

H. B. 3240

(By Delegate D. Poling)
[Introduced February 21, 2011; referred to the
Committee on Finance.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §11-13BB-1, §11-13BB-2, §11-13BB-3, §11-13BB-4 and §11-13BB-5; and to amend and reenact §24-2-1j of said code, all relating to the establishment of tax credits against the coal severance tax and payments by taxpayers claiming the credit to utilities providing electric service to energy intensive industrial consumers at special rates; legislative findings; defining certain terms; and setting forth the amount of the tax credits, when the tax credits may be taken, how the tax credits are to be calculated and allocated, how the payments triggered by the tax credits are to be made to utilities, and when the provisions authorizing the tax credit expire.

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 §11-13BB-1, §11-13BB-2, §11-13BB-3, §11-13BB-4 and §11-13BB-5; and that §24-2-1j of said

1 code be amended and reenacted, all to read as follows:

2 **CHAPTER 11. TAXATION.**

3 **ARTICLE 13BB. ENERGY INTENSIVE INDUSTRIAL CONSUMERS**

4 **REVITALIZATION TAX CREDIT.**

5 **§11-13BB-1. Short title.**

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

8 **§11-13BB-2. Legislative findings and purpose.**

9 The Legislature finds that:

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

14 (b) As a consequence, a number of energy intensive industrial
15 consumers of electric power have located in the state and have
16 provided jobs for its citizens and an increased tax base that
17 contributes to the support of schools, other institutions, and
18 programs that benefit all West Virginians.

19 (c) As the result of competitive disadvantages emanating from
20 outside the state and the current state of the national economy,
21 some energy intensive industrial consumers of electric power have
22 had to cease doing business in the state or are experiencing or may
23 experience strains that could threaten their viability and
24 continued operation.

25 (d) Conversely, coal production in the state is relatively
26 stable and is benefitting from demand from coal purchasers inside

1 the state, outside the state, and outside the country, which demand
2 has increasingly benefitted the state in terms of its coal
3 severance tax revenues.

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

13 (f) In furtherance of its findings, the Legislature's purpose
14 in this article is to create a credit, as provided in section three
15 of this article, against the coal severance tax imposed and levied
16 under the provisions of subsections (a) and (b), section three,
17 article thirteen-a of this chapter, of which the primary ultimate
18 economic beneficiary shall be energy intensive industrial consumers
19 of electric power determined to be in need of special rate
20 assistance pursuant to section one-j, article two, chapter twenty-
21 four of this code.

22 **§11-13BB-3. Amounts of credits; Limitations.**

23 Every taxpayer which is a supplier of coal to a West Virginia
24 electric utility providing a special rate to one or more energy
25 intensive industrial consumers of electric power pursuant to
26 section one-j, article two, chapter twenty-four of this code and

1 which is subject to paying a full five percent tax on the privilege
2 of severing coal levied and imposed by subsections (a) and (b),
3 section three, article thirteen-a of this chapter, prior to the
4 application of any other credits against the tax, shall be entitled
5 to a credit against that tax in an amount determined by the Public
6 Service Commission pursuant to section one-j, article two, chapter
7 twenty-four of this code, subject to the following limitations:
8 (a) the total credits available to all taxpayers under this section
9 shall not exceed \$50 million in any calendar year; and (b) the
10 total credits available to any taxpayer in a given calendar year
11 shall not exceed ninety-three percent of that taxpayer's tax
12 liability imposed and levied under subsections (a) and (b) section
13 three, article thirteen-a of this chapter, so as to preserve
14 undiminished the seven percent of total coal severance tax revenues
15 that is apportioned among counties and municipalities pursuant to
16 section six, article thirteen-a of this chapter.

17 **§11-13BB-4. Required payments to public utilities.**

18 (a) Each person claiming any tax credit pursuant to section
19 three of this article shall, as a condition of receiving that tax
20 credit, make payment equal to ninety-seven percent of the amount of
21 that credit to the public utility providing electric power to the
22 special rate customer whose special rate required the funding
23 generated by that tax credit, as determined by the Public Service
24 Commission pursuant to section one-j, article two, chapter twenty-
25 four of this code.

26 (b) Each taxpayer that elects to participate in this tax

1 credit and required payment program shall notify the State Tax
2 Department of the West Virginia Department of Revenue of its
3 election to participate at such time and in such form of
4 notification as is specified by the tax department. The State Tax
5 Department shall provide updated notification to the commission of
6 the identity of taxpayers from which it has received notification
7 of voluntary participation. This information may be provided to
8 the electric utilities by the commission for purpose of
9 calculating, pursuant to subsection (g), section one-j, article
10 two, chapter twenty-four of this code, the allocated share of tax
11 credits that are available to each taxpayer, and payments that are
12 required to be made to the public utility in order to qualify for
13 the tax credit. Payment to the public utility shall be made no
14 later than the time at which that tax against which the credit is
15 taken would have been due and payable to the state under the
16 provisions of section nine, article thirteen-a of this chapter.

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

23 **§11-13BB-5. Expiration.**

24 The provisions of this article respecting the generation of
25 tax credits for new calendar years shall expire ten years from the
26 effective date of this article.

1 **CHAPTER 24. PUBLIC SERVICE COMMISSION.**

2 **ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.**

3 **§24-2-1j. Special rates for energy intensive industrial consumers**
4 **of electric power.**

5 (a) The Legislature hereby finds that:

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

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

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

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

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

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

22 (7) To assist the commission in the exercise of its authority
23 to establish special rates under this section, the Legislature
24 creates in article thirteen-bb, chapter eleven of this code a tax
25 credit mechanism to provide a source of funding to support special
26 rates of which the commission may avail itself in exercising said

1 authority.

2 (b) As used in this section:

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

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

9 (c) In addition to any authority of the Commission to allow
10 special rates or contracts under any other provision of the code or
11 rule, and in addition to all other factors which the commission may
12 consider in setting rates for consumers of electric power,
13 including, but not limited to the Commission's responsibilities
14 under subsection (b), section one, article one of this chapter, and
15 notwithstanding any other provisions of this code to the contrary,
16 in setting a special rate the commission may take into
17 consideration fluctuations in market prices for the goods or
18 products produced by the energy intensive industrial consumer of
19 electric power, or other variables or factors which may be relevant
20 to or affect the continuing vitality of the energy intensive
21 industrial consumer of electric power in dynamic markets. In
22 setting a special rate by reference to fluctuations in market
23 prices for the goods and products produced by an energy intensive
24 industrial consumer of electric power, the commission may establish
25 variable rates including, but not limited to, ceilings and floors
26 on the special rate, banking or crediting mechanisms, caps, limits

1 or other similar types of safeguards that are intended by the
2 commission, in its reasonable judgment, to provide appropriate
3 flexibility and predictability in the special rate over time, to
4 permit the energy intensive industrial customer the ability to make
5 the capital investments and other commitments necessary to support
6 the continued operation of the facility.

7 (d) An energy intensive industrial consumer wishing to apply
8 for a special rate shall first enter into negotiations with the
9 utility that provides it with electric power, regarding the terms
10 and conditions of a mutually agreeable special rate. If the
11 negotiations result in an agreement between the energy intensive
12 industrial consumer and the utility, the energy intensive
13 industrial consumer and the utility shall make a joint filing with
14 the commission seeking approval of the proposed special rate. If
15 the negotiations are unsuccessful, the energy intensive industrial
16 consumer may file a petition with the commission to consider
17 establishing a special rate. The commission shall have the
18 authority to establish a special rate upon the filing of either a
19 joint filing or a petition pursuant to this section.

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

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

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

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

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

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

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

24 (f) The Commission shall determine whether any excess revenue
25 or revenue shortfall created by a special rate authorized pursuant
26 to this section should be allocated among any other customers of

1 the utility. In making that determination, the Commission shall
2 consider all relevant factors, including whether such allocation is
3 just, reasonable, and fairly balances the interests of other
4 customers, the utility, and the customer receiving the special
5 rate.

6 (g) If the Commission determines that a special rate for an
7 energy intensive industrial consumer of electric power would create
8 a revenue shortfall which it is not reasonable or equitable to
9 allocate among a utility's other customers in its entirety, the
10 Commission may consider the availability of tax credits and
11 payments required to be made to public utilities pursuant to
12 article thirteen-bb, chapter eleven of this code to reduce or
13 eliminate a revenue shortfall. The Commission shall identify in
14 each proceeding in which it establishes a special rate the amount
15 of any unallocated revenue shortfall in need of funding pursuant to
16 article thirteen-bb, chapter eleven of this code to defray it and
17 shall project the amount of the gross tax credits needed for that
18 purpose after taking into consideration the net amounts of such
19 credits that are required to be paid to utilities pursuant to
20 subsection (a), section four, article thirteen-bb, chapter eleven
21 of this code and the limits specified in section three, article
22 thirteen-bb, chapter eleven of this code. The Commission's
23 determination as to the amount of tax credits on which it relies in
24 establishing a given special rate, shall constitute an
25 authorization for each supplier of West Virginia coal to the
26 utility offering that special rate to claim its allocated share of

1 such total amount of tax credits. The allocated share shall be
2 calculated by the affected public utility, subject to the approval
3 of the Commission.

4 (h) The Commission shall include in the annual report to the
5 Legislature which it makes pursuant to subsection (d), section one,
6 article one of this chapter a report on the tax credits being
7 employed pursuant to article thirteen-bb, chapter eleven of this
8 code to help fund special rates created under this section.

NOTE: The purpose of this bill is to provide a tax credit for electric utilities that provide electric service to energy intensive industrial consumers under a special rate that is approved by the Public Service Commission, of which the primary ultimate economic beneficiary will be the energy intensive industrial consumer. Each taxpayer paying five percent coal severance tax would be entitled to a credit against that tax as determined by the Public Service Commission, in order to provide for a special rate for energy intensive industrial consumers in cases where such special rate would create a revenue shortfall to the electric utility providing such special rate, which would not be reasonable to allocate to other customers of the utility. The taxpayer claiming the tax credit must make equal payment to the electric utility providing the electric service to the energy intensive industrial consumer receiving the special rate. In no event may the amount of the tax credit exceed fifty million dollars in any year in respect of any individual special rate.

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

Article 13BB is new; therefore, it has been completely underscored.