WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 1999

ENROLLED

House Bill No. 2884
(By Mr. Speaker, Mr. Kiss, and Delegates Michael, Trump and Faircloth)

Passed March 12, 1999
In Effect Ninety Days from Passage
ENROLLED

H. B. 2884

(BY MR. SPEAKER, MR. KISS, AND DELEGATES: MICHAEL, TRUMP AND FAIRCLOTH)

[Passed March 12, 1999; in effect ninety days 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, relating to business and occupation tax for producing electricity; exempting municipally-owned generating units from tax; and providing that electricity generated in this state by a partnership or limited liability company be considered to be generated pro rata by its partners or members.

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.

§11-13-20. 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.

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

2 (1) “Average four-year generation” is computed by dividing

3 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. For the
purposes of this subdivision, net kilowatt hours of electricity
generated or produced in this state by the taxpayer includes the
taxpayer’s pro rata share of electricity generated or produced in
this state by a partnership or limited liability company of which
the taxpayer is a partner or member. 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 generated 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 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 generat-
ing unit’s taxable generating capacity shall equal five percent
of the official capability of the unit: Provided, That the taxable
154 generating capacity of a municipally-owned generating plant
155 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 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 com-
mission 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 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, however, 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 this section 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 this section 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.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within approved this the 27th day of March 1999.

Governor