SENATE BILL NO. 513

INTRODUCED BY J. ELLIOTT, COBB, TESTER

A BILL FOR AN ACT ENTITLED: "AN ACT TO IMPOSE AN EXCESS PROFITS TAX ON ELECTRICAL ENERGY PRODUCERS WHO BOTH GENERATE AND SELL ELECTRICITY WITHIN THE STATE; ESTABLISHING RATES FOR THE TAX; PROVIDING AN EXCEPTION FOR SALES TO MONTANA CUSTOMERS OF ELECTRICITY FOR LESS THAN 150 PERCENT OF THE COST OF PRODUCTION; PROVIDING THAT THE TAX REVENUE BE USED FOR ENERGY CONSERVATION, ALTERNATIVE ENERGY SYSTEM DEVELOPMENT, AND ELECTRICAL RATE REDUCTION; PROVIDING FOR THE ADMINISTRATION OF THE TAX; PROVIDING THAT AN INDUSTRIAL ELECTRICITY USER MAY NOT RESELL ELECTRICITY; AMENDING SECTIONS 15-31-114 AND 69-8-410, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Excess profits tax imposed on electrical energy producers.** (1) There is a tax on the excess profits of electrical energy producers, calculated as provided in subsection (3).

(2) For the purposes of this section, "producer" means a person that:

(a) generates electricity and who is required to pay a tax under 15-51-101; and

(b) sells, or within the preceding 5 years has sold, electricity in the state.

(3) (a) A producer is considered to have excess profits on the sale of electricity when revenue from the sale of electricity is at least 125% of the cost of generating the electricity during the calendar quarter. The ~~cost-to-revenue~~ REVENUE-TO-COST percentage is determined by dividing the amount of revenue from the sale of electricity by the cost of generating the electricity and multiplying the product by 100.

(b) For the purposes of determining cost and revenue for imposing the tax under this section, the costs and revenue ~~to~~ OF sales to Montana customers for less than 150% of the cost of production may not be included.

(c) The department of revenue, in cooperation with the public service commission, shall adopt rules necessary for the uniform determination of the cost of generating electricity and the determination of revenue from the sale of electricity.

(4) The tax on excess profits is an amount equal to the following percentage of revenue that is over the cost of production from the sale of electricity generated by the producer during the calendar quarter:

(A) 0% FOR A REVENUE-TO-COST PERCENTAGE LESS THAN 125%;

~~(a)~~(B) 25% for a ~~cost-to-revenue~~ REVENUE-TO-COST percentage of at least 125% but less than 150%;

~~(b)~~(C) 50% for a ~~cost-to-revenue~~ REVENUE-TO-COST percentage of at least 150% but less than 175%;

~~(c)~~(D) 75% for a ~~cost-to-revenue~~ REVENUE-TO-COST percentage of at least 175% but less than 200%;

~~(d)~~(E) 100% for a ~~cost-to-revenue~~ REVENUE-TO-COST percentage of 200% or more.

(5) The tax on excess profits must be calculated on a return to be provided by the department. The return must be filed with and the tax must be paid to the department on or before the last day of the month following the end of each calendar quarter.

(6) THE TAX IMPOSED IN THIS SECTION DOES NOT APPLY TO REVENUE FROM ELECTRICAL ENERGY GENERATED IN MONTANA AND SOLD TO CUSTOMERS IN ANOTHER STATE BY AN ELECTRIC UTILITY AT A PRICE THAT IS REGULATED BY A PUBLIC SERVICE COMMISSION OR SIMILAR AGENCY IN THE STATE WHERE THE ELECTRICAL ENERGY IS SOLD.

NEW SECTION. **Section 2. Distribution.** (1) The excess profits tax collected under [sections 1 through 10] must, after providing an allowance for payment of refunds and overpayments, be deposited in a special revenue account to the credit of the public service commission.

(2) Twenty-five percent of the amount deposited in the special revenue account must be distributed to regulated electrical distribution utilities whose entire distribution is within the state for energy conservation and alternative energy system development.

(3) Seventy-five percent of the amount deposited in the special revenue account must be used for electrical rate reductions of regulated electrical distribution utilities whose entire distribution is within the state.

NEW SECTION. **Section 3. Returns -- payment -- authority of department**. (1) (a) A producer required to collect and pay to the department the tax imposed by [sections 1 through 10] shall keep records, render statements, make returns, and comply with the provisions of [sections 1 through 10] and the rules prescribed by the department. Each return or statement must include the information required by the rules of the department.

(b) For the purpose of determining compliance with the provisions of [sections 1 through 10], the department is authorized to examine or cause to be examined any books, papers, records, or memoranda relevant to making a determination of the amount of tax due, whether the books, papers, records, or memoranda are the property of or in the possession of the producer filing the return or another person. In determining compliance, the department may use statistical sampling and other sampling techniques consistent with generally accepted auditing standards. The department may also:

(i) require the attendance of a person having knowledge or information relevant to a return;

(ii) compel the production of books, papers, records, or memoranda by the person required to attend;

(iii) implement the provisions of 15-1-703 if the department determines that the collection of the tax is or may be jeopardized because of delay;

(iv) take testimony on matters material to the determination; and

(v) administer oaths or affirmations.

(2) Pursuant to rules established by the department, returns may be computer-generated and electronically filed.

NEW SECTION. **Section 4. Examination of return -- adjustments -- delivery of notices and demands.** (1) If the department determines that the amount of tax due is different from the amount reported, the amount of tax computed on the basis of the examination conducted pursuant to [section 3] constitutes the tax to be paid.

(2) If the tax due exceeds the amount of tax reported as due on the taxpayer's return, the excess must be paid to the department within 30 days after notice of the amount and demand for payment is mailed or delivered to the person making the return unless the taxpayer files a timely objection as provided in 15-1-211. If the amount of the tax found due by the department is less than that reported as due on the return and has been paid, the excess must be credited or, if no tax liability exists or is likely to exist, refunded to the producer making the return.

(3) The notice and demand provided for in this section must contain a statement of the

computation of the tax and interest and must be:

(a) sent by mail to the taxpayer at the address given in the taxpayer's return, if any, or to the taxpayer's last-known address; or

(b) served personally upon the taxpayer.

(4) A taxpayer filing an objection to the demand for payment is subject to and governed by the uniform tax review procedure provided in 15-1-211.

NEW SECTION. **Section 5. Penalties and interest for violation.** (1) (a) A producer who fails to file a return as required by [section 1] must be assessed a penalty as provided in 15-1-216. The department may waive the penalty as provided in 15-1-206.

(b) A producer who fails to file the return required by [section 1] and to pay the tax before the due date must be assessed penalty and interest as provided in 15-1-216. The department may waive any penalty pursuant to 15-1-206.

(2) A producer who purposely fails to pay the tax when due must be assessed an additional penalty as provided in 15-1-216.

NEW SECTION. **Section 6. Authority to collect delinquent taxes.** (1) (a) The department shall collect taxes that are delinquent as determined under [sections 1 through 10].

(b) If a tax imposed by [sections 1 through 10] or any portion of the tax is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7.

(2) In addition to any other remedy, in order to collect delinquent taxes after the time for appeal has expired, the department may direct the offset of tax refunds or other funds that are due to the taxpayer from the state, except wages subject to the provisions of 25-13-614 and retirement benefits.

(3) As provided in 15-1-705, the taxpayer has the right to a review on the tax liability prior to any offset by the department.

(4) The department may file a claim for state funds on behalf of the taxpayer if a claim is required before funds are available for offset.

NEW SECTION. **Section 7. Interest on deficiency -- penalty.** (1) Interest accrues on unpaid or delinquent taxes as provided in 15-1-216. The interest must be computed from the date on which the return and tax were originally due.

(2) If the payment of a tax deficiency is not made within 60 days after it is due and payable and if the deficiency is due to negligence on the part of the taxpayer but without fraud, the penalty imposed by 15-1-216(1)(c) must be added to the amount of the deficiency.

NEW SECTION. **Section 8. Limitations.** (1) Except in the case of a producer who purposely or knowingly, as those terms are defined in 45-2-101, files a false or fraudulent return violating the provisions of [sections 1 through 10], a deficiency may not be assessed or collected with respect to a month or quarter for which a return is filed unless the notice of additional tax proposed to be assessed is mailed to or personally served upon the taxpayer within 5 years from the date on which the return was filed. For purposes of this section, a return filed before the last day prescribed for filing is considered to be filed on the last day.

(2) If, before the expiration of the 5-year period prescribed in subsection (1) for assessment of the tax, the taxpayer consents in writing to an assessment after expiration of the 5-year period, a deficiency may be assessed at any time prior to the expiration of the period consented to.

NEW SECTION. **Section 9. Refunds -- interest -- limitations.** (1) A claim for a refund or credit as a result of overpayment of taxes collected under [sections 1 through 10] must be filed within 5 years of the date on which the return was due, without regard to any extension of time for filing.

(2) (a) Interest on an overpayment must be paid or credited at the same rate as the interest rate charged on unpaid taxes as provided in 15-1-216.

(b) Except as provided in subsection (2)(c), interest must be paid from the date on which the return was due or the date of overpayment, whichever is later. Interest does not accrue during any period in which the processing of a claim is delayed more than 30 days because the taxpayer has not furnished necessary information.

(c) The department is not required to pay interest if:

(i) the overpayment is refunded or credited within 6 months of the date on which a claim was filed; or

(ii) the amount of overpayment and interest does not exceed $1.

NEW SECTION. **Section 10. Administration -- rules.** The department shall:

(1) administer and enforce the provisions of [sections 1 through 10];

(2) cause to be prepared and distributed forms and information that may be necessary to administer the provisions of [sections 1 through 10]; and

(3) adopt rules that may be necessary or appropriate to administer and enforce the provisions of [sections 1 through 10].

Section 11. Section 15-31-114, MCA, is amended to read:

"15-31-114. Deductions allowed in computing income. (1) In computing the net income, the following deductions are allowed from the gross income received by the corporation within the year from all sources:

(a) all the ordinary and necessary expenses paid or incurred during the taxable year in the maintenance and operation of its business and properties, including reasonable allowance for salaries for personal services actually rendered, subject to the limitation contained in this section, and rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title or in which it has no equity. A deduction is not allowed for salaries paid upon which the recipient has not paid Montana state income tax. However, when domestic corporations are taxed on income derived from outside the state, salaries of officers paid in connection with securing the income are deductible.

(b) (i) all losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the wear and tear and obsolescence of property used in the trade or business. The allowance is determined according to the provisions of section 167 of the Internal Revenue Code in effect with respect to the taxable year. All elections for depreciation must be the same as the elections made for federal income tax purposes. A deduction is not allowed for any amount paid out for any buildings, permanent improvements, or betterments made to increase the value of any property or estate, and a deduction may not be made for any amount of expense of restoring property or making good the exhaustion of property for which an allowance is or has been made. A depreciation or amortization deduction is not allowed on a title plant as defined in 33-25-105(15).

(ii) There is allowed as a deduction for the taxable period a net operating loss deduction determined according to the provisions of 15-31-119.

(c) in the case of mines, other natural deposits, oil and gas wells, and timber, a reasonable allowance for depletion and for depreciation of improvements. The reasonable allowance must be determined according to the provisions of the Internal Revenue Code in effect for the taxable year. All elections made under the Internal Revenue Code with respect to capitalizing or expensing exploration and development costs and intangible drilling expenses for corporation license tax purposes must be the same as the elections made for federal income tax purposes.

(d) The amount of interest paid within the year on its indebtedness incurred in the operation of the business from which its income is derived. Interest may not be allowed as a deduction if paid on an indebtedness created for the purchase, maintenance, or improvement of property or for the conduct of business unless the income from the property or business would be taxable under this part.

(e) (i) taxes paid within the year, except the following:

(A) taxes imposed by this part;

(B) taxes assessed against local benefits of a kind tending to increase the value of the property assessed;

(C) taxes on or according to or measured by net income or profits imposed by authority of the government of the United States;

(D) taxes imposed by any other state or country upon or measured by net income or profits;

(E) taxes imposed on the excess profits of electrical energy producers as provided in [section 1].

(ii) Taxes deductible under this part must be construed to include taxes imposed by any county, school district, or municipality of this state.

(f) that portion of an energy-related investment allowed as a deduction under 15-32-103;

(g) (i) except as provided in subsection (1)(g)(ii), charitable contributions and gifts that qualify for deduction under section 170 of the Internal Revenue Code, as amended.

(ii) The public service commission may not allow in the rate base of a regulated corporation the inclusion of contributions made under this subsection.

(2) In lieu of the deduction allowed under subsection (1)(g), the taxpayer may deduct the fair market value, not to exceed 30% of the taxpayer's net income, of a computer or other sophisticated technological equipment or apparatus intended for use with the computer donated to an elementary, secondary, or accredited postsecondary school located in Montana if:

(a) the contribution is made no later than 5 years after the manufacture of the donated property is substantially completed;

(b) the property is not transferred by the donee in exchange for money, other property, or services; and

(c) the taxpayer receives a written statement from the donee in which the donee agrees to accept the property and representing that the use and disposition of the property will be in accordance with the provisions of subsection (2)(b).

(3) In the case of a regulated investment company or a fund of a regulated investment company, as defined in section 851(a) or 851(h) of the Internal Revenue Code of 1986, as that section may be amended or renumbered, there is allowed a deduction for dividends paid, as defined in section 561 of the Internal Revenue Code of 1986, as that section may be amended or renumbered, except that the deduction for dividends is not allowed with respect to dividends attributable to any income that is not subject to tax under this chapter when earned by the regulated investment company. For the purposes of computing the deduction for dividends paid, the provisions of sections 852(b)(7) and 855 of the Internal Revenue Code of 1986, as those sections may be amended or renumbered, apply. A regulated investment company is not allowed a deduction for dividends received as defined in sections 243 through 245 of the Internal Revenue Code of 1986, as those sections may be amended or renumbered."

Section 12. Section 69-8-410, MCA, is amended to read:

"69-8-410. Unauthorized switching -- commission rulemaking <u>-- unauthorized resale by industrial user</u>. (1) <u>(a)</u> An electricity supplier or any person, firm, corporation, or governmental entity may not make any change in the electricity supplier for a customer without first obtaining the customer's written permission.

~~(2)~~<u>(b)</u> The commission shall promulgate rules establishing procedures to prevent unauthorized switching.

<u>(2) Electrical customers with individual loads greater than 1,000 kilowatts and for loads of the same customer with individual loads at a meter greater than 300 kilowatts that aggregate to 1,000 kilowatts or greater may not resell electrical power.</u>"

<u>NEW SECTION.</u> **Section 13. Codification instruction.** [Sections 1 through 10] are intended to be codified as an integral part of Title 15, and the provisions of Title 15 apply to [sections 1 through 10].

NEW SECTION. **Section 14. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 15. Applicability.** [This act] applies to sales of electricity for the calendar quarter beginning July 1, 2001.

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