
201 *for use in manufacturing activity.* — When electricity used
202 in a manufacturing activity is generated in this state by the
203 person who owns the manufacturing facility in which the
204 electricity is used and the electricity generating unit or
205 units producing the electricity so used are owned by such
206 manufacturer, or by a member of the manufacturer's con-
207 trolled group, as defined in section 267 of the Internal
208 Revenue Code of 1986, as amended, the generation of the
209 electricity shall not be taxable under this article: *Provid-*
210 *ed,* That any electricity generated or produced at the gen-
211 erating unit or units which is sold or used for purposes
212 other than in the manufacturing activity shall be taxed
213 under this section and the amount of tax payable shall be
214 adjusted to be equal to an amount which is proportional to
215 the electricity sold for purposes other than the manufac-
216 turing activity. The department of tax and revenue shall

217 promulgate rules in accordance with article three, chapter
218 twenty-nine-a of the code: *Provided*, That the rules shall
219 be promulgated as emergency rules.

220 (d) Beginning the first day of June, one thousand nine
221 hundred ninety-five, electric light and power companies
222 that actually paid tax based on the provisions of subdivi-
223 sion (3), subsection (a), section two-d of this article or
224 section two-m of this article for every taxable month in
225 one thousand nine hundred ninety-four shall determine
226 their liability for payment of tax under this article in ac-
227 cordance with subdivisions (1) and (2) of this subsection.
228 All other electric light and power companies shall deter-
229 mine their liability for payment of tax under this article
230 exclusively under this section beginning the first day of
231 June, one thousand nine hundred ninety-five and thereaf-
232 ter.

233 (1) If for taxable months beginning on or after the
234 first day of June, one thousand nine hundred ninety-five,
235 liability for tax under section two-o of this article is equal
236 to or greater than the sum of the power company's liability
237 for payment of tax under subdivision (3), subsection (a),
238 section two-d of this article and this section, then the com-
239 pany shall pay the tax due under section two-o of this
240 article and not the tax due under subdivision (3), subsec-
241 tion (a), section two-d of this article and section two-m of
242 this article. If tax liability under this section is less, then
243 the tax shall be paid under subdivision (3), subsection (a),
244 section two-d of this article and section two-m and the tax
245 due under this section shall not be paid.

246 (2) Notwithstanding subdivision (1) of this subsection,
247 for taxable years beginning on or after the first day of
248 January, one thousand nine hundred ninety-eight, all elec-
249 tric light and power companies shall determine their liabil-
250 ity for payment of tax under this article exclusively under
251 this section.

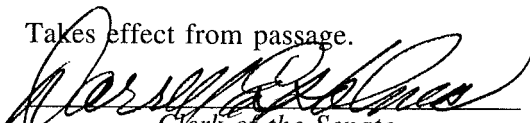
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

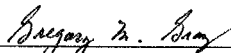

Chairman Senate Committee

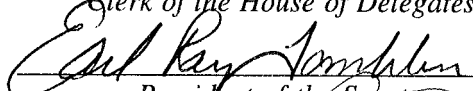

Chairman House Committee

Originating in the House.

Takes effect from passage.

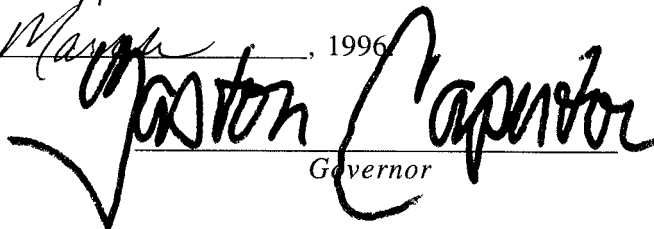

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 28th
day of March, 1996


Governor

PRESENTED TO THE

GOVERNOR

Date 3/27/96

Time 3:01 