

# **WEST VIRGINIA LEGISLATURE**

## **2024 REGULAR SESSION**

**Introduced**

### **House Bill 5416**

By Delegate Hansen

[Introduced February 01, 2024; Referred to the  
Committee on Energy and Manufacturing then  
Finance]

1 A BILL to amend and reenact §11-13-2o of the Code of West Virginia, 1931, as amended, relating  
 2 to allowing the use of degraded properties as an approved location to place solar panels  
 3 utilized by power generating units; and providing conditions thereto.

*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.**

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

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

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

13 (3) "Eligible site" means any site in this state that has been previously used in electric  
 14 generation, industrial, manufacturing, or mining operations, including, but not limited to,  
 15 brownfields, closed landfills, hazardous waste sites, former industrial sites, and former mining  
 16 sites.

17 ~~(3)~~ (4) "Generating unit" means a mechanical apparatus or structure which through the  
 18 operation of its component parts is capable of generating or producing electricity and is regularly  
 19 used for this purpose.

20           ~~(4)~~ (5) "Inactive reserve" means the removal of a generating unit from commercial service  
21 for a period of not less than 12 consecutive months as a result of lack of need for generation from  
22 the generating unit or as a result of the requirements of state or federal law or the removal of a  
23 generating unit from commercial service for any period as a result of any physical exigency which  
24 is beyond the reasonable control of the taxpayer.

25           ~~(5)~~ (6) "Maximum possible annual generation" means the product, expressed in kilowatt  
26 hours, of official capability times 8,760 hours.

27           ~~(6)~~ (7) "Official capability" means the nameplate capacity rating of a generating unit  
28 expressed in kilowatts.

29           ~~(7)~~ (8) "Peaking unit" means a generating unit designed for the limited purpose of meeting  
30 peak demands for electricity or filling emergency electricity requirements.

31           ~~(8)~~ (9) "Retired from service" means the removal of a generating unit from commercial  
32 service for a period of at least 12 consecutive months with the intent that the unit may not  
33 thereafter be returned to active service.

34           ~~(9)~~ (10) "Taxable generating capacity" means the product, expressed in kilowatts, of the  
35 capacity factor times the official capability of a generating unit, subject to the modifications set  
36 forth in subdivisions (2) and (3), subsection (c) of this section.

37           ~~(10)~~ (11) "Net generation" for a period means the kilowatt hours of net generation available  
38 for sale generated or produced by the generating unit in this state during the period less the  
39 following:

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

44           (B) Twenty-one twenty-sixths of the kilowatt hours of electricity produced or generated at  
45 the generating unit during the period by any person producing electric power and an alternative

46 form of energy at a facility located in this state substantially from gob or other mine refuse;

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

49 (b) *Rate of tax.* — Upon every person engaging or continuing within this state in the  
50 business of generating or producing electricity for sale, profit or commercial use, either directly or  
51 indirectly through the activity of others, in whole or in part, or in the business of selling electricity to  
52 consumers, or in both businesses, the tax imposed by §11-13-2 of this code shall be equal to:

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

66 (2) For taxpayers who sell electricity to consumers in this state that is not generated or  
67 produced in this state by the taxpayer, nineteen hundredths of one cent times the kilowatt hours of  
68 electricity sold to consumers in this state that were not generated or produced in this state by the  
69 taxpayer, except that the rate shall be five hundredths of one cent times the kilowatt hours of  
70 electricity not generated or produced in this state by the taxpayer which is sold to a plant location in  
71 this state of a customer engaged in manufacturing activity if the contract demand at such plant

72 location exceeds 200,000 kilowatts per hour per year or if the usage at such plant location exceeds  
73 200,000 kilowatts per hour in a year. The measure of tax under this subdivision shall be equal to  
74 the total kilowatt hours of electricity sold to consumers in the state during the taxable year, that  
75 were not generated or produced in this state by the taxpayer, to be determined by subtracting from  
76 the total kilowatt hours of electricity sold to consumers in the state the net kilowatt hours of  
77 electricity generated or produced in the state by the taxpayer during the taxable year. For the  
78 purposes of this subdivision, net kilowatt hours of electricity generated or produced in this state by  
79 the taxpayer includes the taxpayer's pro rata share of electricity generated or produced in this  
80 state by a partnership or limited liability company of which the taxpayer is a partner or member.  
81 The provisions of this subdivision may not apply to those kilowatt hours exempt under §11-13-  
82 2(n)(b) of this code. Any person taxable under this subdivision shall be allowed a credit against the  
83 amount of tax due under this subdivision for any electric power generation taxes or a tax similar to  
84 the tax imposed by subdivision (1) of this subsection paid by the taxpayer with respect to the  
85 electric power to the state in which the power was generated or produced. The amount of credit  
86 allowed may not exceed the tax liability arising under this subdivision with respect to the sale of the  
87 power.

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

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

96 (2) *New generating units.* — If a new generating unit, other than a peaking unit, is placed in  
97 initial service on or after the effective date of this section, the generating unit's taxable generating

98 capacity shall equal 40 percent of the official capability of the unit: *Provided*, That the taxable  
99 generating capacity of a county-owned or municipally owned generating unit shall equal zero  
100 percent of the official capability of the unit and for taxable periods ending on or before December  
101 31, 2007, the taxable generating capacity of a generating unit utilizing a turbine powered primarily  
102 by wind shall equal five percent of the official capability of the unit: *Provided, however*, That for  
103 taxable periods beginning on or after January 1, 2008, the taxable generating capacity of a  
104 generating unit utilizing a turbine powered primarily by wind shall equal 12 percent of the official  
105 capability of the unit: *Provided further*, That for taxable periods beginning on or after January 1,  
106 2020, the taxable generating capacity of a generating unit utilizing solar photovoltaic methods  
107 shall equal eight percent of the official capacity of the unit: *And provided further, That for taxable*  
108 *periods beginning on or after January 1, 2025, the taxable generating capacity of a generating unit*  
109 *utilizing solar photovoltaic methods that is located on degraded land that is deemed an eligible site*  
110 *as defined herein, shall equal four percent of the official capacity of the unit.* For purposes of this  
111 subsection, "solar photovoltaic methods" means a module or array of solar cells electronically  
112 connected in a series or in parallel to provide suitable voltages and currents for electricity  
113 generation. Methods include, but are not limited to, a grid-connected photovoltaic system  
114 designed to operate in parallel with an electric utility grid.

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

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

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

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

140           (6) *Electricity generated by manufacturer or affiliate for use in manufacturing activity.* —  
141 When electricity used in a manufacturing activity is generated in this state by the person who owns  
142 the manufacturing facility in which the electricity is used and the electricity-generating unit or units  
143 producing the electricity so used are owned by the manufacturer, or by a member of the  
144 manufacturer's controlled group, as defined in Section 267 of the Internal Revenue Code of 1986,  
145 as amended, the generation of the electricity may not be taxable under this article: *Provided,* That  
146 any electricity generated or produced at the generating unit or units which is sold or used for  
147 purposes other than in the manufacturing activity shall be taxed under this section and the amount  
148 of tax payable shall be adjusted to be equal to an amount which is proportional to the electricity  
149 sold for purposes other than the manufacturing activity. The Department of Revenue shall

150 promulgate rules in accordance with §29A-3-1 *et seq.* of this code: *Provided, however,* That the  
151 rules shall be promulgated as emergency rules.

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

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

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

NOTE: The purpose of this bill is to incentivize independent power producers to site solar arrays on degraded land rather than prime farmland.

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