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SB 441

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2007

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 §11-13-2o 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.

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

5 (b) Each wind turbine installed at a wind power
6 project and each tower upon which the turbine is
7 affixed shall be considered to be personal property that
8 is a pollution control facility for purposes of this article
9 and, subject to an allocation of the value of project
10 property determined by the Tax Commissioner in
11 accordance with this section, all of the value associated
12 with the wind turbine and tower shall be accorded
13 salvage valuation: *Provided*, That the portion of the
14 total value of the facility assigned salvage value in
15 accordance with this section shall, on and after the first
16 day of July, two thousand seven, be no greater than
17 seventy-nine percent of the total value of the facility.
18 All personal property at a wind power project other
19 than a wind turbine and tower shall not be accorded
20 salvage valuation and shall not be considered to be
21 personal property that is a pollution control facility. For
22 purposes of this section, "wind turbine and tower" is
23 limited to: The rotor, consisting of the blades and the

24 supporting hub; the drive train, which includes the
25 remaining rotating parts such as the shafts, gearbox,
26 coupling, a mechanical brake and the generator; the
27 nacelle and main frame, including the wind turbine
28 housing, bedplate and the yaw system; the turbine
29 transformer; the machine controls; the tower; and the
30 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.**

1 (a) *Definitions.* — As used in this section:

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

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

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

29 (4) "Inactive reserve" means the removal of a
30 generating unit from commercial service for a period of
31 not less than twelve consecutive months as a result of
32 lack of need for generation from the generating unit or
33 as a result of the requirements of state or federal law or
34 the removal of a generating unit from commercial
35 service for any period as a result of any physical
36 exigency which is beyond the reasonable control of the
37 taxpayer.

38 (5) "Maximum possible annual generation" means the
39 product, expressed in kilowatt hours, of official
40 capability times eight thousand seven hundred sixty
41 hours.

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

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

47 (8) "Retired from service" means the removal of a
48 generating unit from commercial service for a period of
49 at least twelve consecutive months with the intent that

50 the unit will not thereafter be returned to active service.

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

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

60 (A) Twenty-one twenty-sixths of the kilowatt hours of
61 electricity generated at the generating unit and sold
62 during the period to a plant location of a customer
63 engaged in manufacturing activity if the contract
64 demand at the plant location exceeds two hundred
65 thousand kilowatts per hour in a year or where the
66 usage at the plant location exceeds two hundred
67 thousand kilowatts per hour in a year;

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

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

77 (b) *Rate of tax.* — Upon every person engaging or
78 continuing within this state in the business of

79 generating or producing electricity for sale, profit or
80 commercial use, either directly or indirectly through the
81 activity of others, in whole or in part, or in the business
82 of selling electricity to consumers, or in both businesses,
83 the tax imposed by section two of this article shall be
84 equal to:

85 (1) For taxpayers who generate or produce electricity
86 for sale, profit or commercial use, the product of
87 twenty-two dollars and seventy-eight cents multiplied
88 by the taxable generating capacity of each generating
89 unit in this state owned or leased by the taxpayer,
90 subject to the modifications set forth in subsection (c) of
91 this section: *Provided*, That with respect to each
92 generating unit in this state which has installed a flue
93 gas desulfurization system, the tax imposed by section
94 two of this article shall, on and after the thirty-first day
95 of January, one thousand nine hundred ninety-six, be
96 equal to the product of twenty dollars and seventy cents
97 multiplied by the taxable generating capacity of the
98 units, subject to the modifications set forth in
99 subsection (c) of this section: *Provided, however*, That
100 with respect to kilowatt hours sold to or used by a plant
101 location engaged in manufacturing activity in which the
102 contract demand at the plant location exceeds two
103 hundred thousand kilowatts per hour per year or if the
104 usage at the plant location exceeds two hundred
105 thousand kilowatts per hour in a year, in no event shall
106 the tax imposed by this article with respect to the sale
107 or use of the electricity exceed five hundredths of one
108 cent times the kilowatt hours sold to or used by a plant
109 engaged in a manufacturing activity; and

110 (2) For taxpayers who sell electricity to consumers in
111 this state that is not generated or produced in this state

112 by the taxpayer, nineteen hundredths of one cent times
113 the kilowatt hours of electricity sold to consumers in
114 this state that were not generated or produced in this
115 state by the taxpayer, except that the rate shall be five
116 hundredths of one cent times the kilowatt hours of
117 electricity not generated or produced in this state by the
118 taxpayer which is sold to a plant location in this state of
119 a customer engaged in manufacturing activity if the
120 contract demand at such plant location exceeds two
121 hundred thousand kilowatts per hour per year or if the
122 usage at such plant location exceeds two hundred
123 thousand kilowatts per hour in a year. The measure of
124 tax under this subdivision shall be equal to the total
125 kilowatt hours of electricity sold to consumers in the
126 state during the taxable year, that were not generated
127 or produced in this state by the taxpayer, to be
128 determined by subtracting from the total kilowatt hours
129 of electricity sold to consumers in the state the net
130 kilowatt hours of electricity generated or produced in
131 the state by the taxpayer during the taxable year. For
132 the purposes of this subdivision, net kilowatt hours of
133 electricity generated or produced in this state by the
134 taxpayer includes the taxpayer's pro rata share of
135 electricity generated or produced in this state by a
136 partnership or limited liability company of which the
137 taxpayer is a partner or member. The provisions of this
138 subdivision shall not apply to those kilowatt hours
139 exempt under subsection (b), section two-n of this
140 article. Any person taxable under this subdivision shall
141 be allowed a credit against the amount of tax due under
142 this subdivision for any electric power generation taxes
143 or a tax similar to the tax imposed by subdivision (1) of
144 this subsection paid by the taxpayer with respect to the
145 electric power to the state in which the power was
146 generated or produced. The amount of credit allowed

147 may not exceed the tax liability arising under this
148 subdivision with respect to the sale of the power.

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

152 (1) *Retired units; inactive reserve.* — If a generating
153 unit is retired from service or placed in inactive reserve,
154 a taxpayer may not be liable for tax computed with
155 respect to the taxable generating capacity of the unit for
156 the period that the unit is inactive or retired. The
157 taxpayer shall provide written notice to the joint
158 committee on government and finance, as well as to any
159 other entity as may be otherwise provided by law,
160 eighteen months prior to retiring any generating unit
161 from service in this state.

162 (2) *New generating units.* — If a new generating unit,
163 other than a peaking unit, is placed in initial service on
164 or after the effective date of this section, the generating
165 unit's taxable generating capacity shall equal forty
166 percent of the official capability of the unit: *Provided,*
167 That the taxable generating capacity of a county or
168 municipally owned generating unit shall equal zero
169 percent of the official capability of the unit and for
170 taxable periods ending on or before the thirty-first day
171 of December, two thousand seven, the taxable
172 generating capacity of a generating unit utilizing a
173 turbine powered primarily by wind shall equal five
174 percent of the official capability of the unit: *Provided*
175 *further,* That for taxable periods beginning on or after
176 the first day of January, two thousand eight, the taxable
177 generating capacity of a generating unit utilizing a

178 turbine powered primarily by wind shall equal twelve
179 percent of the official capability of the unit.

180 (3) *Peaking units.* — If a peaking unit is placed in
181 initial service on or after the effective date of this
182 section, the generating unit's taxable generating
183 capacity shall equal five percent of the official
184 capability of the unit: *Provided*, That the taxable
185 generating capacity of a county or municipally owned
186 generating plant shall equal zero percent of the official
187 capability of the unit.

188 (4) *Transfers of interests in generating units.* — If a
189 taxpayer acquires an interest in a generating unit, the
190 taxpayer shall include the computation of taxable
191 generating capacity of the unit in the determination of
192 the taxpayer's tax liability as of the date of the
193 acquisition. Conversely, if a taxpayer transfers an
194 interest in a generating unit, the taxpayer may not for
195 periods thereafter be liable for tax computed with
196 respect to the taxable generating capacity of the
197 transferred unit.

198 (5) *Proration, allocation.* — The Tax Commissioner
199 shall promulgate rules in conformity with the provisions
200 of article three, chapter twenty-nine-a of this code to
201 provide for the administration of this section and to
202 equitably prorate taxes for a taxable year in which a
203 generating unit is first placed in service, retired or
204 placed in inactive reserve, or in which a taxpayer
205 acquires or transfers an interest in a generating unit, to
206 equitably allocate and reallocate adjustments to net
207 generation, and to equitably allocate taxes among
208 multiple taxpayers with interests in a single generating
209 unit, it being the intent of the Legislature to prohibit

210 multiple taxation of the same taxable generating
211 capacity.

212 So as to provide for an orderly transition with respect
213 to the rate making effect of this section, those electric
214 light and power companies which, as of the effective
215 date of this section, are permitted by the West Virginia
216 Public Service Commission to utilize deferred
217 accounting for purposes of recovery from ratepayers of
218 any portion of business and occupation tax expense
219 under this article shall be permitted, until the time that
220 action pursuant to a rate application or order of the
221 commission provides for appropriate alternative rate-
222 making treatment for such expense, to recover the tax
223 expense imposed by this section by means of deferred
224 accounting to the extent that the tax expense imposed
225 by this section exceeds the level of business and
226 occupation tax under this article currently allowed in
227 rates.

228 (6) *Electricity generated by manufacturer or affiliate*
229 *for use in manufacturing activity.* — When electricity
230 used in a manufacturing activity is generated in this
231 state by the person who owns the manufacturing facility
232 in which the electricity is used and the electricity
233 generating unit or units producing the electricity so
234 used are owned by the manufacturer, or by a member of
235 the manufacturer's controlled group, as defined in
236 Section 267 of the Internal Revenue Code of 1986, as
237 amended, the generation of the electricity may not be
238 taxable under this article: *Provided*, That any electricity
239 generated or produced at the generating unit or units
240 which is sold or used for purposes other than in the
241 manufacturing activity shall be taxed under this section
242 and the amount of tax payable shall be adjusted to be

243 equal to an amount which is proportional to the
244 electricity sold for purposes other than the
245 manufacturing activity. The Department of Revenue
246 shall promulgate rules in accordance with article three,
247 chapter twenty-nine-a of the code: *Provided, however,*
248 That the rules shall be promulgated as emergency rules.

249 (d) Beginning the first day of June, one thousand nine
250 hundred ninety-five, electric light and power companies
251 that actually paid tax based on the provisions of
252 subdivision (3), subsection (a), section two-d of this
253 article or section two-m of this article for every taxable
254 month in one thousand nine hundred ninety-four shall
255 determine their liability for payment of tax under this
256 article in accordance with subdivisions (1) and (2) of
257 this subsection. All other electric light and power
258 companies shall determine their liability for payment of
259 tax under this article exclusively under this section
260 beginning the first day of June, one thousand nine
261 hundred ninety-five, and thereafter.

262 (1) If for taxable months beginning on or after the first
263 day of June, one thousand nine hundred ninety-five,
264 liability for tax under this section is equal to or greater
265 than the sum of the power company's liability for
266 payment of tax under subdivision (3), subsection (a),
267 section two-d of this article and this section, then the
268 company shall pay the tax due under this section and
269 not the tax due under subdivision (3), subsection (a),
270 section two-d of this article and section two-m of this
271 article. If tax liability under this section is less than the
272 tax shall be paid under subdivision (3), subsection (a),
273 section two-d of this article and section two-m and the
274 tax due under this section may not be paid.

275 (2) Notwithstanding subdivision (1) of this subsection,
276 for taxable years beginning on or after the first day of
277 January, one thousand nine hundred ninety-eight, all
278 electric and light power companies shall determine their
279 liability for payment of tax under this article
280 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.**

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

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

12 (1) “Qualified contractually agreed contribution”
13 means money paid, or the lower of the cost or fair
14 market value, at the time of transfer, of property
15 transferred, by the taxpayer, the owner of the taxpayer
16 or the operator or owner of the wind turbine unit to a
17 county in which the wind turbine unit is located, a
18 county school board of the county in which the wind
19 turbine unit is located or to a municipality located in
20 the county in which the wind turbine unit is located
21 pursuant to a written transfer agreement.

22 (A) The term “qualified contractually agreed
23 contribution” does not include any payment in lieu of
24 taxes or any tax, fee or levy paid to any county, county
25 school board or municipality or to any other
26 governmental subdivision, agency or instrumentality of
27 this state or of any county or municipality.

28 (B) The term “qualified contractually agreed
29 contribution” does not include any payment in lieu of
30 taxes or any tax, fee or levy paid to any county, county
31 school board or municipality or to any other
32 governmental subdivision, agency or instrumentality of
33 any state other than this state or of any county or
34 municipality of any state other than this state.

35 (C) The term “qualified contractually agreed
36 contribution” does not include any payment in lieu of
37 taxes or any tax, fee or levy paid to the United States or
38 to any governmental subdivision of the United States or
39 to any agency or instrumentality of the United States or
40 to any foreign government or subdivision, agency or
41 instrumentality thereof.

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

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

51 (4) “Written transfer agreement” means a written

52 contract or written promise to transfer money or
53 property to a county in which the wind turbine unit is
54 located, a county school board of the county in which
55 the wind turbine unit is located or a municipality
56 located in the county in which the wind turbine unit is
57 located, executed not later than the first day of March,
58 two thousand seven, by the taxpayer, the owner of the
59 taxpayer or the operator or owner of the wind turbine
60 unit and executed by the county commission of the
61 county in which the wind turbine unit is located or by
62 any officer or representative of the county commission
63 having authority to execute binding legal documents for
64 the county commission, the county school board of the
65 county in which the wind turbine unit is located or any
66 officer or representative of the county school board
67 having authority to execute binding legal documents for
68 the county school board, or the city council, mayor or
69 city manager of a municipality located in the county in
70 which the wind turbine unit is located or any officer or
71 representative of the municipality having authority to
72 execute binding legal documents for the municipality.

73 (c) *Credit limitations.* —

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

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

83 this section and no other tax imposed by this code may
84 be offset by the credit.

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

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

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

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

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

108 (A) The year a qualified contractually agreed
109 contribution in money was paid or a qualified
110 contractually agreed contribution in property was

111 delivered to the county, the county school board or the
112 municipality; or

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

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

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

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

128 (1) *Mere change in form of business.* — The credit
129 allowed under this section shall not be forfeited by
130 reason of a mere change in the form of the entity or
131 organization that is conducting the business so long as
132 the successor business continues to remain a taxpayer,
133 as defined in this section, in this state, operating the
134 wind turbine unit that was originally owned or operated
135 by the predecessor taxpayer. Such successor shall
136 acquire the amount of credit that remains available
137 under this section for each subsequent taxable year
138 until the credit expires or is exhausted, based on the
139 years remaining and amount of credit remaining to

140 which the transferor was entitled at the time of the
141 transfer.

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

156 (3) *Apportionment in the year of transfer.* — Upon
157 transfer or sale, the successor shall acquire the amount
158 of credit that remains available under this section for
159 each taxable year subsequent to the taxable year of the
160 transferor during which the transfer occurred and, for
161 the year of transfer, an amount of annual credit for the
162 year in the same proportion as the number of days
163 remaining in the transferor's taxable year bears to the
164 total number of days in the transferor's taxable year.

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

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

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

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 02 2007

Time 3:30 pm