WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 578

SENATORS ROBERTS AND CLINE

[Introduced January 22, 2020; referred

to the Committee on Energy, Industry, and Mining;

and then to the Committee on Finance]

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

Be it enacted by the Legislature of West Virginia:

ARTICLE 13. BUSINESS AND OCCUPATION TAX.

§11-13-2o. Business of generating or producing or selling electricity on and after June 1, 1995; definitions; rate of tax; exemptions; effective date.

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

(1) "Average four-year generation" is computed by dividing by four the sum of a generating unit's net generation, expressed in kilowatt hours, for calendar years 1991, 1992, 1993, and 1994. For any generating unit which was newly installed and placed into commercial operation after January 1, 1991, and prior to the effective date of this section, "average four-year generation" is computed by dividing the unit's net generation for the period beginning with the month in which the unit was placed into commercial operation and ending with the month preceding the effective date of this section by the number of months in the period and multiplying the resulting amount by twelve with the result being a representative 12-month average of the unit's net generation while in an operational status.

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

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

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

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

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

(6) “Official capability” means the nameplate capacity rating of a generating unit expressed in kilowatts.

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

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

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

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

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

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

(C) The total kilowatt hours of electricity generated at the generating unit exempted from tax during the period by §11-13-2(n)(b) of this code.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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