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ENROLLED

Senate Bill No. 441

(By Senators Tomblin, Mr. President, and Caruth, By Request of the Executive)

[Passed March 9, 2007; in effect ninety days from passage.]
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AN ACT to amend and reenact §11-6A-5a of the Code of West Virginia, 1931, as amended; to amend and reenact §11-13-2o of said code; and to amend said code by adding thereto a new section, designated §11-13-2p, all relating generally to tax treatment of wind power projects; imposing limitation on salvage valuation of facilities at a wind power project; increasing taxable generating capacity of wind power-generating unit for business and occupation tax purposes; and providing credit against additional business and occupation tax liability for certain contractually agreed contributions to specified counties, county school boards or municipalities.
Be it enacted by the Legislature of West Virginia:

That §11-6A-5a of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §11-13-20 of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §11-13-2p, all to read as follows:

ARTICLE 6A. POLLUTION CONTROL FACILITIES TAX TREATMENT.

§11-6A-5a. Wind power projects.

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

(b) Each wind turbine installed at a wind power project and each tower upon which the turbine is affixed shall be considered to be personal property that is a pollution control facility for purposes of this article and, subject to an allocation of the value of project property determined by the Tax Commissioner in accordance with this section, all of the value associated with the wind turbine and tower shall be accorded salvage valuation: Provided, That the portion of the total value of the facility assigned salvage value in accordance with this section shall, on and after the first day of July, two thousand seven, be no greater than seventy-nine percent of the total value of the facility.

All personal property at a wind power project other than a wind turbine and tower shall not be accorded salvage valuation and shall not be considered to be personal property that is a pollution control facility. For purposes of this section, “wind turbine and tower” is limited to: The rotor, consisting of the blades and the
supporting hub; the drive train, which includes the
remaining rotating parts such as the shafts, gearbox,
coupling, a mechanical brake and the generator; the
nacelle and main frame, including the wind turbine
housing, bedplate and the yaw system; the turbine
transformer; the machine controls; the tower; and the
tower foundation.

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.

(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
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
the 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
the 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 the period less the following:

(A) Twenty-one twenty-sixths of the kilowatt hours of electricity generated at the generating unit and sold during the period to a plant location of a customer engaged in manufacturing activity if the contract demand at the plant location exceeds two hundred thousand kilowatts per hour in a year or where the usage at the 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 the 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 the 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 the plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at the 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 the electricity exceed five hundredths of one cent times the kilowatt hours sold to or used by a plant engaged in 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 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 shall not apply to those kilowatt hours
exempt under subsection (b), section two-n of this
article. Any person taxable under this subdivision shall
be allowed a credit against the amount of tax due under
this subdivision for any electric power generation taxes
or a tax similar to the tax imposed by subdivision (1) of
this subsection paid by the taxpayer with respect to the
electric power to the state in which the power was
generated or produced. The amount of credit allowed
may not exceed the tax liability arising under this subdivision with respect to the sale of the 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 may 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 county or municipally owned generating unit shall equal zero percent of the official capability of the unit and for taxable periods ending on or before the thirty-first day of December, two thousand seven, the taxable generating capacity of a generating unit utilizing a turbine powered primarily by wind shall equal five percent of the official capability of the unit: Provided further, That for taxable periods beginning on or after the first day of January, two thousand eight, the taxable generating capacity of a generating unit utilizing a
turbine powered primarily by wind shall equal twelve 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 county or municipally owned 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 the 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 may not for periods thereafter be liable for tax computed with respect to the taxable generating capacity of the 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 the time that action pursuant to a rate application 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 the 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 may 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 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 may 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 and light power companies shall determine their liability for payment of tax under this article exclusively under this section.

§11-13-2p. Credit against tax based on the taxable generating capacity of a generating unit utilizing a turbine powered primarily by wind.

(a) For taxable periods beginning on or after the first day of January, two thousand eight, a credit shall be allowed against tax imposed by this article and calculated based on the taxable generating capacity of a generating unit utilizing a turbine powered primarily by wind. The total credit shall be equal to the amount of qualified contractually agreed contributions as defined in this section. The amount of total credit shall be reduced each year by the amount of credit annually applied to reduce tax under this section.

(b) Definitions. — For purposes of this section:

(1) "Qualified contractually agreed contribution" means money paid, or the lower of the cost or fair market value, at the time of transfer, of property transferred, by the taxpayer, the owner of the taxpayer or the operator or owner of the wind turbine unit to a county in which the wind turbine unit is located, a county school board of the county in which the wind turbine unit is located or to a municipality located in the county in which the wind turbine unit is located pursuant to a written transfer agreement.
(A) The term "qualified contractually agreed contribution" does not include any payment in lieu of taxes or any tax, fee or levy paid to any county, county school board or municipality or to any other governmental subdivision, agency or instrumentality of this state or of any county or municipality.

(B) The term "qualified contractually agreed contribution" does not include any payment in lieu of taxes or any tax, fee or levy paid to any county, county school board or municipality or to any other governmental subdivision, agency or instrumentality of any state other than this state or of any county or municipality of any state other than this state.

(C) The term "qualified contractually agreed contribution" does not include any payment in lieu of taxes or any tax, fee or levy paid to the United States or to any governmental subdivision of the United States or to any agency or instrumentality of the United States or to any foreign government or subdivision, agency or instrumentality thereof.

(2) "Taxpayer" means any person that is legally liable for tax imposed by this article that is calculated based on the taxable generating capacity of a generating unit utilizing a turbine powered primarily by wind.

(3) "Wind turbine unit" means, and is limited to, an electricity-generating unit utilizing a turbine powered primarily by wind that has a taxable generating capacity determined in accordance with subdivision (2), subsection (c), section two-o of this article.

(4) "Written transfer agreement" means a written
contract or written promise to transfer money or property to a county in which the wind turbine unit is located, a county school board of the county in which the wind turbine unit is located or a municipality located in the county in which the wind turbine unit is located, executed not later than the first day of March, two thousand seven, by the taxpayer, the owner of the taxpayer or the operator or owner of the wind turbine unit and executed by the county commission of the county in which the wind turbine unit is located or by any officer or representative of the county commission having authority to execute binding legal documents for the county commission, the county school board of the county in which the wind turbine unit is located or any officer or representative of the county school board having authority to execute binding legal documents for the county school board, or the city council, mayor or city manager of a municipality located in the county in which the wind turbine unit is located or any officer or representative of the municipality having authority to execute binding legal documents for the municipality.

(c) Credit limitations. —

(1) The total amount of credit allowable under this section is limited to the amount of qualified contractually agreed contributions made pursuant to a written transfer agreement.

(2) The credit allowed under this section may only be applied to offset annual tax imposed by this article that is measured by the taxable generating capacity of the wind turbine unit. No other tax imposed by or under this article may be offset by the credit allowed under
this section and no other tax imposed by this code may be offset by the credit.

(3) The credit allowed under this section shall be applied after application of the credit allowed under article thirteen-d of this chapter, as applicable, and after any other applicable credits allowed by this chapter against tax imposed by this article.

(4) The amount of credit allowed under this section and the amount of the credit allowed under article thirteen-d of this chapter may not, in combination, reduce the amount of annual tax imposed by this article on the taxable generating capacity of the wind turbine unit to an amount that is less than fifty percent of the amount of annual tax that would have been imposed by this article on the wind turbine unit if the taxable generating capacity of the wind turbine unit was set at five percent of the official capacity of the wind turbine unit.

(d) Time over which credit may be applied. —

(1) The total amount of credit determined under subsection (a) of this section shall be reduced annually by the amount of credit applied in each tax year to offset tax under this section.

(2) The credit allowed under this section may be applied annually, beginning on the later of:

(A) The year a qualified contractually agreed contribution in money was paid or a qualified contractually agreed contribution in property was
delivered to the county, the county school board or the
municipality; or

(B) The year in which title thereto irrevocably passed
to the transferee;

(3) The credit may thereafter be taken in each
succeeding tax year until the amount of total credit has
been exhausted or until the ninth succeeding tax year
after the contractually agreed contribution of money
was so paid or the contractually agreed contribution of
property was so delivered. Credit remaining after the
ninth succeeding tax year is forfeited.

(4) Credit to which a taxpayer is entitled under this
section shall be applied in an order and sequence such
that the credit earned earliest in time shall be applied
first in any tax year to offset tax under this section.

(e) Credit for successor businesses and transferees of a
wind turbine unit; apportionment. —

(1) Mere change in form of business. — The credit
allowed under this section shall not be forfeited by
reason of a mere change in the form of the entity or
organization that is conducting the business so long as
the successor business continues to remain a taxpayer,
as defined in this section, in this state, operating the
wind turbine unit that was originally owned or operated
by the predecessor taxpayer. Such successor shall
acquire the amount of credit that remains available
under this section for each subsequent taxable year
until the credit expires or is exhausted, based on the
years remaining and amount of credit remaining to
which the transferor was entitled at the time of the transfer.

(2) **Transfer or sale to successor.** — The credit allowed under this section shall not be forfeited by reason of a transfer or sale to a successor business of a wind turbine unit so long as the successor business continues to remain a taxpayer, as defined in this section, in this state, operating the wind turbine unit that was originally owned or operated by the predecessor taxpayer. Upon transfer or sale of a wind turbine unit, the successor shall acquire the amount of credit that remains available under this section for each subsequent taxable year until the credit expires or is exhausted, based on the years remaining and amount of credit remaining to which the transferor was entitled at the time of the transfer.

(3) **Apportionment in the year of transfer.** — Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this section for each taxable year subsequent to the taxable year of the transferor during which the transfer occurred and, for the year of transfer, an amount of annual credit for the year in the same proportion as the number of days remaining in the transferor's taxable year bears to the total number of days in the transferor's taxable year.
Enr. S. B. No. 441

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

[Signatures]

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signatures]

Clerk of the Senate

[Signatures]

Clerk of the House of Delegates

[Signatures]

President of the Senate

Speaker House of Delegates

The within is approved this 3rd Day of April, 2007.

[Signature] Governor