No. 119 ORIGINAL

No. _____, Original

In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 17 of the Rules of the Supreme Court, the State of Connecticut, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations, by their Attorneys General, ask leave of this Court to file the Complaint against the State of New Hampshire.

As is more fully set forth in the accompanying Brief in Support of Motion for Leave to File Complaint, the plaintiffs respectfully submit:

1. The State of New Hampshire has imposed a "Tax on Nuclear Station Property" (the "Seabrook Tax") and in the same

legislation, repealed the New Hampshire Franchise Tax formally imposed upon the gross receipts received from utilities selling electricity and also provided a credit to be applied against the New Hampshire Business Profits Tax for any tax paid under the new Seabrook Tax effectively causing virtually the entire burden of the Seabrook Tax to be borne by out-of-state consumers of electricity.

2. The economic impact of the Seabrook Tax on the plaintiff States and their citizens will exceed 14 million dollars annually.

3. The Seabrook Tax violates the rights and protections guaranteed to the plaintiff States and their citizens by the Constitution and statutes of the United States.

WHEREFORE, the plaintiff States respectfully request this Court grant their Motion for Leave to File Complaint.

Respectfully submitted,

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Defendant.

COMPLAINT

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts bring this civil action for declaratory and injunctive relief against the State of New Hampshire, and complain and allege as follows:

JURISDICTION AND STANDING

1. The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, art. III, § 2, cl. 1 and 2 ("controversies between two or more States"), and 28 U.S.C. § 1251(a)(1) (1991). Plaintiffs have no other plain, speedy or adequate remedy at law.

2. This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202 (1991), that the State of New Hampshire's "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as New Hampshire Revised Statutes Annotated ("RSA") chapter 83-D) (hereinafter the "Seabrook Tax"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference, violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2, cl. 1 (Privileges and Immunities Clause). This suit also seeks to enjoin permanently the enforcement of the Seabrook Tax.

3. The plaintiffs are the sovereign State of Connecticut, with its capital located in Hartford, Connecticut; the Commonwealth of Massachusetts, with its capital located in Boston, Massachusetts; and the State of Rhode Island, with its capital located in Providence, Rhode Island. Plaintiffs bring this action in their proprietary capacities as substantial purchasers of electricity from owners of the Seabrook Station, the only property to which the Tax on Nuclear Station Property applies. Plaintiffs also bring this action in their *parens patriae* or quasi-sovereign capacities, as guardians of the health, welfare, and economic prosperity of the citizens of their states.

4. The defendant is the sovereign State of New Hampshire, with its capital located in Concord, New Hampshire.

THE NEW HAMPSHIRE TAX

5. The Seabrook Tax makes three changes in New Hampshire's tax law. First, it imposes an ad valorem tax upon the value of nuclear station property at the rate of 0.64 percent of valuation to be assessed annually. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Second, it amends New Hampshire's Franchise Tax to exclude electric utilities from

the definition of "public utility" and exclude sales of electricity from the Franchise Tax's coverage. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1, II and IV. Third, it allows electric utilities a credit against any liability they have under New Hampshire's Business Profits Tax to the extent of the amount paid by such entities pursuant to the Seabrook Tax. Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5.

6. There is only one nuclear power station in New Hampshire, the Seabrook Station, and therefore only one property subject to the Seabrook Tax.

7. Seabrook Station is jointly owned by utilities and municipal electric cooperatives located in, or selling electricity directly or indirectly to consumers located in, the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Public Service Company of New Hampshire ("PSNH"), an electric utility located in New Hampshire, and making retail sales of electricity to New Hampshire customers, is the single largest owner of Seabrook Station, with a 35.6 percent share. Other New Hampshire utilities own a total of 2.17 percent of Seabrook Station. The United Illuminating Company and the Connecticut Light and Power Company, which are utilities located in Connecticut, and making retail sales of electricity exclusively to Connecticut customers, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to Massachusetts consumers own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative owns 11.6 percent, New England Power Company owns 10 percent, Canal Electric Company owns 3.5 percent, Montaup Electric Company owns 2.9 percent, Taunton Municipal Lighting Plant owns 0.1 percent, and Hudson Light & Power owns 0.07 percent of Seabrook Station. EUA Power owns 12.13 percent of Seabrook. Although EUA Power is a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Utilities located in the

State of Vermont own the remaining 0.41% share.

Each of the Seabrook joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. The Federal Energy Regulatory Commission (FERC) regulates the wholesale sale of electricity between some of the Seabrook joint owners and their retail subsidiaries or other utilities. State regulatory authorities regulate certain retail sales of electricity by some of the joint owners.

8. The Seabrook Tax is imposed upon each entity with an ownership interest in Seabrook Station in the same proportion as that entity's ownership interest bears to the entirety of the total ownership of Seabrook Station property.

9. For 1991 the Seabrook Tax requires that Seabrook Station be valued at no more than $3,500,000,000 and that estimated tax payments be based on a valuation of $3,500,000,000. Based on this statutory valuation, the total liability to be paid to New Hampshire by the owners of Seabrook Station is $22,400,000 annually. For 1991, the tax is deemed to have been assessed as of April 1, 1991, with the first estimated tax payment due on September 15, 1991.

10. Prior to its amendment by the Seabrook Tax to exclude electric utilities, the New Hampshire Franchise Tax (hereinafter "Franchise Tax"), RSA 83-C:1 *et seq.*, had been imposed on public utilities at the rate of 1 percent of all gross receipts from the sale of gas or electricity within the State of New Hampshire pursuant to franchises granted by the state, generating approximately $6 million in tax revenue annually from New Hampshire corporations. Prior to the enactment of the Seabrook Tax, the Franchise Tax applied to the New Hampshire owners of Seabrook Station, but not to the owners selling electricity exclusively to out-of-state customers, since only the New Hampshire utilities received receipts from the sale of electricity pursuant to franchises granted by the State of New Hampshire. The Seabrook Tax wholly eliminated

the previously existing liability of New Hampshire electric utilities to pay the Franchise Tax.

11. Public Service of New Hampshire, the primary provider of electricity for New Hampshire, has been and continues to be subject to the New Hampshire Business Profits Tax. RSA 77-A:5. Part of the legislation creating the Seabrook Tax provides a dollar for dollar credit to be applied against this unrelated Business Profits Tax.

THE PURPOSE AND EFFECT OF THE SEABROOK TAX

12. The stated legislative purpose of the Seabrook Tax is to establish nuclear station property as "a distinct class of property," based upon findings that it is "the only property in the state that generates electricity from the fission of atoms," that such generation "imposes unique responsibilities on the state," that a nuclear generating station "creates special and unique public safety requirements and burdens" and "has a unique and lasting impact on the environment which creates burdens" on the state, and that taxation of such class of property is appropriate "to help defray the public charges of government." Chapter 354:1 (H.B. 64, § 1) (RSA 83-D:1).

13. Contrary to the expressed legislative finding, the Seabrook Tax is not necessary "to help defray" any governmental costs related to the presence of Seabrook Station in New Hampshire because all the specific costs attributable to nuclear generating stations, as compared to non-nuclear generating stations, with respect to environmental compliance, emergency planning, liability insurance, and decommissioning are already the responsibility of, and paid by, the owners of Seabrook Station pursuant to federal and New Hampshire law and regulations which pre-exist and are distinct from the Seabrook Tax.

14. The legislative history of the Seabrook Tax indicates

that the actual purpose of the Seabrook Tax is to raise additional revenues for the State of New Hampshire derived almost entirely from the owners of Seabrook Station which make retail sales of electricity to out-of-state consumers, and ultimately from those consumers themselves.

15. New Hampshire utilities selling electricity to New Hampshire consumers will pay at most a *de minimis* portion of the Seabrook Tax because of the exemption from the Franchise Tax and a dollar for dollar credit against the Business Profits Tax, while the owners of Seabrook which make retail sales of electricity to out-of-state consumers will bear the full burden of the tax.

16. The State of Connecticut, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

17. Virtually all of the citizens of Connecticut are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

18. The Commonwealth of Massachusetts, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

19. The vast majority of the citizens of the Commonwealth of Massachusetts are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

20. The State of Rhode Island, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased, directly or indirectly, from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

21. Virtually all of the citizens of the State of Rhode Island are consumers of electricity purchased directly or indirectly from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

22. The cost of the Seabrook Tax will be passed on to customers of these utilities, including the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts and their citizens as consumers of substantial amounts of electricity, in the form of higher rates, and will impose economic hardships and burdens directly on the plaintiff States and their citizens.

23. The total direct economic cost of the Seabrook Tax on plaintiff States, their instrumentalities, and their citizens is estimated to be approximately $14,000,000 during the first year of the tax and over $500,000,000 over the life of Seabrook Station.

FIRST CAUSE OF ACTION

24. The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

25. The Seabrook Tax is in conflict with and repugnant to federal law and is accordingly void under the Supremacy Clause, art. VI of the United States Constitution.

26. The Seabrook Tax is a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. As such, the tax is in conflict with the Tax Reform Act of 1976, Pub. L. 94-455, § 212(a) 90 Stat. 1914, codified at 15 U.S.C. § 391 which provides:

Tax on or with respect to generation or transmission of electricity

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The greatly disproportionate burden borne ultimately by non-New Hampshire consumers is discrimination which is barred by Congress under this federal law.

SECOND CAUSE OF ACTION

27. Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

28. The generation and sale of electricity are commercial activities in interstate commerce.

29. The Seabrook Tax constitutes an unreasonable, unlawful and prohibited burden on interstate commerce, in contravention of art. I, § 8, cl. 3 of the United States Constitution (Commerce Clause) in that:

A. The Seabrook Tax along with the concurrently enacted credits to another New Hampshire tax and the repeal of the New Hampshire Franchise Tax on electric utilities discriminates against the utilities which are part owners of Seabrook and which sell electricity at retail to non-New Hampshire customers. The burden of this tax will ultimately be borne disproportionately by non-New Hampshire consumers, and thus

this tax will provide substantial and direct commercial advantage to local businesses and consumers.

B. The Seabrook Tax is not a property tax to be borne proportionately by the owners of the taxable property. Through the utilization of the credit provision for the New Hampshire Business Profits Tax and the repeal of the New Hampshire Franchise Tax on electric utilities, the Seabrook Tax is unfairly and therefore unconstitutionally apportioned.

C. The Seabrook Tax is not fairly related to the services provided by New Hampshire. The stated legislative purpose of the Seabrook Tax (RSA 83-D:1) does not justify the tax. Under New Hampshire and federal law, all of the costs of environmental compliance, emergency planning, liability insurance, and decommissioning have been accounted for by the owner-operators of the Seabrook plant. The Seabrook Tax cannot be justified for these purposes and is not fairly related to any benefits provided the taxpayer.

THIRD CAUSE OF ACTION

30. The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

31. The Seabrook Tax deprives the plaintiffs and their citizens of the equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

32. There is no rational basis for the classification established by the Seabrook Tax which results in preferential tax treatment for New Hampshire electric utilities selling electricity at retail to New Hampshire customers, and benefits for New Hampshire citizens at the expense of the plaintiff States and its citizens.

FOURTH CAUSE OF ACTION

33. Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

34. The Seabrook Tax contravenes and violates art. IV, § 2, cl. 1 (the Privileges and Immunities Clause of the United States Constitution) which provides in pertinent part that:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

35. The enactment of the Seabrook Tax, along with the elimination of the New Hampshire Franchise Tax on electric companies and allowance of any payment made pursuant to this tax as a credit against another New Hampshire tax, creates significant benefits for the citizens of New Hampshire, while treating non-New Hampshire ratepayers and citizens substantially different.

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Declare and adjudge, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire Tax on Nuclear Station Property is unconstitutional and unenforceable;

(b) Issue a permanent injunction prohibiting the defendant, its agents and employees from collecting the New Hampshire Tax on Nuclear Station Property;

(c) Issue a preliminary injunction, pending the final determination of this case, prohibiting the defendant, its agents and employees from collecting the New Hampshire Tax on Nuclear Station Property; or in the alternative, order that all revenue collected pursuant to the New Hampshire Tax on Nuclear Station Property be placed in an escrow account and the funds not be expended;

(d) Grant plaintiffs their costs herein expended and such other relief as the Court may deem just and proper.

Respectfully submitted,

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EXHIBIT A TO COMPLAINT

EXHIBIT A
1991 New Hampshire Laws Chapter 354

CHAPTER 354 (HB 64)

AN ACT RELATIVE TO THE BUSINESS PROFITS TAX, THE REAL ESTATE TRANSFER TAX, THE COMMUNICATION SERVICES TAX, RELATIVE TO ESTABLISHING A TAX ON NUCLEAR STATION PROPERTY AND MAKING AN APPROPRIATION THEREFOR, AND APPROPRIATING FUNDS FOR A TAX EXPENDITURE REPORT.

Be it Enacted by the Senate and House of Representatives in General Court convened:

354:1 New Chapter; Tax on Nuclear Station Property. Amend RSA by inserting after chapter 83-C the following new chapter:

CHAPTER 83-D

TAX ON NUCLEAR STATION PROPERTY

83-D:1 Declaration of Purpose and Findings. The general court finds:

I. Nuclear station property is the only property in the state that generates electricity from the fission of atoms.

II. Creating electricity from the fission of atoms imposes unique responsibilities on the state.

III. A nuclear station creates special and unique public safety requirements and burdens on the state.

IV. A nuclear station has a unique and long lasting impact on the environment which creates burdens on the state.

V. Accordingly, in the exercise of authority under part II, article 6 of the constitution of New Hampshire, the general court concludes that nuclear station property constitutes a distinct class of property that is appropriately subject to taxation as such by the state, to help defray the public charges of government, as provided in this chapter.

83-D:2 Nuclear Station Property Defined. For the purposes of this chapter, nuclear station property means the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

83-D:3 Tax Imposed. A tax is imposed upon the value of nuclear station property at the rate of .64 percent of valuation, to be assessed annually as of April 1 and paid in accordance with this chapter.

83-D:4 Valuation. The commissioner of revenue administration shall determine the valuation of nuclear station property. For the purposes of this chapter, the commissioner shall appraise nuclear station property using the standard established pursuant to RSA 75:1.

83-D:5 Persons Liable. The tax imposed by this chapter shall be assessed upon each person with an ownership interest in nuclear station property, in the proportion that such person's ownership interest bears to the entirety of the ownership in the property.

83-D:6 Application of Credit. If the person liable for the tax imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the tax due under this chapter shall be allowed as a credit pursuant to RSA 77-A:5, VI, against the tax liability of such unitary business under RSA 77-A.

83-D:7 Returns and Declarations.

I. On or before January 15 each year, each person shall file with the commissioner of revenue administration, on a form prescribed by the commissioner, a return based on the valuation for April 1 of the prior year. The return shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section. If the return shows an additional amount to be due, such additional amount is due and payable at the time the return is filed. If such return shows an overpayment of the tax due, a credit against a subsequent payment or payments due, to the extent of the overpayment, shall be allowed.

II. On or before April 15 of each year, each person liable to pay the tax imposed by this chapter shall file with the commissioner, on a form prescribed by the commissioner, a statement setting forth the amount of its ownership interest as of April 1. The statement shall include such additional information as the commissioner shall require and shall be signed by an authorized representative, subject to the pains and penalties of perjury. The statement shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section.

III. At the time the statement required by paragraph II is filed, each person liable for the tax shall, in addition, file a declaration of the estimated tax to be assessed as of April 1 in the current calendar year, based on the tax assessed for the preceding calendar year, accompanied by payment of ¼ of the estimated tax due. Additional payments of ¼ of the estimated tax shall be made on June 15, September 15 and December 15.

IV. As of June 1 of each year the principal owner of a nuclear station shall file a list of the changes made to the nuclear station property since the prior April 1. This statement shall include such additional information as the commissioner shall require and shall be signed by an authorized

representative, subject to the pains and penalties of perjury.

V. Taxes and estimated taxes not paid when due shall be subject to appropriate penalties and interest under RSA 21-J.

83-D:8 Records.

I. Every person liable for tax under RSA 83-D:5 shall:

(a) Keep such records as may be necessary to determine the amount of his liability under this chapter.

(b) Preserve such records for the period of at least 3 years or until any litigation or prosecution under this chapter is finally determined.

(c) Make such records available for inspection by the commissioner of revenue administration or his authorized agents, upon demand, at reasonable times during regular business hours.

II. Whoever violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

83-D:9 Tax Payable for 1991. For the calendar year 1991, the tax imposed by this chapter shall be deemed to have been assessed as of April 1, 1991. For purposes of such assessment, the valuation of nuclear station property shall not exceed $3,500,000,000. No later than 30 days after the effective date of this chapter, each person liable for the tax shall file with the commissioner of revenue administration a statement setting forth the amount of the person's ownership interest and a list of the changes made to the nuclear station property since the prior April 1. Payments of estimated tax are due on September 15 and December 15, 1991. Liability for the tax payable for 1991 is limited to ½ of the amount that would otherwise be due. For purposes of this section, estimated tax

payments shall be based upon a valuation of nuclear station property equal to $3,500,000,000. Any overpayment or underpayment under RSA 83-D, by a person defined in RSA 83-D:5, shall be reconciled pursuant to RSA 83-D:7, I.

83-D:10 Adjustments; Procedure. The commissioner of revenue administration is empowered to determine whether there has been error in the assessment of the tax imposed by RSA 83-D:3 in accordance with the following provisions:

I. The person may demand such a determination in writing, within 30 days after the tax was due.

II. After hearing, if requested by the person, the commissioner shall affirm or shall increase or decrease the tax assessed. Any increase ordered by the commissioner shall be assessed against the person and shall carry interest as prescribed in RSA 21-J:28. Any decrease ordered by the commissioner shall, with interest pursuant to RSA 21-J:28 from the date the tax was paid, be credited against any unpaid tax then due from the person, and any balance due the person shall be certified to the state treasurer who shall pay the balance to the person. Such credit and payment together shall not exceed the amount of the tax originally paid.

83-D:11 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner of revenue administration under RSA 83-D:10, a person may appeal the commissioner's determination either by written application to the board of tax and land appeals or by petition to the superior court in the county in which the person has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case may be, shall determine the correctness of the commissioner's action de novo.

83-D:12 Administration.

I. The commissioner of revenue administration shall col-

lect the taxes, interest, additions to tax and penalties imposed under this chapter. The commissioner shall determine the expense of administration of this chapter and shall certify and pay over to the state treasurer the amount of remaining balance of the funds collected under this chapter after the expenses of administration have been deducted.

II. The commissioner shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The administration of the tax imposed under RSA 83-D:3; and

(b) The recovery of any tax, interest on tax, or penalties imposed by RSA 83-D.

III. The commissioner may institute actions in the name of the state to recover any tax, interest on tax, additions to tax or the penalties imposed by this chapter.

IV. In the collection of the tax imposed by this chapter, the commissioner may use all of the powers granted to tax collectors under RSA 80 for the collection of taxes, except that the tax imposed by this chapter shall not take precedence over prior recorded mortgages. The commissioner shall also have all of the duties imposed upon the tax collectors by RSA 80 that are applicable to him. The provisions of RSA 80:26 shall apply to the sale of land for the payment of taxes due under this chapter, and the state treasurer is authorized to purchase the land for the state. If the state purchases the land, the state treasurer shall certify the purchase to the governor, and the governor shall draw his warrant for the purchase price out of any money in the treasury not otherwise appropriated.

V. The commissioner may take the oath of any person in the course of any hearing authorized under RSA 83-D:10, II. In connection with hearings, the commissioner and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts

or other documents. The commissioner and taxpayer may take the depositions of witnesses residing within or without the state pertaining to any matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses shall be the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commissioner shall be considered as an expense of administration of this chapter.

VI. Any notice required by this chapter to be given by the commissioner to a taxpayer shall be made by first class mail to the last known address of the taxpayer, but in the case of hearings, notice shall be given at least 10 days before the date of the hearing and by certified mail.

354:2 Business Profits Tax; Credit Allowed for Tax on Nuclear Station Property. Amend RSA 77-A:5 by inserting after paragraph V the following new paragraph:

VI. Taxes paid pursuant to RSA 83-D.

354:3 Franchise Tax; Public Utility Redefined. Amend RSA 83-C:1, II to read as follows:

II. "Public utility" means every person, partnership, association and corporation except municipal corporation, engaged within this state in the manufacture, generation, distribution, transmission, or sale of gas.

354:4 Franchise Tax; Gross Receipts Redefined. Amend RSA 83-C:1, IV to read as follows:

IV. "Gross receipts" means all receipts received or accrued of the public utility from the sale of gas pursuant to franchises granted by this state. Gross receipts do not include receipts from sales of gas for use outside the state, or receipts from sales of gas to another public utility which is also subject to the payment of this tax.

354:5 Appropriation. The sum of $19,091 for the fiscal year ending June 30, 1992, and the sum of $14,693 for the fiscal year ending June 30, 1993, are hereby appropriated to the department of revenue administration for the purpose of administering the tax imposed in section 1 of this act. These sums shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:6 New Paragraphs; Compensation and Eligible Employee Defined. Amend RSA 77-A:1 by inserting after paragraph XXI the following new paragraphs:

XXII. "Compensation," for the purposes of RSA 77-A:5, VII, means all wages, salaries, fees, bonuses, commissions, or other items, including the following employee benefits: health, life and disability insurance and pensions, profit sharing and retirement benefits.

XXIII. "Eligible employee" means any individual employed by a business organization who, as of the last day of the applicable tax year:

(a) Has been employed by such business organization for at least 6 consecutive months;

(b) Has not been an eligible employee of such business organization or a substantially similar predecessor business organization for any prior taxable year; and

(c) Performs all but an incidental portion of services at a location or locations within the state. For the first taxable year in which the job creation tax credit allowed under RSA 77-A:5, VII, is effective, no employees employed on the first day of such taxable year shall be treated as eligible employees of such business organization for such first taxable year or any succeeding taxable year. For purposes of this paragraph, the commissioner is authorized to adopt rules pursuant

to RSA 541-A to define the terms "substantially similar predecessor business organization" and "incidental portion of services."

354:7 Factors Used in Apportionment; Apportionment Factors Adjusted. Amend the introductory paragraph of RSA 77-A:3, II(a) to read as follows:

II.(a) A fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 1.5 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 3.5, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commission may require, in respect to all or any part of the business organization's business activity, if reasonable:

354:8 Determining Reasonable Compensation. Amend RSA 77-A:4, III to read as follows:

III.(a) In the case of a proprietorship or partnership, a deduction equal to a fair and reasonable compensation for the personal services of the proprietor or partners actually devoting time and effort in the operation of the business organization. The purpose of this paragraph is to permit deduction from gross business profits of a proprietorship or partnership only of such amounts as are fairly attributable to the personal services of the proprietor or partners who are natural persons, but not to permit deduction of any amounts as are fairly attributable to a return on business assets or the labor of non-owner employees of the business organization. The burden shall be upon the business organization filing the return to demonstrate the reasonableness of a deduction claimed under this paragraph, by a preponderance of the evidence. In considering the reasonableness of a deduction claimed under this paragraph, the commissioner shall consider the claimed deduc-

tion in light of compensation for personal services of employees in positions requiring similar responsibility, devotion of time, education and experience in business organizations of similar size, volume and complexity. In addition, the commissioner shall take into account the value to the business organization of the labor of its non-owner employees, and the use of the business assets of the business organization and any other factor which may reasonably assist the commissioner in making a determination as to the reasonableness of the claimed deduction.

(b) The amount of any deduction claimed under subparagraph (a) shall not exceed the amount reported as earned income from the activities of the business organization as reflected on the federal income tax returns of the proprietor or partner rendering such personal services, but may also include an amount not to exceed net rental income as compensation for operating rental property, and an amount not to exceed 15 percent of the gross selling price as commissions on the sale of business assets. Provided, that subject to the preceding sentence, a minimum deduction of $6,000 shall be allowed on account of the proprietor or each partner who is a natural person actually devoting time and effort to the operation of the business organization.

354:9 Total Amount of Credit Allowed. Amend the unnumbered concluding paragraph of RSA 77-A:5 to read as follows:

Provided, that the total amount of any credits allowable under this section shall not exceed the tax due under this chapter.

354:10 New Paragraphs; Credits for Job Creation and Capital Expenditures. Amend RSA 77-A:5 by inserting after paragraph VI the following new paragraphs:

VII. There shall be allowed a job creation tax credit equal to 15 percent of the compensation, as defined in RSA 77-A:1,

XXII, paid during the taxable period to eligible employees, as defined in RSA 77-A:1 XXIII, provided, however, that in no event shall the total number of eligible employees for which the tax credit is taken exceed the increase in the total number of employees from the previous tax period to the current tax period. In the event that the excess of (a) the total number of employees in New Hampshire on the last day of the current taxable period over (b) the total number of employees in New Hampshire on the last day of the previous tax period is less than the total number of eligible employees for the current taxable period, then the total amount of compensation for which a credit may be taken shall equal such excess multiplied by the average compensation of such eligible employees. Furthermore, the total credit allowed under this paragraph shall not exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account. The job creation tax credit allowed under this paragraph shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992, for a period of 5 years only. The job creation tax credit allowed under this paragraph shall not be allowed for taxable periods ending on or after July 1, 1997.

VIII. In the case of a business organization which is eligible for a tax deduction for capital expenditures under section 179 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, an amount equal to 10 percent of:

(a) That portion of the cost of section 179 property situated in this state: or

(b) In the case of a taxpayer which apportions its gross business profits under RSA 77-A:3, that portion of the cost of section 179 property included in the numerator pursuant to RSA 77-A:3, II(a).

Provided, that a credit shall not be allowed for any portion of the cost of section 179 property for which an election has been taken under section 179(a) of the United States In-

ternal Revenue Code as defined in RSA 77-A:1, XX, and that in no event shall the credit allowed under this paragraph exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account, and provided further, that the credit allowed under this paragraph for capital expenditures shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991, for a period of 5 years only. The credit allowed under this paragraph for capital expenditures shall not be allowed for taxable periods ending on or after July 1, 1996.

354:11 **Rate of Tax for Biennium Ending June 30, 1993, Real Estate Transfer Tax.** Notwithstanding the provisions of RSA 78-B:1, I and 1989, 416:4, for the period beginning July 1, 1991, and ending June 30, 1993, the rate of the tax is $.525 per $100, or fractional part thereof, of the price or consideration for such sale, grant or transfer; except that where the price or consideration is $4,000 or less there shall be a minimum tax of $21. The tax imposed shall be computed to the nearest whole dollar.

354:12 **Rate of Tax for Biennium Ending June 30, 1993, Meals and Rooms Tax.** Notwithstanding the provisions of RSA 78-A, the tax imposed under RSA 78-A:6 shall be imposed as follows for the period beginning July 1, 1991, and ending June 30, 1993:

I. A tax of 8 percent of the rent is imposed upon each occupancy.

II. A tax is imposed on taxable meals based upon the charge therefor as follows:

(a) Three cents for a charge between $.36 and $.37 inclusive;
(b) Four cents for a charge between $.38 and $.50 inclusive;

(c) Five cents for a charge between $.51 and $.62 inclusive;
(d) Six cents for a charge between $.63 and $.75 inclusive;
(e) Seven cents for a charge between $.76 and $.87 inclusive;
(f) Eight cents for a charge between $.88 and $1.00 inclusive;
(g) Eight percent of the charge for taxable meals over $1.00, provided that fractions of cents shall be rounded up to the next whole cent.

354:13 Rate of Tax for Biennium Ending June 30, 1993, Communications Services Tax. For the period beginning July 1, 1991, and ending June 30, 1993, there is imposed a surcharge of 100 percent on the tax imposed under RSA 82-A:3 and 82-A:4 on the gross charge for communications services purchased at retail from a retailer.

354:14 New Section; Tax Expenditure Report. Amend RSA 77-A by inserting after section 5 the following new section:

77-A:5-a Tax Expenditure Report. On or before February 1 of every calendar year the commissioner shall certify to the general court and the governor an analysis of each of the past year's credits allowed under RSA 77-A, RSA 83-C, RSA 83-D, RSA 84, and RSA 400-A against the business profits tax imposed by this chapter.

354:15 New Sections; Application of Credit. Amend RSA 84 by inserting after section 24 the following new sections:

84:25 Application of Credit. If the bank or corporation liable for taxes imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, II, against such individual member's portion of the total tax liability of the unitary

business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

84:26 **Application of Credit to Certain New Hampshire Banks and Bank Holding Companies.** Notwithstanding the provisions of RSA 84:25, any New Hampshire bank or New Hampshire bank holding company which has been subject to resolution by the state banking department or federal bank regulators during fiscal year 1992 or fiscal year 1993 shall be permitted to transfer any credit for taxes paid under this chapter during such fiscal year period to any acquiring New Hampshire business organization to be used against such acquiring business organization's tax liability under RSA 77-A. The banking commissioner and the commissioner of revenue administration may adopt rules, pursuant to RSA 541-A, to implement the provisions of this section.

354:16 **Technical Correction.** Amend the introductory paragraph of RSA 77-A:3, I to read as follows:

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors:

354:17 **New Paragraph; Application of Credit.** Amend RSA 400-A:32 by inserting after paragraph IV the following new paragraph:

V. If the insurer liable for the taxes imposed in paragraphs I and II of this section is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, III, against such individual member's portion of the total tax liability of the unitary business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

354:18 **Appropriation.** The sum of $100,000 for the biennium ending June 30, 1993, is hereby appropriated to the department of revenue administration for the purpose of administering the tax expenditure report authorized in section 14 of this act. This sum shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:19 **Nonseverability.** It is the intent of the legislature that sections 1 and 2 of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

354:20 **Severability.** Except as provided in section 19, if

any provision of this act or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this act are severable.

354:21 Effective Date.

I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991.

II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991.

III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991.

IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991.

V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992.

VI. Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991.

VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, l991, but only with respect to capital expenditures incurred on or after July 1, 1991.

VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991.

IX. The remainder of this act shall take effect upon its passage.

[Approved July 2, 1991.]

[**Effective Date** I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991. II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991. III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991. IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991. V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992. VI Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991. VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991. VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991. IX. The remainder of this act shall take effect July 2, 1991.]