

Senate Bill No. 658

(By Senators McCabe, Hall, Foster, Boley, Helmick, Fanning,
Green, K. Facemyer, Barnes, Nohe and Jenkins)

[Introduced February 20, 2012; referred to the Committee on
Economic Development; and then to the Committee on Finance.]

**FISCAL
NOTE**

A BILL 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-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;
establishing a \$40 million limit on the tax credits; setting
forth when the tax credits may be taken; setting forth how the
tax credits are calculated and allocated; setting forth how
the payments triggered by the tax credits are to be made;
establishing when the tax credit expires; granting the Public
Service Commission certain authority concerning special rates;
and requiring information on special rates in the Public

1 Service Commission's annual report.

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

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

7 **CHAPTER 11. TAXATION.**

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

9 **TAX CREDIT.**

10 **§11-13CC-1. Short title.**

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

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

14 The Legislature finds that:

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

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

1 (c) As the result of competitive disadvantages emanating from
2 outside the state and the current state of the national economy,
3 some energy intensive industrial consumers of electric power have
4 had to cease doing business in the state or are experiencing or may
5 experience strains that could threaten their viability and
6 continued operation.

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

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

21 (f) In furtherance of its findings, the Legislature's purpose
22 in this article is to create a credit, as provided in section three
23 of this article, against the coal severance tax imposed and levied
24 under the provisions of subsections (a) and (b), section three,

1 article thirteen-a of this chapter, of which the primary ultimate
2 economic beneficiary shall be eligible energy intensive industrial
3 consumers of electric power determined to be in need of special
4 rate assistance pursuant to section one-j, article two, chapter
5 twenty-four of this code.

6 **§11-13CC-3. Amounts of credits; limitations.**

7 Every taxpayer which is a supplier of coal to a West Virginia
8 electric utility providing a special rate to one or more eligible
9 energy intensive industrial consumers of electric power pursuant to
10 section one-j, article two, chapter twenty-four of this code and
11 which is subject to paying a full five percent tax on the privilege
12 of severing coal levied and imposed by subsections (a) and (b),
13 section three, article thirteen-a of this chapter, prior to the
14 application of any other credits against the tax, shall be entitled
15 to a credit against that tax in an amount determined by the Public
16 Service Commission pursuant to section one-j, article two, chapter
17 twenty-four of this code, subject to the following limitations: (a)
18 The total credits available to all taxpayers under this section
19 shall not exceed \$40 million in any calendar year; and (b) the
20 total credits available to any taxpayer in a given calendar year
21 shall not exceed ninety-three percent of that taxpayer's tax
22 liability imposed and levied under subsections (a) and (b) section
23 three, article thirteen-a of this chapter, so as to preserve
24 undiminished the seven percent of total coal severance tax revenues

1 that is apportioned among counties and municipalities pursuant to
2 section six, article thirteen-a of this chapter. If the full
3 amount of the \$40 million in credits authorized by this section is
4 not allocated and claimed in any calendar year, during all periods
5 when a special rate is in effect for any one or more eligible
6 energy intensive industrial consumers the unused credits may be
7 carried forward to future years: *Provided*, That in no event may the
8 amount of credits allocated and claimed in any single year,
9 including unused credits that have been carried forward, exceed \$55
10 million dollars: *Provided, however*, That if in any year the
11 taxpayers that are suppliers of coal to a West Virginia electric
12 utility providing a special rate to one or more eligible energy
13 intensive industrial consumers of electric power entitled to
14 receive credits pursuant to this section cannot or do not claim
15 credits in an amount equal to the amount of tax credits designated
16 by the commission, then the credits may be allocated to and claimed
17 by any taxpayer that is subject to paying a full five percent tax
18 on the privilege of severing coal levied and imposed by subsections
19 (a) and (b), section three, article thirteen-a of this chapter and
20 that complies with the requirements and procedures set forth in
21 this section: *Provided further*, That all unused credits expire ten
22 years from the effective date of this article: *And provided*
23 *further*, That the credits authorized in this section do not become
24 available for any purpose prior to the commission's first approval

1 of a special rate for an eligible energy intensive industrial
2 consumer.

3 **§11-13CC-4. Required payments to public utilities.**

4 (a) Each person claiming any tax credit pursuant to section
5 three of this article shall, as a condition of receiving that tax
6 credit, make payment equal to ninety-seven percent of the amount of
7 that credit to the public utility providing electric power to the
8 special rate customer whose special rate required the funding
9 generated by that tax credit, as determined by the Public Service
10 Commission pursuant to section one-j, article two, chapter twenty-
11 four of this code.

12 (b) Each taxpayer that elects to participate in this tax
13 credit and required payment program shall notify the State Tax
14 Department of the West Virginia Department of Revenue of its
15 election to participate at such time and in such form of
16 notification as is specified by the tax department. The State Tax
17 Department shall provide updated notification to the commission of
18 the identity of taxpayers from which it has received notification
19 of voluntary participation. This information may be provided to the
20 electric utilities by the commission for purpose of calculating,
21 pursuant to subsection (g), section one-j, article two, chapter
22 twenty-four of this code, the allocated share of tax credits that
23 are available to each taxpayer, and payments that are required to
24 be made to the public utility in order to qualify for the tax

1 credit. Payment to the public utility shall be made no later than
2 the time at which that tax against which the credit is taken would
3 have been due and payable to the state under the provisions of
4 section nine, article thirteen-a of this chapter.

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

11 **§11-13CC-5. Expiration.**

12 The provisions of this article respecting the generation of
13 tax credits for new calendar years expires ten years from the
14 effective date of this article.

15 **CHAPTER 24. PUBLIC SERVICE COMMISSION.**

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

17 **§24-2-1j. Special rates for energy intensive industrial consumers**
18 **of electric power.**

19 (a) The Legislature hereby finds that:

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

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

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

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

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

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

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

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

21 (b) As used in this section:

22 (1) "Energy intensive industrial consumer" means an industrial
23 facility, plant or enterprise that has a contract demand of at
24 least fifty thousand kilowatts of electric power at its West

1 Virginia facilities under normal operating conditions.

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

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

1 permit the energy intensive industrial customer the ability to make
2 the capital investments and other commitments necessary to support
3 the continued operation of the facility.

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

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

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

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

24 (3) Have invested not less than \$500,000 in fixed assets,

1 including machinery and equipment, in West Virginia;

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

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

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

23 (f) The commission shall determine whether any excess revenue
24 or revenue shortfall created by a special rate authorized pursuant

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

7 (g) If the commission determines that: (1) A special rate is
8 necessary for the creation, preservation or retention of jobs by
9 the energy intensive industrial consumer; (2) in connection with
10 the initial special rate that is authorized by the commission for
11 an energy intensive industrial consumer, the energy intensive
12 industrial consumer will increase the number of persons it employs,
13 including both persons who have been previously employed by the
14 energy intensive industrial consumer and persons not previously
15 employed by the energy intensive industrial consumer, by at least
16 one hundred fifty persons as a result of the special rate; (3) the
17 energy intensive industrial consumer will employ no fewer than
18 three hundred persons, which number may include, but is not limited
19 to, the persons newly hired or rehired pursuant to the preceding
20 clause in this subsection; and (4) a special rate for an energy
21 intensive industrial consumer of electric power would create a
22 revenue shortfall which it is not reasonable or equitable to
23 allocate among a utility's other customers in its entirety, the
24 commission may consider the availability of tax credits and

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

24 (h) The commission shall include in the annual report to the

1 Legislature which it makes pursuant to subsection (d), section one,
2 article one of this chapter a report on the tax credits being
3 employed pursuant to article thirteen-cc, chapter eleven of this
4 code to help fund special rates created under this section.

NOTE: The purpose of this bill is to create the Energy Intensive Industrial Consumers Revitalization Tax Credit Act. The bill establishes tax credits for suppliers of coal to certain electric utilities who are subject to the coal severance tax. The bill makes legislative findings. The bill establishes a \$40 million limit on the tax credits. The bill sets forth when the tax credits may be taken. The bill sets forth how the tax credits are calculated and allocated. The bill requires that in order to take the tax credit the taxpayer must make a payment equal to ninety-seven percent of the credit to the utility that provides the electric power to the special rate customer. The bill establishes that the tax credit expires in ten years from the date it becomes effective. The bill grants the Public Service Commission certain authority concerning special rates. The bill also requires information on special rates in the Public Service Commission's annual report.

§11-13CC-1, §11-13CC-2, §11-13CC-3, §11-13CC-4 and §11-13CC-5 are new; therefore, strike-throughs and underscoring have been omitted.

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