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

AGENCY: STATE TAX DIVISION TITLE NUMBER: 110

CITE AUTHORITY W. VA. CODE §§ 11-13C-14(g) AND 29A-3-1 ET SEQ.

AMENDMENT TO AN EXISTING RULE: YES____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 13C

TITLE OF RULE BEING PROPOSED: BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT, CORPORATION HEADQUARTERS RELOCATION TAX CREDIT, AND SMALL BUSINESS TAX CREDIT

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.

ALAN L. MIERKE
ACTING STATE TAX COMMISSIONER

State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

L. FREDERICK WILLIAMS, JR.
SECRETARY

DATE: FEBRUARY 21, 1991

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: STATE TAX DIVISION

LEGISLATIVE RULE TITLE: BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT, CORPORATION HEADQUARTERS RELOCATION TAX CREDIT, AND SMALL BUSINESS TAX CREDIT

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1. Authorizing statute(s) citation: W. Va. Code § 11-13C-14(g) and 29A-3-1 et seq.

2. a. Date filed in State Register with Notice of Public Comment Period: September 6, 1990

   b. What other notice, including advertising, did you give of the hearing? None

   c. Date of Public Comment Period: September 6, 1990 thru October 8, 1990

   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) February 21, 1991

   f. Name and phone number of agency person to contact for additional information: Mark Morton 348-5330

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. N/A

   b. Date of hearing: _____

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

   d. Attach findings and determinations and reasons:
   Attached _____

PUBLIC COMMENTS TO THE BUSINESS INVESTMENT AND JOBS EXPANSION TAX CREDIT, CORPORATION HEADQUARTERS RELOCATION TAX CREDIT, AND SMALL BUSINESS TAX CREDIT REGULATIONS, TITLE 110, SERIES 13C, FILED SEPTEMBER 6, 1990

The following are public comments received by the Department of Tax and Revenue pertaining to the Proposed Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit Regulations, Title 110, Series 13C, filed on September 6, 1990. In total, five letters commenting on the Title 110, Series 13C regulations were received by the Department of Tax and Revenue. Those letters were timely filed within the 30-day comment period, given extension of the final day by reason of its falling on a national holiday. Five main issues were addressed in the five comment letters received. For purposes of responding to the issues presented, the comments have been condensed, rather than repeated verbatim. Copies of the original correspondence containing comments are attached.

Comment 1:

The matter most frequently addressed in the comment letters relates to the fact that Section 110-13C-14.3.2.3.b.1 and Section 110-13C-4b.1.1.1 of the regulations were originally drafted so as to limit the transition rule set forth in Section 11-13C-14(c)(2)(C) of the West Virginia Code to prohibit two or more successive certified projects from qualifying under the transition rule. The regulations limited the transition rule to one certified project.

Enrolled Committee Substitute for Senate Bill 333, passed March 10, 1990, and effective from passage, limited the business investment and jobs expansion tax credit, small business credit and corporation headquarters relocation credit (hereinafter supercredit) to require that the supercredit not apply against the severance tax unless, in accordance with transition rules set forth in the bill, the credit arises from qualified investment property placed in service or use prior to March 10, 1990, or qualified investment property placed in service or use on or after March 10, 1990, pursuant to certain specified transition rule conditions.

All transition rules in Enrolled Committee Substitute for Senate Bill 333 are set forth in Section 11-13C-14(c)(2) of the West Virginia Code. The transition rule set forth in Section 11-13C-14(c)(2)(C) reads as follows:

> (c) Credit not to be applied against severance taxes.
> (1) Notwithstanding any provision in this chapter to the contrary, no credit shall be allowed against the taxes imposed by article thirteen-a of this chapter for taxable years ending on or after the date of passage of this section unless one of the transition rules in paragraph (2) of this subsection (c) applies.
> (2) Transition rules. - The general rule stated in paragraph (1) of this subsection (c) shall not apply:
> . . .
> (C) To property purchased or leased for business expansion that is placed in service or use on or after the date of passage of this section [March 10, 1990], as part of a project otherwise eligible for the credit under subsection

(a), section four-b of this article, if all of the requirements of clauses (i), (ii), (iii) and (iv) of this subparagraph are satisfied:

(i) The taxpayer and other participants in the project, if any, have made investments in property purchased or leased for business expansion as defined in subsection (b)(19), section three of this article prior to the date of passage of this section [March 10, 1990] in excess of ten million dollars.

(ii) The investments described in clause (i) were made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project.

(iii) The portion of the project constructed, purchased or leased after the date of passage of this section [March 10, 1990] meets the definition of new business facility in subsection (e)(3) of this section.

(iv) The new jobs created by the project after the date of passage of this section [March 10, 1990] are filled by new employees as defined in subsection (e)(4) of this section.

Sections 110-13C-14.3.1, 14.3.2, 14.3.2.3 and 14.3.2.3a through 14.3.2.3d, inclusive, of the regulations (which interpreted Section 11-13C-14(c)(2)(C) of the West Virginia Code) formerly read as follows:

14.3.1 Notwithstanding any provision in West Virginia Code article 11-13C to the contrary, no credit shall be allowed against the taxes imposed by West Virginia Code article 11-13A (the severance tax) for taxable years ending on or after March 10, 1990 unless one of the transition rules in West Virginia Code § 11-13C-14(c)(2) applies.

14.3.2 Transition rules. - The general rule stated in West Virginia Code § 11-3C-14(c)(1) and Section 14.3.1 of these regulations shall not apply:

14.3.2.3 To property purchased or leased for business expansion that is placed in service or use on or after March 10, 1990 as part of a project otherwise eligible for the credit under West Virginia Code § 11-13C-4b(a) if all of the requirements of subsections 14.3.2.3.a through 14.3.2.3.d, inclusive, of these regulations are satisfied:

14.3.2.3.a The taxpayer and other participants in the project, if any, have made investments in property purchased or leased for business expansion as defined in West Virginia Code § 11-13C-3(b)(19) prior to March 10, 1990 in excess of ten million dollars ($10,000,000).

14.3.2.3.a.1 The requirement of West Virginia Code § 11-13C-14(c)(2)(C)(i) that more than ten million dollars ($10,000,000) investment be made in property purchased or leased for business expansion means that an actual payment of at least ten million dollars ($10,000,000) must have been made for such property and, because the definition of

property purchased for business expansion requires that property be placed in service or use in order to qualify as such, the property purchased with the said ten million dollar ($10,000,000) investment must have been placed in service or use in the project prior to March 10, 1990 in order for the investment to qualify under West Virginia Code § 11-13C-14(c)(2)(C)(i). Investment in mineral reserves placed in service or use before March 10, 1990 for which production royalties or other investment payments have actually been paid may be counted toward the ten million dollar ($10,000,000) threshold amount only to the extent of actual amounts paid before March 10, 1990. This means the actual amount paid and not the amount of credit applied based upon royalties paid divided by ten (10) and applied each year for up to ten (10) years under West Virginia Code § 11-13C-6(c)(7). No amount of mineral royalties or other nonquantifiable investment paid or to be paid subsequent to March 9, 1990 will qualify as part of the ten million dollar ($10,000,000) investment amount under West Virginia Code § 11-13C-14(c)(2)(C)(i) notwithstanding the fact that such property was placed in service or use prior to March 10, 1990 and notwithstanding the fact that total cumulative royalty or other payments to be paid over the ten (10) year nonquantifiable investment period specified in West Virginia Code § 11-13C-6(c)(7) may ultimately exceed ten million dollars ($10,000,000) at some time subsequent to March 10, 1990.

14.3.2.3.a.2 Quantifiable lease payments, minimum royalties and other known and quantifiable investment which will constitute rent reserved for the primary term of a lease or, scheduled payments or which will otherwise constitute prospective qualified investment for purposes of this credit will be counted toward the ten million dollar ($10,000,000) threshold amount only to the extent of actual amounts paid before March 10, 1990. No amount of lease payments or other payments paid or to be paid subsequent to March 9, 1990 will qualify as part of the ten million dollar ($10,000,000) investment amount under West Virginia Code § 11-13C-14(c)(2)(C)(i), notwithstanding the fact that such property was placed in service or use prior to March 10, 1990, and notwithstanding the fact that total cumulative royalty or other payments to be paid over the lease term or other payment term may ultimately exceed ten million dollars ($10,000,000), and further notwithstanding the fact that rent reserved for the primary term of the lease or other prospective cumulative payments or scheduled payments constitute qualified investment upon which the credit is based.

14.3.2.3.b The investments described in section 14.3.2.3.a of these regulations were made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project.

14.3.2.3.b.1 The term "integrated project" under West Virginia Code § 11-13C-14(c)(2)(C)(ii) means a West Virginia Code § 11-13C-4b certified project. In no circumstance will the integrated project concept of West Virginia Code § 11-13C-14(c)(2)(C)(ii) be interpreted to encompass two (2) or more successive certified projects certified under West Virginia Code § 11-13C-4b which are or may be parts or phases of a single long-term investment program. Any certified project for which investment is first placed in service or use after March 10, 1990 shall not qualify as an integrated project under West Virginia Code § 11-13C-14(c)(2)(C)(ii).

14.3.2.3.c The portion of the project constructed, purchased or leased after March 10, 1990 meets the definition of new business facility in West Virginia Code § 11-13C-14(e)(3).

14.3.2.3.d The new jobs created by the project after March 10, 1990 are filled by new employees as defined in West Virginia Code § 11-13C-14(e)(3).

Section 110-13C-4b.1.1.1 of the regulations formerly read as follows:

4b.1.1.1 The term "integrated project" under West Virginia Code § 11-13C-14(c)(2)(C)(ii) means a West Virginia Code § 11-13C-4b certified project. In no circumstance will the integrated project concept of West Virginia Code § 11-13C-14(c)(2)(C)(ii) be interpreted to encompass two (2) or more successive certified projects certified under West Virginia Code § 11-13C-4b which are or may be parts or phases of a single long-term investment program. Any certified project for which investment is first placed in service or use after March 10, 1990 shall not qualify as an integrated project under West Virginia Code § 11-13C-14(c)(2)(C)(ii).

The commentators stated that Sections 110-13C-14.3.2.3.b.1 and 110-13C-4b.1.1.1 were inconsistent with the statute and contrary to the intent of the Legislature in its enactment of the transition rule because the definition of the term "integrated project" in those regulations sections prohibited the term from encompassing more than one successive certified projects. The commentators point out that Section 11-13C-14(c)(2)(C)(ii) of the West Virginia Code uses the following language: "Pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project." The commentators argue that this language contains no time limitation, and should therefore embrace investment placed in service over any number of years and entitle a taxpayer to take supercredit as part of an "integrated project" over any number of years.

One commentator states that the language of Section 11-13C-14(c)(2)(C) of the West Virginia Code refers to "an integrated project to be developed over a period of one or more years." The commentator points out that the section does not refer to a "certified project," and points out that, had the Legislature meant to limit the integrated project period to a single three-year certified

project, the Legislature could have written the section to say at least one, but no more than three years.

Response to Comment 1:

Sections 4b.1.1.1 through 4b.1.1.3, and 14.3.2.3 through 14.3.2.3.d of the regulations have been added or amended to adopt the interpretation of the commentators that the integrated project language appearing in Section 11-13C-14(c)(2)(C) of the West Virginia Code encompasses more than one multiple year business investment and jobs expansion tax credit project. However, the term has been limited to no more than two successive multiple year projects in the proposed regulations.

Comment 2:

A commentator states that "proposed Regulation Sec. 14.3.2.a.1" would limit the $10 million threshold investment amount set forth in Section 11-13C-14(c)(2)(C)(i) of the West Virginia Code (the transition rule set forth above under Comment 1) to require that "an actual payment of at least ten million dollars must have been made." The particular commentator quoted above stated the former regulation section number erroneously. The correct number should have been shown as Section 110-13C-14.3.2.3.a.1.

The commentators state that this "narrow" interpretation could result in similarly situated taxpayers being treated differently, and could result in taxpayers who "reasonably" relied upon the language of the statute being disqualified from taking the credit based on the regulations.

One of the commentators asks that the regulation be modified to allow a taxpayer who "makes an investment as defined in W. Va. Code Sec. 11-13C-3(b)(19)(A) in property purchased or leased for business expansion in excess of ten million dollars prior to March 10, 1990 but places it in service thereafter . . . qualify for the credit under the transition rules."

Response to Comment 2:

Sections 14.3.2.3 through 14.3.2.3.d of the regulations have been amended or inserted to adopt the interpretation of Section 11-13C-14(c)(2)(C) of the West Virginia Code advocated by the commentators.

Comment 3:

Section 11-13C-14(e)(4)(A) of the West Virginia Code (enacted in Enrolled Committee Substitute for Senate Bill 333), in part, redefined the term "new employee" as follows:

> The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position or a job in this state which previously did not exist in taxpayer's business enterprise in this state prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net

increase in the taxpayer's employment in this state: Provided, That with respect to taxpayers who file application for certification after the date of passage of this section [March 10, 1990], the tax commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one person for the controlled groups of all participants, taken as a whole: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion on or after the effective date of this section may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the tax commissioner and the tax commissioner expressly finds. . . .

Section 110-13C-3.15.1 of the regulations defines, in part, the term "new employee" pursuant to the above quoted statutory section. However, the underlined portions of the regulation set forth below are the basis of a comment:

3.15.1 The term "new employee" means a person residing and domiciled in this State, hired by the taxpayer to fill a position for a job in this State which previously did not exist in the taxpayer's business enterprise in this State prior to the date on which the taxpayer's qualified investment is placed in service or used in this State. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this State: Provided, That with respect to taxpayers who file application for certification of a project under West Virginia Code § 11-13C-4b after March 10, 1990, **and other taxpayers which place qualified investment into service or use after March 10, 1990**, the Tax Commissioner may require that the net increase in the taxpayer's employment in this State be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one (1) person for the controlled groups of all participants, taken as a whole: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion on or after March 10, 1990 may be treated as new employees filling new jobs if the taxpayer certifies the material facts to the Tax Commissioner and the Tax Commissioner expressly finds that. . . .

(Emphasis added.)

The commentator characterizes the underlined portion of the regulation as an additional requirement not set forth in the statute. The commentator requests that the underlined portions of the regulation be deleted as not in conformity with the statute.

Response to Comment 3:

The statute refers to "taxpayers who file application for certification after the date of passage of this section," (March 10, 1990), and makes such taxpayers subject to the determination of the net increase in the taxpayer's employment on the basis of the taxpayer's controlled group, at the discretion of the Tax Commissioner. The statute then refers to "a project involving more than one person for the controlled groups of all participants. . . ."

The statute seems to expressly authorize the Tax Commissioner's use of the discretionary determination of net employment based on the controlled group in the case of taxpayers who file applications for project certification under Section 11-13C-4b of the West Virginia Code. However, it could be argued that the statute is silent as to nonproject taxpayers. To so read the statute is to subject nonproject and project taxpayers to potentially disparate treatment without a rational reason for such disparate treatment. Therefore, the "application for certification" discussed in Section 11-13C-14(e)(4)(A) of the West Virginia Code was interpreted in Section 110-13C-3.15 of the regulations to mean either the application for certification of a project filed after March 10, 1990 under Section 11-13C-4b of the West Virginia Code, or application for credit for investment placed in service or use after March 10, 1990, filed under Section 11-13C-14(f) of the West Virginia Code. This interpretation eliminates the disparate treatment of similarly situated taxpayers which could otherwise result if the commentator's interpretation were adopted.

The Department of Tax and Revenue respectfully requests that the agency approved regulation section be adopted as filed.

Comment 4:

Section 11-13C-14(e)(4)(A) of the West Virginia Code reads as follows:

> The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position or a job in this state which previously did not exist in taxpayer's business enterprise in this state prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this state: Provided, That with respect to taxpayers who file application for certification after the date of passage of this section [March 10, 1990], the tax commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one person for the controlled groups of all participants, taken as a whole: Provided, however, That persons filling jobs saved as a direct result of taxpayer's qualified investment in property purchased or leased for business expansion on or after the effective date of this section may be treated as new employees filling new jobs if

the taxpayer certifies the material facts to the tax commissioner and the tax commissioner expressly finds that:

(i) But for the new employer purchasing the assets of a business in bankruptcy under chapter seven or eleven of the United States Bankruptcy Code and such new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold by the United States bankruptcy court in a liquidation sale and the jobs so saved would have been lost; or

(ii) But for taxpayer's qualified investment in property purchased or leased for business expansion in this state, taxpayer would have closed its business facility in this state and the employees of the taxpayer located at such facility would have lost their jobs: Provided, That the tax commissioner shall not make this certification unless the tax commissioner finds that the taxpayer is insolvent as defined in 11 U.S.C. § 101(31) or that the taxpayer's business facility was destroyed in whole or in significant party by fire, flood or other act of God.

A commentator characterizes the language of paragraph (ii) of the above quoted statutory section as appearing to be the result of an "inadvertent drafting error." The commentator argues that the language of subsection (ii) of the above quoted statute should be interpreted to substantively parallel subsection (i) of the above quoted section in the regulations. The commentator states that former Section 110-13C-3.15.1.2 of the regulations (which merely repeated the language of Section 11-13C-14(e)(4)(A)(ii) of the West Virginia Code, as quoted above) should be rewritten as follows:

3.15.1.2 But for the ~~taxpayer's~~ new employer's qualified investment in property purchased or leased for business expansion in this State, ~~taxpayer~~ the seller would have closed its business facility in this State and the employees of the ~~taxpayer~~ seller located at such facility would have lost their jobs: Provided, that the Tax Commissioner shall not make this certification unless the Tax Commissioner finds that the ~~taxpayer~~ seller is insolvent as defined in 11 U.S.C. § 101(31) or that the ~~taxpayer~~ seller's business facility was destroyed in whole or in significant part by fire, flood or other act of God.

Strike-throughs indicate language being deleted and underscoring indicates language being added.

Response to Comment 4:

The commentator contends that the language of Section 11-13C-14(e)(4)(A)(ii) of the West Virginia Code appears to be the result of an inadvertent drafting error. This may well be the case. The language of the statutory subsection as currently written would, indeed, appear to exact a strained, perhaps even impossible requirement upon an insolvent taxpayer in order for the taxpayer to qualify under the "saved jobs" criterion of the "new employee" definition. The statute would appear to require an insolvent taxpayer to make qualified investment in its own insolvent business in order to qualify

as having saved the jobs in placed with the business. At first impression it might seem self-evident that an insolvent taxpayer could not have the means for making such an investment in itself. The proposition would seem to defy the very concept of insolvency. If a taxpayer had the means to make such an investment it would, by definition, not be insolvent.

The Department of Tax and Revenue has substantively adopted the proposed changes set forth by the commentator with relation to Section 110-13C-3.15.1.2 in the agency approved regulations as filed. The particular language adopted by the Department of Tax and Revenue with regard to this section differs from the proposal set forth in the comment. However, use of the actual language adopted is technically necessary in order that certain corporate transfers and mergers and certain partnership transfers and transactions not covered by the commentator's proposed language will be included and fully covered.

Comment 5:

Sections 110-13C-4b.6.2 and 4b.6.4.1 through 4b.6.4.4, inclusive, of the proposed regulations read as follows:

> 4b.6.2 Ordinarily where a new project participant is to be added or a new project participant is to be substituted for a former project participant, the Tax Department will require the project participants to obtain approval from the Tax Department for such a substitution and to amend the application for project certification prior to the addition or substitution of the new project participant. Failure to submit an amendment for participant addition or substitution prior to such addition or substitution shall result in an invalid and unrecognized addition or substitution.
>
> 4b.6.4.1 New project participants may not be added, except as successors to ongoing participants, after expiration of the three (3) year new jobs redetermination period or the three (3) year project investment period set forth in West Virginia Code § 11-13C-7(f) and West Virginia Code § 11-13C-4b(a)(1), respectively. These periods would typically end simultaneously with the end of the second tax year subsequent to the end of the tax year during which project investment was first placed in service or use. Refer to Section 4.3 of these regulations for discussion of investment periods.
>
> 4b.6.4.2 Although other entities could engage in the project enterprise after the above-described three (3) year periods have expired, such entities could not be added as new project participants. However, substitute project participants acting as successors to already participating participants could be substituted subsequent to the end of the above-described three (3) year periods so long as the total number of jobs and qualified investment in service or use remained substantially unchanged.

4b.6.4.3 Addition or substitution of a project participant will require submission of an amendment to the application for project certification. Such amendment can consist of a letter identifying the new or substitute participants and describing the change sought. The letter should contain or be accompanied by a properly executed statement of participation from each new or substitute participant, and an agreement executed by the new or substitute participants to the plan of credit allocation among project participants in effect for the project.

4b.6.4.4 Addition or substitution of project participants must be approved by the Tax Commissioner prior to the addition or substitution.

A commentator comments that these regulations are unclear as to whether a participant in a certified supercredit project can sell its assets, or can be sold or transferred, either through liquidation to or merger with a transferee, and have that transferee be treated as a successor in business in accordance with Section 11-13C-9 of the West Virginia Code. The commentator suggests that the following section be added to the regulations.

4b.6.4.5 Nothing herein shall be construed to preclude the transfer or sale of qualified investment to a successor in business as set forth in W. Va. Code § 11-13C-9 at any time during the life of the credit or to require any application to or pre-approval of the Tax Commissioner with respect to such transfer. The employees of such successor will be considered new employees to the extent they replace or succedd jobs held by employees filling enw jobs of the business whose qualified investment were tranferred to the successor.

The commentator also states that Section 4b.6.2 (quoted above) sets forth an unreasonable and harsh penalty for the failure of a proposed project participant to secure the approval of the Tax Commissioner of the substitution of a proposed successor project participant for an old participant or the addition of a new participant to the project. The commentator points out that the non-recognition of the proposed project participant not preapproved by the Tax Commissioner is potentially a harsher penalty than those penalties prescribed for total failure to seek or obtain certification of a project prior to the taking of supercredit on a tax return, and that the penalty is therefore unreasonable.

Response to Comment 5:

The Department of Tax and Revenue has substantially adopted the commentator's suggestions on both points made in the comment. The regulation section proposed by the commentator has been adopted in the agency approved regulations as filed by the Department of Tax and Revenue, except that the requirement for prior approval of a new or substitute project participant has been retained. The portion of the commentator's proposed regulation section relating to preapproval has, therefore, been struck from the language adopted.

Section 110-13C-4b.6.2 has been rewritten in the proposed regulations as filed by the Department of Tax and Revenue to clarify the fact that the same penalty applies in the case of failure to obtain prior approval of the Tax Commissioner for the substitution or addition of a certified project participant as in the case of failure to seek or obtain project certification prior to the taking of the supercredit on a tax return.

Other Changes:

In addition to the changes described above as having been made in the regulations as a result of comments received, certain changes have been made as a result of the discovery of typographical or textual errors.

In the agency approved proposed legislative regulations as filed, at Section 110-13C-3.26.1, in the chart of annual payroll and annual gross receipts, the word "payment" has been changed to the word "receipts" in the heading for the right column of the chart. Also, the annual payroll number for the period of January 1, 1989 to December 31, 1989 has been changed from "$1,526,050" to "$1,562,050." In Section 5.9.4.2, in the example, several changes were made due to numerical, typographical or textual errors.

USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776

Tax Division

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RECEIVED
1990 OCT -9 AM 3:00
STATE TAX DEPARTMENT
LEGAL DIVISION

October 5, 1990

USX

Mr. Richard Boyle, Director
Legal Division
State Tax Department
P.O. Drawer 1005
Charleston, West Virginia 25324-1005

Re: Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit Regulation.
110 C.S.R. 13C, Sec. 1.1 et seq. (1990).

Dear Mr. Boyle,

The following general comments are made on behalf of USX Corporation concerning the proposed Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit Regulations. Specifically, these comments address the ten million dollar investment requirement and the "integrated project" definition.

First, the language of the statute under the transition rules for property purchased or leased for business expansion that is placed in service or use on or after March 10, 1990 as part of a project otherwise eligible for the credit requires investments in excess of ten million dollars prior to March 10, 1990. W. Va. Code Sec. 11-13C-14(c)(2)(C)(i) (1990). However, the proposed Regulation, Sec. 14.3.2.a.1, would limit this requirement by requiring that an actual payment of at least ten million dollars must have been made for such property and, because the definition of property purchased for business expansion requires that property be placed in service or use in order to qualify, the property purchased with the ten million investment must have been placed in service or use in the project prior to March 10, 1990. This narrow interpretation expressed in the proposed Regulations could result in similarly situated taxpayers being treated differently as well as in taxpayers who reasonably relied upon the language of the statute being disqualified for the credit based on the Regulations. Therefore,

USX Corporation
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Tax Division

USX

it is respectfully requested that the proposed Regulations be modified so as to provide that the taxpayer who makes an investment as defined in W. Va. Code Sec. 11-13C-3(b)(19)(A) in property purchased or leased for business expansion in excess of ten million dollars prior to March 10, 1990 but places it in service thereafter will qualify for the credit under the transition rules.

Similarly, the proposed Regulations tend to narrow significantly the definition of "integrated project". The statute requires that the investments referred to in the preceding paragraph be "made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project". W. Va. Code Sec. 11-13C-14(c)(2)(C)(ii) (1990). Also, W. Va. Code Sec. 11-13C-4b-(a)(1) states "[t]hat such qualified investment is made pursuant to a written business facility development plan of the taxpayer providing for an integrated project for investment at one or more new or expanded business facilities,..". This passage clearly identifies the integrated project as the taxpayers' plan for developing his business facility. The proposed Regulations narrow this requirement by defining an integrated project to be a certified project, by excluding two or more successive certified projects which are part or phases of a single long-term investment program and by requiring that the certified project be placed in service prior to March 10, 1990. 110 C.S.R. 13C, Sec. 14.3.2.3.b.1 (1990). Again, this narrow interpretation could result in similarly situated taxpayers being treated differently as well as in taxpayers who reasonably relied upon the language of the statute being disqualified for the credit based on the proposed Regulations. It is respectfully requested that these limitations be eliminated from the proposed Regulations and that the plain meaning of the term integrated project be applied when interpreting the statute.

Your review and consideration of these comments regarding the proposed Regulations to the Business Investments and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit are greatly appreciated. We will continue to follow the

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600 Grant Street
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Tax Division

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development of these Regulations and reserve the right to make additional comments in the future. If you have any questions regarding our comments or are in need of additional information, please do not hesitate to contact us.

K. J. Zuh

Manager-Tax, Accounting
State Income & Franchise Taxes

Marathon Oil Company
USS
U.S. Diversified Group
Texas Oil & Gas Corp.

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October 8, 1990

Hon. Alan L. Mierke
State Tax Commissioner
Legal Division
State Tax Division
P. O. Drawer 1005
Charleston, WV 25324-1005

Re: Emergency Legislative Rule - Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit

Dear Sir:

The following comments are submitted by the undersigned as counsel for Mingo Logan Coal Company in connection with the Emergency Rule filed September 5, 1990, entitled ***Business Investment and Jobs Expansion Tax Credits, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit***. The official citation is 110 CSR, 13C, § 110-13C-___ (1990). For purposes of this comment, pertinent provisions will be referred to as Reg. § 110-13C-___.

The comments address the portion of the Emergency Rule devoted to the Business Investment and Jobs Expansion Tax Credit (Jobs Credit) and more particularly the provisions dealing with the transition rules incorporated into the legislation passed March 10, 1990 that adopted restrictions and limitations on credits allowed by W. Va. Code § 11-13C-1 et seq. We believe that the intent of the transition rules contained in the 1990 legislation was accurately stated by Dale W. Steager, General Counsel to Secretary of the Department of Tax and Revenue, Charles O. Lorensen, in his letter dated February 19, 1990, addressed to the undersigned, wherein he states:

> The purpose of the various transition rules in Senate Bill 333 (House Bill 4488) is to grandfather under current law, provided certain criteria are satisfied, investments that have or are being made in reliance of and with the expectation that the investments will

qualify for the business investment and jobs expansion tax credit.

The Legislature incorporated specific criteria in the transition rules in the bill passed March 10, 1990. The Emergency Rule purports to cover the transition rules (Reg. § 110-13C-14.3.2) but contains provisions that are inconsistent with the law and clearly contrary to the intent of the transition rules.

The specific provision for which comment is submitted and to which objection is registered is the definition of the term "integrated project" found in Reg. § 110-13C-14.3.2.3.b.1. The identical definition also appears under the certified projects' regulation at Reg. § 110-13C-4b.1.1.1.

The definition of "integrated project" reads:

> The term "integrated project" under West Virginia Code § 11-13C-14(c)(2)(C)(ii) means a West Virginia Code § 11-13C-4b certified project. In no circumstance will the integrated project concept of West Virginia Code § 11-13C-14(c)(2)(C)(ii) be interpreted to encompass two (2) or more successive certified projects certified under West Virginia Code § 11-13C-4b which are or may be parts or phases of a single long term investment program. Any certified project for which investment is first placed in service or use after March 10, 1990, will not qualify as an integrated project under West Virginia Code § 11-13C-14(c)(2)(C)(ii). [Reg. § 110-13C-14.3.2.3.b.1.]

The transition rule adopted by the Legislature to deal with integrated projects is found at W. Va. Code § 11-13C-14(c)(2)(C) and provides that the general rule prohibiting the application of the Jobs Credit against the severance tax shall not apply:

> (C) To property purchased or leased for business expansion that is placed in service or use on or after the date of passage of this section [March 10, 1990], as part of a project otherwise eligible for the credit under

> subsection (a), section four-b [§ 11-13C-4b(a)] of this article, if all of the requirements of clauses (i), (ii), (iii) and (iv) of this subparagraph are satisfied:
>
> (i) The taxpayer and other participants in the project, if any, have made investments in property purchased or leased for business expansion as defined in subsection (b)(19), section three [§ 11-13C-3(b)(19)] of this article prior to the date of passage of this section [March 10, 1990] in excess of ten million dollars.
>
> (ii) The investments described in clause (i) were made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project.
>
> (iii) The portion of the project constructed, purchased or leased after the date of passage of this section [March 10, 1990] meets the definition of new business facility in subsection (e)(3) of this section.
>
> (iv) The new jobs created by the project after the date of passage of this section [March 10, 1990] are filled by new employees as defined in subsection (e)(4) of this section.

The law states that property purchased or leased for business expansion placed in service or use on or after March 10, 1990, as part of a project otherwise eligible for credit under W. Va. Code § 11-13C-4b(a), falls within the transition rule if all four of the statutory requirements are satisfied. The transition rule is not limited to investments first placed in service prior to March 10, 1990, but specifically includes investments made <u>on or after</u> that date. The Emergency Rule would disqualify a previously certified project first placed in service after March 10, 1990, even though such project is part of an integrated project. This result is directly contrary to the law. Had the Legislature intended the transition rule to apply only to projects certified

under W. Va. Code § 11-13C-4b(a) and first placed in service before March 10, 1990, it would not have used the phrase "a project otherwise eligible for credit" in the transition rule.

The Emergency Rule definition of "integrated project" prohibits that term from including two or more successive certified projects which are part of a single integrated investment program. This limitation is also contrary to the transition rule language in the statute. The second of the four requirements of the transition rule quoted above specifies that the minimum investment in excess of ten million dollars prior to March 10, 1990, be made "pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project." This requirement does not embrace the certified project provisions of W. Va. Code § 11-13C-4b(a) and specifically does not limit the investment period to three years. The requirement adopts a test that investments must be made under a plan for an integrated project over one or more years without a specific time limitation. The only limitation imposed by the Legislature is that the investment be made pursuant to an integrated project plan.

The concept of an integrated project for purposes of the transition rules was presented for discussion with Secretary of the Department of Tax and Revenue, Charles O. Lorensen, through his General Counsel, Dale W. Steager, in February 1990 before the final version of Senate Bill 333 (House Bill 4488) was enacted. At the time of that discussion, the transition rule in the proposed Legislation authorized the Tax Commissioner to waive the application of the new restrictions "with respect to a project otherwise eligible for credit under subsection (a), section four-b of this article, for which the taxpayer has made investment prior to the date of passage of this article exceeding twenty million dollars in the reliance on the availability of the credit." In the final version of the legislation, the waiver authority was replaced with the four specific requirements that have to be met before the transition rule applies. The type of project that is subject to the transition rule if the four requirements are satisfied, however, remains the same in the final bill as in the original version, that is "a project otherwise eligible for the credit under subsection (a), section four-b of this article."

Secretary Lorensen authorized General Counsel Steager to advise us in his February 19, 1990 letter that two integrated phases of a project previously certified as multiple projects will

be treated as a single project for purposes of the application of the then twenty million dollar grandfather rule. Although the threshold amount was lowered by the Legislature to ten million dollars and other criteria were adopted, the concept of an integrated project remained the same and was not in any way restricted to or by the certified project provisions of W. Va. Code § 11-13C-4b(a).

We believe that the legislative intent for approving an integrated project to qualify under the transition rule is for a determination to be made that qualified investments placed in service or use after March 10, 1990, are part of a project that the facts and circumstances show is a plan that existed on or before March 10, 1990, and that expenditures after that date were integral to the completion of the plan. In other words, a fact and circumstance test must be applied rather than an arbitrary time limit as contained in the Emergency Rule. To continue the Emergency Rule limitation would restrict the application of the transition rule in a manner contrary to the law as enacted by the Legislature.

Mingo Logan Coal Company made qualified investments far exceeding the ten million dollar transition rule threshold prior to March 10, 1990. The company has continued to carry out its integrated project plan, reviewed with Secretary Lorensen's representative in February, with substantial investments since March 10, 1990, in reliance on the Jobs Credit and on the interpretation placed on the transition rule concept by the Secretary. The restricted definition of "integrated plan" in the Emergency Rule is extremely detrimental to Mingo Logan Coal Company and to its plan for expansion and development as approved and in place prior to March 10, 1990.

We respectfully request your consideration of the foregoing comments and ask for an opportunity to discuss the same with the object of developing an amendment to the Emergency Rules that is consistent with the law.

Very truly yours,

G. Thomas Battle

GTB/ljr
cc: Markus J. Ladd, President
Mingo Logan Coal Company

WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION 1624 KANAWHA BOULEVARD, EAST • CHARLESTON, WEST VIRGINIA 25311 • (304) 346-5318

October 8, 1990

Mr. Alan Mierke
West Virginia Tax Department
Capitol Building
Charleston, West Virginia 25305

Dear Alan:

On behalf of the 350 member companies of the West Virginia Mining and Reclamation Association, we are pleased to offer the attached comments.

If you have any questions or need additional information, please advise.

Sincerely,

William B. Raney
Vice-President

WBR/pqb

INTEGRATED PROJECT- Reg. Section 110-13C-14.3.2.3.b.1 and Reg. Section 110-13C-4b.1.1.1 define the term "integrated project" as follows:

> *4b.1.1.1 The term "integrated project" under West Virginia Code §11-13C-14(c)(2)(C)(ii) means a West Virginia Code §11-13C-4b certified project. In no circumstance will the integrated project concept of West Virginia Code §11-13C-14(c)(2)(C)(ii) be interpreted to encompass two (2) or more successive certified projects certified under West Virginia Code §11-13C-4b which are or may be parts or phases of a single long-term investment program. Any certified project for which investment is first placed in service or use after March 10, 1990 shall not qualify as an integrated project under West Virginia Code §11-13C-14(c)(2)(C)(ii).*

The term "integrated project" is contained in the transition rules required by Senate Bill No. 333. This definition is not only contrary to the intent of the transition rule, but the plain meaning of statute. The term "Integrated Project" is clearly broader than project as definied in Section 11-13C-4b(a).

This language effectively defines "integrated project" to be a certified project. By cross defining these terms, these regulations give no meaning to the term "integrated project".

The language contained in section 11-13C-14(c)(2)(C) refers to "an integrated project to be developed over a period of of one or more years". It does not refer to a certified project. In effect, the definition of "Integrated Project" in the emergency regulations substitutes "certified project" in place of this phrase. Had the legislature intended to limit this time frame, it could have used certified project, or it could have limited the period of the "integrated project" to at least one, but no more than three years. It did not choose to do so.

The requirement in clause (i) of subsection (C) of the transition rule provides only that the participant in the project must have made an investment in property in excess of ten million dollars. There is no requirement that the investment be made in the same certified project or even in a certified project. Clearly, the contolling criteria is that the ten million dollar investment be:

1. made pursuant to a plan for an integrated project, and

2. made with the expectation of making additional investments in the integrated project.

We respectfully request that this definition be rewritten to address the characteristics of an "integrated project" in terms of the interdependence required to exist in an "integrated

project".

mm
90-315

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*ADMITTED TO PRACTICE IN KENTUCKY AND WEST VIRGINIA

October 8, 1990

RECEIVED
1990 OCT -9 AM 11:30
STATE TAX DEPARTMENT
LEGAL DIVISION

Richard Boyle, Director
Legal Division
State Tax Division
Post Office Drawer 1005
Charleston, West Virginia 25324-1005

Re: Written Comment Relating to Proposed Legislative Rule 13C

Dear Mr. Boyle:

The March 1990 amendments to Chapter 11, Article 13C inserted a revised definition of the term "new employee." In that connection, the provision concerning saving jobs was expanded so that an insolvent company did not need to actually be in federal bankruptcy proceedings in order for the purchaser of the assets of the company to qualify for the "save jobs" mechanism.

Specifically, new Section 14(e)(4)(A)(ii) was added by the Legislature as a companion to (i) so that the jobs saved by qualified investment in a statutorily insolvent company could qualify as new jobs under the business investment and jobs expansion credit statute without the need for a bankruptcy filing. However, it appears that through an inadvertent drafting error Subsection (ii) reads "[B]ut for taxpayer's qualified investment in property purchased or leased for business expansion in this State, the taxpayer would have closed its business facility in this State and the employees of the taxpayer located at such facility would have lost their jobs . . ." Presumably, everyone would agree that the language should have been the "mirror image" of Subsection (i) which reads "[B]ut for the new employer purchasing the assets of a business in bankruptcy under Chapter 7 or 11 of the United States

Bankruptcy Code and any such new employer making qualified investment in property purchased or leased for business expansion, the assets would have been sold . . . and the job so saved would have been lost."

Obviously, Subsection (ii) should be interpreted to mean "but for the new employer's qualified investment in property purchased or leased for business expansion in this State, the seller would have closed its business facility in this State and the employees of seller located at such facility would have lost their jobs."

The proposed Regulation in this area is found on page 7, Regulation 3.15.1. Regulation 3.15.1.2 merely repeats the language of statutory Subsection (ii). It is suggested that the legislative rule making process is the appropriate manner in which to correct the inadvertent oversight in the original language.

Accordingly, it is respectfully requested that proposed Regulation 3.15.1.2 be rewritten as follows:

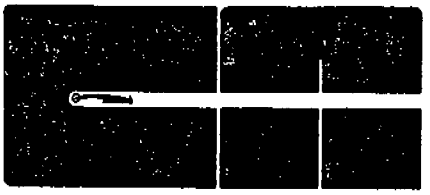
> "3.15.1.2 But for the new employer's qualified investment in property purchased or leased for business expansion in this State, the seller would have closed its business facility in this State and the employees of the seller located at such facility would have lost their jobs: Provided, That the Tax Commissioner shall not make this certification unless the Tax Commissioner finds that the seller is insolvent as defined in 11 U.S.C. §101(31) or that the seller's business facility was destroyed in whole or in significant part by fire, flood or other act of God."

Very truly yours,

David K. Higgins

DKH/ddd

mm
90-313



WEST VIRGINIA COAL ASSOCIATION

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STATE TAX DEPARTMENT
LEGAL DIVISION

October 8, 1990

Richard Boyle, Director
Legal Division
State Tax Department
P.O. Drawer 1005
Charleston, West Virginia 25324-1005

RE: Business Investment and Jobs Expansion Tax Credit, Corporate Headquarters Relocation Tax Credit, and Small Business Tax Credit Regulations 110 C.S.R. 13C-1 et seq.

Dear Mr. Boyle:

The following comments regarding the Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit Regulations promulgated by the State Tax Division on September 6, 1990 are made on behalf of the West Virginia Coal Association. The comment period for these rules, established pursuant to W. Va. Code § 29A-3-1 et seq., expires on October 8, 1990. Our comments address three (3) specific areas of the proposed Regulations.

I. New Employee. Senate Bill 333 redefined the term "new employee" as follows:

> The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position or a job in the state which previously did not exist in taxpayer's business enterprise in this state prior to the date on which the taxpayer's qualified investment is placed in service or use in this state. In no case shall the number of new employees directly attributable to such investment for purposes of this credit exceed the total net increase in the taxpayer's employment in this state: Provided, That with respect to taxpayers who file application for certification after the date of passage of this section the tax commissioner may require that the net increase in the taxpayer's employment in this state be determined and certified for

> the taxpayer's controlled group; and in the case of a project involving more than one person for the controlled groups of all participants, taken as a whole. . . W. Va. Code § 11-13C-14(e)(4)(A).

Regs. § 110-13C-3.15 defines the term "new employee" in a manner similar to the statute, except that it adds the additional requirement as follows:

> Provided, that with respect to taxpayers who file application for certification of a project under W. Va. Code § 11-13C-4b after March 10, 1990, and other taxpayers which place qualified investment into service or use after March 10, 1990., the tax commissioner may require that the net increase in taxpayer's employment in this state be determined and certified for the taxpayer's controlled group; and in the case of a project involving more than one person for the controlled group of all participants taken as a whole: (emphasis added).

We respectfully request this language be deleted as not in conformity with the statute.

It appears that the Legislature intended to give the Tax Commissioner flexibility in determining whether or not to require taxpayer to include the employment of its controlled group for purposes of determining whether there has been a net increase in employment. Given this flexibility, it seems obvious that the Legislature intended that the Tax Commissioner have the discretion to determine which members, if any, of taxpayer's controlled group should be included for purposes of determining whether there has been a net increase in employment.

Accordingly, we respectfully request that the portion of Regs. § 110-13C-3.15 cited above, be rewritten as follows:

> 3.15.1 The term "new employee" means a person residing and domiciled in this state, hired by the taxpayer to fill a position for a job in this state which previously did not exist in the taxpayer's business enterprise in this state prior to the date on which taxpayer's qualified investment is placed in service or used in this state. In no case shall the number of new employees directly

> attributable to such investment for purposes of this credit exceed the total net increase in taxpayer's employment in this state: Provided, that with respect to taxpayers who file application for certification of a project under W. Va. Code § 11-13C-4b after March 10, 1990, the tax commissioner may require a net increase in taxpayer's employment in this state be determined and certified for the taxpayer's controlled group or any portion thereof as determined by the tax commissioner; and in the case of a project involving more than one (1) person, that the controlled groups of all participants or any portion thereof as determined by the tax commissioner, taken as a whole:

II. Transition Rules under W. Va. Code § 11-13C-14(c)(2). Senate Bill 333 (the "Act"), passed by the Legislature on March 10, 1990, prohibited application of the West Virginia Business Investment and Jobs Expansion Tax Credit against Severance Tax liability. W. Va. Code § 11-13C-14(c). The transition rules contained therein continued to allow the credit against Severance Taxes with respect to certain investments. The "Note" attached to Senate Bill 333, as originally introduced, stated that "transition rules are provided under which property placed in service or use prior to the date of passage of this Bill and property purchased or leased before the date of passage of this Bill is grandfathered under current law rules." (emphasis added).

At the time Senate Bill 333 was introduced, the transition rules specifically provided that the credit would continue to be available against Severance Taxes with respect to:

(1) property placed in service prior to the date of passage of the Act;

(2) property constructed pursuant to a contract executed before the date of passage of the Act; or

(3) property purchased pursuant to a purchase contract executed before the date of passage of the Act.

As the Bill was being considered by the Legislature, it became apparent that the transition rules did not adequately protect certain taxpayers who had made investments prior to the

date of passage of the Act in reliance upon the Supercredit. Accordingly, prior to passage, the Legislature made several modifications to the transition rules. W. Va. Code § 11-13C-14(c)(2)(B)(iii) was added to include new or expanded business facilities purchased or leased pursuant to a written contract executed prior to the date of passage of the Act. In addition, W. Va. Code § 11-13C-14(c)(2)(C) was added to include investments made in furtherance of an integrated project by taxpayers who, prior to March 10, 1990, had made investments in the project in excess of $10 million. This section provides that the repeal of the credit against Severance Taxes will not apply:

> (C) To property purchased or leased for business expansion that is placed in service or use on or after the date of passage of this section as part of a project otherwise eligible for the credit under subsection (a), section four-b of this article, if all of the requirements of clauses (i), (ii), (iii) and (iv) of this subparagraph are satisfied:
>
> (i) The taxpayer and other participants in the project, if any, have made investments in property purchased or leased for business expansion as defined in subsection (b)(19), section three of this article prior to the date of passage of this section in excess of ten million dollars.
>
> (ii) The investments described in clause (i) were made pursuant to a plan for an integrated project to be developed over a period of one or more years and with the expectation of making additional investments in the integrated project.
>
> (iii) The portion of the project constructed, purchased or leased after the date of passage of this section meets the definition of new business facility in subsection (e)(3) of this section.
>
> (iv) The new jobs created by the project after the date of passage of this section are filled by new employees as defined in subsection (e)(4) of this section.

The State Tax Division has proposed several Regulations interpreting this subsection.

A. $10,000,000 Investment Requirement. Regulation § 110-13C-14.3.2.3.a.1 provides:

> The requirement of W. Va. Code § 11-13C-14(c)(2)(C)(i) that more than ten million dollars ($10,000,000) investment be made in property purchased or leased for business expansion means that an actual payment of at least ten million dollars ($10,000,000) must have been made for such property and, because the definition of property purchased for business expansion requires property be placed in service or use in order to qualify as such, the property purchase with the said ten million dollar ($10,000,000) investment must have been placed in service or use in the project prior to March 10, 1990 in order for the investment to qualify under W. Va. Code § 11-13C-14(c)(2)(C)(i).

This Regulation requires that investments made for purposes of determining whether taxpayer has met the requisite $10 million threshold, must not only have been purchased or leased, but also paid for and placed in service prior to March 10, 1990. It appears that the Commissioner is attempting through the Regulations to impose restrictions on the types of investments which qualify under the transition rules set forth in W. Va. Code § 11-13C-14(c)(2) not intended by the Legislature and in contravention of the language of the statute.

While W. Va. Code § 11-13C-4(c)(2)(c) clearly requires taxpayers to have made $10 million of investment in property purchased for business expansion prior to March 10, 1990 to qualify under the transition rules, it is erroneous to interpret the statute as meaning that such investment must have been paid for and placed in service prior to the date of the passage of the Act. W. Va. Code § 11-13C-3(b)(19) defines "property purchased or leased for business expansion" as including real property and improvements thereto and tangible personal property constructed, purchased and placed in service or use by the taxpayer after March 1, 1985 (February 1, 1986 in the case of leased property and property relocated into the state) for use as a component part of a new or expanded business facility. The proper interpretation of W. Va. Code § 11-13C-14(c)(2)(C)(i) appears to

be that this requirement is satisfied by a taxpayer who, prior to March 10, 1990 purchased or leased investments totaling $10 million which constitutes "property purchased for business expansion" if placed in service in the project. Two provisions of the statute support this interpretation. First, property which is purchased or leased or for which a binding contract was signed prior to March 10, 1990 but placed in service prior to January 1, 1992 is grandfathered under W. Va. Code § 11-13C-14(c)(2)(B). Second, W. Va. Code § 11-13C-14(c)(2)(C)(ii) which grandfathers an "integrated project to be developed" contemplates projects for which investment has not yet been placed in service.

Under the Regulations as written, the possibility exists that certain taxpayers who should qualify because they have made substantial investments in new projects prior to the passage of the Act in reliance on the availability of the credit to offset Severance Taxes, will not qualify under the transition rules. Moreover, certain similarly situated taxpayers would not be treated equally.

For example, prior to March 10, 1990 Taxpayer A and Taxpayer B began identical $20 million expansions of their West Virginia mining operations. Both expansions qualify for the Supercredit as the law existed prior to March 10, 1990. As of March 10, 1990, both Taxpayers had purchased $12 million in equipment with respect to their expansion projects. At the end of February, Taxpayer A had received and placed in service $11 million of the equipment and Taxpayer B had received and placed in service $9 million of the equipment. Both taxpayers purchased the remaining equipment in April and placed the entire projects in service by June, 1990.

In each case, Taxpayer A and Taxpayer B would appear to qualify the $12 million investment purchased prior to March 10, 1990 and placed in service before January 1, 1992 under the transition rule contained at W. Va. Code § 11-13C-14(c)(2)(B)(iii). However, under the Regulations, Taxpayer A would qualify the additional $8 million investment under the transition rule contained at W. Va. Code § 11-13C-14(c)(2)(C) whereas Taxpayer B would not.

Despite the fact that both taxpayer's investments had been in reliance on the Supercredit and that they would not have made the initial investments but/for the additional investments required to complete the project, they are being treated differently based solely on delivery dates. In each of these cases, the Taxpayer A and Taxpayer B have made identical

investments and relied equally on the availability of the credit. The Legislature intended that such taxpayers be equally treated and grandfathered with respect to their investments. Similar discrimination exists where two (2) taxpayers have made identical investments but where one has paid cash and the other has purchased for credit.

Accordingly, we respectfully request that the portions of Reg. § 110-13C-14.3.2.3.a.1 cited above, be eliminated from the proposed Regulations or modified to provide that property purchased or leased prior to March 10, 1990 but paid for and placed in service thereafter will qualify under the transition rules.

B. "Integrated Project". Reg. §§ 110-13C-14.3.2.3.b.1 and § 110-13C-4b.1.1.1. define the term "integrated project" as follows:

> 4b.1.1.1 The term "integrated project" under W. Va. Code § 11-13C-14(c)(2)(C)(ii) means a W. Va. Code § 11-13C-4b certified project. In no circumstance will the integrated project concept of West Virginia Code § 11-13C-14(c)(2)(C)(ii) be interpreted to encompass two (2) or more successive certified projects certified under West Virginia Code § 11-13C-4b which are or may be parts or phases of a single long-term investment program. Any certified project for which investment is first placed in service or use after March 10, 1990 shall not qualify as an integrated project under W. Va. Code § 11-13C-14(c)(2)(C)(ii).

The proposed Regulations 4b.1.1.1 and 14.3.2.3.b.1 should be rewritten in their entirety since as a matter of statutory construction they conflict with the language contained in W. Va. Code § 11-13C-14(c)(2)(C)(ii). The phrase "an integrated project to be developed over a period of one or more years" found in 14(c)(2)(c)(ii) means exactly what it says. "Integrated project" is used in W. Va. Code § 11-13C-4b(a)(1) and (3) to indicate that in certified projects encompassing more than one new business facility, the business facilities must be related to and be developed pursuant to a single investment plan. That is the manner in which the statute itself uses the phrase "integrated project." The remainder of the statutory phrase, (i.e. "to be developed over a period of one or more years") means what it says. It means "one or more" not "three."

The Legislature's choice of the words "one or more years" shows that the Legislature clearly did not intend to limit the transition rules to integrated projects of not more than three years in duration as the proposed Regulation appears to assume.

In addition, the language of the proposed Regulations, defining "integrated project" as not including any certified project for which investment is not placed-in-service or use until after March 10, 1990, is neither supported by the statute itself or the intent of the Legislature and suffers from the defect of exposing similarly situated taxpayers to different treatment. This difference in treatment is particularly unjust because it is retroactive, thus defeasing taxpayers without affording them any opportunity to adjust their existing business plans to account for the tax impact of the change.

The discriminatory impact can be illustrated by the following example. Prior to March 10, 1990, both Taxpayer C and Taxpayer D had obtained unconditional certification of their respective projects. Each had invested more than $10 million pursuant to a plan for a project to be developed over a period of one or more years. Both projects had a term of January 1, 1990 through December 31, 1992. Taxpayer C obtained delivery of his first piece of equipment that constitutes qualified investment on March 10, 1990 and put it into service that same day. Taxpayer D's delivery was delayed until March 11, 1990, when he put his first qualified investment property into service or use.

Under the statute, the taxpayers would qualify for equivalent treatment under § 11-13C-14(c)(2)(C)(ii). Under the third sentence of the proposed Regulations, Taxpayer D would not qualify for equivalent treatment - - he would lose the ability to use the Supercredit against the Severance Tax. The proposed Regulations thus "ungrandfather" taxpayers who were grandfathered under § 11-13C-14(c), in contravention of the language of the statute and the intent of the Legislature.

Accordingly, we believe the proposed Regulation should be changed to read as follows:

> 4(b).1.1.1 The terms "integrated project" under W. Va. Code § 11-13C-14(c)(2)(C)(ii) means one or more W. Va. Code § 11-13C-4b certified projects.

The same change should be made in proposed Regulation 14.3.2.3.b.1."

III. Successors in Business. Regs. §§ 110-13C-4b.6.2, 110-13C-4b.6.4.1 to 110-13C-4b.6.4.4 provide:

> 4b.6.2 Ordinarily where a new project participant is to be added or a new project participant is to be substituted for a former project participant, the Tax Department will require the project participants to obtain approval from the Tax Department for such a substitution and to amend the application for project certification prior to the addition or substitution of the new project participant. Failure to submit an amendment for participant addition or substitution prior to such addition or substitution shall result in an invalid and unrecognized addition or substitution shall result in an invalid and unrecognized addition or substitution.
>
> ....
>
> 4b.6.4.1 New project participants may not be added, except as successors to ongoing participants, after expiration of the three (3) year new jobs redetermination period or the three (3) year project investment period set forth in West Virginia Code § 11-13C-7(f) and West Virginia Code § 11-13C-4b(a)(1), respectively. These periods would typically end simultaneously with the end of the second tax year subsequent to the end of the tax year during which project investment was first placed in service or use. Refer to section 4.3 of these regulations for discussion of investment periods.
>
> 4b.6.4.2 Although other entities could engage in the project enterprise after the above-described three (3) year periods have expired, such entities could not be added as new project participants. However, substitute project participants acting as successors to already participating participants could be substituted subsequent to the end of the above-described three (3) year periods so long as the total number of jobs and qualified investment in service or use remained substantially unchanged.

> 4b.6.4.3 Addition or substitution of a project participant will require submission of an amendment to the Application for Project Certification. Such amendment can consist of a letter identifying the new or substitute participants and describing the change sought. The letter should contain or be accompanied by a properly executed statement of participation from each new or substitute participant and an agreement executed by the new or substitute participants to the plan of credit allocation among participants in effect for the project.
>
> 4b.6.4.4 Addition or substitution of project participants must be approved by the Tax Commissioner prior to the addition or substitution.

These Regulations authorize substitution of project participants within the time allowed for making qualified investments in the project so long as application is made to the Tax Commissioner and approved prior to the addition or substitution. As these sections are currently written, it is unclear whether these Regulations are intended to apply to transfers or sales by project participants to successors in business and whether any employees of the successor would constitute "successor new employees" in the project. W. Va. Code § 11-13C-9(b) provides:

> (a) Mere change in form of business. - Property shall not be treated as disposed of under section eight [§ 11-13C-8] of this article, by reason of a mere change in the form of conducting the business as long as the property is retained in a business in this state, and the taxpayer retains a controlling interest in the successor business. In this event, the successor business shall be allowed to claim the amount of credit still available with respect to the business facility or facilities transferred, and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

> (b) The transfer or sale to successor. - Property shall not be treated as disposed of under section 8 by reason of any transfer or sale to a successor business which continues to operate the business facility in this state. Upon transfer or sale, the successor shall acquire the amount of credit that remains available under this Article for each subsequent taxable year and the taxpayer (transferor) shall not be required to redetermine the amount of credit allowed in earlier years.

The statute and Regs. § 110-13C-9 et seq. provide that qualified investment can be transferred to successors after the end of the period for making investment without prior approval of the Tax Commissioner. We suggest that a new paragraph be added to § 110-13C-4b.6.4 for the purposes of clarifying this rule as follows:

> 4b.6.4.5 - Nothing herein shall be construed to preclude the transfer or sale of qualified investment to a successor in business as set forth in W. Va. Code § 11-13C-9 at any time during the life of the credit or to require any application to or pre-approval of the Tax Commissioner with respect to such transfer. The employees of such successor will be considered new employees to the extent they replace or succeed jobs held by employees filling new jobs of the business whose qualified investments were transferred to the successor.

In addition, the penalty contained in Reg. § 110-13C-4b.6.2 for failure to amend the application for credit prior to substituting or adding a new participant is too harsh. Clearly, taxpayers may file applications for Supercredit after investments are paced in service and jobs have been created. The only sanction in such a case is that interest and penalties may be imposed if credit is claimed prior to approval of the project. Certainly, the penalty for mere failure to notify Commissioner of the substitution or addition of a participant should not be any harsher. We respectfully request that the Regulations be amended to make this clear.

We appreciate your review of these comments regarding the proposed Business Investment and Jobs Expansion Tax Credit, Corporation Headquarters Relocation Tax Credit, and Small Business Tax Credit Legislative rules. If you have any questions regarding our comments or need additional information in your analysis, please advise.

Sincerely,

Gary G. White