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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2001



ENROLLED

**COMMITTEE SUBSTITUTE
FOR
House Bill No. 2968**

(By Delegates Michael, Shaver, Williams and Evans)



Passed April 14, 2001

In Effect Ninety Days from Passage

FILED

2001 MAY -2 P 11: 54

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COMMITTEE SUBSTITUTE

FOR

H. B. 2968

(BY DELEGATES MICHAEL, SHAVER, WILLIAMS AND EVANS)

[Passed April 14, 2001; in effect ninety days from passage.]

AN ACT to amend article six-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section five-a; and to amend and reenact section two-o, article thirteen of said chapter, all relating to clarifying and specifying the tax treatment of certain wind power projects; specifying the valuation of wind power turbines and related towers for property tax purposes; and specifying the taxable generating capacity of generating units used for the production of electricity by wind for state business and occupation tax purposes.

Be it enacted by the Legislature of West Virginia:

That article six-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section five-a; and that

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section two-o, article thirteen of said chapter be amended and reenacted, all to read as follows:

ARTICLE 6A. POLLUTION CONTROL FACILITIES TAX TREATMENT.

§11-6A-5a. Wind power projects.

1 (a) Notwithstanding any other provisions of this article, a
2 power project designed, constructed or installed to convert wind
3 into electrical energy shall be subject to the provisions of this
4 section.

5 (b) Each wind turbine installed at a wind power project and
6 each tower upon which the turbine is affixed shall be consid-
7 ered to be personal property that is a pollution control facility
8 for purposes of this article and all of the value associated with
9 the wind turbine and tower shall be accorded salvage valuation.
10 All personal property at a wind power project other than a wind
11 turbine and tower shall be valued without regard to this article.

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

**§11-13-2o. Business of generating or producing or selling electric-
ity on and after the first day of June, one thou-
sand 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 the 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 the
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 the 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 the
55 period to a plant location of a customer engaged in manufactur-
56 ing activity if the contract demand at the plant location exceeds
57 two hundred thousand kilowatts per hour in a year or where the
58 usage at the plant location exceeds two hundred thousand
59 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 the 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 the 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 the plant location exceeds two hundred thousand
91 kilowatts per hour per year or if the usage at the 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 the electricity exceed five hundredths of one cent
95 times the kilowatt hours sold to or used by a plant engaged in
96 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 the electric power to the state in which
128 the power was generated or produced. The amount of credit
129 allowed may not exceed the tax liability arising under this
130 subdivision (2) with respect to the sale of the 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 may 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 county or municipally-owned generating unit shall
149 equal zero percent of the official capability of the unit and the
150 taxable generating capacity of a generating unit utilizing a
151 turbine powered primarily by wind shall equal five percent of
152 the official capability of the unit.

153 (3) *Peaking units.* — If a peaking unit is placed in initial
154 service on or after the effective date of this section, the generat-
155 ing unit's taxable generating capacity shall equal five percent
156 of the official capability of the unit: *Provided*, That the taxable
157 generating capacity of a county or municipally-owned generat-
158 ing plant shall equal zero percent of the official capability of the
159 unit.

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

168 (5) *Proration, allocation.* — The tax commissioner shall
169 promulgate rules in conformity with the provisions of article
170 three, chapter twenty-nine-a of this code to provide for the
171 administration of this section and to equitably prorate taxes for

172 a taxable year in which a generating unit is first placed in
173 service, retired or placed in inactive reserve, or in which a
174 taxpayer acquires or transfers an interest in a generating unit, to
175 equitably allocate and reallocate adjustments to net generation,
176 and to equitably allocate taxes among multiple taxpayers with
177 interests in a single generating unit, it being the intent of the
178 Legislature to prohibit multiple taxation of the same taxable
179 generating capacity.

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

194 (6) *Electricity generated by manufacturer or affiliate for*
195 *use in manufacturing activity.* — When electricity used in a
196 manufacturing activity is generated in this state by the person
197 who owns the manufacturing facility in which the electricity is
198 used and the electricity generating unit or units producing the
199 electricity so used are owned by the manufacturer, or by a
200 member of the manufacturer's controlled group, as defined in
201 section 267 of the Internal Revenue Code of 1986, as amended,
202 the generation of the electricity may not be taxable under this
203 article: *Provided*, That any electricity generated or produced at
204 the generating unit or units which is sold or used for purposes
205 other than in the manufacturing activity shall be taxed under

206 this section and the amount of tax payable shall be adjusted to
207 be equal to an amount which is proportional to the electricity
208 sold for purposes other than the manufacturing activity. The
209 department of tax and revenue shall promulgate rules in
210 accordance with article three, chapter twenty-nine-a of the
211 code: *Provided, however*, That the rules shall be promulgated
212 as emergency rules.

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

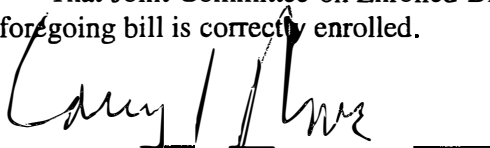
225 (1) If for taxable months beginning on or after the first day
226 of June, one thousand nine hundred ninety-five, liability for tax
227 under this section is equal to or greater than the sum of the
228 power company's liability for payment of tax under subdivision
229 (3), subsection (a), section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

237 (2) Notwithstanding subdivision (1) of this subsection, for
238 taxable years beginning on or after the first day of January, one

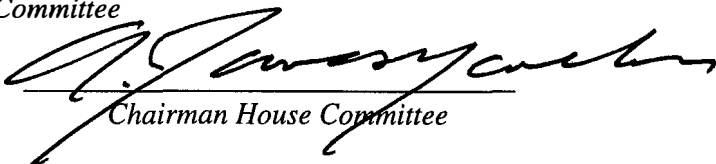
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239 thousand nine hundred ninety-eight, all electric and light power
240 companies shall determine their liability for payment of tax
241 under this article exclusively under this section.

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



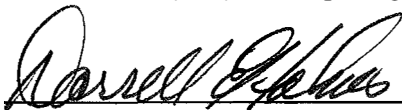
Chairman Senate Committee



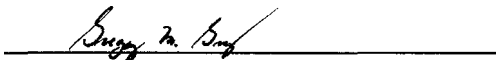
Chairman House Committee

Originating in the House.

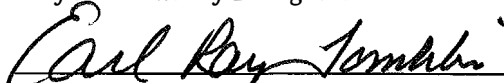
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker of the House of Delegates

The within approved bill this the 2
day of May, 2001.



Governor

PRESENTED TO THE

GOVERNOR

Date: 4/27/01

Time: 11:50am