

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #7

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1989 JUN 30 PM 1:58
OFFICE OF WEST VIRGINIA
STATE SECRETARY

NOTICE OF AN EMERGENCY RULE

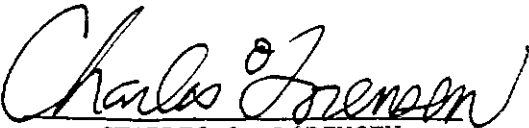
AGENCY: STATE TAX DEPARTMENT TITLE NUMBER: 110
CITE AUTHORITY: W. VA. CODE § 11-10-5 AND 29A-3-15
EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X, NO REPEALED AND REENACTMENT
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 13
TITLE OF RULE BEING AMENDED: BUSINESS AND OCCUPATION TAX
IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY:
TITLE OF RULE BEING FILED AS AN EMERGENCY:

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SENATE BILL 1 SUBSTANTIALLY AMENDED THE B & O TAX BY IMPOSING A TAX ON THE BUSINESS OF GAS STORAGE, BY AMENDING THE EXISTING TAX ON THE BUSINESS OF GENERATING OR PRODUCING ELECTRIC POWER, AND BY IMPOSING AN ALTERNATE TAX ON THE BUSINESS OF GENERATING, PRODUCING OR SELLING ELECTRIC POWER. THIS RULE IS NECESSARY TO PROVIDE APPROPRIATE GUIDANCE, PREVENT CONFUSION ON THE PART OF AFFECTED TAXPAYERS, AND TO THEREFORE PREVENT SUBSTANTIAL HARM TO THE PUBLIC INTEREST.

Use Additional Sheets If Necessary.


CHARLES O. LORENSEN
STATE TAX COMMISSIONER

FISCAL NOTE FOR PROPOSED RULES

FILED

Rule Title: BUSINESS AND OCCUPATION TAX

JUN 30 PM 1:59

Type of Rule: X Legislative Interpretive Procedural

Agency: Tax Department Address: State Capitol, Charleston, WV 25305

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 and Alterations	-0-	-0-	-0-	-0-	-0-
Equipment	-0-	-0-	-0-	-0-	-0-
Other	-0-	-0-	-0-	-0-	-0-

2. Explanation of above estimates:

The fiscal impact of this rule should not vary from that envisioned by the Legislature when it enacted amendments to the Business and Occupations tax.

3. Objectives of these rules:

Senate Bill 1, which was enacted January 31, 1989, and made effective March 1, 1989, made substantial changes in the Business and Occupation tax: imposed a tax on the business of gas storage, amended the existing tax on the business of generating or producing electric power, and imposed an alternative tax on the business of generating, producing or selling electric power. Senate Bill 622 provided further amendment. The rule repeals all prior rules and reenacts 110 C.S.R. 13 to incorporate the legislative changes.

FILED

EMERGENCY
WEST VIRGINIA LEGISLATIVE REGULATIONS
STATE TAX DEPARTMENT
TITLE 110
SERIES 13
1989.

JUL 30 PM 1:59

OFFICE OF WEST VIRGINIA
LEGISLATIVE COUNSEL

Filed: July 1, 1989

§ 110-13-1. General.

1.1 Type of regulation. - These regulations are emergency legislative regulations as defined in W. Va. Code § 29A-3-1 et seq.

1.2 Scope. - These emergency legislative regulations explain and clarify the West Virginia Business and Occupation Tax, W. Va. Code § 11-13-1 et seq. Effective upon filing in the State Register on July 1, 1989, these emergency legislative regulations are intended to repeal and re-enact 110 C.S.R. 13.

1.3 Authority. - These emergency legislative regulations are issued under the authority of W. Va. Code § 11-10-5 and 29A-3-15.

1.4 Filing date. - These emergency legislative regulations were filed in the State Register on July 1, 1989.

1.5 Effective date. - These emergency legislative regulations become effective July 1, 1989.

1.6 Citation. - These emergency legislative regulations may be cited as 110 C.S.R. 13, _____ (1989).

§ 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.

1a.2 Terms defined.

1a.2.1 "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall include 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.2.1.1 The business and occupation tax act imposes taxes upon persons engaged in business. The term "Business" shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect.

1a.2.1.2 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 in without profit as the primary motivation.

1a.2.2 "Company use" means that amount of electrical energy, excluding station use, 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.2.3 "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.2.3.1 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.2.3.1.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.2.3.1.b Any gas used in a recycling operation of the storage reservoir.

1a.2.3.2 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.2.4 "Gas" means either natural gas unmixed, or any mixture of natural and artificial gas or any other gas.

1a.2.5 "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 "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.2.7 "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 "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 "Gross West Virginia electric energy generation" means the total amount of electric energy produced by a generating station located in West Virginia.

1a.2.10 "Kilowatt hours of electricity 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.

1a.2.11 "Kilowatt hours of net generation available for sale that was generated or produced in this State" means net kilowatt hours generated or produced in West Virginia less both company use and line loss as herein defined.

1a.2.12 "Line loss" means the amount of loss of electrical energy occurring in or attributable to transmission lines, facilities or apparatus in West Virginia. For purposes of these regulations, line loss is line loss at transmission levels at which power is exported out of the State of West Virginia. Line loss shall in no case exceed 1.5% of net kilowatt hours generated or produced in West Virginia.

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

1a.2.14 "Net Kilowatt hours generated or produced in West Virginia" means gross West Virginia electric energy generation less station use, as defined herein.

1a.2.15 "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 "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.2.17 "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 "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 a portion thereof.

1a.2.19 "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 "State" or "this State" means the State of West Virginia.

1a.2.21 "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 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 "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 includes the energy used for pumping water for purposes of providing stored energy at a pumped storage hydroelectric plant.

1a.2.23 "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. Provided, That storage reservoirs into which gas was first injected for the purpose of storage after February 28, 1989 and prior to April 6, 1989 shall be included as storage reservoirs subject to the tax imposed pursuant to W. Va. Code § 11-13-2e for periods beginning March 1, 1989 and continuing through April 5, 1989.

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

1a.2.25 "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.

§ 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 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.

2.3 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;

2d.3.2 Water companies, four and four-tenths percent, 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 paragraphs 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 separately metered from all other electric power consumed at that location, the sales and 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 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 by 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; and

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

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 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 of 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 2d.3.3 of this Section shall expire and become null and void for taxable years beginning on or after January 1, 1998.

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

2e.1 Rate of tax. - 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 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 beginning on or after April 6, 1989, the tax due under W. Va. Code § 11-13-2e shall be five cents 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.

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 four of these regulations, except that such payments shall be remitted on or before the twentieth day of the month following the month or quarter in which the tax accrued.

§ 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, except that the rate shall be two percent 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 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.

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

2n.1 Rate of tax. - Upon every person engaging or continuing within this State in the business of generating or producing electricity for sale, profit or commercial use, either directly or indirectly through the activity of others, in whole or in part, or in the business of selling electricity to consumers, or in both businesses, the tax due under W. Va. Code § 11-13-2n shall be equal to:

2n.1.1 Two tenths (.2) cents 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 (.05) cents 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 § 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 (.05) cents 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 in this State by the taxpayer after February 28, 1989, 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 (.15) cents 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 (.05) cents 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 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 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 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 in this State during calendar year 1989 but after February 28, 1989.

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 paragraph, 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) 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 paragraph 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. - 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, 1989.

§ 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 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 per month is deducted. Inasmuch as the law grants each person a monthly exemption of forty-one dollars and sixty-seven cents per month, only one annual exemption 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 paragraph (b) 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 assets 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" shall include 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" shall 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" shall 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 subsection two (2) of these definitions.

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 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 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.

§ 110-13-4. Compilation 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 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 subdivision 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 of any applicable tax credits allowable for the taxable year and one twelfth 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 per month, the tax shall be due and payable in quarterly installments within one month from the expiration of each quarter in which the tax accrued. Each such taxpayer shall, within one 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 of any applicable tax credits allowable for the taxable year and one fourth 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 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 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 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 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. 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 of any applicable tax credits allowable for the taxable year and one twelfth of the total exemption allowed for such year.

4.2.2 For taxpayers whose estimated tax due as calculated under subsection 4.2.1 of these regulations is less than one thousand dollars 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 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 of any applicable tax credits allowable for the taxable year and one fourth of the total exemption allowed for such year. Should the taxpayer have a monthly estimated tax due of over one thousand dollars prior to deducting the allowable credit and exemption deductions for that month, than all previous monthly installments shall be retroactively due and payable at the time they would have otherwise been due and payable under subsection 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 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 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 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 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 quarterly estimate. The annual return is a recompilation of the three quarterly estimates and the fourth 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. 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 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.

5.2.3 Extensions of the time to file any tax return under W. Va. Code § 11-13-1 et seq. shall not extend the time for payment of any tax due under the said article.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
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STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

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Director, Corporations

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Special Assistant

(Plus all the volunteer
help we can get)

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug. 10, 1989
ADMINISTRATIVE LAW DIVISION

August 10, 1989

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: State Tax Department

RULE: Amendments, Series 13; Business and Occupation Tax

DATE FILED AS AN EMERGENCY RULE: June 30, 1989

DECISION NO. 11-89

Following review under WV Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Ken Hechler".

KEN HECHLER
Secretary of State

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
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help we can get)

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

FILED IN THE OFFICE OF
THE SECRETARY OF STATE
THIS DATE Aug-10/1989
ADMINISTRATIVE LAW DIVISION

DECISION

EMERGENCY RULE DECISION
(ERD 11-89)

AGENCY: State Tax Department
RULE: Amendments Series 13, Business and Occupation Tax
FILED AS AN EMERGENCY RULE: June 30, 1989

- par. 1 The State Tax Department has filed the above emergency amendments to Series 13, Business and Occupation Tax
- par. 2 West Virginia Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 6 The Tax Department filed this emergency rule with supporting documents with the Secretary of State on June 30, 1989 and with the LRMRC on June 30, 1989.

par. 7 It is the determination of the Secretary of State that the Tax Department has complied with the procedural requirements of WV Code §29A-3-15 for adoption of an emergency rule.

par. 8 (B) Statutory Authority -- WV Code §11-10-5 reads:

§11-10-5. General power; regulations and forms.

The tax commissioner shall administer and enforce each tax to which this article applies and, in connection therewith, shall prescribe all necessary forms. The tax commissioner may make all needful rules and regulations for the taxes in which this article applies as provided in the State Administrative Procedures Act in chapter twenty-nine-a (§29A-1-1 et seq.) of this code: Provided, That all rules and regulations of the tax commissioner presently in effect on the effective date of this article (July 1, 1986) shall remain in full force and effect until amended or repealed by the tax commissioner in the manner prescribed by law.

par. 9 It is the determination of the Secretary of State that the Tax Department has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

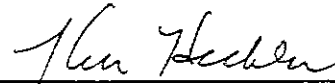
par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Department of Transportation are as follows:

Senate Bill 1 substantially amended the B & O Tax by imposing a tax on the business of gas storage, by amending the existing tax on the business of generating or producing electric power, and by imposing an alternate tax on the business of generating, producing or selling electric power. This rule is necessary to provide appropriate guidance, prevent confusion on the part of affected taxpayers, and to therefore prevent substantial harm to the public interest.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of emergency.

par. 14 This decision shall be cited as Emergency Rule Decision 11-89 or ERD 11-89 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the State Tax Department, the Attorney General and the Legislative Rule Making Review Commission.



KEN HECHLER
SECRETARY OF STATE

Entered _____