

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 578

SENATORS ROBERTS AND CLINE, *original sponsors*

[Passed March 6, 2020; to take effect July 1, 2020]

1 AN ACT to amend and reenact §11-13-2o of the Code of West Virginia, 1931, as amended,
2 relating to adjusting the calculation of business and occupation tax on the business of
3 generating, producing, or selling electricity from solar energy facilities; defining terms; and
4 establishing the taxable generating capacity for certain generating units utilizing solar
5 photovoltaic methods.

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
7 the unit was placed into commercial operation and ending with the month preceding the effective
8 date of this section by the number of months in the period and multiplying the resulting amount
9 by twelve with the result being a representative 12-month average of the unit’s net generation
10 while in 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) “Generating unit” means a mechanical apparatus or structure which through the
14 operation of its component parts is capable of generating or producing electricity and is regularly
15 used for this purpose.

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

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

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

23 (6) "Official capability" means the nameplate capacity rating of a generating unit expressed
24 in kilowatts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95 taxable generating capacity of a county-owned or municipally owned generating unit shall equal
96 zero percent of the official capability of the unit and for taxable periods ending on or before
97 December 31, 2007, the taxable generating capacity of a generating unit utilizing a turbine
98 powered primarily by wind shall equal five percent of the official capability of the unit: *Provided,*
99 *however,* That for taxable periods beginning on or after January 1, 2008, the taxable generating
100 capacity of a generating unit utilizing a turbine powered primarily by wind shall equal 12 percent
101 of the official capability of the unit: *Provided further,* That for taxable periods beginning on or after
102 January 1, 2020, the taxable generating capacity of a generating unit utilizing solar photovoltaic
103 methods shall equal eight percent of the official capacity of the unit. For purposes of this
104 subsection, “solar photovoltaic methods” means a module or array of solar cells electronically
105 connected in a series or in parallel to provide suitable voltages and currents for electricity
106 generation. Methods include, but are not limited to, a grid-connected photovoltaic system
107 designed to operate in parallel with an electric utility grid.

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

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

117 (5) *Proration, allocation.* — The Tax Commissioner shall promulgate rules in conformity
118 with §29A-3-1 *et seq.* of this code to provide for the administration of this section and to equitably
119 prorate taxes for a taxable year in which a generating unit is first placed in service, retired, or
120 placed in inactive reserve, or in which a taxpayer acquires or transfers an interest in a generating

121 unit, to equitably allocate and reallocate adjustments to net generation, and to equitably allocate
122 taxes among multiple taxpayers with interests in a single generating unit, it being the intent of the
123 Legislature to prohibit multiple taxation of the same taxable generating capacity.

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

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

145 (d) Beginning June 1, 1995, electric light and power companies that actually paid tax
146 based on §11-13-2d(a)(3) of this code or §11-13-2m of this code for every taxable month in 1994

147 shall determine their liability for payment of tax under this article in accordance with subdivisions
148 (1) and (2) of this subsection. All other electric light and power companies shall determine their
149 liability for payment of tax under this article exclusively under this section beginning June 1, 1995,
150 and thereafter.

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

To take effect July 1, 2020.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2020.

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Governor