

ENROLLED

H. B. 101

(By Mr. Speaker, (Mr. Thompson) and Delegate Armstead)

[By Request of the Executive]

[Passed March 16, 2012; in effect from passage.]

10 AN ACT to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §11-13CC-1,
12 §11-13CC-2, §11-13CC-3, §11-13CC-3a, §11-13CC-4 and
13 §11-13CC-5; and to amend and reenact §24-2-1j of said code,
14 all relating to creating the Energy Intensive Industrial
15 Consumers Revitalization Tax Credit Act; making legislative
16 findings and declaring purpose; establishing tax credits for
17 suppliers of coal to certain electric utilities who are
18 subject to the coal severance tax subject to certain
19 limitations and requirements; specifying when the tax credits
20 may be claimed; authorizing the carry forward of tax credits
21 subject to certain limitations and restrictions; specifying
22 how the tax credits are calculated and allocated; providing
23 for applicability of tax credit against required minimum
24 severance tax payments on coal; specifying how the payments

1 triggered by the tax credits are to be calculated and made;
2 authorizing the notification and disclosure of certain
3 information related to the implementation and administration
4 of tax credits and required payments; establishing certain
5 effective dates and expiration dates; granting the Public
6 Service Commission certain authority concerning special rates
7 and prescribing certain limitations and requirements related
8 thereto; and requiring information on special rates in the
9 Public Service Commission's annual report.

10 *Be it enacted by the Legislature of West Virginia:*

11 That the Code of West Virginia, 1931, as amended, be amended
12 by adding thereto a new article, designated §11-13CC-1, §11-13CC-2,
13 §11-13CC-3, §11-13CC-3a, §11-13CC-4 and §11-13CC-5; and that
14 §24-2-1j of said code be amended and reenacted, all to read as
15 follows:

16 **CHAPTER 11. TAXATION.**

17 **ARTICLE 13CC. ENERGY INTENSIVE INDUSTRIAL CONSUMERS REVITALIZATION**

18 **TAX CREDIT.**

19 **§11-13CC-1. Short title.**

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

22 **§11-13CC-2. Legislative findings and purpose.**

23 The Legislature finds that:

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

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

10 (c) As the result of competitive disadvantages emanating from
11 outside the state and the current state of the national economy,
12 some energy intensive industrial consumers of electric power have
13 had to cease doing business in the state or are experiencing or may
14 experience strains that could threaten their viability and
15 continued operation.

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

21 (e) It is in the public interest for the state to assist
22 eligible energy intensive industrial consumers of electric power
23 determined to be in need of special rate assistance pursuant to
24 subsection (g), section one-j, article two, chapter twenty-four of

1 this code, in order to encourage them to locate, to remain in
2 operation, or to resume operation, in West Virginia on a long-term
3 basis, by employing a portion of the coal severance tax revenues to
4 reduce such industrial consumers' electric power costs without
5 imposing an undue burden on electric utilities or their other
6 customers.

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

16 **§11-13CC-3. Amounts of credits; limitations.**

17 (a) Every taxpayer which is a supplier of coal to a West
18 Virginia electric utility providing a special rate to one or more
19 eligible energy intensive industrial consumers of electric power
20 pursuant to subsection (g), section one-j, article two, chapter
21 twenty-four of this code and which is subject to paying the tax on
22 the privilege of severing coal levied and imposed by subsections
23 (a) and (b), section three, article thirteen-a of this chapter,
24 prior to the application of any other credits against the tax,

1 shall be entitled to a credit against that tax in an amount
2 determined by the Public Service Commission pursuant to subsection
3 (g), section one-j, article two, chapter twenty-four of this code,
4 subject to the following limitations:

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

10 (2) The total aggregate credits available to all taxpayers
11 under this section shall not exceed \$20 million in any calendar
12 year; and

13 (3) The total credits available to any taxpayer in a given
14 calendar year shall not exceed ninety-three percent of that
15 taxpayer's tax liability imposed and levied under subsections (a)
16 and (b), section three, article thirteen-a of this chapter, so as
17 to preserve undiminished the seven percent of total coal severance
18 tax revenues that is apportioned among counties and municipalities
19 pursuant to section six, article thirteen-a of this chapter.

20 (b) If the full amount of the \$20 million in credits
21 authorized by this article is not allocated and claimed in any
22 calendar year, during all periods when a special rate is in effect
23 for any one or more eligible energy intensive industrial consumers,
24 the unused credits may be carried forward to future years:

1 *Provided*, That the maximum aggregate amount of unused credits that
2 may be carried forward to future years shall not exceed \$15 million
3 at any time. In no event may the amount of credits allocated and
4 claimed in any single year, including unused credits that have been
5 carried forward, exceed \$35 million.

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

20 (d) All unused credits authorized under this article expire
21 and cease to be usable for tax years beginning on or after December
22 31, 2021.

23 (e) The credits authorized in this article shall not become
24 available for any purpose prior to the Public Service Commission's

1 first approval of a special rate for an eligible energy intensive
2 industrial consumer. The credits provided in this article may be
3 claimed by taxpayers against periodic installment payments of
4 severance tax paid under the provisions of section nine, article
5 thirteen-a of this chapter.

6 **§11-13CC-3a. Applicability to minimum severance tax credit.**

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

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

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

1 as an adjustment to the price of coal sold to the public utility.

2 (b) Each taxpayer that elects to participate in this tax
3 credit and required payment program shall notify the State Tax
4 Department of its election to participate at the time and in such
5 form of notification as prescribed by the State Tax Department.
6 Notwithstanding the provisions of section five-d, article ten of
7 this chapter or any other provision of this code, the State Tax
8 Department shall provide updated notification to the Public Service
9 Commission of the identity of taxpayers from which it has received
10 notification of voluntary participation, and other information
11 necessary for the efficient and accurate administration of this
12 article. Notwithstanding any provision of this code to the
13 contrary, the Public Service Commission shall disclose to the State
14 Tax Department information necessary for the efficient and accurate
15 administration of this article. This information may be provided
16 to the electric utilities by the Public Service Commission for
17 purpose of calculating, pursuant to subsection (g), section one-j,
18 article two, chapter twenty-four of this code, the allocated share
19 of tax credits that are available to each taxpayer, and payments
20 that are required to be made to the public utility in order to
21 qualify for the tax credit. Information disclosure to electric
22 utilities by the Public Service Commission is limited to that
23 information necessary for the calculations. Payment to the public
24 utility shall be made no later than the time at which the tax

1 against which the credit is taken would have been due and payable
2 to the state under the provisions of section nine, article
3 thirteen-a of this chapter.

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

10 **§11-13CC-5. Expiration.**

11 The provisions of this article shall be effective for tax
12 years beginning on or after January 1, 2012. No new tax credits
13 may be created for any tax year beginning on or after December 31,
14 2021. All unused tax credits expire and cease to be useable in tax
15 years beginning on or after December 31, 2021.

16 **CHAPTER 24. PUBLIC SERVICE COMMISSION.**

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

18 **§24-2-1j. Special rates for energy intensive industrial consumers**
19 **of electric power.**

20 (a) The Legislature hereby finds that:

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

1 for West Virginia;

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

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

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

19 (5) It is in the best interests of West Virginia, the citizens
20 of West Virginia, electric public utilities in West Virginia, and
21 all consumers of electric power in West Virginia, including
22 residential customers, to encourage the continued development,
23 construction, operation, maintenance and expansion in West Virginia
24 of industrial plants and facilities which are energy intensive

1 consumers of electric power, thereby increasing the creation,
2 preservation and retention of jobs, expanding the tax base, helping
3 keep power rates low for all consumers of electric power, and
4 enhancing the productive capacity, competitiveness and economic
5 opportunities of all citizens of West Virginia;

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

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

22 (b) As used in this section:

23 (1) "Energy intensive industrial consumer" means an industrial
24 facility, plant or enterprise that has a contract demand of at

1 least fifty thousand kilowatts of electric power at its West
2 Virginia facilities under normal operating conditions.

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

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

1 flexibility and predictability in the special rate over time, to
2 permit the energy intensive industrial customer the ability to make
3 the capital investments and other commitments necessary to support
4 the continued operation of the facility.

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

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

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

23 (2) Create or retain at least twenty-five full-time jobs in
24 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

1 or revenue shortfall created by a special rate authorized pursuant
2 to this section should be allocated among any other customers of
3 the utility. In making that determination, the commission shall
4 consider all relevant factors, including whether such allocation is
5 just, reasonable, and fairly balances the interests of other
6 customers, the utility, and the customer receiving the special
7 rate.

8 (g) If the commission determines that: (1) A special rate is
9 necessary for the creation, preservation or retention of jobs by
10 the energy intensive industrial consumer; (2) in connection with
11 the initial special rate that is authorized by the commission for
12 an energy intensive industrial consumer, the energy intensive
13 industrial consumer will increase the number of persons it employs,
14 including both persons who have been previously employed by the
15 energy intensive industrial consumer and persons not previously
16 employed by the energy intensive industrial consumer, by at least
17 one hundred fifty persons as a result of the special rate; (3) the
18 energy intensive industrial consumer will employ no fewer than
19 three hundred persons, which number may include, but is not limited
20 to, the persons newly hired or rehired pursuant to the preceding
21 clause in this subsection; (4) the energy intensive industrial
22 consumer has a contract demand of at least two hundred fifty
23 thousand kilowatts of electric power at its West Virginia
24 facilities under normal operating conditions; and (5) a special

1 rate for an energy intensive industrial consumer of electric power
2 would create a revenue shortfall, the commission shall, prior to
3 determining whether it is reasonable to allocate all or a portion
4 of the revenue shortfall amount among a public utility's other
5 customers, first consider the availability of tax credits and
6 payments required to be made to public utilities pursuant to
7 article thirteen-cc, chapter eleven of this code to reduce or
8 eliminate a revenue shortfall. The commission shall identify in
9 each proceeding in which it establishes a special rate for an
10 eligible energy intensive industrial consumer the amount of any
11 unallocated revenue shortfall in need of funding pursuant to
12 article thirteen-cc, chapter eleven of this code to defray it and
13 shall project the amount of the gross tax credits needed for that
14 purpose after taking into consideration the net amounts of credits
15 that are required to be paid to utilities pursuant to subsection
16 (a), section four, article thirteen-cc, chapter eleven of this code
17 and the limits specified in section three, article thirteen-cc,
18 chapter eleven of this code. Tax credits authorized under this
19 section may be designated by the commission only in respect of
20 periods of time during which the eligible energy intensive
21 industrial consumer employs at least three hundred persons. The
22 commission's determination as to the amount of tax credits on which
23 it relies in establishing a given special rate, shall constitute an
24 authorization for each supplier of West Virginia coal to the

1 utility offering that special rate to claim its allocated share of
2 the total amount of tax credits. The allocated share shall be
3 calculated by the affected public utility, subject to the approval
4 of the commission.

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