

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4462

DELEGATES STEELE, BATES, HIGGINBOTHAM, KESSINGER,

PACK AND TONEY

[Introduced January 22, 2020; Referred to the

Committee on Finance]

1 A BILL to amend and reenact §11-13-2o of the Code of West Virginia, 1931, as amended, relating
2 to adjusting the calculation of business and occupation tax on the business of generating
3 or producing or selling electricity from solar energy facilities; and clarifying that rate of tax
4 for generating units utilizing solar photovoltaic methods shall equal eight percent of official
5 capacity of the unit for the taxable period beginning January 1, 2020.

Be it enacted by the Legislature of West Virginia:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§11-13-2o. Business of generating or producing or selling electricity on and after June 1, 1995; 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 by four the sum of a generating
3 unit's net generation, expressed in kilowatt hours, for calendar years 1991, 1992, 1993, and 1994.
4 For any generating unit which was newly installed and placed into commercial operation after
5 January 1, 1991, and prior to the effective date of this section, "average four-year generation" is
6 computed by dividing the unit's net generation for the period beginning with the month in which
7 the unit was placed into commercial operation and ending with the month preceding the effective
8 date of this section by the number of months in the period and multiplying the resulting amount
9 by twelve with the result being a representative 12-month average of the unit's net generation
10 while in an operational status.

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

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

16 (4) "Inactive reserve" means the removal of a generating unit from commercial service for
17 a period of not less than 12 consecutive months as a result of lack of need for generation from

18 the generating unit or as a result of the requirements of state or federal law or the removal of a
19 generating unit from commercial service for any period as a result of any physical exigency which
20 is beyond the reasonable control of the taxpayer.

21 (5) "Maximum possible annual generation" means the product, expressed in kilowatt
22 hours, of official capability times 8,760 hours.

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

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

27 (8) "Retired from service" means the removal of a generating unit from commercial service
28 for a period of at least 12 consecutive months with the intent that the unit ~~will~~ may not thereafter
29 be returned to active service.

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

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

35 (A) Twenty-one twenty-sixths of the kilowatt hours of electricity generated at the
36 generating unit and sold during the period to a plant location of a customer engaged in
37 manufacturing activity if the contract demand at the plant location exceeds 200,000 kilowatts per
38 hour in a year or where the usage at the plant location exceeds 200,000 kilowatts per hour in a
39 year;

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

43 (C) The total kilowatt hours of electricity generated at the generating unit exempted from

44 tax during the period by §11-13-2(n)(b) of this code.

45 (b) *Rate of tax.* -- Upon every person engaging or continuing within this state in the
46 business of generating or producing electricity for sale, profit or commercial use, either directly or
47 indirectly through the activity of others, in whole or in part, or in the business of selling electricity
48 to consumers, or in both businesses, the tax imposed by section two of this article shall be equal
49 to:

50 (1) For taxpayers who generate or produce electricity for sale, profit or commercial use,
51 the product of \$22.78 multiplied by the taxable generating capacity of each generating unit in this
52 state owned or leased by the taxpayer, subject to the modifications set forth in subsection (c) of
53 this section: *Provided*, That with respect to each generating unit in this state which has installed
54 a flue gas desulfurization system, the tax imposed by section two of this article shall, on and after
55 January 31, 1996, be equal to the product of \$20.70 multiplied by the taxable generating capacity
56 of the units, subject to the modifications set forth in subsection (c) of this section: *Provided*,
57 *however*, That with respect to kilowatt hours sold to or used by a plant location engaged in
58 manufacturing activity in which the contract demand at the plant location exceeds 200,000
59 kilowatts per hour per year or if the usage at the plant location exceeds 200,000 kilowatts per
60 hour in a year, in no event ~~shall~~ may the tax imposed by this article with respect to the sale or use
61 of the electricity exceed five hundredths of 1¢ times the kilowatt hours sold to or used by a plant
62 engaged in a manufacturing activity; and

63 (2) For taxpayers who sell electricity to consumers in this state that is not generated or
64 produced in this state by the taxpayer, nineteen hundredths of 1¢ times the kilowatt hours of
65 electricity sold to consumers in this state that were not generated or produced in this state by the
66 taxpayer, except that the rate shall be five hundredths of 1¢ times the kilowatt hours of electricity
67 not generated or produced in this state by the taxpayer which is sold to a plant location in this
68 state of a customer engaged in manufacturing activity if the contract demand at such plant location
69 exceeds 200,000 kilowatts per hour per year or if the usage at such plant location exceeds

70 200,000 kilowatts per hour in a year. The measure of tax under this subdivision shall be equal to
71 the total kilowatt hours of electricity sold to consumers in the state during the taxable year, that
72 were not generated or produced in this state by the taxpayer, to be determined by subtracting
73 from the total kilowatt hours of electricity sold to consumers in the state the net kilowatt hours of
74 electricity generated or produced in the state by the taxpayer during the taxable year. For the
75 purposes of this subdivision, net kilowatt hours of electricity generated or produced in this state
76 by the taxpayer includes the taxpayer's pro rata share of electricity generated or produced in this
77 state by a partnership or limited liability company of which the taxpayer is a partner or member.
78 The provisions of this subdivision ~~shall~~ may not apply to those kilowatt hours exempt under §11-
79 13-2(n)(b) of this code.. Any person taxable under this subdivision shall be allowed a credit against
80 the amount of tax due under this subdivision for any electric power generation taxes or a tax
81 similar to the tax imposed by subdivision (1) of this subsection paid by the taxpayer with respect
82 to the electric power to the state in which the power was generated or produced. The amount of
83 credit allowed may not exceed the tax liability arising under this subdivision with respect to the
84 sale of the power.

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

87 (1) *Retired units; inactive reserve.* -- If a generating unit is retired from service or placed
88 in inactive reserve, a taxpayer may not be liable for tax computed with respect to the taxable
89 generating capacity of the unit for the period that the unit is inactive or retired. The taxpayer shall
90 provide written notice to the Joint Committee on Government and Finance, as well as to any other
91 entity as may be otherwise provided by law, 18 months prior to retiring any generating unit from
92 service in this state.

93 (2) *New generating units.* -- If a new generating unit, other than a peaking unit, is placed
94 in initial service on or after the effective date of this section, the generating unit's taxable
95 generating capacity shall equal 40 percent of the official capability of the unit: *Provided*, That the

96 taxable generating capacity of a county- or municipally owned generating unit shall equal zero
97 percent of the official capability of the unit and for taxable periods ending on or before December
98 31, 2007, the taxable generating capacity of a generating unit utilizing a turbine powered primarily
99 by wind shall equal five percent of the official capability of the unit: *Provided, further however,*
100 That for taxable periods beginning on or after January 1, 2008, the taxable generating capacity of
101 a generating unit utilizing a turbine powered primarily by wind shall equal 12 percent of the official
102 capability of the unit: *Provided further, That for taxable periods beginning on or after January 1,*
103 *2020, the taxable generating capacity of a generating unit utilizing solar photovoltaic methods*
104 *shall equal eight percent of the official capacity of the unit.*

105 (3) *Peaking units.* -- If a peaking unit is placed in initial service on or after the effective
106 date of this section, the generating unit's taxable generating capacity shall equal five percent of
107 the official capability of the unit: *Provided, That the taxable generating capacity of a county- or*
108 *municipally owned generating plant shall equal zero percent of the official capability of the unit.*

109 (4) *Transfers of interests in generating units.* -- If a taxpayer acquires an interest in a
110 generating unit, the taxpayer shall include the computation of taxable generating capacity of the
111 unit in the determination of the taxpayer's tax liability as of the date of the acquisition. Conversely,
112 if a taxpayer transfers an interest in a generating unit, the taxpayer may not for periods thereafter
113 be liable for tax computed with respect to the taxable generating capacity of the transferred unit.

114 (5) *Proration, allocation.* -- The Tax Commissioner shall promulgate rules in conformity
115 with ~~the provisions of §29A-3-1 et seq. of~~ this code to provide for the administration of this section
116 and to equitably prorate taxes for a taxable year in which a generating unit is first placed in service,
117 retired or placed in inactive reserve, or in which a taxpayer acquires or transfers an interest in a
118 generating unit, to equitably allocate and reallocate adjustments to net generation, and to
119 equitably allocate taxes among multiple taxpayers with interests in a single generating unit, it
120 being the intent of the Legislature to prohibit multiple taxation of the same taxable generating
121 capacity.

122 So as to provide for an orderly transition with respect to the rate making effect of this
123 section, those electric light and power companies which, as of the effective date of this section,
124 are permitted by the West Virginia Public Service Commission to utilize deferred accounting for
125 purposes of recovery from ratepayers of any portion of business and occupation tax expense
126 under this article shall be permitted, until the time that action pursuant to a rate application or
127 order of the commission provides for appropriate alternative rate-making treatment for ~~such~~ that
128 expense, to recover the tax expense imposed by this section by means of deferred accounting to
129 the extent that the tax expense imposed by this section exceeds the level of business and
130 occupation tax under this article currently allowed in rates.

131 (6) *Electricity generated by manufacturer or affiliate for use in manufacturing activity.* --
132 When electricity used in a manufacturing activity is generated in this state by the person who
133 owns the manufacturing facility in which the electricity is used and the electricity-generating unit
134 or units producing the electricity so used are owned by the manufacturer, or by a member of the
135 manufacturer's controlled group, as defined in Section 267 of the Internal Revenue Code of 1986,
136 as amended, the generation of the electricity may not be taxable under this article: *Provided*, That
137 any electricity generated or produced at the generating unit or units which is sold or used for
138 purposes other than in the manufacturing activity shall be taxed under this section and the amount
139 of tax payable shall be adjusted to be equal to an amount which is proportional to the electricity
140 sold for purposes other than the manufacturing activity. The Department of Revenue shall
141 promulgate rules in accordance with §29A-3-1 *et seq.* of this code: *Provided, however*, That the
142 rules shall be promulgated as emergency rules.

143 (d) Beginning June 1, 1995, electric light and power companies that actually paid tax
144 based on ~~the provisions of~~ §11-13-2d(a)(3) of this code or §11-13-2m of this code for every
145 taxable month in 1994 shall determine their liability for payment of tax under this article in
146 accordance with subdivisions (1) and (2) of this subsection. All other electric light and power
147 companies shall determine their liability for payment of tax under this article exclusively under this

148 section beginning June 1, 1995, and thereafter.

149 (1) If for taxable months beginning on or after June 1, 1995, liability for tax under this
150 section is equal to or greater than the sum of the power company's liability for payment of tax
151 under subdivision (3), subsection (a), section two-d of this article and this section, then the
152 company shall pay the tax due under this section and not the tax due under §11-13-2d(a)(3) of
153 this code and §11-13-2m of this code. If tax liability under this section is less, then the tax shall
154 be paid under §11-13-2d(a)(3) of this code and §11-13-2m of this code and the tax due under this
155 section may not be paid.

156 (2) Notwithstanding subdivision (1) of this subsection, for taxable years beginning on or
157 after January 1, 1998, all electric and light power companies shall determine their liability for
158 payment of tax under this article exclusively under this section.

NOTE: The purpose of this bill is to clarify the calculation of business and occupation tax rates on solar generating units to match those of other renewable electric facilities.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.