WEST VIRGINIA LEGISLATURE
FIRST EXTRAORDINARY SESSION, 2012

ENROLLED

House Bill No. 101

(By Mr. Speaker, Mr. Thompson, and Delegate Armstead)
[By Request of the Executive]

Passed March 16, 2012
To Take Effect From Passage
AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §11-13CC-1, §11-13CC-2, §11-13CC-3, §11-13CC-3a, §11-13CC-4 and §11-13CC-5; and to amend and reenact §24-2-1j of said code, all relating to creating the Energy Intensive Industrial Consumers Revitalization Tax Credit Act; making legislative findings and declaring purpose; establishing tax credits for suppliers of coal to certain electric utilities who are subject to the coal severance tax subject to certain limitations and requirements; specifying when the tax credits may be claimed; authorizing the carry forward of tax credits subject to certain limitations and restrictions; specifying how the tax credits are calculated and allocated; providing for applicability of tax credit against required minimum severance tax payments on coal; specifying how the payments triggered by the tax credits are to be calculated and made; authorizing the notification and disclosure of certain information related to the implementation and administration of tax credits and required payments; establishing certain effective dates and expiration dates; granting the Public Service Commission certain authority concerning special rates and prescribing certain limitations and requirements related thereto; and requiring information on special rates in the Public Service Commission’s annual report.
Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §11-13CC-1, §11-13CC-2, §11-13CC-3, §11-13CC-3a, §11-13CC-4 and §11-13CC-5; and that §24-2-1j of said code be amended and reenacted, all to read as follows:

CHAPTER 11. TAXATION.

ARTICLE 13CC. ENERGY INTENSIVE INDUSTRIAL CONSUMERS REVITALIZATION TAX CREDIT.

§11-13CC-1. Short title.

This article may be cited as the "Energy Intensive Industrial Consumers Revitalization Tax Credit Act."

§11-13CC-2. Legislative findings and purpose.

The Legislature finds that:

(a) West Virginia enjoys a competitive economic advantage among the states attributable to relatively low-cost electric power due in considerable measure to an abundance of coal resources, production from which powers electric generation in the state.

(b) As a consequence, a number of energy intensive industrial consumers of electric power have located in the state and have provided jobs for its citizens and an increased tax base that contributes to the support of schools, other institutions, and programs that benefit all West Virginians.
(c) As the result of competitive disadvantages emanating from outside the state and the current state of the national economy, some energy intensive industrial consumers of electric power have had to cease doing business in the state or are experiencing or may experience strains that could threaten their viability and continued operation.

(d) Conversely, coal production in the state is relatively stable and is benefitting from demand from coal purchasers inside the state, outside the state, and outside the country, which demand has increasingly benefitted the state in terms of its coal severance tax revenues.

(e) It is in the public interest for the state to assist eligible energy intensive industrial consumers of electric power determined to be in need of special rate assistance pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code, in order to encourage them to locate, to remain in operation, or to resume operation, in West Virginia on a long-term basis, by employing a portion of the coal severance tax revenues to reduce such industrial consumers' electric power costs without imposing an undue burden on electric utilities or their other customers.

(f) In furtherance of its findings, the Legislature's purpose in this article is to create a credit, as provided in section three of this article, against the coal severance tax imposed and levied under the provisions of subsections (a) and (b), section three, article thirteen-a of this chapter, of which the primary ultimate economic beneficiary shall be eligible energy intensive industrial consumers of electric power determined to be in need of special rate assistance pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code.
§11-13CC-3. Amounts of credits; limitations.

(a) Every taxpayer which is a supplier of coal to a West Virginia electric utility providing a special rate to one or more eligible energy intensive industrial consumers of electric power pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code and which is subject to paying the tax on the privilege of severing coal levied and imposed by subsections (a) and (b), section three, article thirteen-a of this chapter, prior to the application of any other credits against the tax, shall be entitled to a credit against that tax in an amount determined by the Public Service Commission pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code, subject to the following limitations:

1. The tax credits authorized by this article shall only be available when the eligible energy intensive industrial consumer of electric power receives a special rate from a West Virginia electric utility pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code;

2. The total aggregate credits available to all taxpayers under this section shall not exceed $20 million in any calendar year; and

3. The total credits available to any taxpayer in a given calendar year shall not exceed ninety-three percent of that taxpayer’s tax liability imposed and levied under subsections (a) and (b), section three, article thirteen-a of this chapter, so as to preserve undiminished the seven percent of total coal severance tax revenues that is apportioned among counties and municipalities pursuant to section six, article thirteen-a of this chapter.
(b) If the full amount of the $20 million in credits authorized by this article is not allocated and claimed in any calendar year, during all periods when a special rate is in effect for any one or more eligible energy intensive industrial consumers, the unused credits may be carried forward to future years: Provided, That the maximum aggregate amount of unused credits that may be carried forward to future years shall not exceed $15 million at any time. In no event may the amount of credits allocated and claimed in any single year, including unused credits that have been carried forward, exceed $35 million.

(c) If in any year the taxpayers that are suppliers of coal to a West Virginia electric utility providing a special rate to one or more eligible energy intensive industrial consumers of electric power entitled to receive credits pursuant to this section cannot or do not claim credits in an amount equal to the amount of tax credits designated by the commission, then the affected public utility may allocate the unclaimed tax credits, with such allocated amounts subject to the approval of the Public Service Commission, to and the tax credits may be claimed by any taxpayer that is subject to paying the tax on the privilege of severing coal levied and imposed by subsections (a) and (b), section three, article thirteen-a of this chapter: Provided, That taxpayers receiving the reallocation shall comply with the requirements and procedures set forth in this article.

(d) All unused credits authorized under this article expire and cease to be usable for tax years beginning on or after December 31, 2021.

(e) The credits authorized in this article shall not become available for any purpose prior to the Public Service Commission’s first approval of a special rate for an eligible energy intensive industrial consumer. The credits provided
in this article may be claimed by taxpayers against periodic installment payments of severance tax paid under the provisions of section nine, article thirteen-a of this chapter.

§11-13CC-3a. Applicability to minimum severance tax credit.

Every taxpayer which applies the tax credit allowed under section three of this article for a tax year shall also be entitled to apply the tax credit against the minimum coal severance tax imposed by article twelve-b of this chapter for the same tax year in an amount up to the amount of the tax credit applied for the tax year under the provisions of section three of this article.

§11-13CC-4. Required payments to public utilities.

(a) Each person claiming any tax credit pursuant to section three of this article shall, as a condition of receiving that tax credit, make payment equal to ninety-seven percent of the amount of that credit to the public utility providing electric power to the special rate customer whose special rate required the funding generated by that tax credit, as determined by the Public Service Commission pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code. Any payment made to the public utility providing electric power to the special rate customer shall be treated in the same manner as the payment of taxes under section three, article thirteen-a of the chapter, and shall not be treated as an adjustment to the price of coal sold to the public utility.

(b) Each taxpayer that elects to participate in this tax credit and required payment program shall notify the State Tax Department of its election to participate at the time and in such form of notification as prescribed by the State Tax Department. Notwithstanding the provisions of section
five-d, article ten of this chapter or any other provision of this code, the State Tax Department shall provide updated notification to the Public Service Commission of the identity of taxpayers from which it has received notification of voluntary participation, and other information necessary for the efficient and accurate administration of this article. Notwithstanding any provision of this code to the contrary, the Public Service Commission shall disclose to the State Tax Department information necessary for the efficient and accurate administration of this article. This information may be provided to the electric utilities by the Public Service Commission for purpose of calculating, pursuant to subsection (g), section one-j, article two, chapter twenty-four of this code, the allocated share of tax credits that are available to each taxpayer, and payments that are required to be made to the public utility in order to qualify for the tax credit. Information disclosure to electric utilities by the Public Service Commission is limited to that information necessary for the calculations. Payment to the public utility shall be made no later than the time at which the tax against which the credit is taken would have been due and payable to the state under the provisions of section nine, article thirteen-a of this chapter.

(c) The three percent differential between a taxpayer’s tax credit and its required payment to the public utility is intended as an inducement to the taxpayer to participate in the tax credit and required payment mechanism provided in this article and may be retained by the taxpayer as compensation for the costs of participation.

§11-13CC-5. Expiration.

The provisions of this article shall be effective for tax years beginning on or after January 1, 2012. No new tax credits may be created for any tax year beginning on or after
December 31, 2021. All unused tax credits expire and cease to be useable in tax years beginning on or after December 31, 2021.

CHAPTER 24. PUBLIC SERVICE COMMISSION.

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-1j. Special rates for energy intensive industrial consumers of electric power.

(a) The Legislature hereby finds that:

(1) West Virginia enjoys relatively low cost electric power rates for residential customers, business and industry and these relatively low rates constitute a competitive economic advantage for West Virginia;

(2) West Virginia has many energy intensive industrial consumers of electric power, and has the ability to retain its existing energy intensive industrial consumers of electric power and attract additional energy intensive industrial consumers of electric power in the future, through the adoption of policies and the establishment of rates that enhance and preserve the attractiveness of West Virginia as a place for energy intensive industrial consumers to do business;

(3) Energy intensive industrial consumers of electric power create jobs, provide a substantial tax base and enhance the productive capacity, competitiveness and economic opportunities of West Virginia and all of its citizens;

(4) Energy intensive industrial consumers of electric power help keep power rates low for all consumers of electric
power, including residential customers, by providing a large consumption base over which the cost of producing electric power may be spread from time to time;

(5) It is in the best interests of West Virginia, the citizens of West Virginia, electric public utilities in West Virginia, and all consumers of electric power in West Virginia, including residential customers, to encourage the continued development, construction, operation, maintenance and expansion in West Virginia of industrial plants and facilities which are energy intensive consumers of electric power, thereby increasing the creation, preservation and retention of jobs, expanding the tax base, helping keep power rates low for all consumers of electric power, and enhancing the productive capacity, competitiveness and economic opportunities of all citizens of West Virginia;

(6) To encourage the continued development, construction, operation, maintenance and expansion in West Virginia of industrial plants and facilities which are energy intensive consumers of electric power, the commission may establish special rates under this section that in its judgment are necessary or appropriate for the continued, new or expanded operation of energy intensive industrial consumers and that can reasonably be expected to support the long-term operation of energy intensive industrial consumers, and that do not impose an unreasonable burden upon electric public utilities or their other customers; and

(7) To assist the commission in the exercise of its authority to establish special rates under this section, the Legislature creates in article thirteen-cc, chapter eleven of this code a tax credit mechanism to provide a source of funding to support special rates of which the commission may avail itself in exercising said authority in certain circumstances.
(b) As used in this section:

(1) "Energy intensive industrial consumer" means an industrial facility, plant or enterprise that has a contract demand of at least fifty thousand kilowatts of electric power at its West Virginia facilities under normal operating conditions.

(2) "Special rate" means a rate set for an energy intensive industrial consumer pursuant to this section.

(c) In addition to any authority of the commission to allow special rates or contracts under any other provision of the code or rule, and in addition to all other factors which the commission may consider in setting rates for consumers of electric power, including, but not limited to, the commission's responsibilities under subsection (b), section one, article one of this chapter, and notwithstanding any other provisions of this code to the contrary, in setting a special rate the commission may take into consideration fluctuations in market prices for the goods or products produced by the energy intensive industrial consumer of electric power, or other variables or factors which may be relevant to or affect the continuing vitality of the energy intensive industrial consumer of electric power in dynamic markets. In setting a special rate by reference to fluctuations in market prices for the goods and products produced by an energy intensive industrial consumer of electric power, the commission may establish variable rates including, but not limited to, ceilings and floors on the special rate, banking or crediting mechanisms, caps, limits or other similar types of safeguards that are intended by the commission, in its reasonable judgment, to provide appropriate flexibility and predictability in the special rate over time, to permit the energy intensive industrial customer the ability to make the capital investments and other commitments necessary to support the continued operation of the facility.
(d) An energy intensive industrial consumer wishing to apply for a special rate shall first enter into negotiations with the utility that provides it with electric power, regarding the terms and conditions of a mutually agreeable special rate. If the negotiations result in an agreement between the energy intensive industrial consumer and the utility, the energy intensive industrial consumer and the utility shall make a joint filing with the commission seeking approval of the proposed special rate. If the negotiations are unsuccessful, the energy intensive industrial consumer may file a petition with the commission to consider establishing a special rate. The commission shall have the authority to establish a special rate upon the filing of either a joint filing or a petition pursuant to this section.

(e) In order to qualify for a special rate, an energy intensive industrial consumer shall:

(1) Have a contract demand of at least fifty thousand kilowatts of electric power at its West Virginia facilities under normal operating conditions;

(2) Create or retain at least twenty-five full-time jobs in West Virginia;

(3) Have invested not less than $500,000 in fixed assets, including machinery and equipment, in West Virginia;

(4) Provide reasonable evidence that due to market conditions in the industry in which the energy intensive industrial consumer operates, or other factors bearing on investment in and operation of the industrial facility or facilities, without the special rate the operation or continued operation of the industrial facility or facilities is threatened or not economically viable under reasonable assumptions and
projections regarding the market and the operation of the industrial facility or facilities;

(5) Provide reasonable evidence that, with the special rate, the energy intensive industrial consumer intends to operate the industrial facility or facilities in West Virginia for an extended period of time, and that the operation or continued operation of the industrial facility or facilities for an extended period of time appears economically viable, under reasonable assumptions and projections regarding the market in which the energy intensive industrial consumer operates and regarding the operation of the industrial facility or facilities; and

(6) Provide information and data setting forth how the energy intensive industrial consumer meets the qualifications of this section, and how the special rate advances the policy goals set forth in subsection (a) of this section.

(f) The commission shall determine whether any excess revenue or revenue shortfall created by a special rate authorized pursuant to this section should be allocated among any other customers of the utility. In making that determination, the commission shall consider all relevant factors, including whether such allocation is just, reasonable, and fairly balances the interests of other customers, the utility, and the customer receiving the special rate.

(g) If the commission determines that: (1) A special rate is necessary for the creation, preservation or retention of jobs by the energy intensive industrial consumer; (2) in connection with the initial special rate that is authorized by the commission for an energy intensive industrial consumer, the energy intensive industrial consumer will increase the number of persons it employs, including both persons who have been previously employed by the energy intensive
industrial consumer and persons not previously employed by
the energy intensive industrial consumer, by at least one
hundred fifty persons as a result of the special rate; (3) the
energy intensive industrial consumer will employ no fewer
than three hundred persons, which number may include, but
is not limited to, the persons newly hired or rehired pursuant
to the preceding clause in this subsection; (4) the energy
intensive industrial consumer has a contract demand of at
least two hundred fifty thousand kilowatts of electric power
at its West Virginia facilities under normal operating
conditions; and (5) a special rate for an energy intensive
industrial consumer of electric power would create a revenue
shortfall, the commission shall, prior to determining whether
it is reasonable to allocate all or a portion of the revenue
shortfall amount among a public utility’s other customers,
first consider the availability of tax credits and payments
required to be made to public utilities pursuant to article
thirteen-cc, chapter eleven of this code to reduce or eliminate
a revenue shortfall. The commission shall identify in each
proceeding in which it establishes a special rate for an
eligible energy intensive industrial consumer the amount of
any unallocated revenue shortfall in need of funding pursuant
to article thirteen-cc, chapter eleven of this code to defray it
and shall project the amount of the gross tax credits needed
for that purpose after taking into consideration the net
amounts of credits that are required to be paid to utilities
pursuant to subsection (a), section four, article thirteen-cc,
chapter eleven of this code and the limits specified in section
three, article thirteen-cc, chapter eleven of this code. Tax
credits authorized under this section may be designated by
the commission only in respect of periods of time during
which the eligible energy intensive industrial consumer
employs at least three hundred persons. The commission’s
determination as to the amount of tax credits on which it
relies in establishing a given special rate, shall constitute an
authorization for each supplier of West Virginia coal to the
utility offering that special rate to claim its allocated share of
the total amount of tax credits. The allocated share shall be
calculated by the affected public utility, subject to the
approval of the commission.

(h) The commission shall include in the annual report to
the Legislature which it makes pursuant to subsection (d),
section one, article one of this chapter a report on the tax
credits being employed pursuant to article thirteen-cc, chapter
eleven of this code to help fund special rates created under
this section.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

To take effect from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within is approved this the 22d day of April, 2012.

Governor
PRESENTED TO THE GOVERNOR

MAR 29 2012

Time 1:35 p.m.