

HB 2884

RECEIVED

99 MAR 20 PM 4: 19

OFFICE OF THE CLERK
WEST VIRGINIA STATE

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

RECEIVED

99 MAR 29 PM 4:18

OFFICE OF THE CLERK
LEGISLATIVE BRANCH

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.

§11-13-2o. 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 dividing
- 3 by four the sum of a generating unit’s net generation, expressed

4 in kilowatt hours, for calendar years one thousand nine hundred
5 ninety-one, one thousand nine hundred ninety-two, one thou-
6 sand nine hundred ninety-three, and one thousand nine hundred
7 ninety-four. For any generating unit which was newly installed
8 and placed into commercial operation after the first day of
9 January, one thousand nine hundred ninety-one and prior to the
10 effective date of this section, "average four-year generation" is
11 computed by dividing such unit's net generation for the period
12 beginning with the month in which the unit was placed into
13 commercial operation and ending with the month preceding the
14 effective date of this section by the number of months in such
15 period and multiplying the resulting amount by twelve with the
16 result being a representative twelve-month average of the unit's
17 net generation while in an operational status.

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

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

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

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

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

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

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

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

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

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

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

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

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

75 (1) For taxpayers who generate or produce electricity for
76 sale, profit or commercial use, the product of twenty-two

77 dollars and seventy-eight cents multiplied by the taxable
78 generating capacity of each generating unit in this state owned
79 or leased by the taxpayer, subject to the modifications set forth
80 in subsection (c) of this section: *Provided*, That with respect to
81 each generating unit in this state which has installed a flue gas
82 desulfurization system, the tax imposed by section two of this
83 article shall, on and after the thirty-first day of January, one
84 thousand nine hundred ninety-six, be equal to the product of
85 twenty dollars and seventy cents multiplied by the taxable
86 generating capacity of the units, subject to the modifications set
87 forth in subsection (c) of this section: *Provided, however*, That
88 with respect to kilowatt hours sold to or used by a plant location
89 engaged in manufacturing activity in which the contract
90 demand at such plant location exceeds two hundred thousand
91 kilowatts per hour per year or if the usage at such plant location
92 exceeds two hundred thousand kilowatts per hour in a year, in
93 no event shall the tax imposed by this article with respect to the
94 sale or use of such electricity exceed five hundredths of one
95 cent times the kilowatt hours sold to or used by a plant engaged
96 in such a manufacturing activity; and

97 (2) For taxpayers who sell electricity to consumers in this
98 state that is not generated or produced in this state by the
99 taxpayer, nineteen hundredths of one cent times the kilowatt
100 hours of electricity sold to consumers in this state that were not
101 generated or produced in this state by the taxpayer, except that
102 the rate shall be five hundredths of one cent times the kilowatt
103 hours of electricity not generated or produced in this state by
104 the taxpayer which is sold to a plant location in this state of a
105 customer engaged in manufacturing activity if the contract
106 demand at such plant location exceeds two hundred thousand
107 kilowatts per hour per year or if the usage at such plant location
108 exceeds two hundred thousand kilowatts per hour in a year. The
109 measure of tax under this subdivision (2) shall be equal to the
110 total kilowatt hours of electricity sold to consumers in the state
111 during the taxable year, that were not generated or produced in
112 this state by the taxpayer, to be determined by subtracting from
113 the total kilowatt hours of electricity sold to consumers in the
114 state the net kilowatt hours of electricity generated or produced
115 in the state by the taxpayer during the taxable year. For the

116 purposes of this subdivision, net kilowatt hours of electricity
117 generated or produced in this state by the taxpayer includes the
118 taxpayer's pro rata share of electricity generated or produced in
119 this state by a partnership or limited liability company of which
120 the taxpayer is a partner or member. The provisions of this
121 subdivision (2) shall not apply to those kilowatt hours exempt
122 under subsection (b), section two-n of this article. Any person
123 taxable under this subdivision (2) shall be allowed a credit
124 against the amount of tax due under this subdivision (2) for any
125 electric power generation taxes or a tax similar to the tax
126 imposed by subdivision (1) of this subsection (b) paid by the
127 taxpayer with respect to such electric power to the state in
128 which such power was generated or produced. The amount of
129 credit allowed shall not exceed the tax liability arising under
130 this subdivision (2) with respect to the sale of such power.

131 (c) The following provisions are applicable to taxpayers
132 subject to tax under subdivision (1), subsection (b) of this
133 section:

134 (1) *Retired units; inactive reserve.* — If a generating unit is
135 retired from service or placed in inactive reserve, a taxpayer
136 shall not be liable for tax computed with respect to the taxable
137 generating capacity of the unit for the period that the unit is
138 inactive or retired. The taxpayer shall provide written notice to
139 the joint committee on government and finance, as well as to
140 any other entity as may be otherwise provided by law, eighteen
141 months prior to retiring any generating unit from service in this
142 state.

143 (2) *New generating units.* — If a new generating unit, other
144 than a peaking unit, is placed in initial service on or after the
145 effective date of this section, the generating unit's taxable
146 generating capacity shall equal forty percent of the official
147 capability of the unit: *Provided*, That the taxable generating
148 capacity of a municipally-owned generating unit shall equal
149 zero percent of the official capability of the unit.

150 (3) *Peaking units.* — If a peaking unit is placed in initial
151 service on or after the effective date of this section, the generat-
152 ing unit's taxable generating capacity shall equal five percent

153 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.

156 (4) *Transfers of interests in generating units.* — If a
157 taxpayer acquires an interest in a generating unit, the taxpayer
158 shall include the computation of taxable generating capacity of
159 said unit in the determination of the taxpayer's tax liability as
160 of the date of the acquisition. Conversely, if a taxpayer transfers
161 an interest in a generating unit, the taxpayer shall not for
162 periods thereafter be liable for tax computed with respect to the
163 taxable generating capacity of such transferred unit.

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

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

190 (6) *Electricity generated by manufacturer or affiliate for*
191 *use in manufacturing activity.* — When electricity used in a
192 manufacturing activity is generated in this state by the person
193 who owns the manufacturing facility in which the electricity is
194 used and the electricity generating unit or units producing the
195 electricity so used are owned by such manufacturer, or by a
196 member of the manufacturer's controlled group, as defined in
197 section 267 of the Internal Revenue Code of 1986, as amended,
198 the generation of the electricity shall not be taxable under this
199 article: *Provided*, That any electricity generated or produced at
200 the generating unit or units which is sold or used for purposes
201 other than in the manufacturing activity shall be taxed under
202 this section and the amount of tax payable shall be adjusted to
203 be equal to an amount which is proportional to the electricity
204 sold for purposes other than the manufacturing activity. The
205 department of tax and revenue shall promulgate rules in
206 accordance with article three, chapter twenty-nine-a of the
207 code: *Provided, however*, That the rules shall be promulgated
208 as emergency rules.

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

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

228 two-d of this article and section two-m of this article. If tax
229 liability under this section is less, then the tax shall be paid
230 under subdivision (3), subsection (a), section two-d of this
231 article and section two-m and the tax due under this section
232 shall not be paid.

233 (2) Notwithstanding subdivision (1) of this subsection, for
234 taxable years beginning on or after the first day of January, one
235 thousand nine hundred ninety-eight, all electric light and power
236 companies shall determine their liability for payment of tax
237 under this article exclusively under this section.

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

Randy Schermer
Chairman Senate Committee

Joe F. Smith
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Harold Elphick
Clerk of the Senate

Gregory M. Berg
Clerk of the House of Delegates

Earl Ray Tomblin
President of the Senate

John C. Schwalb
Speaker of the House of Delegates

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

Jeff O'Callahan
Governor

PRESENTED TO THE

GOVERNOR

Date 3/23/99

Time 4:02 pm