

105TH CONGRESS
2D SESSION

H. R. 3927

To amend the Internal Revenue Code of 1986 to restrict the use of tax-exempt financing by governmentally owned electric utilities and to subject certain activities of such utilities to income tax.

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 1998

Mr. ENGLISH of Pennsylvania (for himself, Mr. JEFFERSON, and Mr. CRANE) introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to restrict the use of tax-exempt financing by governmentally owned electric utilities and to subject certain activities of such utilities to income tax.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. BONDS ISSUED TO FINANCE CERTAIN GOVERN-**
4 **MENTAL ELECTRIC OUTPUT FACILITIES**
5 **TREATED AS PRIVATE ACTIVITY BONDS.**

6 (a) GOVERNMENTAL UNITS NO LONGER ELIGIBLE
7 FOR EXCEPTION FROM TERMINATION OF LOCAL FUR-
8 NISHING PROVISIONS.—Paragraph (3) of section 142(f) of

1 the Internal Revenue Code of 1986 is amended by adding
 2 at the end the following flush sentence:

3 “For purposes of applying this paragraph to bonds
 4 issued after the date of the enactment of this sen-
 5 tence, the term ‘person’ shall not include a govern-
 6 mental unit.”

7 (b) CERTAIN ISSUES FOR GOVERNMENTAL ELECTRIC
 8 OUTPUT FACILITIES TREATED AS PRIVATE ACTIVITY
 9 BONDS.—Section 141 of such Code (relating to private
 10 activity bonds) is amended by adding at the end the follow-
 11 ing new subsection:

12 “(f) ISSUES FOR GOVERNMENTAL ELECTRIC OUT-
 13 PUT FACILITIES.—

14 “(1) IN GENERAL.—The term ‘private activity
 15 bond’ includes any bond issued as part of an issue
 16 if any proceeds of the issue are to be used (directly
 17 or indirectly) for the construction or acquisition of
 18 any governmental electric output facility.

19 “(2) GOVERNMENTAL ELECTRIC OUTPUT FA-
 20 CILITY; ELECTRIC ENERGY SERVICES.—For purposes
 21 of this subsection—

22 “(A) GOVERNMENTAL ELECTRIC OUTPUT
 23 FACILITY.—

24 “(i) IN GENERAL.—The term ‘govern-
 25 mental electric output facility’ means any

1 facility (including any generation, trans-
2 mission, or distribution facility) used or to
3 be used in connection with the furnishing
4 for sale of electric energy services by any
5 governmental utility.

6 “(ii) EXCEPTION FOR PROPERTY CON-
7 VERTED TO NONOUTPUT USE.—The term
8 ‘governmental electric output facility’ shall
9 not include any property described in sub-
10 section (d)(4).

11 “(B) ELECTRIC ENERGY SERVICES.—The
12 term ‘electric energy services’ includes the fur-
13 nishing of electric energy.

14 “(3) EXCEPTION FOR LOCAL GOVERNMENTAL
15 UTILITIES.—

16 “(A) IN GENERAL.—Paragraph (1) shall
17 be applied by not taking into account any facil-
18 ity owned by a local governmental utility.

19 “(B) LOCAL GOVERNMENTAL UTILITY.—
20 For purposes of this subsection, the term ‘local
21 governmental utility’ means any governmental
22 utility if—

23 “(i) all governmental electric output
24 facilities (other than generation facilities)
25 which—

1 “(I) are owned by such utility,
2 and

3 “(II) are placed in service after
4 the date of the enactment of this sub-
5 section,

6 are located within the qualified govern-
7 mental service area of such utility,

8 “(ii) electric energy services furnished
9 by such utility are sold only to ultimate
10 consumers located within such area, and

11 “(iii) no governmental electric output
12 facility owned by such utility is designed
13 differently, sized larger, built sooner, or
14 constructed in a more costly manner than
15 is reasonably necessary for ultimate con-
16 sumers located within such area.

17 “(C) JOINT ACTION POWER AGENCIES.—
18 For purposes of determining whether a partici-
19 pant in a joint action power agency meets the
20 requirements of subparagraph (B)—

21 “(i) such participant shall be treated
22 as owning its share of the governmental
23 electric output facilities owned by such
24 agency, and

1 “(ii) the determination of whether the
2 requirements of clause (i) or (iii) of sub-
3 paragraph (B) are met shall be made by
4 treating the qualified governmental service
5 area of such participant as including such
6 area of all participants in such agency.

7 “(4) EXCEPTION FOR SMALL GOVERNMENTAL
8 UTILITIES.—

9 “(A) IN GENERAL.—Paragraph (1) shall
10 be applied by not taking into account any facil-
11 ity owned by a small governmental utility.

12 “(B) SMALL GOVERNMENTAL UTILITY.—
13 For purposes of this subsection, the term ‘small
14 governmental utility’ means any governmental
15 utility if—

16 “(i) as of the issuance date of the
17 issue, it is reasonably expected that such
18 utility will furnish electric energy services
19 for sale to less than 5,000 consumers, and

20 “(ii) at least 30 percent of its average
21 gross income during any 3-calendar year
22 period is from sales to residential consum-
23 ers.

1 “(5) EXCEPTION FOR LOCAL DISTRIBUTION FA-
2 CILITIES.—Paragraph (1) shall be applied by not
3 taking into account any distribution facility if—

4 “(A) such facility is located within the
5 qualified governmental service area of such util-
6 ity, and

7 “(B) such facility meets the requirements
8 of paragraph (3)(B)(iii).

9 “(6) EXCEPTIONS TO RULES REQUIRING THAT
10 ULTIMATE CONSUMERS BE LOCATED WITHIN QUALI-
11 FIED GOVERNMENTAL SERVICE AREA.—

12 “(A) IN GENERAL.—For purposes of
13 clauses (ii) and (iii) of paragraph (3)(B), a sale
14 shall be treated as being to an ultimate con-
15 sumer located within a governmental utility’s
16 qualified governmental service area if such sale
17 meets—

18 “(i) the governmental utility exception
19 of subparagraph (B),

20 “(ii) the pooling exception of subpara-
21 graph (C),

22 “(iii) the existing contract exception
23 of subparagraph (D),

24 “(iv) the de minimis exception of sub-
25 paragraph (E), or

1 “(v) the transmission exception of
2 subparagraph (F).

3 “(B) GOVERNMENTAL UTILITY EXCEP-
4 TION.—A sale of electric energy services meets
5 the governmental utility exception of this sub-
6 paragraph if the sale is by a governmental util-
7 ity with a qualified governmental service area to
8 another governmental utility for resale solely to
9 ultimate consumers located within the qualified
10 governmental service area of the purchasing
11 governmental utility.

12 “(C) POOLING EXCEPTION.—A sale of
13 electric energy services meets the pooling excep-
14 tion of this subparagraph if—

15 “(i) the sale is by a governmental util-
16 ity with a qualified governmental service
17 area to a person for the resale of the elec-
18 tric energy services,

19 “(ii) such sale is—

20 “(I) pursuant to a pooling or
21 swap arrangement to a person that
22 owns distribution facilities for dis-
23 tribution through those facilities,

24 “(II) pursuant to a regional
25 transmission group or other similar

1 arrangement to a person that owns
2 distribution facilities for distribution
3 through those facilities, or

4 “(III) for the emergency transfer
5 of electric energy services, and

6 “(iii) the dollar amount of the pooling
7 sales by the governmental utility during a
8 calendar year does not exceed the dollar
9 amount of the pooling purchases by such
10 utility during such year.

11 “(D) EXISTING CONTRACT EXCEPTION.—A
12 sale of electric energy services meets the exist-
13 ing contract exception of this subparagraph if
14 the sale is pursuant to—

15 “(i) a binding contract in effect on the
16 date of the enactment of this subsection, or

17 “(ii) a renewal of such a contract but
18 only if such renewal is at the sole option
19 of the purchaser.

20 “(E) DE MINIMIS EXCEPTION.—A sale of
21 electric energy services meets the de minimis
22 exception of this subparagraph if—

23 “(i) the sale is by a governmental util-
24 ity with a qualified governmental service
25 area to a person who owns any electric en-

1 ergy distribution facility for distribution
2 and resale by such person through such fa-
3 cility, and

4 “(ii) all of the governmental electric
5 output facilities of such utility meet the re-
6 quirements of paragraph (3)(B)(iii), and

7 “(iii) the aggregate dollar amount of
8 the sales described in clause (i) during any
9 calendar year (other than sales which meet
10 the requirements of any other subpara-
11 graph of this paragraph) does not exceed
12 10 percent of the average of the dollar
13 amounts of the governmental utility’s sales
14 of electric energy services during the 3 pre-
15 ceding calendar years.

16 “(F) TRANSMISSION EXCEPTION.—A sale
17 of electric energy services meets the trans-
18 mission exception of this subparagraph if the
19 only electric energy services provided by the
20 governmental utility with respect to such sale
21 are provided by—

22 “(i) any transmission or distribution
23 facility placed in service before the date of
24 the enactment of this subsection,

1 “(ii) any distribution facility which
 2 meets the requirements of paragraph (5),
 3 or

4 “(iii) any transmission or distribution
 5 facility which meets the requirements of
 6 clauses (i) and (iii) of paragraph (3)(B).

7 If electric energy is sold in connection with the
 8 sale of any transmission or distribution service,
 9 the sale of such service meets the requirements
 10 of this subparagraph only if the sale of the elec-
 11 tric energy is to ultimate consumers located
 12 within the qualified governmental service area
 13 of such utility.

14 “(7) QUALIFIED GOVERNMENTAL SERVICE
 15 AREA.—For purposes of this subsection—

16 “(A) IN GENERAL.—The term ‘qualified
 17 governmental service area’ means, with respect
 18 to any governmental utility, the area—

19 “(i)(I) in which such utility has the
 20 obligation to supply electric energy services
 21 to ultimate consumers, or

22 “(II) if such utility has no such obli-
 23 gation, which is coincident to an electric
 24 distribution system of such utility and im-
 25 mediately adjacent thereto, and

1 “(ii) which is claimed openly as a
2 service area by such utility without a com-
3 peting claim or dispute.

4 “(B) OBLIGATION TO SUPPLY.— For pur-
5 poses of subparagraph (A)(i), a governmental
6 utility shall be considered to have an obligation
7 to provide service only if an explicit requirement
8 of law imposes on such utility the obligation to
9 provide retail electric service to any person
10 within the area who requests such service and
11 who meets the terms and conditions applicable
12 to all other similarly situated consumers.

13 “(8) OTHER DEFINITIONS.—For purposes of
14 this subsection—

15 “(A) GOVERNMENTAL UTILITY.—

16 “(i) IN GENERAL.—The term ‘govern-
17 mental utility’ means any governmental
18 unit which is engaged in the activity or
19 business of the selling, generating, trans-
20 mitting, or distributing electric energy.

21 “(ii) CONTROLLED GROUPS.—A gov-
22 ernmental unit and all related persons of
23 such unit shall be treated as 1 person
24 which is a governmental utility if such
25 unit, or any such person, is engaged in any

1 activity or business referred to in clause
 2 (i).

3 “(B) RELATED PERSON.—The term ‘relat-
 4 ed person’ means a group of related persons
 5 (within the meaning of section 144(a)(3)),
 6 which includes a governmental unit, and shall
 7 include a taxable person, owned or controlled,
 8 in whole or in part, by a governmental unit.

9 “(C) POOLING SALES AND PURCHASES.—

10 “(i) POOLING SALES.—The term
 11 ‘pooling sales’ means sales by the utility
 12 which are treated as described in subpara-
 13 graph (A) of section 141(f)(6) solely by
 14 reason of subparagraph (C) thereof.

15 “(ii) POOLING PURCHASES.—The
 16 term ‘pooling purchases’ means purchases
 17 by the utility in a sale which is a pooling
 18 sale by another utility.”

19 (c) TREATMENT OF PRE-EFFECTIVE DATE BONDS
 20 FINANCING TRANSMISSION AND DISTRIBUTION FACILI-
 21 TIES.—

22 (1) IN GENERAL.—Paragraph (6) of section
 23 141(b) of such Code is amended by adding at the
 24 end the following new subparagraph:

1 “(C) SPECIAL RULES RELATING TO CER-
2 TAIN OUTPUT FACILITIES.—For purposes of the
3 first sentence of subparagraph (A), with respect
4 to bonds issued on or before the date of the en-
5 actment of this subparagraph, the term ‘private
6 business use’ shall not include use by a person
7 of a transmission or distribution facility of a
8 governmental utility if—

9 “(i) such use is provided as part of a
10 comprehensive statewide or regional open-
11 access regime mandated or encouraged by
12 a Federal or State regulatory entity, or

13 “(ii)(I) such use results from the
14 turnover of operational control (in whole or
15 in part) of, but not an ownership interest
16 in, a transmission facility by a govern-
17 mental utility to an independent system
18 operator,

19 “(II) such facility is used by the inde-
20 pendent system operator to provide trans-
21 mission services and specified ancillary
22 services on an open-access nondiscrim-
23 inatory basis,

24 “(III) the independent system opera-
25 tor meets the principles set forth in Fed-

1 eral Energy Regulatory Commission Order
2 No. 888 and/or any successor provision,

3 “(IV) the governmental utility follows
4 comparable rules in opening up its quali-
5 fied governmental service area (as defined
6 in section 141(f)(4)) to retail competition
7 as are applicable to other owners of dis-
8 tribution facilities (other than govern-
9 mental utilities) within the State in which
10 the governmental utility is located, and

11 “(V) the independent system operator
12 does not own any electric distribution fa-
13 cilities.”

14 (2) CONFORMING AMENDMENT.—Subsection (b)
15 of section 141 of such Code is amended by adding
16 at the end the following new paragraph:

17 “(10) SPECIAL RULES RELATING TO THE PRI-
18 VATE SECURITY OR PAYMENT TEST.—In calculating
19 the private security or payment test of paragraph
20 (2), no payments for use described in paragraph
21 (6)(C) shall be treated as payments in respect of
22 property, or borrowed money, used or to be used for
23 a private business use.”.

1 (d) EFFECTIVE DATE.—The amendments made by
 2 this section shall apply to obligations issued after the date
 3 of the enactment of this Act.

4 **SEC. 2. TAXATION OF INCOME FROM CERTAIN ACTIVITIES**
 5 **OF GOVERNMENTAL UTILITY.**

6 (a) IN GENERAL.—Section 115 of the Internal Reve-
 7 nue Code of 1986 (relating to income of States and mu-
 8 nicipalities) is amended—

9 (1) by striking “Gross income” and inserting
 10 “(a) GENERAL RULE.—Gross income”, and

11 (2) by adding at the end the following new sub-
 12 section:

13 “(b) EXCEPTION FOR CERTAIN GOVERNMENTAL
 14 UTILITIES.—

15 “(1) IN GENERAL.—Subsection (a) shall not
 16 apply to any gross income derived by any govern-
 17 mental utility from sales of electric energy services—

18 “(A) to persons not within a qualified gov-
 19 ernmental service area of such utility, and

20 “(B) to persons for resale if such resale is
 21 to persons outside such service area.

22 Any amount included in gross income by reason of
 23 the preceding sentence shall be treated as gross in-
 24 come derived from an unrelated trade or business
 25 under section 512(a)(1), and such utility shall be

1 treated as an organization described in section
2 511(a)(2).

3 “(2) EXCEPTIONS.—

4 “(A) IN GENERAL.—Paragraph (1) shall
5 not apply to any income derived from any
6 sale—

7 “(i) which is treated under section
8 141(f)(6) as made to ultimate consumers
9 located within the qualified governmental
10 service area of the utility, or

11 “(ii) by any small governmental util-
12 ity.

13 “(B) SPECIAL RULE FOR POOLING EXCEP-
14 TION.—For purposes of applying subparagraph
15 (A)(i), subparagraph (C) of section 141(f)(6)
16 shall be applied without regard to clause (iii)
17 thereof but subsection (b)(1) shall apply to
18 pooling sales to the extent that the dollar
19 amount of such sales by the governmental util-
20 ity during a calendar year exceeds the dollar
21 amount of the pooling purchases by such utility
22 during such year.

23 “(C) DE MINIMIS EXCEPTION.—For pur-
24 poses of applying subparagraph (A)(i), subpara-
25 graph (E) of section 141(f)(6) shall apply only

1 if the governmental utility is a local govern-
2 mental utility.

3 “(3) SPECIAL RULE FOR DETERMINING DEPRE-
4 CIATION.—In the case of a governmental utility
5 whose gross income is subject to tax under this
6 chapter by reason of this subsection, the adjustment
7 under section 1016(a)(3) for any period before the
8 date of the enactment of this subsection shall be
9 treated as being at the fastest rate permitted under
10 this title for such period.

11 “(4) DEFINITIONS.—Terms used in this sub-
12 section which are also used in section 141(f) shall
13 have the respective meanings given such terms by
14 such section.”

15 (b) EFFECTIVE DATE.—The amendments made by
16 this section shall apply to amounts received or accrued
17 after the date of the enactment of this Act.

○