WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1996

ENROLLED

HOUSE BILL No. H834

(By Delegates Kiss, Clements, Compton,
Tarri, 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.

(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
(1) "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 mod-
ifications 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 gener-
ating 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 thou-
sand 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 gener-
at 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 ex-
ceeds 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 con-
sumers 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 taxpayers 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 period that the unit is inactive or retired. The taxpayer shall provide written notice to the joint committee on government and finance, as well as to any other entity as may be otherwise provided by law, eighteen months prior to retiring 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: Provided, That the taxable generating capacity of a municipally-owned wood-waste fired generating unit and of a municipally-owned hydo-electric generating unit shall equal zero 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: Provided, That the taxable generating capacity of a municipally owned hydro-electric generating plant shall equal zero percent of the official capability of the unit.

4. 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.

5. Proration, allocation. — The tax commissioner
shall promulgate rules in conformity with the provisions
of article three, chapter twenty-nine-a of this code to pro-
vide 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 re-
serve, or in which a taxpayer acquires or transfers an inter-
est 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 permit-
ted, until such time that action pursuant to a rate applica-
tion 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.

(6) 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 con-
trolled 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 gen-
erating 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 manufac-
turing 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 28th
day of Mason, 1996.

Governor