WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

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OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FILED
JUL 28 1 35 PM '95
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

AGENCY: State Tax Division TITLE NUMBER: 110

CITE AUTHORITY W.Va. Code § 11-10-5

AMENDMENT TO AN EXISTING RULE: YES X NO ____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13

TITLE OF RULE BEING AMENDED: Business and Occupation Tax

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: ____

TITLE OF RULE BEING PROPOSED: ____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Robert A. Hoffman

Authorized Signature
James H. Paige III
State Tax Commissioner

12.20

GASTON CAPERTON
GOVERNOR

State of West Virginia
Department of Tax and Revenue
TAX DIVISION
P. O. Box 2389
Charleston, WV 25328-2389

JAMES H. PAIGE III
SECRETARY

CONSENT TO FILE RULE

July 25, 1995

To Whom It May Concern:

Title of Rule:	Business and Occupation Tax
Title Number:	110
Series Number:	13

Pursuant to West Virginia Code § 5F-2-2(a), the undersigned hereby consents to the filing of the foregoing rule.

Signed this 25th day of July, 1995.

James H. Paige, III
Secretary, Tax and Revenue

STATEMENT OF AGENCY APPROVED RULE

The rule explains and clarifies the Business and Occupation Tax, Article 13, Chapter 11 of the West Virginia Code, and the amendments relate to the imposition of that tax on the businesses of gas storage and the generation or production of electricity.

STATEMENT OF CIRCUMSTANCES

Committee Substitute for House Bill 2267, enacted March 11, 1995, amended Article 13, Chapter 11 of the West Virginia Code, the Business and Occupation Tax. As a result, the regulations governing the administration of that tax are being amended.

FISCAL NOTE FOR AGENCY APPROVED RULES

Rule Title: Business and Occupation Tax

Type of Rule: X Legislative ____Interpretive ____Procedural

Agency: State Tax Division
Address: P.O. Box 1005
Charleston, WV 25324-1005

1. Effect of Proposed Rule

	ANNUAL		FISCAL YEAR		
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	$	$	$	$	$
PERSONAL SERVICES	0	0	0	0	0
CURRENT EXPENSE	0	0	0	0	0
REPAIRS & ALTERNATIONS	0	0	0	0	0
EQUIPMENT	0	0	0	0	0
OTHER	0	0	0	0	0

2. Explanation of above estimates:

The amendments to the Rule should have no impact on Division expenses.

3. Objectives of these rules:

Explain and clarify amendments to Article 13, Chapter 11 of the West Virginia Code which result from Committee Substitute for House Bill 2267.

Rule Title: Business and Occupation Tax.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

There should be no impact other than that envisioned with the passage of Committee Substitute for H.B. 2267.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

There should be no impact other than that envisioned with the passage of Committee Substitute for H.B. 2267.

C. Economic Impact on Citizens/Public at Large.

There should be no impact other than that envisioned with the passage of Committee Substitute for H.B. 2267.

Date: July 27, 1995

Signature of Agency Head or Authorized Representative

Robert H. Hoffman

James H. Paige III
Secretary of Tax and Revenue,
State Tax Commissioner

DATE: July 28, 1995

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: State Tax Division

LEGISLATIVE RULE TITLE: Business and Occupation Tax

1. Authorizing statute(s) citation: West Virginia Code §§ 11-10-5

2. a. Date filed in State Register with Notice of Comment Period:

June 23, 1995

b. What other notice, including advertising, did you give of the comment period?

N/A

c. Date of public comment period: June 23, 1995 - July 24, 1995

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received ____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 1995

f. Name and phone number(s) of agency person(s) to contact for additional information:

Keith Larson - 558-5330

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

_____

_____

_____

b. Date of hearing:_____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

_____

d. Attach findings and detminations and reasons:

Attached_____

AGENCY APPROVED

FILED

WEST VIRGINIA LEGISLATIVE RULE
TAX DEPARTMENT

JUL 28 1 35 PM '95

TITLE 110
SERIES 13

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

BUSINESS AND OCCUPATION TAX

§ 110-13-1. General.

1.1 **Scope.** - These legislative rules explain and clarify the West Virginia Business and Occupation Tax, W. Va. Code § 11-13-1 et seq. These legislative rules are intended to repeal and reenact 110 C.S.R. 13.

1.2 **Authority.** - W. Va. Code §§ 11-10-5 and 29A-3-15.

1.3 **Filing Date.** - ~~April 2, 1990~~

1.4 **Effective Date.** - ~~April 2, 1990~~

§ 110-13-1a. Definitions.

1a.1 For purposes of these rules ~~and regulations, the~~ terms ~~defined in Section 1a.2 of these regulations~~ shall have the meaning given to them by this Section, unless a different meaning is clearly required by either the context in which the term is used or by specific definition elsewhere in these rules.

1a.2 Terms defined.

1a.2.1 "Average four year generation" - See Section 2o.1

1a.2.2 "Business" includes all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" includes the rendering of gas storage service by any person for the gain or economic benefit of any person, including, but not limited to, the storage operator, whether or not incident to any other business activity.

1a.2.2.1 The business and occupation tax act imposes taxes upon persons engaged in business. The term "Business" includes all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect.

1a.2.2.2 In determining whether a business is engaged in for direct or indirect economic gain or benefit, the lack of profit suffered in said activity is not relevant; nor is it material that the business was engaged without profit as the primary motivation.

1a.1.3 "Capacity factor" - See Section 2o.1

1a.2.4 "Company use" means that amount of electrical energy, excluding station use and line loss, used to construct, maintain or operate generation, transmission, office or other facilities of the taxpayer in West Virginia, used in the conduct of any electric utility business in West Virginia or any electric energy generation business in West Virginia.

1a.2.5 "Dekatherm" means the thermal energy unit equal to one million British thermal units (BTU's) or the equivalent of one thousand cubic feet of gas having a heating content of one thousand BTU's per cubic foot.

1a.2.5.1 For the purpose of calculating the tax imposed upon any gas storage business, the number of dekatherms of gas injected into or withdrawn from such a gas storage reservoir during a tax month shall not include:

1a.2.5.1.a Any gas consumed by a gas storage operation as fuel for compressors used to pump gas into or out of storage, including gas used in a recycling operation, whether or not that gas was temporarily placed into storage prior to its withdrawal for such use as fuel; or

1a.2.5.1.b Any gas used in a recycling operation of the storage reservoir.

1a.2.5.2 All other gas injected into or withdrawn from a storage reservoir shall be included in the number of dekatherms constituting the measure of the tax base, and such measure shall not be decreased to reflect any loss of gas from storage or any gas which may escape or otherwise be lost.

1a.2.6 "Ferroalloy" - See Section 2n.2.

~~1a.2.4~~ 1a.2.7 "Gas" means either natural gas unmixed, or any mixture of natural and artificial gas or any other gas.

~~1a.2.5~~ 1a.2.8 "Gas storage operator" means any person who operates a storage reservoir or provides a storage service as defined herein, either as owner or lessee.

~~1a.2.6~~ 1a.2.9 "Gas storage service" means the injection of gas into a storage reservoir, the storage of gas for any period of time in a storage reservoir, or the withdrawal of gas from a storage reservoir. Such gas may be owned by the storage operator or any other person.

1a.2.10 "Generating unit" - See Section 2o.1

~~1a.2.7~~ 1a.2.11 "Gross income" means the gross receipts of the taxpayer, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible

personal property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments however designated and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expenses whatsoever.

~~1a.2.8~~ 1a.2.12 "Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property or the providing of services without any deduction on account of the cost of property sold or expenses of any kind.

~~1a.2.9~~ 1a.2.13 "Gross West Virginia electric energy generation" means the total amount of electric energy produced by a generating station located in West Virginia without reduction for station use, company use, line loss or any other use, loss or deduction.

1a.2.14 "Inactive reserve." - See Section 2o.1

~~1a.2.10~~ 1a.2.15 "Kilowatt hours of electricity sold to consumers in this State that were not generated or produced in this State" means total kilowatt hours of electricity sold to consumers located in West Virginia less net kilowatt hours generated or produced in West Virginia as defined in Section 1a.2.21 of these regulations.

~~1a.2.11~~ 1a.2.16 "Kilowatt hours of net generation available for sale that was generated or produced in this State" means gross West Virginia electric energy generation less station use, as defined in these regulations. "Kilowatt hours of net generation available for sale that was generated or produced in this State" shall not be reduced by company use, line loss or any other use, loss or deduction, except station use, as defined in these regulations.

~~1a.2.12~~ 1a.2.17 "Line loss" means loss of electrical energy by electrical resistance and electromagnetism occurring from or in electrical transmission lines or apparatus between any two points along such transmission lines or apparatus.

1a.2.18 "Maximum possible annual generation." - See Section 2o.1

~~1a.2.13~~ 1a.2.19 "Month" or "tax month" means the calendar month.

1a.2.20 "Net generation." - See Section 2o.1

~~1a.2.14~~ 1a.2.21 "Net Kilowatt hours generated or produced in West Virginia" means kilowatt hours of net generation available for sale that was generated or produced in this State, as defined in Section 1a.2.16 of these regulations.

~~1a.2.15~~ 1a.2.22 "Net number of dekatherms of gas injected" means the sum of the daily injections of dekatherms of gas in excess of the sum of the daily withdrawals of dekatherms of gas during a tax month.

~~1a.2.16~~ 1a.2.23 "Net number of dekatherms of gas withdrawn" means the sum of the daily withdrawals of dekatherms of gas in excess of the sum of the daily injections of dekatherms of gas during a tax month.

1a.2.24 "Official capability." - See Section 2o.1

1a.2.25 "Peaking unit." - See Section 2o.1

~~1a.2.17~~ 1a.2.26 "Person" or the term "company," herein used interchangeably, includes any individual, firm, partnership, joint venture, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

~~1a.2.18~~ 1a.2.27 "Recycling operation" means the withdrawal of gas from a storage reservoir and the subsequent reinjection of gas into the same reservoir solely for the purpose of regulating the pressure of the storage reservoir or portion thereof.

1a.2.28 "Retired from service." - See Section 2o.1

~~1a.2.19~~ 1a.2.29 "Sale," "sales" or "selling" includes any transfer of or title to property or electricity, whether for money or in exchange for other property.

~~1a.2.20~~ 1a.2.30 "State" or "this State" means the State of West Virginia.

~~1a.2.21~~ 1a.2.31 "Station" or "generating station" means a station at which electrical generators, dynamos or other equipment or apparatus are used to convert mechanical, chemical, solar, geothermal or nuclear energy into electrical energy. The term shall include, but not be limited to, those generating stations producing electrical energy by means of coal fired, gas fired, wood fired, gob fired, coal waste fired, coal refuse fired or waste fired electrical energy generation technology; and shall also include, but not be limited to, stations producing electrical energy by means of nuclear fission or fusion, magnetohydrodynamic, fluidized bed combustion, solar, biomass, wind, fuel cell, steam turbine, fluid turbine, gas turbine, hydroelectric or pumped-storage hydroelectric electrical energy generation technology.

~~1a.2.22~~ 1a.2.32 "Station use" or "plant use" means that amount of electric energy used by a generating station in the production of electricity and general operation of the generating station. The term "station use" or "plant use" includes the energy used for pumping water for purposes of providing stored energy at a pumped storage hydroelectric plant. "Station use" or "plant use" does not include company use or line loss.

~~1a.2.23~~ 1a.2.33 "Storage reservoir" means that portion of any subterranean sand or rock stratum or strata into which gas is, was or may have been injected for the purpose of storage prior to March 1, 1989.

1a.2.34 "Storage Utilization Index." - See Section 2e.1.

1a.2.35 "Taxable generating capacity." - See Section 2o.1

1a.2.36 "Tax" means Business and Occupation Tax imposed pursuant to W. Va. Code § 11-13-1 et seq.

~~1a.2.24~~ 1a.2.37 "Taxpayer" means any person liable for any tax hereunder.

~~1a.2.25~~ 1a.2.38 "Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which tax liability is computed under W. Va. Code § 11-13-1 et seq. "Taxable year" means, in case of a return made for a fractional part of a year under the provisions of W. Va. Code § 11-13-1 et seq., or under these regulations, the period for which such return is made.

1a.2.39 "Twelve consecutive months." - See Section 2o.1

§ 110-13-2. Imposition of Privilege Tax.

~~2.1 For taxable years or months beginning after June 30, 1987, there is levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amount to be determined by the application of rates against values or gross income as set forth in W. Va. Code §§ 11-13-2d and 11-13-2m.~~

~~2.2~~ 2.1 Until June 1, 1995, for taxable months or taxable years beginning after February 28, 1989, there is levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amount to be determined by the application of rates against values or gross income as set forth in W. Va. Code §§ 11-13-2d, 11-13-2e, 11-13-2m and 11-13-2n.

2.2 For taxable months or taxable years beginning after May 31, 1995, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the

business and other activities. and in the amount to be determined by the application of rates against the measure of the tax as set forth in Sections 2d, 2e, 2m, 2n and 2o.

2.3 Sales to affiliates.

2.3.1 In determining value in sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax shall be levied upon the fair market value of the subject matter sold, corresponding as nearly as possible to the gross proceeds which have been or would be realized from the sale of the same or similar electrical energy, utility service or products of like quality or character where no common interest exists between a buyer and a seller but the circumstances and conditions, including time and place of sale, are otherwise similar. The term "affiliated companies or persons" includes but is not limited to "affiliated groups" as defined by Internal Revenue Code 1504(a) and "parent and subsidiary corporations" as defined by W. Va. Code § 11-23-3.

2.3.2 In determining value in regard to sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the vendor and vendee is such that gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the following rules shall be applied in the order stated.

2.3.2.1 Whenever sales are made to affiliates, the value shall correspond to the gross proceeds from the sale of similar electrical energy, utility service or products of like quality and character and in similar quantities between persons of no common interest.

2.3.2.2 If there are no sales between parties of no common interest by which the taxpayer may value his sales to affiliates, the value shall correspond to the gross proceeds from sales by the taxpayer to nonrelated purchasers of similar electrical energy, utility service or products of like quality and character and in similar quantities and shall include all subsidies and bonuses.

2.3.2.3 In the absence of sales of similar electrical energy, utility service or products as a guide to value, such value may be determined by a cost basis. In such cases there shall be included every item of cost attributable to the particular matter sold, including direct and indirect overhead, costs. There shall be added to this total cost the average markup realized by the taxpayer on all electrical energy, utility service or products sold.

§ 110-13-2d. Public Service or Utility Business.

2d.1 Persons engaged within this State in certain public service or utility business are taxable on the privilege of engaging in such businesses and are required to report the gross income from such business activities under the appropriate classification on the business and

occupation tax form. Only gross income derived from the supplying of public services shall be reported under the public service classifications.

2d.2 There are certain persons who are not subject to tax under W. Va. Code § 11-13-2d even though such persons may be subject to the control of this State's Public Service Commission. These statutorily exempt persons are railroads, railroad car companies, express companies, pipeline companies, motor carriers, telephone and telegraph companies and water carriers by steamboat or steamship. Municipally-owned water companies and municipally-owned electric distribution systems are not subject to the tax under W. Va. Code § 11-13-2d.

2d.3 Upon any person engaged or continuing within this State in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, the tax due under in W. Va. Code § 11-13-2d shall be equal to the gross income of the business derived from such activity or activities multiplied by the respective rates as follows:

2d.3.1 Street and interurban and electric railways, one and four-tenths percent (1.4%);

2d.3.2 Water companies, four and four-tenths percent (4.4%, except as to income received by municipally owned water plants;

2d.3.3 Electric light and power companies:

2d.3.3.1 A person who generates electric power in this State and then sells that power generation in regulated transactions in this State, shall pay tax at the rate of four percent (4%) on sales and demand charges derived from the sale of such power in this State, except as otherwise provided in these regulations.

2d.3.3.2 A person who sells electric power in this State in regulated transactions which such person does not generate in this State, shall pay tax at the rate of three percent (3%) on sales and demand charges derived from the sale of such power in this State, except as otherwise provided in these regulations.

2d.3.3.3 Notwithstanding the provisions of Sections 2.3.3.1 and 2.3.3.2, if electric power is sold in this State:

(1) to a plant location of a customer engaged in manufacturing activity and the contract demand or usage at such plant location exceeds two hundred thousand kilowatts per hour per year or two hundred thousand kilowatts per hour in a year, then the rate of tax on the sales and demand charges derived from such sales shall be two percent (2%);

(2) to a plant location in this State that consumes such power in an electrolytic process for the manufacture of chlorine, then to the extent the electric power consumed in the electrolytic process is separated metered from all other electric power consumed at that location, the demand charges for such power shall be exempt from the tax imposed by W. Va. Code § 11-13-2;

(3) to a plant location in this State that consumes such power in the manufacture of ferroalloy, then to the extent the electric power consumed in manufacturing ferroalloy is separately metered from all other electric power consumed at that location, the sales and demand charges for such power are exempt from the tax imposed by W. Va. Code § 11-13-2; or

(4) by a municipally owned plant producing or purchasing electricity and distributing the same, the income it receives from such power shall be exempt from the tax imposed by W. Va. Code § 11-13-2.

2d.3.3.4 As used in this Section, the term "ferroalloy" means any of the various alloys of iron and one or more other elements used as a raw material in the production of steel, but does not include the final production of steel.

2d.3.4 Natural gas companies, four and twenty-nine hundredths percent (4.29%) on the gross income, except (1) that the sale of natural gas under W. Va. Code § 11-13-2d shall be exempt from the tax due under W. Va. Code § 11-13-2d to the extent that the natural gas is separately metered and is gas from which the purchaser derives hydrogen and carbon monoxide for use in the manufacture of chemicals in this State, and the full economic benefit of the exception herein provided to the taxpayer shall be passed on to such purchaser of the natural gas and (2) that there shall be no exemption for the sale of any natural gas from which the purchaser derives carbon monoxide or hydrogen for the purpose of resale;

2d.3.5 Toll bridge companies, four and twenty-nine hundredths percent (4.29%); and

2d.3.6 Upon all other public service or utility business, two and eighty-six hundredths percent (2.86%).

2d.4 The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this Section shall include only gross income received from the activity of supplying public service.

2d.5 Until June 1, 1995, on and after March 1, 1989, electric light and power companies shall also determine their liability for payment of tax under W. Va. Code §§ 11-13-2d, 11-13-2m and 11-13-2n. If for taxable months beginning on or after the March 1, 1989 liability for tax under W. Va. Code § 11-13-2n is equal to or greater than the sum if the power company's liability for payment of tax under W. Va. Code §§ 11-13-2d and 11-13-2m, then the company shall pay the tax due only under W. Va. Code § 11-13-2n. But if tax liability under W. Va. Code § 11-13-2n is

less, then tax shall be paid under W. Va. Code §§ 11-13-2d and 11-13-2m and the tax under W. Va. Code § 11-13-2n shall not be paid. The provisions of this paragraph and ~~paragraph~~ Section 2d.3.3 ~~and Section 2d.5~~ of this rule shall expire and become null and void for taxable years beginning on or after January 1, 1998.

2d.6 Beginning June 1, 1995, electric light and power companies that actually paid tax based on the provisions of Section 2d.3.3 or Section 2m for every taxable month in 1994 shall determine their liability for payment of tax in accordance with Section 2d.6.1. All other electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o.

2d.6.1 If for taxable months beginning on or after June 1, 1995, liability for tax under Section 2o is equal to or greater than the sum of the power company's liability for payment of tax under Section 2d.3.3 and Section 2m, then the company shall pay the tax due under Section 2o and not the tax due under 2d.3.3 and Section 2m. If tax liability under Section 2o is less, then the tax shall be paid under Section 2d.3.3 and Section 2m and the tax due under Section 2o shall not be paid.

2d.6.2 The provisions of Section 2d.3.3 shall expire and become null and void for taxable years beginning on or after January 1, 1998, at which time all electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o.

§ 110-13-2e. Business of Gas Storage; Effective Date.

2e.1 **Rate of tax.** - Until July 1, 1995, upon every person engaged or continuing within this State in any gas storage business utilizing one or more gas storage reservoirs located within this State, ~~the tax due under by W. Va. Code § 11-13-2e shall be equal to five cents (.05%) multiplied by the sum of (1) the number of dekatherms of gas injected into such a gas storage reservoir during a tax month and (2) the number of dekatherms of gas withdrawn from such a gas storage reservoir during a tax month, whether or not such gas is owned by, or is injected or withdrawn for, the storage operator or any other person. Provided, however, That for taxable years beginning on or after April 6, 1989~~ the tax due under W. Va. Code § 11-13-2e shall be five cents (.05) multiplied by either (1) the net number of dekatherms of gas injected into a gas storage reservoir during a tax month or (2) the net number of dekatherms of gas withdrawn from a gas storage reservoir during a tax month, whichever is applicable for that month, whether or not such gas is owned by, or is injected or withdrawn for, the storage operator or any other person; **Provided**, That Effective July 1, 1995, the net number of dekatherms of gas injected or the net number of dekatherms withdrawn shall not exceed the storage utilization index as defined in this Section. For purposes of this Section, storage utilization means the utilization of storage reservoir, through the operation of existing and functional facilities available for storage use during the five (5) year base period ending December 31, 1994, and the "storage utilization index" shall be the five year average of taxable dekatherms as determined for each taxable period of the stated base period.

2e.2 **Fractional parts of dekatherms.** - The number of dekatherms of gas injected or withdrawn from a gas storage reservoir shall include fractional parts of dekatherms to be taxed at the following rates:

2e.2.1 From 0 up to but not including .2 dekatherms at one cent.

2e.2.2 From .2 up to but not including .4 dekatherms at two cents.

2e.2.3 From .4 up to but not including .6 dekatherms at three cents.

2e.2.4 From .6 up to but not including .8 dekatherms at four cents.

2e.2.5 From .8 up to and including 1 dekatherm at five cents.

2e.3 **Measurement.** - At each point where gas may be injected or withdrawn from gas storage reservoirs located within this State, the taxpayer must install meters or other appropriate means to determine the number of dekatherms of gas injected into and withdrawn from storage. In order for gas consumed as fuel or gas for compressors used to pump gas into or out of storage or used in a recycling operation to be excluded from the gas subject to this tax, the operator of a storage facility must measure the amount of the gas injected into or withdrawn from storage which is used as fuel or in the recycling operation.

2e.4 **Administration; installment payments.** - The tax due under W. Va. Code § 11-13-2e shall be submitted in accordance with instructions and forms provided by the Tax Commissioner and shall be administered, collected and enforced as provided in the West Virginia Tax Crimes and Penalties Act, W. Va. Code § 11-9-1 et seq; and W. Va. Code § 11-13-1 et seq., and these regulations promulgated pursuant thereto. The tax due under W. Va. Code § 11-13-2e shall be remitted in periodic installment payments as provided in Section 4 of these regulations, except that such payments shall be remitted on or before the twentieth (20th) day of the month following the month or quarter in which the tax accrued.

2e.5 **Notice of retirement from service.** - A taxpayer subject to the tax due under this Section shall provide written notice to the Joint Committee on Government and Finance and the Department of Tax and Revenue eighteen (18) months prior to the retirement from service of a storage reservoir.

2e.5.1. Failure to provide notice may result in liability for tax for months in which notice was required.

§ 110-13-2m. Business Of Generating Or Producing Electric Power; Exception; Rates.

2m.1 Every person engaging within this State in the business of generating electric power when the sale thereof is not subject to tax under W. Va. Code § 11-13-2d, shall be liable for tax

on the gross proceeds from the sale thereof at a rate of four percent (4%), except that the rate shall be two percent (2%) on that portion of the gross proceeds on the sale of electric power to a plant of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

2m.2. The measure of this tax shall be the value of all electric power generated or produced in this State for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: **Provided,** That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under these regulations.

2m.3 Until June 1, 1995, beginning March 1, 1989, every person taxable under this Section shall determine their liability for payment of tax under W. Va. Code §§ 11-13-2m and 11-13-2d and under W. Va. Code § 11-13-2n. If for taxable months beginning on or after March 1, 1989, such person's liability for payment of tax under W. Va. Code §§ 11-13-2m and 11-13-2d is less than the amount of such person's liability for payment of tax under W. Va. Code § 11-13-2n, then such person shall pay the tax under W. Va. Code § 11-13-2n and not the sum of the amount of tax due under W. Va. Code §§ 11-13-2m and 11-13-2d. If the tax due under W. Va. Code § 11-13-2n is less, then the amount of tax due under W. Va. Code §§ 11-13-2m and 11-13-2d shall be the tax due. The provisions of this Section of these regulations shall expire and become null and void for taxable years beginning on or after January 1, 1998.

2m.4 Beginning June 1, 1995, electric light and power companies that actually paid tax based on the provisions of Section 2d.3.3 or this Section for every taxable month in 1994 shall determine their liability for payment of tax under these rules in accordance with Section 2m.4.1. All other electric light and power companies shall determine their liability for payment of tax under these rules exclusively under Section 2o.

2m.4.1 If for taxable months beginning on or after June 1, 1995, liability for tax under Section 2o of this Article is equal to or greater than the sum of the power company's liability for payment of tax under Section 2d.3.3 and this Section, then the company shall pay the tax due under Section 2o and not the tax due under Section 2d.3.3. If tax liability under Section 2o is less, then the tax shall be paid under Section 2d.3.3 and this Section and the tax due under Section 2o shall not be paid.

2m.4.2 The provisions of this Section shall expire and become null and void for taxable years beginning on or after January 1, 1998, at which time all electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o. Notwithstanding this Section or any other provision of Chapter 11 of the West Virginia Code to the contrary, an electric light and power company that generates and produces power in this State shall continue to be deemed to be an "industrial taxpayer" for purposes of W. Va. Code § 11-13D-2(b)(8), and gross income of an electric light and power company from the generation and

production of power in this State and sales and demand charges for electric power sold in this State shall continue to be deemed "gross income of the business subject to tax under Article thirteen of this Chapter" for purposes of W. Va. Code § 11-23-17(b), all to the extent of and in accordance with the law in effect immediately preceding June 1, 1995.

§ 110-13-2n. Business of Generating or Producing or Selling Electric Power; Exemptions; Rates.

2n.1 **Rate of tax.** - Until June 1, 1995, 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 due under W. Va. Code § 11-13-2n shall be equal to:

2n.1.1 ~~Two tenths cents ($.002)~~ Twenty-six hundredths of one cent ($.0026) times the kilowatt hours of net generation available for sale that was generated in this State by the taxpayer during the taxable year. This rate shall be five hundredths cents ($.0005) times the kilowatt hours of net generation available for sale that was generated in this State by the taxpayer and sold to a plant of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year. Tax due under W. Va. Code § 11-13-2n for any person generating electric power and an alternative form of energy at a facility located within this State substantially from gob or other mine refuse shall be five hundredths cents ($.0005) times the kilowatt hours of net generation or production available for sale. The measure of tax under this paragraph shall be total kilowatt hours of net generation available for sale that was generated or produced in this State by the taxpayer ~~after February 28, 1989,~~ during the taxable year regardless of the place of sale or use, or the fact that transmission may be made to points outside this State.

2n.1.2 ~~Fifteen hundredths cents ($.00015)~~ Nineteen hundredths of one cent ($.0019) times the kilowatt hours of electricity sold to consumers in this State that were not generated or produced in this State by the taxpayer. The rate shall be five hundredths cents ($.0005) times the kilowatt hours electricity not generated in this State by the taxpayer which is sold to a plant in this State of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year. The measure of tax ~~under W. Va. Code § 11-13-2n(a)(2)~~ shall be the total kilowatt hours of electricity sold to consumers in this 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 during the taxable year, the net kilowatt hours of electricity generated or produced in the State by the taxpayer during that year.: ~~**Provided,** That for calendar year 1989, the measure of tax shall be the total kilowatt hours of electricity sold to consumers in this State after February 29, 1989, 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 this State during calendar year 1989 but after February 28, 1989, the net kilowatt hours of electricity generated or produced in this State during calendar Year 1989 but after February 28, 1989.~~

2n.1.3 The West Virginia Public Service Commission shall, upon application of a public utility, allow an immediate pass-through to the utility's customers in this State in the form of a rate surcharge the increase enacted by the Legislature during its third extraordinary session, 1990, in the tax imposed by W. Va. Code § 11-13-1 et seq. upon electricity generated or produced in this State and sold to consumers in this State and upon electricity not generated or produced in this State that is sold to consumers in this State.

2n.2 **Exemptions.** - The provisions of W. Va. Code § 11-13-2n shall not apply to:

2n.2.1 Kilowatt hours of electricity generated and sold, or purchased and resold, by a municipally owned plant.

2n.2.2 Kilowatt hours of electric power that are separately metered and consumed in an electrolytic process for the manufacture of chlorine.

2n.2.3 Kilowatt hours of electric power that are separately metered and consumed in the manufacture of ferroalloy. As used in this Section, the term "ferroalloy" means any of the various alloys of iron and one or more other elements used as a raw material in the production of steel but shall not include electric power used in the production of steel.

2n.2.4 The full economic benefits provided to the taxpayer by ~~W. Va. Code §§ 11-13-2n(b)(2) and (3)~~ Sections 2n.2.2 and 2n.2.3 shall be passed on to the manufacturer of the chlorine or ferroalloy.

2n.3 **Credit.** - Any person taxable under W. Va. Code § 11-13-2n(a)(2) shall be allowed a credit against the amount of tax due under that Section for any electric power generation taxes paid by the taxpayer with respect to the generation of such electric power to the state in which such power was generated or produced. The amount of credit allowed shall not exceed the tax liability arising under W. Va. Code § 11-13-2n(a)(2) with respect to the sale of kilowatt hours of such power in a regulated transaction in this State when that same kilowatt hour was taxed by the state of generation.

2n.4 **Transition rule.** - Until June 1, 1995, beginning March 1, 1989, electric light and power companies shall determine their liability for payment of tax under W. Va. Code §§ 11-13-2n, 11-13-2d and 11-13-2m. If for taxable months beginning on or after March 1, 1989, liability for tax under W. Va. Code § 11-13-2n is equal to or greater than the sum of the power company's liability for payment of tax under W. Va. Code §§ 11-13-2d(a)(3) and 11-13-2m, then the company shall pay the tax due under W. Va. Code § 11-13-2n and not the tax due under W. Va. Code §§ 11-13-2d(a)(3) or 11-13-2m. If tax liability under W. Va. Code § 11-13-2n is less, then tax shall be paid

under W. Va. Code §§ 11-13-2d(a)(3) and 11-13-2m, as applicable, and the tax due under W. Va. Code § 11-13-2n shall not be paid. The provisions of this Section of these regulations shall expire and become null and void for taxable years beginning on or after January 1, 1998.

2n.5 **Termination Date.** - Beginning June 1, 1995 and thereafter, electric light and power companies shall not determine their tax liability under this Section.

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

2o.1 **Definitions.** - As used in this Section:

2o.1.1 "Average four-year generation" is computed by dividing by four (4) 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, June 1, 1995, "average four-year generation" is computed by dividing such 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 such period and multiplying the resulting amount by twelve (12) with the result being a representative twelve-month average of the unit's net generation while in an operational status.

2o.1.2 "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.

2o.1.3 "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.

2o.1.4 "Inactive reserve" means the removal of a generating unit from commercial service for a period of not less than twelve (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.

2o.1.5 "Maximum possible annual generation" means the product, expressed in kilowatt hours, of official capability times 8760 hours [i.e., the number of hours in a year.]

2o.1.6 "Official capability" means the nameplate capacity rating of a generating unit expressed in kilowatts.

2o.1.7 "Peaking unit" means a generating unit designed for the limited purpose of meeting peak demands for electricity or filling emergency electricity requirements.

2o.1.8 "Retired from service" or "retiring from service" means the removal of a generating unit from commercial service for a period of at least twelve (12) consecutive months with the intent that the unit will not thereafter be returned to active service.

2o.1.9 "Taxable generating capacity" means the product, expressed in kilowatts, of the capacity factor times the official capability of a generating unit, [i.e., average four-year generation in kilowatt hours ÷ 8760 hours] subject to the modifications set forth in Sections 2o.3.2 [new generating units] and 2o.3.3 [peaking units]. Taxable generating capacity is the measure of tax under Section 2o. In no event shall taxable generating capacity for any unit first placed in service prior to June 1, 1995 be recomputed or adjusted based upon post June 1, 1995 changes in net generation or consumption except insofar as the unit is retired or placed in inactive reserve.

2o.1.10 "Net generation" for a period means the "kilowatt hours of net generation available for sale that was generated or produced in this State" by the generating unit during such period less the following adjustments:

2o.1.10.1 Twenty-one twenty-sixths (21/26 or .8077) of the kilowatt hours of electricity generated at the generating unit and sold during such period to a plant location of a customer engaged in manufacturing activity if the contract demand at such plant location exceeds 200,000 kilowatts per hour in a year or where the usage at such plant location exceeds 200,000 kilowatts per hour in a year;

2o.1.10.2 Twenty-one twenty-sixths (21/26 or .8077) of the kilowatt hours of electricity produced or generated at the generating unit during such 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;

2o.1.10.3 The total kilowatt hours of electricity generated at the generating unit exempted from tax during such period by Section 2n.2.

2o.1.10.3.1 Taxpayers paying under Section 2o who received any of these exemptions described in Section 2n.2 in calendar years 1991 through 1994 receive the exemption under Section 2o automatically when they calculate their "average four-year generation" values for calendar years 1991 through 1994. Therefore, no additional exemption is allowable for kilowatt hours generated in calendar years after 1994.

2o.1.11 "Net generation" for a period shall not be reduced by company use, line loss or any other use or loss or deduction, except station use, as defined in Section 1a.

2o.1.12 "Twelve consecutive months" means a period beginning with the day the generating unit in question is removed from commercial service and ending on the day which is 364 days thereafter.

2o.2 **Rates 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 2 shall be equal to:

2o.2.1 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 Section 2o.3: **Provided**, That with respect to each generating unit in this State which has installed a flue gas desulfurization system, the tax imposed by Section 2 of this Article shall, on and after January 31, 1996, be equal to the product of $20.70 cents multiplied by the taxable generating capacity of the units, subject to the modifications set forth in Section 2o.3: **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 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, in no event shall the tax imposed by this Article with respect to the sale or use of such electricity exceed five hundredths of one cent (.05¢) times the kilowatt hours sold to or used by a plant engaged in such a manufacturing activity; and.

2o.2.1.1 Taxpayers with a flue gas desulfurization system installed as of January 31, 1996 shall file a separate return at the new rate for that one (1) day, together with their return for January at the old rate reflecting only the previous consecutive thirty (30) days.

2o.2.2 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 one cent (.19¢) 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 one cent (.05¢) 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 Section 2o.2.2 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. The provisions of this Section 2o.2.2 shall not apply to those kilowatt hours exempt under Section 2n.2. Any person taxable under this Section 2o.2.2 shall be allowed a credit against the amount of tax due under this Section 2o.2.2 for any electric power generation taxes or a tax similar to the tax imposed by Section 2o.2.1 paid by the taxpayer with respect to such electric power to the state in which such power was generated or produced. The amount of credit allowed shall not exceed the tax liability arising under this Section 2o.2.2 with respect to the sale of such power.

2o.2.3 **EXAMPLE 1.** Taxpayers subject to two or more rates shall segregate their average four-year generation by tax category. A generating unit's total net generation for calendar years 1991 through 1994 is 5 billion kilowatt-hours, of which 2.2 billion kilowatt-hours were subject to the lower rate for large customers (i.e., 2000,000 kilowatts per hour per year) and for power generated from gob or other mine refuse. Taxable generating capacity at the lower rate ($4.38) would be 251,141.55 kilowatts (i.e., 2.2 billion kilowatt-hours ÷ 8,760 hours.) Taxable generating capacity at the regular rate ($22.78) would be 319,634.70 kilowatts (i.e., 2.8 billion kilowatt hours ÷ 8760 hours.)

2o.2.4. **EXAMPLE 2.** A taxpayer owns three generating units operating in the State during calendar years 1991 through 1994. The generating units produced gross electric power in billions of kilowatt hours ("B KWH") in accordance with the following table:

YEAR	UNIT A	UNIT B	UNIT C
1991	11 B KWH	6 B KWH	3.5 B KWH
1992	11 B KWH	6 B KWH	3.5 B KWH
1993	11 B KWH	6 B KWH	3.5 B KWH
1994	11 B KWH	6 B KWH	3.5 B KWH
TOTAL	44 B KWH	24 B KWH	14.0 B KWH

The "official capability" of generating unit A is 2,100,000 KWH, of generating unit B is 1,500,000 KWH and of generating unit C is 1,000,000 KWH. During each year the taxpayer sold 2 billion KWH of electricity to a large industrial user that qualified for the reduced tax treatment (i.e. consumption of greater than 200,000 kilowatts per hour per year) from unit C in accordance with a binding contract.

Average four year generation is 11 billion KWH for unit A, 6 billion KWH for unit B and 1,884,615,385 KWH for unit C (calculated by including 1.5 billion KWH not sold to the large industrial user plus 5/26 of the 2 billion (384,615,385) KWH of electricity sold to the large industrial user each year). The taxpayer's annual gross B&O Tax liability (before credits, and without taking into account other factors described below) for such units is $49,120,514, assuming that (1) units A, B and C are not retired or placed in inactive reserve, (2) the taxpayer continues to own each of the units, and (3) none of the units have a flue desulfurization system installed and without taking into account the second proviso set forth in Section 2o.2.1 of this Rule (which provides that the tax on electricity sold to large industrial users shall not exceed 0.05¢ times such KWH sold):

	Unit A	Unit B	Unit C
Ave 4-yr generation (KWH)	11,000,000,000	6,000,000,000	1,884,615,385
Official Capability (KW/HR)	2,100,000	1,500,000	1,000,000

Max. Ann. Gen. (Off. Cap. X 8,760) (KW)	18,396,000,000	13,140,000,000	8,760,000,000
Capacity Factor	.598	.457	.215
Taxable Generating Capacity (KWH)	1,255,800	685,500	215,000
Tax Rate	$22.78	$22.78	$22.78
Gross Tax Liability	$28,607,124	$15,615,690	$4,897,700

2o.3 The following provisions are applicable to taxpayers subject to tax under Section 2o.2.1:

2o.3.1 **Retired units; inactive reserve.** - If a generating unit is retired from service or placed in inactive reserve, a taxpayer shall 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 and to the Tax Division, as well as to any other entity as may be otherwise provided by law, eighteen (18) months prior to retiring any generating unit from service in this State.

2o.3.1.1 A generating unit shall be considered to be retired from service on the later of (1) the day specified in the 18 month notice described in Section 2o.3.1 or (2) the day the unit is removed from commercial service, provided, that on such day the taxpayer intends that the unit will not thereafter be returned to service and the unit is not in fact returned to service for the next succeeding twelve consecutive months.

2o.3.1.2 A generating unit shall be considered to be placed in inactive reserve on the day occurring soonest with respect to the following events: (1) the day the unit is removed from commercial service as a result of the lack of need for generation from the generating unit or as a result of State or federal law, provided that on such day the taxpayer intends that the unit will not thereafter be returned to service within the following twelve consecutive month period after such removal and the unit is not in fact returned to service for the next succeeding twelve consecutive months, or (2) the day the unit is removed from commercial service as a result of any physical exigency which is beyond the reasonable control of the taxpayer. If a generating unit is placed in inactive reserve, such status shall continue until the day the unit is restored to commercial service.

~~2o.3.1.1~~ 2o.3.1.3 Units removed from commercial operation for less than twelve (12) consecutive months are neither retired from service nor in an inactive reserve status, and are taxable without proration or allocation pursuant to Section 2o.3.5.

~~2o.3.1.2~~ 2o.3.1.4 Failure to provide notice may result in liability for tax for months in which notice was required.

2o.3.2 **New generating units.** - If a new generating unit, other than a peaking unit, is placed in initial service on or after June 1, 1995, the generating unit's taxable generating capacity shall equal forty percent (40%) of the official capability of the unit.

2o.3.3 **Peaking units.** - If a peaking unit is placed in initial service on or after June 1, 1995, the generating unit's taxable generating capacity shall equal five percent (5%) of the official capability of the unit.

2o.3.4 **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 said 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 shall not for periods thereafter be liable for tax computed with respect to the taxable generating capacity of such transferred unit.

2o.3.5 **Proration, allocation.** -

(a) It being the intent of the Legislature to prohibit multiple taxation of the same taxable generating capacity, taxes shall be equitably (1) prorated for the 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; (2) allocated and reallocated among different generating units of a taxpayer with respect to adjustments to net generation; and (3) allocated among multiple taxpayers with interests in a single generating unit.

(b) 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 June 1, 1995, 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 W. Va. Code § 11-13-1 et seq. and these rules shall be permitted, until such time that action pursuant to a rate application or order of the Commission provides for appropriate alternative rate-making treatment for such expense, to recover by means of deferred accounting the tax expense imposed by this Section to the extent that the tax expense imposed by this Section exceeds the level of Business and Occupation Tax allowed in rates as of March 11, 1995.

2o.3.5.1 When calculating the average four year generation for a generating unit first placed in service after January 1, 1991 and prior to June 1, 1994; retired or placed in inactive reserve; or in which a taxpayer acquires or transfers an interest in the generating unit, net generation (including adjustments) for the month in which such event occurs on a day other than the first day thereof shall be computed by dividing net generation during that month by the number

of days in that month in which such generation occurred, and multiplying the resulting amount by the total number of days in that month.

2o.3.5.1.1 A generating unit shall be considered first placed in service on the day when all of the following conditions have been satisfied: (1) all necessary permits and licenses to operate the unit have been approved; (2) critical testing of the unit has been completed and it is reasonably anticipated that the unit will perform in the intended manner; and (3) electricity generated by the unit has been synchronized into the power grid.

2o.3.5.2. The amount of tax liability among multiple taxpayers with interests in a single generating unit shall be allocated between them in direct proportion to the percentage interest owned by each taxpayer.

2o.3.5.3 When a taxpayer acquires an interest in a generating unit on any date other than the first day of the month, the acquiring taxpayer is liable for tax only for those days of the month in which it owns such interest. The tax liability for such month is allocated between acquiring and transferring taxpayers by multiplying taxable generating capacity for the entire month by a fraction, the numerator of which is the number of days during the month the taxpayer owned such interest, and the denominator of which is the total number of days in the month. For tax purposes the interest transferred shall be deemed to have been owned for the entire day on which the transfer occurred.

2o.3.5.4 Adjustments to net generation available for sale pursuant to W. Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be entirely allocated to a unit or units designated specifically by contract for the 1991 through 1994 period to supply a customer whose usage or demand resulted in such adjustment. However, to the extent there is no such unit designated by contract during such time or to the extent usage exceeds the total generation from such unit or units, the adjustments to net generation available for sale as set forth in W. Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be allocated among all West Virginia units owned by the taxpayer pro rata based upon official capability.

2o.3.6 **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 owned the manufacturing facility in which the electricity is used and the electricity generating unit or units producing the electricity so used are owned by such 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 shall not be taxable under W. Va. Code § 11-13-1 et seq. and these rules. 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.

2o.4 Beginning June 1, 1995, electric light and power companies that actually paid tax based on the provisions of Section 2d.3.3 or 2m as then in effect for every taxable month in 1994 shall determine their liability for payment of tax under W. Va. Code § 11-13-1 et seq. and in accordance with Sections 2o.4.1 and 2o.4.2 below. All other electric light and power companies shall determine their liability for payment of tax exclusively under this Section beginning June 1, 1995 and thereafter.

2o.4.1 If for taxable months beginning on or after June 1, 1995, liability for tax under Section 2o is equal to or greater than the sum of the power company's liability for payment of tax under Sections 2d.3.3 and 2m, then the company shall pay the tax due under Section 2o and not the tax due under Sections 2d and 2m. If tax liability under this Section is less, then the tax shall be paid under Sections 2d and 2m and the tax due under this Section shall not be paid.

2o.4.2 Notwithstanding Section 2o.4.1, for taxable years beginning on or after January 1, 1998, all electric light and power companies shall determine their liability for payment of Business and Occupation tax exclusively under this Section 2o.

§ 110-13-3. Exemptions.

3.1 **Monthly exemptions from tax.** - Each taxpayer shall be granted an exemption in every case of forty-one dollars and sixty-seven cents ($41.67) per month of tax computed under the business and occupation tax law. From the total taxes due the monthly exemption of forty-one dollars and sixty-seven cents ($41.67) per month is deducted. Inasmuch as the law grants each person a monthly exemption of forty-one dollars and sixty-seven cents ($41.67) per month, only one ~~annual~~ exemption per tax period can be claimed even though such person may conduct more than one business.

3.2 **Business exempt by specific statutes.**

3.2.1 Public service district for water and sewage services. Public service districts for water and sewage services organized in compliance with the provisions of W. Va. Code § 16-3-1 et seq., entitled, "Public Service Districts for Water and Sewage Services," are exempt from the payment of the business and occupation tax. This is an exemption provided by specific statute and is only available to those public service districts that have complied with all the requirements as set forth in the aforecited provisions of the Code.

3.2.2 **Municipal waterworks.** - Waterworks in the State of West Virginia which are organized by a municipal corporation in compliance with the provision of W. Va. Code § 8-12-1 et seq., entitled, "Waterworks," are exempt from the payment of the business and occupation tax. This is an exemption provided by specific statute and is only available to those municipal waterworks that have complied with all requirements as set forth in the aforecited provisions of the Code.

3.2.3 **Municipal combined waterworks and sewage systems.** - Waterworks and sewage systems in the State of West Virginia which are organized or operated by a municipal corporation in compliance with the provisions of W. Va. Code § 8-13-1 et seq., entitled Combined Waterworks and Sewage Systems, are exempt from the payment of the business and occupation tax. This is an exemption provided by specific statute and is only available to those municipal waterworks and sewage systems that have complied with all the requirements as set forth in the aforecited provisions of the Code.

3.2.4 **Municipal and sanitary district sewage works.** - Sewage works in the State of West Virginia which are organized or operated by any municipal corporation or sanitary district in compliance with the provisions of W. Va. Code § 16-13-1 et seq., entitled, "Sewage Works of Municipal Corporations and Sanitary Districts", are exempt from the payment of the business and occupation tax. This is an exemption provided by specific statute and is only available to those sewage works of municipal corporations and sanitary districts that have complied with all the requirements as set forth in the aforecited provisions of the Code.

§ 110-13-3a. Reserved For Future Use.

§ 110-13-3b. Reserved For Future Use.

~~**§ 110-13-3c. Business And Occupation Tax Credit For Industrial Expansion.**~~

~~3c.1 A credit against business and occupation tax is allowed to certain industrial taxpayers who make qualified investment for industrial expansion.~~

~~3c.2 **Definitions.**~~

~~3c.2.1 The term "Industrial Taxpayer" means any person who exercises any privilege taxable or formerly taxable under the manufacturing classification of the business and occupation tax law or any person who exercises any privilege taxable or formerly taxable under the service classification of such law; **Provided,** That the business activity is manufacturing for another, which activity would be taxable or formerly taxable under the manufacturing classification if title to the goods and materials were vested in the person performing the manufacturing service.~~

~~3c.2.2 The terms "Qualified Property" and "Property Purchased for Industrial Expansion" means real property and improvements thereto and tangible personal property constructed or purchased for the use as a component part of a new or expanded business of an industrial taxpayer. Such property must be located within West Virginia. Such terms include only tangible personal property with respect to which depreciation or amortization is allowable in determining the industrial taxpayer's West Virginia personal income tax or West Virginia corporation net income tax. Said property must have a useful life at the time the property is placed in service of four (4) years or more.~~

~~3c.2.2.1 The terms defined within this Section 3c.2.2 do not include replacement property, motor vehicles licensed by the Department of Motor Vehicles, airplanes, off-premises transportation equipment or property which is used outside this State.~~

~~3c.2.2.2 The terms do not include property purchased prior to July 25, 1969, nor property the construction, reconstruction or erection of which began (or the contract therefor was let) prior to July 25, 1969.~~

~~3c.2.2.3 Nor do the terms include property which is acquired incident to the purchase of the stock or asset, of an industrial taxpayer which property has been used by the vendor in such business in this State, or which property has been previously designated "Property Purchased for Industrial Expansion" and so used to qualify for the tax credit.~~

~~3c.2.3 "Property Purchased for Industrial Expansion" includes property acquired by lease for a term of ten (10) years or longer, if the leased property would otherwise qualify if purchased outright. Lease renewal, subleases or assignments are not considered "Property Purchased for Industrial Expansion."~~

~~3c.2.4 The term "Cost" does not include the value of any property given in trade or exchange for new property which qualifies for this industrial expansion credit. The "Cost" of leased property is one hundred percent (100%) of the rent reserved for the primary term of the lease but not to exceed twenty (20) years.~~

~~3c.2.5 The term "Property Acquired for Multiple Business Use" mean qualified property placed in service by an industrial taxpayer as a component part of a new or expanded business together with some other business or occupation not qualifying for the credit. Property acquired for multiple business use must be apportioned between the qualifying and nonqualifying business and occupations and the proportion allocated to qualifying businesses of industrial taxpayers shall be considered as "Qualified Investments" subject to the conditions and limitations of this Section 3c.~~

~~3c.3 **Computation of and amount of credit allowable.**~~

~~3c.3.1 The amount of credit allowed to industrial taxpayers shall be equal to ten percent (10%) of the cost of qualified investment made for industrial expansion and shall be applied over a ten (10) year period to reduce the business and occupation tax at the rate of one-tenth (1/10th) of the amount of such credit per taxable year. The credit shall commence with the taxable year that such qualified investment is first placed in service or use. In other words, the credit is limited to ten percent (10%) (one percent (1%) for each of the ten (10) consecutive taxable years) of the total qualified investment.~~

~~3c.3.2 The amount of credit employed in any taxable year may not reduce business and occupation tax liability by more than fifty percent (50%) of the tax computed before applying the credit.~~

~~3c.3.3 When making a claim for credit for industrial expansion, the industrial taxpayer must explain in detail the purpose of the facility, the anticipated increased production, the anticipated additional employment generated, the products to be manufactured, the type of qualified property purchased and the cost thereof, etc. Failure to provide detailed information will result in the credit being disallowed.~~

~~3c.4 **Qualified investment.** — If the qualified property has a useful life of eight (8) years or more, the industrial taxpayer may consider one hundred percent (100%) of the cost of the property as qualified investment. If the useful life is six (6) years or more but less than eight (8) years, the industrial taxpayer may consider two thirds (66 2/3%) of the cost of the property as qualified investment. If the property has a useful life of four (4) years or more but less than six (6) years, the industrial taxpayer may consider one third (33 1/3%) of the cost of the property as qualified investment. Property with a useful life of less than four (4) years does not qualify for the purposes of the credit.~~

~~3c.5 **Forfeiture of unused tax credits.**~~

~~3c.5.1 If during any taxable year, an industrial taxpayer disposes of or ceases to use property with respect to which a tax credit has been claimed, or ceases operation of such business before expiration of the useful life of the property, then that portion of the unused annual credit attributable to the remainder of the taxable year subsequent to such disposition shall be forfeited for the taxable year in which such event occurs, and remaining unused credit shall be forfeited for all ensuing years.~~

~~3c.5.2 If an industrial taxpayer trades in qualified property on a purchase of new qualified property, he loses the unused credit on the trade in property but is permitted to compute the credit on the new qualified property. However, the cost of the new qualified property shall not include the value of that property traded in.~~

~~3c.5.3 No carryover shall be allowed for the amount of any unused portion of the credit; nor shall any credit be allowed against any tax liability for any year prior to July 25, 1969, by reason of an assessment issuing within any period after such date, which assessment is, in whole or part, for any period prior to July 25, 1969.~~

§ 110-13-3c. Tax Credit for Business Investment and Jobs Expansion. - There shall be allowed as a credit against the B&O tax imposed under W. Va. Code § 11-13-1 et seq., the amount determined under W. Va. Code § 11-13C-1 et seq., relating to B&O tax credit for business investment and jobs expansion.

§ 110-13-3d. Tax Credit for Industrial Expansion and Industrial Revitalization and Eligible Research and Development Projects. - There shall be allowed as a credit against the B&O tax imposed under W. Va. Code § 11-13-1 et seq., the amount determined under W. Va. Code § 11-13D-1 et seq., relating to B&O tax credit for industrial expansion and industrial revitalization, and eligible research and development projects.

§ 110-13-3e. Tax Credit for Coal Loading Facilities.

3e.1 There shall be allowed as a credit against the B&O tax imposed under W. Va. Code § 11-13-1 et seq., the amount determined under W. Va. Code § 11-13E-1 et seq., relating to tax credit for new or expanded or revitalized coal loading facilities.

§ 110-13-3f. Tax Credit for Reducing Electric and Natural Gas Utility Rates for Low-Income Residential Customers.

3f.1 There shall be allowed as a credit against the B&O tax imposed under W. Va. Code § 11-13-1 et seq., the cost of providing electric or natural gas utility service, or both, at reduced rates to qualified low-income residential customers which has not been reimbursed by any other means.

§ 110-13-4. Computation of Tax; Payment.

4.1 Except for those amounts due under W. Va. Code § 11-13-2e, the taxes levied under W. Va. Code § 11-13-1 et seq. shall be due and payable as follows:

4.1.1 For taxpayers whose estimated tax under W. Va. Code § 11-13-1 et seq. exceeds one thousand dollars ($1,000) per month, the tax shall be due and payable in monthly installments on or before the last day of the month following the month in which the tax accrued. Each such taxpayer shall, on or before the last day of each month, make out an estimate of the tax for which he is liable for the preceding month, sign the same and mail it together with a remittance, in the form prescribed by the Tax Commissioner, of the amount of tax to the Office of the Commissioner: **Provided,** That the installment payment otherwise due under this Section on or before June 30th each year shall be remitted to the Tax Commissioner on or before the June 15th each year, beginning June 15, 1988. In estimating the amount of tax due for each month, the taxpayer may deduct one twelfth (1/12th) of any applicable tax credits allowable for the taxable year and one twelfth (1/12th) of the total exemption allowed for such.

4.1.2 For taxpayers whose estimated tax under W. Va. Code § 11-13-1 et seq. does not exceed one thousand dollars ($1,000) per month, the tax shall be due and payable in quarterly installments within one (1) month from the expiration of each quarter in which the tax accrued. Each such taxpayer shall, within one (1) month from the expiration of each quarter, make out an estimate of the tax for which he is liable for such quarter, sign the same and mail it together with a remittance, in the form prescribed by the Tax Commissioner, of the amount of tax to the Office

of the Commissioner. In estimating the amount of tax due for each quarter, the taxpayer may deduct one fourth (1/4th) of any applicable tax credits allowable for the taxable year and one fourth (1/4th) of the total exemption allowed for such year.

4.1.3 When the total tax for which any person is liable under W. Va. Code § 11-13-1 et seq. does not exceed two hundred dollars ($200) in any year the taxpayer may pay the same quarterly as aforesaid, or, with the consent in writing of the Tax Commissioner, at the end of the month next following the close of the tax year.

4.1.4 The above provisions of this Section notwithstanding, the Tax Commissioner, if he deems it necessary to ensure payment of the tax, may require the return and payment under this Section for periods of shorter duration than those prescribed above.

4.2 Taxpayers owing taxes on amounts due under W. Va. Code § 11-13-2e shall, on or before the twentieth (20th) of each month in which such tax is due and payable, make out an estimate of the tax for which the taxpayer is liable during the period for which the amount is due, sign the same and mail it together with a remittance, in the form prescribed by the Tax Commissioner, of the amount of tax to the Office of the Commissioner.

4.2.1 The amount of tax due under W. Va. Code § 11-13-2e shall be due and payable in monthly installments on or before the twentieth (20th) day of the month following the month in which the tax accrued. Estimated tax due under W. Va. Code § 11-13-2e shall be calculated based on the actual number of dekatherms of gas injected or withdrawn from a gas storage reservoir during the month in which the tax accrued. **Provided,** That for taxable years beginning on or after April 6, 1989, tax due under W. Va. Code § 11-13-2e shall be calculated based on the actual net number of dekatherms of gas injected or net number of dekatherms of gas withdrawn from a gas storage reservoir during each month. **Provided**, for the monthly tax periods beginning on or after July 1, 1995, the tax due under W. Va. Code Section 11-13-2e shall not exceed the tax as determined by the storage utilization index for the month the tax accrues. Estimated tax due under W. Va. Code § 11-13-2e may not be arrived at by averaging out an estimated or actual yearly total. In estimating the amount of tax due each month, the taxpayer may deduct one twelfth (1/12th) of any applicable tax credits allowable for the taxable year and one twelfth (1/12th) of the total exemption allowed for such year.

4.2.2 For taxpayers whose estimated tax due as calculated under Section 4.2.1 of these regulations is less than one thousand dollars ($1,000) in each month of a quarter, the taxpayer may elect to make a quarterly installment payment in lieu of the monthly installment, due and payable on the twentieth (20th) day of the month following the quarter in which the tax accrued. In estimating the amount of tax due for each quarter, the taxpayer may deduct one fourth (1/4th) of any applicable tax credits allowable for the taxable year and one fourth (1/4th) of the total exemption allowed for such year. Should the taxpayer have a monthly estimated tax due of over one thousand dollars ($1,000) prior to deducting the allowable credit and exemption deductions for that month, then all previous monthly installments shall be retroactively due and

payable at the time they would have otherwise been due and payable under Section 4.2.1 of these regulations, subject to interest and additions.

4.2.3 For taxpayers whose total tax due under W. Va. Code § 11-13-2e does not exceed two hundred dollars ($200) in any year, the taxpayer may pay the same quarterly or monthly as aforesaid, or with the consent in writing of the Tax Commissioner, on the twentieth (20th) day of the month next following the close of the tax year.

4.2.4 The above provisions of this Section notwithstanding, the Tax Commissioner, if he deems it necessary to insure payment of the tax, may require the return and payment under this Section for periods of shorter duration than those prescribed above.

§ 110-13-5. Return and Remittance by Taxpayer.

5.1 Annual return.

5.1.1 Every taxpayer shall, on or before the expiration of one (1) month after the end of the tax year, file a business and occupation tax return for the entire taxable year. Said return must show the gross proceeds of sales, gross income of business or other measure of tax in dekatherms, kilowatts or kilowatt hours, as appropriate, and the taxpayer must compute the amount of tax chargeable against him. Such return must be signed by the taxpayer.

5.1.2 For a taxpayer maintaining records and paying taxes on a calendar year basis, the annual return is due on or before January 31 of the following year. The annual return is filed at the close of the taxable year and replaces the fourth (4th) quarterly estimate. The annual return is a recompilation of the three (3) quarterly estimates and the fourth (4th) quarter's business. It provides a medium for making such adjustments on the quarterly estimates as may be necessary.

5.2 Extension of time.

5.2.1 Any taxpayer desiring an extension of time for filing his annual business and occupation tax return must make such request in writing to the Tax ~~Department~~ Division. The request must be postmarked before the due date of the return and must state the reason for such request and the period of extension required. The taxpayer will then be advised in writing as to whether or not such extension is granted. No extension shall be granted for a period of time longer than ninety (90) days from the due date of the annual return.

5.2.1.1 The written request for an extension of time shall be signed by the taxpayer if made by an individual, or by the president, vice president, secretary or treasurer of a corporation if made on behalf of a corporation. If made on behalf of a partnership, joint venture, association, trust, or any other group or combination acting as a unit, any individual delegated by such firm, copartnership, joint adventure, association, trust or any other group or combination acting as a unit shall sign the written request for an extension of time on behalf of the taxpayer.

5.2.2 No extension of time may be granted for filing of monthly or quarterly estimated returns.

§§ 110-13-6 through 110-13-8. Reserved for Future Use.

§ 110-13-9. Tax Year and Method of Accounting.

9.1 Taxable year. - For purposes of the B&O tax imposed under W. Va. Code § 11-13-1 et seq., a taxpayer's taxable year shall be the same as the taxpayer's taxable year for federal income tax purposes.

9.2 Method of accounting. - A taxpayer's method of accounting under this article shall be the same as the taxpayer's method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, the tax under this article shall be computed under such method that in the opinion of the Tax Commissioner clearly reflects such income.

9.3 Adjustments. - In computing a taxpayer's liability for tax for any taxable year under a method of accounting different from the method under which the taxpayer's liability for tax under this article for the previous year was computed, there shall be taken into account those adjustments which are determined by the Tax Commissioner to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted.

§§ 110-13-10 through 110-13-26. Reserved for Future Use.

§ 110-13-27. General Procedure and Administration.

Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in W. Va. Code § 11-10-1 et seq. shall apply to the tax imposed by W. Va. Code § 11-13-1 et seq. with like effect as if said act were applicable only to the tax imposed by W. Va. Code § 11-13-1 et seq. and were set forth in extenso therein.

PUBLIC COMMENTS ON THE PROPOSED
1995 BUSINESS AND OCCUPATION
TAX RULES
(110 C.S.R. 13)

Set forth below are public comments received by the Department of Tax and Revenue pertaining to the Business and Occupation Tax Regulations. For purposes of responding to the issues, public comments have been summarized. Copies of the full text are contained in the attached correspondence in the same sequence in which they are summarized.

COMMENT A - THE UNIT CONCEPT:

Section 2o.2.3 and the Example therein do not illustrate how a taxpayer with multiple generating units should calculate tax liability. A lengthy, detailed example is provided as a substitute. (See attachment #1)

RESPONSE TO COMMENT A:

The Department accepts the proposed example in addition to, not as a substitute, for the present example, which is modified to apply to a "generating unit" rather than a "company."

COMMENT B - RETIRED UNITS - INACTIVE RESERVE:

Section 2o.3.5 explains when a generating unit's inactive reserve or retired status is not attained, but does not explain when such status is attained. The following language is suggested to replace Section 2o.3.1.1 with new Sections 2o.3.1.1 and 2o.3.1.2:

> 2o.3.1.1 A generating unit shall be considered to be retired from service on the later of (1) the day specified in the 18 month notice described in Section 2o.3.1 or (2) the day the unit is removed from commercial service, provided that on such day the taxpayer intends that the unit will not thereafter be returned to service and the unit is not in fact returned to service for the next succeeding twelve consecutive months.
>
> 2o.3.1.2 A generating unit shall be considered to be placed in inactive reserve on the day occurring soonest with respect to the following events: (1) the day the unit is removed from commercial service as a result of the lack of need for generation from the generating unit or as a result of State or federal law, provided that on such day the taxpayer intends that the unit will not

thereafter be returned to service within the following twelve consecutive month period after such removal and the unit is not in fact returned to service for the next succeeding twelve consecutive months, or (2) the day the unit is removed from commercial service as a result of any physical exigency which is beyond the reasonable control of the taxpayer. If a generating unit is placed in inactive reserve, such status shall continue until the day the unit is restored to commercial service.

RESPONSE TO COMMENT B:

The Department accepts these sections in addition to, not in place of, the present Section 20.3.1.1.

COMMENT C - PLACED IN SERVICE:

The following provision explaining when a generating unit is "placed in service" should be adopted:

> 2o.3.5 A generating unit shall be considered first placed in service on the day when all of the following conditions have been satisfied: (1) all necessary permits and licenses to operate the unit have been approved; (2) critical testing of the unit has been completed and it is reasonably anticipated that the unit will perform in the intended manner; and (3) electricity generated by the unit has been synchronized into the power grid.

RESPONSE TO COMMENT C:

This proposed new section has been incorporated into the agency approved rules.

COMMENT D - BASE YEAR GENERATION FIXED:

The fixed nature of the B&O tax base should be emphasized by addition of the following provision:

> In no event shall taxable generating capacity for any unit first placed in service prior to June 1, 1995 be recomputed or adjusted based upon post June 1, 1995 changes in net generation or consumption except insofar as the unit is retired or placed in inactive reserve.

RESPONSE TO COMMENT D:

The Department agrees and has incorporated this language into the agency approved rules at Section 2o.1.9.

COMMENT E - ALLOCATION OF ADJUSTMENTS TO NET GENERATION:

Proration and allocation between different generating units of the same taxpayer needs to be addressed. The following language is suggested:

> Adjustment to net generation available for sale pursuant to W. Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be entirely allocated to a unit or units designated specifically by contract for the 1991 through 1994 period to supply a customer whose usage or demand resulted in such adjustment. However, to the extent there is no such unit designated by contract during such time or to the extent usage exceeds the total generation from such unit or units, the adjustments to net generation available for sale as set forth in W. Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be allocated among all West Virginia units owned by the taxpayer pro rata based upon official capability.

RESPONSE TO COMMENT E:

This language has been incorporated into the agency approved rules at Section 2o.3.5.4.

COMMENT F:

Section 2o.1.11 reflects the Department's position (upheld in Circuit Court) that line loss and company use should not be included in determining kilowatt hours of net generation available for sale. If the West Virginia Supreme Court of Appeals does not uphold that position, this section should be revisited.

RESPONSE TO COMMENT F:

This provision will be reconsidered if the Department's position is not upheld.

COMMENT G - DEFINITION OF TWELVE CONSECUTIVE MONTHS:

The phrase "twelve consecutive months" should be defined as follows:

> "Twelve consecutive months" means a period beginning with the day the generating unit in

question is removed from commercial service and ending on the day which is 364 days thereafter.

RESPONSE TO COMMENT G:

The Department has incorporated this suggestion at Section 2o.1.12.

COMMENT H:

Section 4 of the Rules relating to computation needs to be revised to reflect changes in W. Va. Code § 11-13-2e and Section 2e of the Rules, by adding the following clarification to paragraph 4.2.1: "Provided, for the monthly tax periods beginning on or after July 1, 1995, the tax due under W. Va. Code Section 11-13-2e shall not exceed the tax as determined by the storage utilization index for the month the tax accrues."

RESPONSE TO COMMENT H:

Although such language was not included in W. Va. Code § 11-13-4, clarification of Section 4 of the Rules is appropriate and is now included therein.

COMMENT I:

The words "at which time all electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o" should be added to W. Va. Leg. Reg. 110-13-2d.6.2 at the end of the sentence and added to Leg. Reg. 110-13-2m.4.2 at the end of the first sentence.

RESPONSE TO COMMENT I:

The changes suggested have been made.

COMMENT J:

The first sentence in Section 2o.1.10.3.1 should be clarified by addition of the following underlined language: "Taxpayers paying under Section 2o who received any of the exemptions described in Section 2n.2 in calendar years 1991 through 1994 receive the exemption under 2o automatically when they calculate their 'average four year generation' value for calendar years 1991 through 1994."

RESPONSE TO COMMENT J:

The Department agrees and has made the suggested change.

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July 24, 1995

STATE TAX DEPT.
LEGAL DIVISION
95 JUL 25 AM 10 33

VIA FACSIMILE

Keith Larson, Esquire
Legal Division
Department of Tax and Revenue
Post Office Box 1005
Charleston, WV 25324-1005

Re: Comments of Morgantown Energy Associates Regarding Proposed Business and Occupation Tax Regulations

Dear Mr. Larson:

On June 23, 1995, the State Tax Division filed proposed Business and Occupation Tax ("B&O Tax") legislative rules with the Secretary of State's office. In lieu of holding a public hearing, a comment period has been established during which interested persons may make suggestions to the Tax Department regarding these proposed rules. I have reviewed the legislative rules on behalf of Morgantown Energy Associates ("MEA"), a West Virginia partnership which operates an electric and steam co-generation facility located in Monongalia County. MEA has several comments which, if accepted by the Department, will help clarify the meaning of the regulations in several places.

First, we suggest that the words "at which time all electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o" be added to W. Va. Leg. Reg. 110-13-2d.6.2 at the end of the sentence after the words "January 1, 1998". The addition of this language will clarify that the B&O Taxes imposed under W. Va. Code §§ 11-13-2d, 2m and 2n expire for all taxpayers effective January 1, 1998. This change is consistent with the statute and W. Va. Leg. Reg. § 110-13-2d.6.

Second, for the same reasons which we requested the change in the preceding paragraph, we request that the words "at which time all electric light and power companies shall determine their liability for payment of tax exclusively under Section 2o" be added to W. Va. Leg. Reg. § 110-13-2m.4.2, at the end of the first sentence after the words "January 1, 1998".

Finally, W. Va. Leg. Reg. § 110-13-2o.1.10.3.1 contains rules to be used by taxpayers, entitled to any of the exemptions contained in W. Va. Leg. Reg. § 110-13-2n.2, to determine "net generation" under W. Va. Leg. Reg. § 110-13-2o.1.10. As written, this subsection appears to only apply with respect to taxpayers described under W. Va. Leg. Reg. § 110-13-2o.1.10.3 and not to taxpayers described under W. Va. Leg. Reg. §§ 110-13-2o.1.10.1 and 2o.1.10.2. It is possible that this subsection could be erroneously interpreted as applicable with respect to taxpayers described under W. Va. Leg. Reg. §§ 110-13-2o.1.10.1 and 2o.1.10.2. Such an erroneous interpretation will be avoided if the first sentence of W. Va. Leg. Reg. § 110-13-2o.1.10.3.1 is changed to read as follows:

> "Taxpayers paying under Section 2o who received any of the exemptions described in Section 2n.2 in calendar years 1991 through 1994 receive the exemption under 2o automatically when they calculate their "average four year generation" value for calendar years 1991 through 1994."

We appreciate the opportunity to provide our comments regarding the proposed regulations to the Tax Department and request that our suggested changes be adopted.

Very truly yours,

John A. Mairs

JAM/dbu
cc: Doyle Creekmore

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STATE TAX DEPT.
LEGAL DIVISION

July 21, 1995

Via Hand Delivery

The Honorable James H. Paige III
Secretary and Tax Commissioner
West Virginia Department of Tax and Revenue
State Capitol Building
West Wing Room 300
Charleston, West Virginia 25324-0963

RE: Comments to Proposed 1995 Business and Occupation Tax Rule; 110 C.S.R. 13, § 2o

Dear Secretary Paige:

I am writing on behalf of Appalachian Power Company ("APCO") and Ohio Power Company ("OPCO") to provide comments respecting the proposed Business and Occupation Tax Rule ("Proposed Rule") filed in the State Register on June 23, 1995. APCO and OPCO, both electric power generators in West Virginia, supported the significant B&O Tax reform brought about by the passage of Engrossed Committee Substitute for House Bill No. 2267 during the 1995 Regular Session of the West Virginia Legislature. We believe changes should be made to the Proposed Rule to fully clarify the application of H.B. 2267. Our review of the Proposed Rule is limited exclusively to provisions relating to the new "capacity utilization tax" found in new W.Va. Code § 11-13-2o.

A. The Unit Concept

One critical feature of new W.Va. Code § 11-13-2o is that tax liability is computed with respect to the taxable capacity of *each separate generating unit* in the State. However, when illustrating the calculation of the new capacity utilization tax, the Proposed Rule does not recognize this important generating unit concept. The Proposed Rule at § 110-13-2o.2.3 sets forth an Example where "taxpayers [are] subject to two or more rates," requiring segregation of average four-year generation "by tax category":

> 2o.2.3 Taxpayers subject to two or more tax rates shall segregate their average four-year generation by tax category.
>
> Example.
>
> A company's total net generation for calendar years 1991 through 1994 is 5 billion kilowatt-hours, of which 2.2 billion kilowatt-hours were subject to the lower rate for large customers (i.e., 200,000 kilowatts per hour per year) and for power generated from gob or other mine refuse. Taxable generating capacity at the lower rate ($4.38) would be 251,141.55 kilowatts (i.e., 2.2 billion kilowatt-hours ÷ 8,760 hrs.) Taxable generating capacity at the regular rate ($22.78) would be 319,634.70 kilowatts (i.e., 2.8 billion kilowatt hours ÷ 8760 hours.)

The Example transforms the proportionate (21/26) exclusion provided in the definition of "net generation available for sale" into a separate *category* and imposes a lower tax *rate* computed with reference to the 21/26 exclusion. These tax categories and rate differentials are carried over to the revised B&O Tax forms we reviewed.

The Example and the revised forms fail to recognize that the tax base enacted in H. B. 2267 references each generating unit. The Example transforms adjustments to net generation available for sale into separate tax generation categories and translates an exclusion into a lower rate. Further, the Example does not refer to generating units but instead references the broader category of a "taxpayer," which likely owns interests in more than one generating unit.

The Example does not serve to clarify the mechanics of applying the tax to real world situations. For example, if a generating unit were sold or retired, it would be crucial to determine the exact amount of tax that relates to the unit in question so that in the case of a sale, the tax liability to be assumed by the purchaser can be determined, and in the case of a retirement, the reduction in the tax liability of the owner of the retired unit can be determined. Accordingly, we recommend that the Proposed Rule be revised to delete the § 110-13-2o.2.3 and to substitute in lieu thereof the following:

§ 2o.2.3 Example. A taxpayer owns three generating

units operating in the State during calendar years 1991 through 1994. The generating units produced gross electric power in billions of kilowatt hours ("B KWH") in accordance with the following table:

year	unit A	unit B	unit C
1991	11 B KWH	6 B KWH	3.5 B KWH
1992	11 B KWH	6 B KWH	3.5 B KWH
1993	11 B KWH	6 B KWH	3.5 B KWH
1994	11 B KWH	6 B KWH	3.5 B KWH
TOTAL	44 B KWH	24 B KWH	14.0 B KWH

The "official capability" of generating unit A is 2,100,000 KWH, of generating unit B is 1,500,000 KWH and of generating unit C is 1,000,000 KWH. During each year the taxpayer sold 2 billion KWH of electricity to a large industrial user that qualified for the reduced tax treatment (i.e. consumption of greater than 200,000 kilowatts per hour per year) from unit C in accordance with a binding contract.

Average four year generation is 11 billion KWH for unit A, 6 billion KWH for unit B and 1,884,615,385 KWH for unit C (calculated by including 1.5 billion KWH not sold to the large industrial user plus 5/26 of the 2 billion (384,615,385) KWH of electricity sold to the large industrial user each year). The taxpayer's annual gross B&O Tax liability (before credits, and without taking into account other factors described below) for such units is $ 49,120,514, assuming that (1) units A, B and C are not retired or placed in inactive reserve, (2) the taxpayer continues to own each of the units, and (3) none of the units have a flue desulfurization system installed and without taking into account the second proviso set forth in Section 2o.2.1 of this Rule (which provides that the tax on electricity sold to large industrial users shall not exceed 0.05¢ times such KWH sold):

	Unit A	Unit B	Unit C
Ave 4-yr generation (KWH)	11,000,000,000	6,000,000,000	1,884,615,385
Official Capability (KW/HR)	2,100,000	1,500,000	1,000,000
Max. Ann. Gen. (Off. Cap. X 8,760) (KW)	18,396,000,000	13,140,000,000	8,760,000,000
Capacity Factor	.598	.457	.215
Taxable Generating Capacity (KWH)	1,255,800	685,500	215,000
Tax Rate	$22.78	$22.78	$22.78
Gross Tax Liability	$28,607,124	$15,615,690	$4,897,700

B. **Retired Units; Inactive Reserve**

The Proposed Rule at § 110-13-2o.3.1.1 provides: "units removed from commercial operation for less than twelve (12) consecutive months are neither retired from service nor in inactive reserve status and are taxable without proration or allocation pursuant to § 2o.3.5." This statement is very broad and incorrect with respect to reserve status arising out of exigencies. Moreover, the Proposed Rule fails to answer the practical question: When is inactive reserve or retired status attained?

Accordingly, we recommend that the Proposed Rule be revised by striking current § 110-13-2o.3.1.1 and inserting in lieu thereof the following:

> 2o.3.1.1 A generating unit shall be considered to be retired from service on the later of (1) the day specified in the 18 month notice described in Section 2o.3.1 or (2) the day the unit is removed from commercial service, provided that on such day the taxpayer intends that the unit will not thereafter be returned to service and the unit is not in fact returned to service for the next succeeding twelve consecutive months.
>
> 2o.3.1.2 A generating unit shall be considered to

be placed in inactive reserve on the day occurring soonest with respect to the following events: (1) the day the unit is removed from commercial service as a result of the lack of need for generation from the generating unit or as a result of State or federal law, provided that on such day the taxpayer intends that the unit will not thereafter be returned to service within the following twelve consecutive month period after such removal and the unit is not in fact returned to service for the next succeeding twelve consecutive months, or (2) the day the unit is removed from commercial service as a result of any physical exigency which is beyond the reasonable control of the taxpayer. If a generating unit is placed in inactive reserve, such status shall continue until the day the unit is restored to commercial service.

C. **Placed in Service**

The Proposed Rule does not address when a generating unit is considered "placed in service." We suggest that such provision be adopted, and recommend the following language to address this issue:

> 2o.3.5 A generating unit shall be considered first placed in service on the day when all of the following conditions have been satisfied: (1) all necessary permits and licenses to operate the unit have been approved; (2) critical testing of the unit has been completed and it is reasonably anticipated that the unit will perform in the intended manner; and (3) electricity generated by the unit has been synchronized into the power grid.

D. **Base Year Generation Fixed**

House Bill 2267 was designed to neutralize the negative impact on utilization of West Virginia electric generating units owned by multi-state generating systems brought about by West Virginia's kilowatt-hour based B&O Tax. The "solution" to the problem was to "fix" a units' liability and remove tax as a variable cost.

The Proposed Rule discusses the fixed nature of the tax base only when dealing with the W.Va. Code § 11-13-2n(b) exemptions:

> 2o.1.10.3.1 Taxpayers paying under Section 2o who received any of these exemptions in calendar years

> 1991 through 1994 receive the exemption under Section 2o automatically when they calculate their "average four-year generation" values for calendar years 1991 through 1994. Therefore, no additional exemption is allowable for kilowatt hours generated in calendar years after 1994.

The Proposed Rule does not fully and fairly reflect the goal of the law to fix the tax liability for each generating unit as long as it remains in service and not retired or placed in inactive reserve where such unit was first placed in service prior to June 1, 1995. Accordingly, we recommend that the Proposed Rule state the following:

> In no event shall taxable generating capacity for any unit first placed in service prior to June 1, 1995 be recomputed or adjusted based upon post June 1, 1995 changes in net generation or consumption except insofar as the unit is retired or placed in inactive reserve.

E. Allocation of Adjustments to Net Generation

The proration and allocation provisions in the Proposed Rule do not address an important concept delegated to the rulemaking process by the statute: How must a taxpayer allocate among different generating units adjustments to net generation available for sale set forth in W.Va. Code § 11-13-2o(a)(10)? We recommend the Department specifically address this issue by adopting the following language in the Proposed Rule:

> Adjustments to net generation available for sale pursuant to W.Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be entirely allocated to a unit or units designated specifically by contract for the 1991 through 1994 period to supply a customer whose usage or demand resulted in such adjustment. However, to the extent there is no such unit designated by contract during such time or to the extent usage exceeds the total generation from such unit or units, the adjustments to net generation available for sale as set forth in W.Va. Code § 11-13-2o(a)(10) and Section 2o.1.10 of this Rule shall be allocated among all West Virginia units owned by the taxpayer pro rata based upon official capability.

F. Line Loss Exclusion

The Proposed Rule in at least two different places attempts to bolster the Department's position that line loss and company use are not to be excluded in determining "net generation available for sale" for purposes of the B&O Tax. See Prop. Rule § 110-13-2o.1.10 and § 110-13-2o.1.11. Of course, this position is the subject of on-going litigation currently pending before the West Virginia Supreme Court of Appeals. These provisions should be revisited should the West Virginia Supreme Court of Appeals reverse the Circuit Court of Kanawha County's order in the pending line loss case.

G. Definition of Twelve Consecutive Months

We believe the Proposed Rules would clarify the statute by providing a definition of the phrase "twelve consecutive months" as follows:

> "Twelve consecutive months" means a period beginning with the day the generating unit in question is removed from commercial service and ending on the day which is 364 days thereafter.

APCO and OPCO believe that the above-mentioned topics merit attention. We thank you and appreciate this opportunity to provide written comments to the Proposed Rule. We would also appreciate the opportunity to comment upon the annual B&O Tax return when available. If you have any questions or desire any additional information, please feel free to contact me.

Sincerely,

Charles O. Lorensen

COL/sjm

cc: Robert Hoffman, Esquire
Keith Larson, Esquire
Mark Muchow
Earl Goldhammer, Esquire
R. Daniel Carson, Jr.
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STATE TAX DEPT.
LEGAL DIVISION

July 24, 1995

Honorable James H. Paige, III
Secretary, West Virginia Department
of Tax & Revenue
Legal Division
State Capitol
Charleston, WV 25305

Re: Proposed Amendments to the Business & Occupation Tax Rule

Dear Mr. Secretary:

On behalf of CNG Transmission, of Clarksburg, West Virginia, I am commenting on the proposed amendments to the Business & Occupation Tax Rules found in Title 110 at Series 13, which amendments were filed by you on June 23, 1995.

The amendment to the Rule was necessitated by and based upon the provisions of House Bill 2267 which was passed on March 11, 1995 and was effective from that date. The comments of CNG Transmission relate to the provisions of Section 11-13-2e, Business of Gas Storage, which was amended by House Bill 2267. CNG Transmission has no comment or criticism on Section 110-13-2e of the proposed rule.

CNG Transmission does, however, believe that Section 110-13-4 relating to computation of tax and payment needs to be revised to reflect the changes in W. Va. Code § 11-13-2e and §110-13-2e. The provisions of Section 4 of the Rule retain existing provisions for making estimated payments of the tax described in Section 2e of the Rule. Currently, the Rule provides that the estimated payment will be calculated on the actual net dekatherms injected or actual net dekatherms withdrawn. The Rule at Section 4 has not been revised to recognize the amendments to West Virginia Code § 11-13-2e that were made by House Bill 2267. The provisions of Section 4 of the Rule and particularly 4.2 need to be amended to recognize the ceiling on the tax that was imposed by House Bill 2267.

Enclosed is proposed language that provides for the payment of estimated tax based on the lesser of the actual activity or storage utilization index, consistent with the provisions of House Bill 2267. This language should be substituted for the language that currently is reflected in Section 4.2.1 of the Rule. Changes to Section 4.2.1 as proposed by the Tax Department are underlined.

Very truly yours,

Herschel H. Rose III

HHRIII/ks

Enclosure

cc: Mike Greer

4.2.1 The amount of tax due under W. Va. Code Section 11-13-2e shall be due and payable in monthly installments on or before the twentieth (20th) day of the month following the month in which the tax accrued. Estimated tax due under W. Va. Code Section 11-13-2e shall be calculated based on the actual number of dekatherms of gas injected or withdrawn from a gas storage reservoir during the month in which the tax accrued. Provided, that for taxable years beginning on or after April 6, 1989, tax due under W. Va. Code Section 11-13-2e shall be calculated based on the actual net number of dekatherms of gas injected or net number of dekatherms of gas withdrawn from a gas storage reservoir during each month. Provided, for the monthly tax periods beginning on or after July 1, 1995, the tax due under W. Va. Code Section 11-13-2e shall not exceed the tax as determined by the storage utilization index for the month the tax accrues. Estimated tax due under W. Va. Code Section 11-13-2e may not be arrived at by averaging out an estimated or actual yearly total. In estimating the amount of tax due each month, the taxpayer may deduct one twelfth 1/12th) of any applicable tax credits allowable for the taxable year and one twelfth (1/12th) of the total exemption allowed for such year.

WEIRTON
STEEL CORPORATION

July 21, 1995

Via facsimile # 304-558-3269

Legal Division
WV Dept. Of Tax and Revenue
Charleston, WV 25324-1005

Re: Comments on Proposed Rule Relating to Pollution Control Facilities (Title 110, Series 6)

Dear Sir or Madam:

In lieu of a public hearing, the following comments are submitted within the comment period relating to the proposed rule on pollution control facilities:

Comment One:

110-6-5.3 A facility will not qualify as a pollution control facility under W. Va. Code Section 11-6A-5(b) if it burns coal, coal waste or fuel waste obtained from outside West Virginia after March 11, 1995.

The above rule is violative of the spirit and technical requirements of the Commerce Clause of the United States Constitution in that it discriminates against interstate commerce. The apparent purpose of this rule is to favor local commercial interests over those of out-of-state businesses and impedes upon taxpayer's rights to utilize interstate commerce to successfully compete in the marketplace. Such facial discrimination has been held invalid even where there is no intent to discriminate. Kraft General Foods v. Iowa Dept. Of Revenue, 112 S.Ct. 2365 (1992). See also New Energy Co. Of Indiana v. Limbach, 486 U.S. 269 (1988), and most recently, West Lynn Creamery, Inc. V. Healy, 114 S.Ct. 2205 (1994).

Comment Two:

Section 110-6-2.4: "Facility or "Pollution Control Facility" means any personal property....

The narrow construction of the rule that salvage value is only applicable to personal property overlooks the economic and legal requirements and realities that pollution control facilities sometimes includes capital improvements upon real property in areas such as remediation, land improvements, and real property structures built around personal property. The definition at present excludes such improvements made that are required for the protection and benefit of the environment and the general welfare of the public, yet do not add economic value to the business. Further, if the primary purpose of a building or capital improvement is to preserve the economic life of pollution control equipment, it's market value is only that of

preserving equipment that has no economic value to the business enterprise, and accordingly, should be subject to a residual value for assessment purposes.

Comment Three:

110-6-2.4: These items of personal property which may coincidentally comply with air or water quality or effluent standards prescribed by or promulgated under the laws of this state or the United States, but which are primarily installed for plant operations or are productive, will not be deemed eligible for salvage tax treatment.

"Coincidentally" does not fully address fact patterns in the middle range of the continuum that exist in a large industrial facility. There are situations where a taxpayer receives significant benefit from a piece of equipment from its productive capabilities as well as for its pollution control features. In such a circumstance, the substitution method proposed at 5.4.2 would result in no cost apportionment to the pollution control equipment, and hence no tax reduction. A third test would be more representative of the economic consequences, that being a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property (discussed more fully in comment Four).

Comment Four:

110-6-5.4.3 (Suggested): Proportionate Method.

5.4.3.1 When the component or substitution method fail to apprehend the economic consequences of installing pollution control equipment, a proportionality method based on the pollution control features of the property over the pollution control features and production features of the property will be applied. The numerator will represent the lesser of the proportion of the value of the property that is related to pollution control as determined on a functional basis or the separate value of the pollution control element of the property installed as a standalone item; over the total cost of the property.

Such a test would not penalize taxpayer's who for economic efficiency purposes attempt to meet the general welfare of the public as well as maintain competitiveness in the marketplace in the outlays for new property.

Should you have any questions relating to the above comments, please contact me at 304-797-2718. Thank you for your consideration.

Very truly yours,

James J. Pierson
Corporate Tax Director