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.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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v.

STATE OF NEW HAMPSHIRE

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

INTRODUCTION

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts challenge the New Hampshire Nuclear Station Property Tax, 1991 N.H. Laws c. 354, the "Seabrook Tax." The tax is purportedly imposed on the nuclear property of all utilities which generate electricity in New Hampshire and sell it in New Hampshire and the plaintiff States, but the ultimate economic burden is designed to fall almost entirely on non-New Hampshire consumers of electricity, while almost completely exempting New Hampshire

consumers from its burden. The tax has increased or will eventually increase the costs of electricity for the plaintiff States and their citizens by placing a discriminatory tax burden on electricity sold to them.

Plaintiffs claim that the tax violates the Supremacy, Commerce, Equal Protection and Privileges and Immunities Clauses of the United States Constitution, and 15 U.S.C. § 391, which bars taxes which "discriminate[] against out-of-state . . . producers . . . or consumers of electricity." Plaintiffs claim that by imposing a tax on owners of "nuclear station property" and concurrently repealing the "Franchise Tax" on gross receipts from retail sales of electricity in New Hampshire, and allowing the full amount of the tax to be credited against such owner's liability for "Business Profits Tax" (in a manner which can be expected to benefit New Hampshire consumers in a grossly disproportionate fashion, relative to out-of-state consumers), New Hampshire has effectively protected its own residents from the impact of the tax and has exported nearly the entire burden of the tax to consumers living in the neighboring plaintiff States. For the reasons set forth in this brief, this case falls squarely within the Supreme Court's original jurisdiction, and the Court should grant plaintiffs' motion for leave to file their complaint.

JURISDICTION

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts by this action challenge the constitutionality of the New Hampshire Seabrook Tax.

This controversy between the States of Connecticut, Massachusetts, and Rhode Island and the State of New Hampshire is within the original and exclusive jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and 62 Stat. 927, Title 28, United States Code, Section 1251(a)(1) (1976).

QUESTION PRESENTED

Whether a challenge by the plaintiff States to the constitutionality of the New Hampshire Seabrook Tax, which by operation and design imposes a discriminatory burden on out-of-state consumers of electricity, presents an appropriate case for this Court's exercise of its exclusive and original jurisdiction, where plaintiffs present facts which establish that:

I. The Seabrook Tax violates the Supremacy Clause of the United States Constitution in that it "discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of electricity" in violation of 15 U.S.C. § 391.

II. The Seabrook Tax places an unconstitutional, discriminatory burden upon interstate commerce.

III. The Seabrook Tax denies equal protection of the laws.

IV. The Seabrook Tax violates the Privileges and Immunities Clause of the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article III, section 2, clause 3 of the Constitution of the United States provides as follows:

In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

Section 1 of the fourteenth amendment to the Constitution of the United States provides as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, section 2, clause 1 of the Constitution of the United States provides as follows:

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

Title 28 U.S.C. § 1251(a) provides:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Title 15 U.S.C. § 391 provides as follows:

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.

Title 16 U.S.C. § 824, of the Federal Power Act, is contained in full in the Addendum to this brief.

Title 42 U.S.C. §§ 2011, 2012, 2013, of the Atomic Energy Act, are contained in full in the Addendum to this brief.

New Hampshire's "Tax on Nuclear Station Property," (the "Seabrook Tax"), Chapter 354 (H.B. 64 § 1) of the 1991 New Hampshire Laws, is set out in full in Exhibit A to the accompanying Complaint and in the Addendum to this brief and is codified as New Hampshire Rev. Stat. Ann. 83-D.

New Hampshire's "Business Profits Tax," New Hamp. Rev. Stat. Ann. 77-A:5, prior to amendment by Chapter 354 (H.B. 64 § 2) of 1991 New Hampshire Laws, is contained in the Addendum to this brief.

New Hampshire's "Franchise Tax," New Hamp. Rev. Stat. Ann. 83-C:1, prior to amendment by Chapter 354 (H.B. 64 §§ 3 and 4) of 1991 New Hampshire Laws, is contained in the Addendum to this brief.

Conn. Gen. Stat. § 16-19 is contained in the Addendum to this brief.

Conn. Gen. Stat. § 16-19a is contained in the Addendum to this brief.

Mass. Gen. Laws c. 164, §§ 94 and 94G are contained in the Addendum to this brief.

STATEMENT

This is a suit to set aside on constitutional grounds New Hampshire's "Tax on Nuclear Station Property" contained in Chapter 354 (H.B. 64) entitled "An Act relative to establishing a tax on nuclear station property and making an appropriation therefor," §§ 1, 2, 3, 4, 19, 20 and 21.[1] The intent and effect of this tax is that its burden will fall almost entirely on out-of-state consumers, while insulating New Hampshire consumers from its burden.

Effective July 1, 1991, the State of New Hampshire imposed a property tax on nuclear power station property at the rate of 0.64% of the property's valuation, to be assessed annually. RSA 83-D:3; RSA 83-D:4. Since the only nuclear power station in New Hampshire is the Seabrook Station in Seabrook, New Hampshire ("Seabrook Station"), it is the only property subject to the Seabrook Tax. The majority of Seabrook Station, or 62.23%, is owned by power companies making no retail sales in New Hampshire, with the remaining 37.77% owned by New Hampshire retail power companies.[2]

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[1] Chapter 354 (H.B. 64-FN-A) (1991) amended the Revised Statutes Annotated (RSA) of New Hampshire by creating a new chapter, 83-D, and in concert amended existing chapters 77-A and 83-C. References throughout this brief will be to the RSA citations as contained in Chapter 354 which is attached as Exhibit A to the accompanying Complaint and in the Addendum to this brief.

[2] In accordance with and in furtherance of national policy regarding the development and peaceful use of atomic energy, as enunciated in the Atomic Energy Act of 1954 and preceding legislation, codified in 42 U.S.C. § 2011 *et seq.*, in May of 1973, electrical utility companies throughout New England ("joint owners") joined together to construct and operate two identical 1150 megawatt nuclear powered generating plants in Seabrook, New Hampshire. Ultimately, only one such generating plant (Seabrook Station) was constructed and is in operation. Pursuant to a joint ownership agreement, each of the joint owners owned, as tenants-in-common, an undivided fractional interest in the Seabrook Station. The joint owners shared and continue to share the total cost and expense of constructing and operating the Seabrook Station in accordance with their respective proportion-

(continued)

Each of the joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. These joint owners are members of the New England Power Pool ("NEPOOL"), a regional power pool which includes a network of electric generating units and transmission lines throughout New England. Seabrook Station is a significant generating unit within NEPOOL, and its output is dispatched by NEPOOL on behalf of the joint owners to thousands of businesses and millions of individual citizens throughout New England, including those located in the plaintiff states. The Federal Energy Regulatory Commission ("FERC") regulates the wholesale sale of electricity between some of the joint owners and their retail subsidiaries, under 16 U.S.C. § 824. In addition, state regulatory authorities regulate retail sales of electricity by some of the joint owners. Mass. Gen. Laws c. 164, §§ 94 and 94G; Conn. Gen. Stat. §§ 16-19, 16-19a.

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[2] *(continued)*
ate interests. In turn, each joint owner is entitled to a share of the generated electric power equal to its ownership share. Public Service Company of New Hampshire ("PSNH"), an electric utility located in, and making retail sales of electricity to consumers located in, New Hampshire, is the single largest owner of Seabrook Station, with a 35.6 percent interest. Other New Hampshire retail 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, and making retail sales of electricity to consumers located in, Connecticut, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to consumers located within Massachusetts own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative ("MMWEC") 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% of Seabrook. Although a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Any profits accrue to its parent company, EUA, which includes both EUA Power and Montaup. Utilities located in the State of Vermont own the remaining 0.41% share.

(continued)

Although at first glance the application of the Seabrook Tax to all of the joint owners may appear even-handed, RSA 83-D:5, an examination of the entire legislative package creating the tax makes it clear the economic burden of the tax will ultimately fall, by intent as well as by effect, almost entirely on the non-New Hampshire consumers of electricity purchased from joint owners of Seabrook. This is because, as part of the same legislative package that created the Seabrook Tax, the New Hampshire legislature repealed the Franchise Tax formerly paid by the New Hampshire power companies, RSA 83-D:12 VI (3),[3] and provided a credit permitting New Hampshire utilities ostensibly liable for the Seabrook Tax to credit

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[2] *(continued)*
The joint owners seek to recoup the costs of constructing, operating and owning the Seabrook Station through approved electrical rates that they charge their customers.

In Rhode Island, the Blackstone Valley Electric, Newport Electric, and Pascoag Electric Companies generate no electricity themselves, but all purchase wholesale power from Montaup, which holds an ownership interest in the Seabrook plant.

[3] Prior to the enactment of the Seabrook Tax, New Hampshire utilities making retail sales of electricity within New Hampshire had paid a one percent tax upon their gross receipts from the sale of electricity in that state. RSA 83-C:1. The elimination of this obligation only affects New Hampshire utilities and their ratepayers. The other joint owners of Seabrook Station and their non-New Hampshire ratepayers receive no similar benefit. Prior to enactment of the Seabrook Tax, New Hampshire tax law provided as follows. An enterprise engaged in New Hampshire in the "manufacture, generation, distribution, transmission or sale of gas or electric energy," was defined as a "public utility". RSA 83-C:1, II. A public utility paid a franchise tax of 1% of its gross receipts. *Id.*, § 83-C:2. Gross receipts were defined as all receipts received or accrued by a public utility from the sale of gas or electricity excluding: (1) sales to another public utility subject to the New Hampshire public utility franchise tax; (2) receipts from the sale of gas or electricity for use outside of New Hampshire. *Id.*, § 83-C:1, IV. A business enterprise which paid a franchise tax as a "public utility" received a credit against its business profits tax in the amount of the utility franchise tax paid. *Id.*, § 77-A:5, I. Thus, under previous New Hampshire law, a generator or provider of electricity in New Hampshire paid a franchise tax of 1% on its sales to New Hampshire retail customers.

that liability, dollar for dollar, against the New Hampshire Business Profits Tax. RSA 83-D:12 VI (2).[4]

The net effect of these provisions is to ultimately subject out-of-state consumers to the burden of the Seabrook Tax, while effectively exempting in-state consumers from its burden. Because the tax is considered a cost of doing business for the utilities, it has been or will be passed on and paid through increased rates by their customers: that is, by the States of Connecticut, Massachusetts, and Rhode Island as consumers of electricity; by the states' political subdivisions and instrumentalities such as cities, towns, and school districts as consumers of electricity; and by all the individual consumers of electricity who are customers of these utilities – in other words, virtually the entire populations of these three New England states.

The legislation enacting the Seabrook Tax included a statement that the tax is to compensate the State of New Hampshire for the environmental impact and "unique public safety requirements and burdens" created by Seabrook Station. RSA 83-D:1. The Seabrook Tax is not designed to accomplish this purpose, however, because the public safety and environmental burdens caused by Seabrook Station have been, and continue to be, paid by all the joint owners of the Station pursuant to pre-existing and distinct federal and New Hamp-

[4] The allowance of a credit for payment of the Seabrook Tax to be applied against the New Hampshire Business Profits Tax provides a meaningful benefit only to the New Hampshire utilities making retail sales of electricity to New Hampshire consumers because they are the only joint owners which will have any significant portion of their income apportioned to New Hampshire and subject to the Business Profits Tax. Although all joint owners are presumably subject to the New Hampshire tax by virtue of owning property there, i.e., the Seabrook plant, given the operation of the apportionment formula contained in RSA 77-A:3, I, it is clear that the only joint owner which would have significant income subject to the New Hampshire tax against which the credit could be applied is Public Service of New Hampshire.

shire laws and regulations.[5] The real purpose of the Seabrook Tax, as is apparent both from an examination of the legislation as a whole and from the legislative history,[6] is to generate revenue for the State of New Hampshire derived almost entirely from non-New Hampshire consumers of electricity.

For 1991, the first installment of the estimated tax was due and payable on September 15, 1991. This payment has

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[5] The joint owners must pay a nuclear decommissioning financing charge to the state. RSA 162-F:14 *et seq.* They must also pay the cost of preparing, maintaining, and operating the state's emergency nuclear response program. RSA 107-B:1 *et seq.* In addition, they must pay fees to the federal government to fund the cost of the government's obligation to remove spent nuclear fuel from Seabrook. 42 U.S.C. §§ 10101 *et seq.* Furthermore, as a condition to their operating license from the Federal Nuclear Regulatory Commission, the joint owners must maintain hundreds of millions of dollars in financial protection to cover public liability claims. 42 U.S.C. § 2210.

[6] The New Hampshire Floor debate (May 29, 1991), House Floor debate (April 2 and 9, 1991) and a legislative hearing on the legislation (May 2, 1991) are replete with well articulated statements revealing the discriminatory nature and intent of the tax:

> If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay. Over the seven-year term of the rate agreement, I am assured by those who know that this will have no increase or negligible increase in [New Hampshire] rates, that you will not be able to see this in the negotiated five and a half per cent rate increase which this House has approved . . . I would say that this is a tax in the *New Hampshire tradition of finding some way for the other fellow to pay.*

Remarks of Representative Robert Hayes, Chairman of the Legislative Subcommittee which drafted the Seabrook Tax. New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. (Emphasis added).

This view was also held by the New Hampshire Senate as exemplified by the statement of Senator Russman:

> It [Seabrook Tax] generates an incredible amount of revenue, given what it is, at *essentially no cost to the State of New Hampshire.*

New Hampshire Senate Floor Debate Re: House Bill 64, May 29, 1991, page 3. (Emphasis added).

been made. The plaintiff States and their consumer citizens, upon pass-through of this payment in rates, have been or will be substantially harmed by the Seabrook Tax and will suffer economic burdens and hardships because of it.

SUMMARY OF ARGUMENT

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION, AND THIS CASE IS APPROPRIATE FOR THE EXERCISE OF THAT JURISDICTION.

The Supreme Court has original and exclusive jurisdiction over this action under Art. III, § 2, cl. 2 of the Constitution and 28 U.S.C. § 1251(a). The complaint alleges a dispute between the States of Connecticut, Massachusetts, and Rhode Island on the one hand, and the State of New Hampshire on the other hand, over a taxing scheme enacted by New Hampshire on the Seabrook Station. The complaint raises important issues of federal constitutional law and alleges substantial injury to the plaintiffs.

The plaintiff States have brought this action in both their proprietary and *parens patriae* capacities. In their proprietary capacities, the plaintiff States will suffer serious injury as substantial consumers of electricity purchased from utilities which are subject to the Seabrook Tax upon inclusion of the tax cost in rates. The plaintiff States and their political subdivisions have been or will be required to pay increased rates for their electricity as a direct result of the Seabrook Tax.

In their *parens patriae* capacities, the plaintiff States bring this action to redress serious harm caused by the Seabrook Tax to their citizens who purchase electricity from utilities which are subject to the tax. Virtually the entire populations of the States of Connecticut and Rhode Island, and a large portion of the population of Massachusetts, have been or will be injured by the Seabrook Tax. It is estimated that

over the life of the Seabrook Station, the citizens of the plaintiff States will pay approximately half a billion dollars in increased electricity rates as a result of the Seabrook Tax.

This is an appropriate case for the Supreme Court to exercise its original and exclusive jurisdiction because of the serious nature of the claim involved. This case raises issues of national significance concerning interstate commerce and the supremacy of federal law, implicating federalism concerns which are at the core of this Court's original and exclusive jurisdiction. The Seabrook Tax by design discriminates against out-of-state producers and consumers of electricity in direct conflict with both the Commerce Clause and Section 212(a) of the Tax Reform Act of 1976, 90 Stat. 1914, codified at 15 U.S.C. § 391, as well as with decisions of this Court. *See Maryland v. Louisiana*, 451 U.S. 725 (1981); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

Further, the parties actually injured by the tax – that is, the consumers of electricity in the plaintiff States who must pay the tax through higher rates – have no other adequate forum in which to challenge the tax. The utilities which are assessed the tax can merely pass it on through their rates to their customers, and have not mounted a constitutional challenge to the tax. They have already made the first estimated tax payment to New Hampshire on September 15, 1991. There is no pending state court or administrative proceeding raising the issue of the tax's constitutionality, leaving the injured consumers of electricity with the inevitable obligation to pay the tax through higher rates but with no practical opportunity to challenge its legality other than through the present complaint.

This case is factually and legally similar to *Maryland v. Louisiana*, 451 U.S. 725 (1981), in which the Supreme Court exercised its original and exclusive jurisdiction in a challenge to Louisiana's First Use Tax on natural gas brought by nine states in their proprietary capacities as consumers of natural gas and in their *parens patriae* capacities representing their

citizens as consumers of natural gas. There is at most a limited amount of fact finding necessary to a determination of the legal issues raised in this case, and such facts may be established through documentary evidence or by stipulation, avoiding the need for testimony and assessments of credibility.

II. THE SEABROOK TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH FEDERAL LAW AND APPLICABLE DECISIONS OF THIS COURT.

The Seabrook Tax violates several provisions of the United States Constitution:

A. The Seabrook Tax Violates 15 U.S.C. § 391 And Therefore Is Invalid Under The Supremacy Clause.

Section 212(a) of the Tax Reform Act of 1976, 90 Stat. 1914, codified at 15 U.S.C. § 391, provides in relevant part:

> No State . . . 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.

There can be little question that the Seabrook Tax is a tax "on or with respect to the generation or transmission of electricity," and that through New Hampshire's scheme of tax credits and exemptions for in-state utility owners and consumers it discriminates against out-of-state producers, retailers, and consumers of that electricity, in direct violation of this federal law. A similar New Mexico tax scheme was found by this Court to be contrary to this same federal law and unconstitutional under the Supremacy Clause in *Arizona Public Serv. Co. v. Snead, supra.* The same result is warranted here.

B. The Seabrook Tax Violates The Commerce Clause.

The Seabrook Tax violates the Commerce Clause because it intentionally and by effect discriminates against interstate commerce, is not fairly apportioned among the joint owners, and is not fairly related to services provided by the taxing state. *See Washinqton Revenue Dept. v. Washington Stevedoring Assn.,* 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

C. The Seabrook Tax Violates The Equal Protection Clause.

The undeniable discrimination between New Hampshire consumers of electricity and non-New Hampshire consumers who purchase electricity either directly or indirectly from the joint owners of Seabrook is arbitrary and capricious and violates the Equal Protection Clause. The classification created by this taxing scheme – that the tax burden almost exclusively will fall on non-New Hampshire consumers of electricity – is not rationally related to any legitimate state purpose and therefore violates the Equal Protection Clause.

D. The Seabrook Tax Violates The Privileges And Immunities Clause.

The Seabrook Tax falls almost exclusively upon non-New Hampshire ratepayers. These non-residents are entitled to the same treatment as New Hampshire residents. The calculated deprivation of such equality by the New Hampshire legislature is contrary to the Privileges and Immunities Clause of the Constitution.

ARGUMENT

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION, AND THIS CASE IS AN APPROPRIATE ONE IN WHICH TO EXERCISE THAT JURISDICTION.

A. This Court Has Original And Exclusive Jurisdiction Over This Action.

This complaint is based on a dispute between the sovereign states of Connecticut and Rhode Island and the sovereign Commonwealth of Massachusetts, on the one hand, and the sovereign state of New Hampshire on the other. As such, the complaint falls within Art. III, § 2, cl. 2 of the Constitution, which provides the Supreme Court with original jurisdiction over cases in which a "State shall be a Party." It also falls within the parameters of 28 U.S.C. § 1251(a), which gives the Supreme Court "original and exclusive jurisdiction of all controversies between two or more states."

This Court's previous interpretations of its jurisdiction under these two provisions leave no doubt that the present dispute between the states constitutes a proper "controversy" sufficient to invoke this Court's jurisdiction. As this Court has held:

> In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts v. Missouri*, 308 U.S. 1, 15, 60 S.Ct. 39, 42, 84 L.Ed. 3 (1939). See *New York v. Illinois*, 274 U.S. 488, 490, 47 S.Ct. 661, 71 L.Ed. 1164 (1927); *Texas v. Florida*, 306 U.S. 398, 405, 59 S.Ct. 563, 567, 83 L.Ed. 817 (1939).

Maryland v. Louisiana, supra, 451 U.S. at 735-736.

The plaintiff States satisfy these jurisdictional requirements both in their proprietary capacities as substantial consumers of electricity, and in their *parens patriae* capacities on behalf of their citizens.

1. Jurisdiction Is Established By The Injury To The Plaintiff States In Their Proprietary Capacities.

The plaintiff States are major consumers of electricity purchased from utilities that are joint owners of the Seabrook Station. In fiscal year 1989-1990, the State of Connecticut as proprietor of numerous state buildings used nearly a half billion kilowatt-hours of electricity provided from the two Connecticut joint owners of Seabrook, resulting in charges of over 36 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. Connecticut continues to purchase and consume substantial amounts of electricity from utilities subject to the Seabrook Tax, and will continue to do so.

In the fiscal year ending June 30, 1991, the Commonwealth of Massachusetts as proprietor of numerous state buildings consumed substantial amounts of electricity provided from joint owners of Seabrook, resulting in charges of over 16.5 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. The Commonwealth of Massachusetts continues to purchase and consume substantial amounts of electricity from utilities subject to the Seabrook Tax, and will continue to do so.

In fiscal year 1990-1991, the State of Rhode Island as proprietor of numerous state buildings used over 100 million kilowatt-hours of electricity provided from joint owners of Seabrook, resulting in charges of over 12 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. Rhode Island continues to purchase and consume substantial amounts of electricity from utilities subject, directly or indirectly, to the Seabrook Tax, and will continue to do so.

The Seabrook Tax on the utilities constitutes a cost of doing business which is recoverable from the ultimate consumers of electricity, including the plaintiff States, in the form of increased rates.[7] The plaintiff States, as major purchasers of electricity whose costs will increase as a result of the New Hampshire Seabrook Tax, are thus "directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction." *Maryland v. Louisiana, supra,* 451 U.S. at 737.

2. Jurisdiction Is Also Established By The Substantial Injury To The General Population Of The Plaintiff States Which Are Represented By The Plaintiffs In Their *Parens Patriae* Capacity.

Although a state may not invoke this Court's original jurisdiction as a nominal party on behalf of individual citizens, it may "act as the representative of its citizens in original actions where the injury alleged affects the general popula-

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[7] In a recent rate setting decision concerning the Connecticut Light and Power Company, one of the Connecticut joint owners of Seabrook Station, the Connecticut Department of Public Utility Control ("DPUC") noted that, under its rate-setting policies, the Seabrook Tax is unquestionably a cost which would be included in customer rates. *See,* Decision, *In Re Application of Connecticut Light and Power Company,* Docket #90-12-03, Aug. 1, 1991, p. 18, footnote, reprinted in excerpted form in the Addendum to this brief.

In Rhode Island, the Settlement Agreement with Montaup Electric Company which was filed with FERC on September 13, 1991 includes a pass-through of the Seabrook Tax. The Blackstone Valley Electric, Newport Electric, and Pascoag Electric Companies all purchase wholesale power from Montaup, which holds an ownership interest in the Seabrook plant. The annual impact on Rhode Island utilities from the pass-through of this tax by Montaup alone (Rhode Island utilities are also affected by New England Power's share of the tax) is estimated to be nearly a quarter of a million dollars.

In Massachusetts, customers of MMWEC have already had their electric rates increased to reflect that utility's assessment of the Seabrook Tax.

tion of a State in a substantial way." *Maryland v. Louisiana, supra,* 451 U.S. at 737. This is such a case.

The present case presents a controversy in which the vast majority of the populations of the plaintiff States have been or will be injured by the action of New Hampshire. Most of the citizens of the plaintiff States, and in fact of the entire New England region, are consumers of electricity purchased from utilities that are subject to the Seabrook Tax, and they all are subject to the payment of higher utility rates as a result of the tax. It is estimated that for each year of the Seabrook Tax, the consumers in the three plaintiff States will have to pay approximately an additional $14 million in increased rates caused by the tax, with an estimated total of nearly half a billion dollars additional over the life of the Seabrook Station.[8] This represents a significant injury to most of the citizens of these states.

This case is indistinguishable from *Maryland v. Louisiana, supra,* in which natural gas consumers in a number of states were injured by a Louisiana First Use tax on natural gas imported into Louisiana, and *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), in which natural gas consumers

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[8] These figures are based on estimates of valuation of Seabrook Station as contained in the Seabrook Tax. For 1991, the Nuclear Station Property 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. If Seabrook Station is assessed at this value, the joint owners' aggregate liability under the Seabrook Tax would be approximately $22,400,000 per year. Of this amount, $14 million will be borne by consumers in Massachusetts, Connecticut and Rhode Island in the form of higher rates. The legislative history reveals that the intent of the New Hampshire legislature was to raise only the additional $14 million to be paid by out-of-state consumers, with the remaining $8 million ostensibly paid by New Hampshire citizens to be effectively negated through the simultaneous repeal of the Franchise Tax and the allowance of credits to the Business Profits Tax. See comments of Rep. Robert Hayes, Chairman of the legislative subcommittee which drafted the Seabrook Tax, New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, p. 25, contained in Addendum to this brief.

in Ohio and Pennsylvania were injured by a West Virginia law restricting the interstate shipment of gas. In both those cases, this Court found that the respective plaintiff States could properly invoke this Court's original and exclusive jurisdiction as *parens patriae* representatives of their citizens' interests. By contrast, in those cases in which this Court has declined to exercise its original jurisdiction, only a small number of citizens was directly injured by the challenged action. *See Massachusetts v. Missouri,* 308 U.S. 1, 17 (1939); *Oklahoma, ex rel. Johnson v. Cook,* 304 U.S. 387 (1938).

The plaintiff States have properly invoked the Supreme Court's original and exclusive jurisdiction because they will suffer substantial and serious injury from the New Hampshire tax in their proprietary capacities as substantial consumers of electricity, and because millions of their citizens will suffer similar substantial injury in their consumption of a product essential to their health, safety, and welfare.

B. This Is An Appropriate Case In Which To Exercise The Supreme Court's Original And Exclusive Jurisdiction.

This Court has interpreted its grant of exclusive jurisdiction under 28 U.S.C. § 1251(a) as giving the Court "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in th[e] Court for particular disputes within [its] constitutional original jurisdiction . . ." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983) (citations omitted).[9] The Court's "case-by-case" judgments about its jurisdiction rest on "prudential" and "equitable"

[9] *But see California v. West Virginia,* 454 U.S. 1027 (1981) (Stevens, J., dissenting from order denying motion for leave to file complaint); *Illinois v. City of Milwaukee,* 406 U.S. 91, 102 n.2 (1972), citing H.R. Rep. No. 308, 80th Cong., 1st Sess., A 104 (1947) ("Congress may provide for or deny exclusiveness."); *New Orleans Public Service, Inc. v. Council,* 491 U.S. 350, 358-359 (1989) (federal courts lack authority to abstain from the exercise of jurisdiction conferred).

standards. *California v. Texas,* 457 U.S. 164, 168 (1982).

In determining whether a case is appropriate for the exercise of this Court's original and exclusive jurisdiction, this Court has looked both at the nature and seriousness of the claim itself, and at the availability of another forum in which to resolve the claim. *See Arizona v. New Mexico,* 425 U.S. 794, 796-797 (1976); *Massachusetts v. Missouri, supra,* 308 U.S. at 18. The Court is especially concerned with claims that "implicate[] the unique concerns of federalism forming the basis of [its] original jurisdiction." *Maryland v. Louisiana,* 451 U.S. at 725. Finally, the Court weighs the interests of the United States in the subject matter of the proposed original case. In accepting jurisdiction of *Maryland v. Louisiana,* for example, the Court cited the interests of the United States "under the regulatory mechanism that supervises the production and development of natural gas resources." *Id.* at 744-745. In this case, each of these factors supports the exercise of jurisdiction.

At the heart of the dispute in this case are basic federal constitutional issues with important national implications. New Hampshire's Seabrook Tax intentionally burdens interstate commerce while protecting local interests. In doing so, it undermines "[t]he very purpose of the Commerce Clause [which] was to create an area of free trade among the several States"; *McLead v. J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944); and to prevent "'a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Dean Milk Co. v. Madison,* 340 U.S. 349, 356, 71 S.Ct. 295, 299, 95 L.Ed. 329 (1951)." *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 329 (1977).

Further, there are significant federal interests at stake in this case. The Seabrook Tax directly conflicts with federal law prohibiting taxation on the generation or transmission of electricity in a way that discriminates against out-of-state producers and consumers. 15 U.S.C. § 391. As this Court has recognized, the importance of such an issue extends far beyond this one tax and this one case, because "what one state may

do others may [do] . . . and what may be done with one natural product may be done with others . . ." *Pennsylvania v. West Virginia, supra,* 262 U.S. at 596. The New Hampshire tax represents precisely the type of interstate feudalism that the Commerce Clause and 15 U.S.C. § 391 were designed to prevent. Plaintiffs' claims against the tax therefore implicate "serious and important concerns of federalism" within the "purposes and reach of [the Court's] original jurisdiction." *Maryland v. Louisiana,* 451 U.S. at 744; *see Pennsylvania v. West Virginia, supra,* 262 U.S. at 591-592.[10]

Important interests of the federal executive branch are also at stake. The national energy policy as contained in chapter 23 of Title 42 of the United States Code, 42 U.S.C. §§ 2011, 2012, 2013, calls for the development and peaceful use of nuclear energy. This policy is of critical importance in New England, which has depended heavily on imports of foreign oil. It was in furtherance of this national policy that the utility owners in the present case banded together in 1973 to construct a nuclear power generating plant, Seabrook Station, to provide electricity to the New England region. *See* footnote 2, *supra,*. New Hampshire's Seabrook Tax, by placing a discriminatory tax burden on the non-New Hampshire customers of Seabrook Station, interferes with this national policy of promoting development of nuclear energy, and indeed threatens its continuation in the New England region.

In addition, the Federal Power Act, 16 U.S.C. § 824 grants FERC regulatory authority over "interstate wholesale power rates." *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 956 (1986). The Federal Power Act gives the Commission the power to decide whether the costs which underlie wholesale rates are "reasonable." *Id.* at 956-957. In this case, the Commission has already entered the controversy, since at least

[10] Nor is this a case in which the alleged injury was "self-inflicted"; *see Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976); or limited to issues of local law. *See Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 504 (1971).

one of the utilities which paid the estimated New Hampshire tax due September 15, 1991, has already applied to FERC for permission to pass on the cost of the tax to its Rhode Island customers. *See* footnote 7, *supra*, p. 17.

Further, there is no adequate alternate forum in which the parties actually injured by the Seabrook Tax can effectively challenge its legality. In exercising its original jurisdiction, the Court considers "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where the appropriate relief may be had." *California v. Texas, supra*, 457 U.S. at 168, quoting *Illinois v. City of Milwaukee, supra*, 406 U.S. at 93-94.

In *Maryland v. Louisiana*, the Court accepted jurisdiction on the grounds that (1) none of the plaintiff States in *Maryland* had interests represented in a pending state court suit; (2) the Louisiana First Use Tax had already affected the retail costs of natural gas; and (3) the Louisiana tax affected numerous citizens in a number of states. *Id.* at 743-744; *see also Kentucky v. Indiana*, 281 U.S. 163, 177 (1930) (original jurisdiction exercised despite related, pending state court case). All of these factors support the exercise of jurisdiction here.

In the present case, the tax has been imposed virtually entirely on utility companies which sell electricity at retail to out-of-state consumers, with the ultimate resulting burden falling on the consumers of the electricity generated – that is, on the plaintiff States and their citizens. Since these actual victims will pay the tax indirectly through their rates rather than directly to the New Hampshire taxing authorities, it is highly unlikely that they will have any adequate forum in which to challenge the tax or seek a refund. Only the exercise of the Supreme Court's original and exclusive jurisdiction in this matter will provide an appropriate and effective forum

for the parties with a true stake in the outcome.[11]

Ironically, although the utilities as joint owners may have a means of contesting the tax, they have not suffered a true injury since the tax they pay can simply be passed on to their customers. Significantly, no constitutional challenge to the tax has been brought in any other forum by the utilities, and the tax has gone uncontested. For this reason, the present case is unlike *Arizona v. New Mexico, supra,* in which this Court declined to exercise jurisdiction, in part because at the time this Court's original jurisdiction was invoked, Arizona's interests were being represented in a state court action by an electric company which was actually a political subdivision of the state. *See Maryland v. Louisiana,* 451 U.S. at 743. In fact, the present case is even more compelling than *Maryland v. Louisiana,* in which this Court exercised its jurisdiction despite the pendency of state court actions challenging the tax in question. *Id.* at 740-743. Here, the ultimate consumers have or will become obligated to pay the tax through their increased rates without any legal recourse except the present action.

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[11] The plaintiffs have no other plain, speedy, or adequate remedy in any forum other than the Supreme Court. The federal courts appear foreclosed by virtue of the Tax Injunction Act, 28 U.S.C. § 1341, *see Franchise Tax Board of California v. Alcan Aluminum,* 110 S.Ct. 661, 666 (1990), and by the Eleventh Amendment as it applies to the citizens of the plaintiff States. Neither of these grounds bars an original jurisdiction action brought in the Supreme Court. *Maryland v. Louisiana,* 451 U.S. at 745 n.21.

Similarly, it is at best speculative that the plaintiffs would be able to challenge the tax in New Hampshire state courts because the plaintiffs neither pay the Seabrook Tax directly, nor are they New Hampshire ratepayers. The possibility of such a state court action is thus speculative at best, and should not preclude the exercise of this Court's jurisdiction. At any rate, the purpose of providing for original jurisdiction in the Supreme Court for actions between states, or between a state and citizens of another state, "was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicions of partiality, which might exist if the plaintiff State[s] were compelled to resort to the courts of the state of which the defendants were citizens." *Massachusetts v. Mellon,* 262 U.S. 447, 481 (1923).

Nor is this a case in which extensive fact finding will be necessary. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). Such facts as may be necessary primarily concern such matters as the relative ownership interests in Seabrook Station of the various utilities; the consumption of electricity by the Plaintiffs; the amount of tax revenue generated by the tax; and the increase in electricity rates which will result from the tax. These facts may be established by documentary evidence or even by stipulation, avoiding the need for lengthy testimony and assessments of credibility.

This case is factually and legally similar to *Maryland v. Louisiana*, in which this Court exercised its original and exclusive jurisdiction in a challenge to Louisiana's First Use Tax on natural gas brought by nine states in both their proprietary capacities as substantial consumers of natural gas and in their *parens patriae* capacities representing their citizens who were consumers of natural gas.

The present case is thus an appropriate one for the exercise of this Court's original and exclusive jurisdiction. It involves serious questions of federal constitutional law that will affect millions of citizens in the three plaintiff States, and there is no adequate alternate forum available for the injured parties to obtain relief. Consequently, the exercise of jurisdiction would serve the purposes underlying Article III, § 2, cl. 2, and is necessary for the protection of the plaintiffs' interests.

II. THE SEABROOK TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH FEDERAL LAW AND APPLICABLE DECISIONS OF THIS COURT.

The New Hampshire legislature's thinly disguised attempt to shift New Hampshire's tax burden to citizens of other states offends several provisions of the United States Constitution.

A. The Seabrook Tax Violates Section 2121(a) Of The Tax Reform Act Of 1976, 15 U.S.C. § 391, And Therefore Is Invalid Under The Supremacy Clause.

By repealing the Franchise Tax and establishing a credit against New Hampshire's Business Profits Tax for taxes paid under the Seabrook Tax, the Seabrook Tax violates section 2121(a) of the Tax Reform Act of 1976, codified at 15 U.S.C. § 391.

Section 391 prohibits a state from enacting a tax on the generation or transmission of electricity that discriminates against out-of-state users of that electricity. The full text of the statute provides:

> 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.

15 U.S.C. § 391.

The discriminatory effect of the Seabrook Tax results from both the repeal of the Franchise Tax and the tax credit provision of the statute. Since the repeal of the Franchise Tax only benefits utilities making retail sales of electricity to New Hampshire consumers, and likewise these same New Hampshire utilities are the only significant beneficiaries of the simultaneously enacted credit to the Business Profits Tax, the entire Seabrook Tax package has the effect of discriminating against out-of-state consumers of electricity and fulfills the clear intent of the New Hampshire legislature that the full burden

of this tax fall on out-of-staters. Under the tax credit portion of the package, a joint owner subject to the Business Profits Tax may reduce liability for that tax by means of a credit for taxes paid under the Seabrook Tax. Since sales of electricity outside New Hampshire do not subject a joint owner to tax liability under the New Hampshire Business Profits Tax, those sales provide no tax basis against which to offset the nuclear station property tax. As a consequence, the credit provision discriminates against out-of-state users of electrical power generated in New Hampshire, whose rates will not reflect the benefit of any tax credit.

1. The Statute Imposes A Tax "On Or With Respect To The Generation Or Transmission Of Electricity."

Section 391 prohibits a discriminatory tax "on or with respect to the generation or transmission of electricity." Notwithstanding that the Seabrook Tax is in the form of a tax on "ownership" in "property," the tax plainly falls within the prohibition of section 391.

Section 83-D:3 of the New Hampshire statute imposes a tax at the rate of 0.64% of the value of nuclear station property on each person with an "ownership interest" in "nuclear station property," in the proportion that such person's ownership interest bears to the entire ownership of the property. N.H. Rev. Stat. Ann. c. 83-D:3 and c. 83-D:5. The statute defines "nuclear station property" as "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." N.H. Rev. Stat. Ann. c. 83-D:2.

Since the property taxed by the statute by definition is used solely for the purpose of "generating, producing, supplying and distributing" electric power, the tax in effect is a tax "on or with respect to the generation or transmission of

electricity," notwithstanding that the tax takes the form of a tax on property.

This Court did not have occasion to consider the scope of the language "on or with respect to the generation or transmission of electricity," in the leading case interpreting § 391, *Arizona Public Service Co. v. Snead, supra.*[12]

However, in cases involving the interpretation of tax statutes in other contexts, the Court has emphasized that the substance of a transaction, not its form, is determinative of the tax consequences of the transaction. *See, e.g., Commissioner of Internal Revenue v. Court Holding Co.*, 324 U.S. 331 (1945).

Moreover, since § 391 by its terms prohibits any tax which even *indirectly* results in a greater tax burden on electricity generated and transmitted in interstate commerce than in intrastate commerce, the fact that the Seabrook Tax takes the form of a property tax does not remove it from the strictures of § 391.

Therefore, since the Seabrook tax in substance and effect *is* a tax "on or with respect to the generation or transmission of electricity," it is subject to the prohibition in 15 U.S.C. § 391 of such taxes that discriminate against out-of-state users of the electricity.

2. The Statute Discriminates Against Out-of-State Consumers Of Electricity Generated In New Hampshire.

Through its scheme of tax credits and exemptions for in-state utility owners of the Seabrook Station, which insulates in-state consumers from the burden of the tax while imposing

[12] Since the state tax statute at issue in *Snead* explicitly imposed a tax "on any person generating electricity," 441 U.S. at 143 n.4, the tax was "concededly a tax on the generation of electricity." 441 U.S. at 149.

it fully on out-of-state consumers, the Seabrook Tax "results . . . in a greater tax burden on electricity which is generated and transmitted in interstate commerce than transmitted in intrastate commerce," in violation of section 391. The discriminatory impact of the tax results from the fact that sales of electricity within New Hampshire by a joint owner of Seabrook subject the owner to the New Hampshire Business Profits Tax (and thereby allow the owner to offset taxes paid under the Seabrook Tax by a credit against the Business Profits Tax), whereas sales of electricity outside New Hampshire do not subject the owner to liability for the Business Profits Tax (and, accordingly, do not allow the owner to offset taxes paid under the Seabrook Tax by a credit against the Business Profits Tax).

As discussed above (*see*, "Statement" *supra* pages 6-8), Seabrook is jointly owned by various public utility companies, each of which owns a varying share of the nuclear power station. Since sales of electricity within New Hampshire constitute "business activity" for purposes of the business profits tax, each of the joint owners that makes sales of electricity within New Hampshire is subject to the Business Profits Tax and, accordingly, may use that tax liability as a basis against which to offset (by means of the tax credit) their liability for the Seabrook Tax.

Most of the joint owners (such as MMWEC, Canal, Montaup, United Illuminating, and Connecticut Light and Power)[13] that make retail sales of electricity only outside of New Hampshire are subject to little or no Business Profits Tax, and therefore receive little or no benefit from the credit provision. The discriminatory effect of the tax is most obvious as to out-of-state sales by those joint owners.

In addition, the tax discriminates against out-of-state sales made by even those joint owners who, although they make only out-of-state sales, nevertheless may incur a nomi-

[13] See footnote 2, *supra*.

nal tax liability under the Business Profits Tax (and, accordingly, may receive a nominal credit), as a consequence of their corporate presence in New Hampshire as a joint owner of Seabrook or their corporate relation to a parent corporation that is subject to the business profits tax for sales of electricity within New Hampshire. Because of the formula used to apportion the net income for the New Hampshire Business Profits Tax, the credit for these companies will be at most insignificant.

The New Hampshire tax is virtually identical to the tax struck down by this Court in *Arizona Public Service Co. v. Snead, supra. Snead* concerned New Mexico's Electrical Energy Tax Act, which imposed a 2% energy tax "on any person generating electricity" within the state. 441 U.S. at 143 n.4. The tax applied to electricity generated in New Mexico and sold either within or outside the state. *Id.* The Act further provided that the electrical energy tax could be fully credited against a company's tax liability under the state's gross receipts tax (a 4% tax on retail sales of electricity within New Mexico). Plaintiffs in *Snead,* several public utility companies that generated electricity within New Mexico and sold the bulk of the electricity to out-of-state consumers, challenged the tax under 15 U.S.C. § 391, as well as under the Commerce Clause, Due Process Clause, and Import-Export Clause of the Constitution.[14]

The Court held that the electrical energy tax violated 15 U.S.C. § 391 because the effect of the tax was to discriminate against sales of electricity made outside New Mexico. The discriminatory effect of the tax resulted from the fact that "a generating company's 2% tax is completely offset by the credit against the 4% retail sales tax when its electricity is sold within New Mexico. But to the extent that the electricity generated in New Mexico is not sold at retail in the State,

[14] Because the Court concluded that the tax was invalid under the statute and the Supremacy Clause, it did not reach the substantive constitutional claims.

there is no gross receipts tax liability against which to offset the electrical energy tax liability of the generating company." 441 U.S. at 145.

The Court found that the New Mexico tax clearly was a tax "on the generation of electricity." Furthermore,

> [t]he tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State .... Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-150 (emphasis in original) (footnote omitted).

The Seabrook Tax suffers from precisely the same discriminatory feature as the electrical energy tax at issue in *Snead.* Like the New Mexico tax, New Hampshire's Seabrook Tax provides a credit for payment of the Seabrook Tax that may be used to offset payment of the business profits tax. And like the credit provision in the New Mexico tax, the New Hampshire tax credit provision "*itself* indirectly but necessarily discriminates against electricity sold outside [New Hampshire]," and thus violates the federal statute.

Through § 391, Congress has set the standard for the taxation of electricity generated and transmitted in interstate commerce. This Court struck down the electrical energy tax in *Snead,* concluding that "under the Supremacy Clause, the tax is invalid by reason of this federal statute ...." *Snead,* 441 U.S. at 146 (footnote omitted). The New Hampshire Seabrook Tax statute, by directly conflicting with this same federal statute, is thus also invalid under the Supremacy Clause.

B. The Seabrook Tax Violates The Commerce Clause.

The purpose of the Commerce Clause, Const. art. I, § 8, cl. 3, was "to avoid the tendencies toward economic Balkanization that had plagued relations between the Colonies and later among the states under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 332, 325-326 (1979), and to create a "federal free trade unit" based on the principle that "our economic unit is the Nation" and not the separate, individual States. *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 537-538 (1949).

The "Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (citations omitted). "This 'negative aspect' of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (citations omitted).

The generation and transmission of electricity is an activity of interstate commerce. *Federal Energy Regulatory Com'n v. Mississippi*, 456 U.S. 742, 757 (1982).[15] To be valid under the Commerce Clause, a state tax on an activity of interstate commerce must: (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided by the taxing state. *Washington Revenue Dept. v. Washington Stevedoring Assn., supra*, 435 U.S. at 750; *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S. at 279. The New Hampshire Seabrook Tax fails this test.

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[15] "[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 757 (1982).

Fundamental to the very purpose of the Commerce Clause is the principle that no state may "'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959)." *Maryland v. Louisiana, supra*, 451 U.S. at 754. In determining whether a tax discriminates against interstate commerce, it "must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Id.* at 756.

A review of the entire Seabrook Tax scheme reveals that, as with the Louisiana First Use Tax struck down in *Maryland v. Louisiana*, the New Hampshire tax "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." *Id.* at 756. Under the specific provisions of the Seabrook Tax, a tax of .64 percent of valuation of the Seabrook Station property is 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 of the property." RSA 83-D:3; 83-D:5. Since utilities making no retail sales of electricity to New Hampshire consumers have a 62.23% ownership interest in Seabrook Station, they are liable for 62.23% of the assessed tax, while owners which make retail sales of electricity to New Hampshire consumers and hold a 37.77% ownership interest, should be liable for 37.77% of the assessed tax. However, because the legislation goes on to exempt these in-state utilities, and ultimately their customers, from the Franchise Tax, RSA 83-D:12 VI(3), and to provide them with a dollar-for-dollar credit against the Business Profits Tax, RSA 83-12 VI(2), these utilities, and thus their New Hampshire customers, will in reality pay at most a *de minimis* portion of the Seabrook Tax, while owners selling electricity at retail to consumers in the plaintiff States will bear the full burden of the tax. In reality, then, this tax scheme unquestionably discriminates against out-of-state consumers.

This discriminatory scheme is precisely the same situation as that which occurred in *Maryland v. Louisiana, supra,* where this Court struck down Louisiana's First Use Tax because of its blatant favoritism to local interests. If the New Hampshire "tradition" of devising schemes to tax only out-of-state residents is successful, it is probable that other states will attempt to retaliate, leading to the very Balkanization of, and rivalry between, states that the Commerce Clause was designed to prevent.

In addition, although the stated purpose of the tax is to compensate New Hampshire for the "special and unique" burdens on the state caused by a nuclear power plant, RSA 83-D:1, the costs associated with specific burdens are already being paid by all the joint owners of Seabrook Station pursuant to pre-existing and distinct federal and state statutes and regulations. See footnote 5, *supra.* Consequently, because there is no basis for an additional tax to meet that objective, the tax is unrelated to the services provided by New Hampshire.

Because the Seabrook Tax unfairly discriminates against interstate commerce, is not fairly apportioned, and is not fairly related to the services provided by New Hampshire, it violates the Commerce Clause.

C. The Seabrook Tax Violates The Equal Protection Clause Of The Fourteenth Amendment.

To be valid under the Equal Protection Clause, a taxing statute must be rationally related to a legitimate state purpose. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527-528 (1959). Any classification made by the tax must further that legitimate purpose and do so in a way that is not arbitrary and capricious. *Id.*

Through its system of tax credits and exemptions for in-state utility owners and consumers which are not available to utility owners selling to out-of-state consumers, the Sea-

brook Tax classifies taxpayers into two groups based solely on their relationship to New Hampshire: one group consists of in-state utility owners and consumers, who are effectively exempted from payment of the tax; the other group consists of utility owners selling at retail to out-of-state consumers, who are fully subject to the tax.

> It is settled law that a state's taxing authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

W. & S. Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 668 (1981).

The stated purpose of the Seabrook Tax is to compensate New Hampshire for burdens caused by the presence of a nuclear power plant. RSA 82-D:1. As stated earlier, the tax does not further that interest because these costs have been and are being met by all the joint owners through other pre-existing and distinct federal and state laws. For this reason, the tax itself, even if it were apportioned fairly between in-state and out-of-state owners, would fail to serve a legitimate state purpose.

Moreover, even if the stated purpose were legitimate, there can be no rational basis for distinguishing between in-state and out-of-state consumers in seeking compensation for the purported increased burden. If there are any services provided by New Hampshire to justify the tax, then all consumers, both in-state and out, benefit from them and ought to pay for them. *Arizona Public Serv. Co. v. Snead, supra*, 441 U.S. at 150-151. New Hampshire's attempt to impose the entire burden of the tax on out-of-state consumers while insulating in-state consumers is arbitrary, capricious, and "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Ins. Co. v. Ward*,

470 U.S. 869, 878 (1985).[16]

D. The Seabrook Tax Violates The Privileges And Immunities Clause.

The Privileges and Immunities Clause has long been interpreted to protect nonresidents of a state "from higher taxes or impositions than are paid by the other citizens of the state" *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975), quoting *Corfield v. Coryell*, 6 F.Cas. pp. 546, 552 (No. 3,230) (CCED Pa. 1825). A fundamental purpose of this clause is that nonresidents doing business or working in a state are entitled to "substantial equality" with the citizens of the state when it comes to taxation. *Austin v. New Hampshire, supra*, 420 U.S. at 662-664, citing *Toomer v. Witsell*, 334 U.S. 385, 395-396 (1948); and *Ward v. Maryland*, 12 Wall. 418, 20 L.Ed. 449 (1871).

It is clear that the Seabrook Tax imposes a burden on nonresidents which is not shared by residents. *Austin v. New Hampshire, supra*, involved a similar New Hampshire tax scheme which imposed a tax on non-residents' New Hampshire-derived income, while exempting from the burden of the tax all income of New Hampshire residents. In striking the tax down as violative of the Privileges and Immunities Clause, this Court noted:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents

[16] The New Hampshire Supreme Court has questioned on Equal Protection grounds a property tax on Seabrook Station, albeit one based on size and not type of fuel. *Opinion of the Justices*, 118 N.H. 343, 386 A.2d 1273 (1978).

> are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution."

Id. at 662-663 (footnotes and internal citations omitted).

The New Hampshire Seabrook Tax implicates these same concerns and fails for the same reasons.

CONCLUSION

For the foregoing reasons, this Court should grant the plaintiff States the right to file their original jurisdiction complaint in this Court against the State of New Hampshire.

Respectfully submitted,

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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.

ADDENDUM

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SUBCHAPTER II – REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy In Interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the

transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities sub-

ject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

42 U.S.C. § 2011

Congressional declaration of policy

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that–

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2012

Congressional findings

The Congress of the United States makes the following find-

ings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub.L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub.L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2013

Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for –

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which v.ill be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

Connecticut General Statutes § 16-19

Sec. 16-19. Amendment of rate schedule; investigations and findings by department; hearings; deferral of municipal rate increases; refunds; notice of application for rate amendment, interim rate amendment and reopening of rate proceeding. (a) No public service company may charge rates in excess of those previously approved by the authority or the department of public utility control except that any rate approved by the public utilities commission or the authority shall be permitted until amended by the authority or the department, that rates not approved by the authority or the department may be charged pursuant to subsection (b) of this section, and that the hearing requirements with respect to adjustment clauses are as set forth in section 16-19b. Each public service company shall file any proposed amendment of its existing rates with the department in such form and in accordance with such reasonable regulations as the department may prescribe. Each electric, gas or telephone company filing a proposed amendment shall also file with the department an estimate of the effects of the amendment, for various levels of consumption, on the household budgets of high and moderate income customers and customers having household incomes not more than one hundred fifty per cent of the federal poverty level. Each electric company shall also file such an estimate for space heating customers. Each water company, except a water

company that provides water to its customers less than six consecutive months in a calendar year, filing a proposed amendment, shall also file with the department a plan for promoting water conservation by customers in such form and in accordance with a memorandum of understanding entered into by the department pursuant to section 4-67e. Each public service company shall notify each customer who would be affected by the proposed amendment, by mail, at least one week prior to the public hearing thereon, that an amendment has been or will be requested. Such notice shall also indicate (1) the department of public utility control telephone number for obtaining information concerning the schedule for public hearings on the proposed amendment and (2) whether the proposed amendment would, in the company's best estimate, increase any rate or charge by twenty per cent or more, and, if so, describe in general terms any such rate or charge and the amount of the proposed increase, provided no such company shall be required to provide more than one form of the notice to each class of its customers. In the case of a proposed amendment to the rates of any public service company, the department shall hold a public hearing thereon, except as permitted with respect to interim rate amendments by subsection (d) and subsection (g) of this section, and shall make such investigation of such proposed amendment of rates as is necessary to determine whether such rates conform to the principles and guidelines set forth in section 16-19e, or are unreasonably discriminatory or more or less than just, reasonable and adequate, or that the service furnished by such company is inadequate to or in excess of public necessity and convenience. The department, if in its opinion such action appears necessary or suitable in the public interest may, and, upon written petition or complaint of the state, under direction of the governor, shall, make the aforesaid investigation of any such proposed amendment which does not involve an alteration in rates. If the department finds any proposed amendment of rates to not conform to the principles and guidelines set forth in section 16-19e, or to be unreasonably discriminatory or more or less than just, reasonable and adequate to enable such company to provide properly for the public con-

venience, necessity and welfare, or the service to be inadequate or excessive, it shall determine and prescribe, as appropriate, an adequate service to be furnished or just and reasonable maximum rates and charges to be made by such company. In the case of a proposed amendment filed by an electric, gas or telephone company, the department shall also adjust the estimate filed under this subsection of the effects of the amendment on the household budgets of the company's customers, in accordance with the rates and charges approved by the department. The department shall issue a final decision on each rate filing within one hundred fifty days from the proposed effective date thereof, provided it may, before the end of such period and upon notifying all parties and intervenors to the proceedings, extend the period by thirty days.

(b) If the department has not made its finding respecting an amendment of any rate within one hundred fifty days from the proposed effective date of such amendment thereof, or within one hundred eighty days if the department extends the period in accordance with the provisions of subsection (a) of this section, such amendment may become effective pending the department's finding with respect to such amendment upon the filing by the company with the department of assurance satisfactory to the department, which may include a bond with surety, of the company's ability and willingness to refund to its customers with interest such amounts as the company may collect from them in excess of the rates fixed by the department in its finding or fixed at the conclusion of any appeal taken as a result of a finding by the department.

(c) Upon conclusion of its investigation of the reasonableness of any proposed increase of rates, the department shall order the company to refund to its customers with interest any amounts the company may have collected from them during the period that any amendment permitted by subsection (b) of this section was in force, which amounts the department may find to have been in excess of the rates fixed by the department in its finding or fixed at the conclusion of any appeal taken as a result of a finding by the department. Any such

refund ordered by the department shall be paid by the company, under direction of the department, to its customers in such amounts as are determined by the department.

(d) Nothing in this section shall be construed to prevent the department from approving an interim rate increase, if the department finds that such an interim rate increase is necessary to prevent substantial and material deterioration of the financial condition of a public service company, to prevent substantial deterioration of the adequacy and reliability of service to its customers or to conform to the applicable principles and guidelines set forth in section 16-19e, provided the department shall first hold a special public hearing on the need for such interim rate increase and the company, at least one week prior to such hearing, notifies each customer who would be affected by the interim rate increase that such an increase is being requested. The company shall include the notice in a mailing of customer bills, unless such a mailing would not provide timely notice, in which case the department shall authorize an alternative manner of providing such notice. Any such interim rate increase shall only be permitted if the public service company submits an assurance satisfactory to the department, which may include a bond with surety, of the company's ability and willingness to refund to its customers with interest such amounts as the company may collect from such interim rates in excess of the rates approved by the department in accordance with subsection (a) of this section. The department shall order a refund in an amount equal to the excess, if any, of the amount collected pursuant to the interim rates over the amount which would have been collected pursuant to the rates finally approved by the department in accordance with subsection (a) of this section or fixed at the conclusion of any appeal taken as a result of any finding by the department. Such refund ordered by the department shall be paid by the company to its customers in such amounts and by such procedure as ordered by the department.

(e) If the department finds that the imposition of any increase in rates would create a hardship for a municipality,

because such increase is not reflected in its then current budget, or cannot be included in the budget of its fiscal year which begins less than five months after the effective date of such increase, the department may defer the applicability of such increase with respect to services furnished to such municipality until the fiscal year of such municipality beginning not less than five months following the effective date of such increase; provided the revenues lost to the public service company through such deferral shall be paid to the public service company by the municipality in its first fiscal year following the period of such deferral.

(f) Any public service company, as defined in section 16-1, filing an application with the department of public utility control to reopen a rate proceeding under this section, which application proposes to increase the company's revenues or any rate or charge of the company by five per cent or more, shall, not later than one week prior to the hearing under the reopened proceeding, notify each customer who would be affected thereby that such an application is being filed. Such notice shall indicate the rate increases proposed in the application. The company shall include the notice in a mailing of customer bills, unless such a mailing would not provide timely notice to customers of the reopening of the proceeding, in which case the department shall authorize an alternative manner of providing such notice.

(g) The department shall hold a special public hearing on the need for an interim rate decrease (1) when a public service company has, for six consecutive months, earned a return on equity which exceeds the return authorized by the department by at least one percentage point, (2) if it finds that any change in municipal, state or federal tax law creates a significant increase in a company's rate of return, or (3) if it finds that a public service company may be collecting rates which are more than just, reasonable and adequate, as determined by the department, provided the department shall require appropriate notice of hearing to the company and its customers who would be affected by an interim rate decrease in

such form as the department deems reasonable. At such hearing, the company shall be required to demonstrate to the satisfaction of the department that earning such a return on equity or collecting rates which are more than just, reasonable and adequate is directly beneficial to its customers. At the completion of such hearing, the department may order an interim rate decrease if it finds that such return on equity or rates exceed a reasonable rate of return or are more than just, reasonable and adequate as determined by the department. Any such interim rate decrease shall be subject to a customer surcharge if the interim rates collected by the company are less than the rates finally approved by the department or fixed at the conclusion of any appeal taken as a result of any finding by the department. Such surcharge shall be assessed against customers in such amounts and by such procedure as ordered by the department.

(h) The department shall review the effects of the federal Tax Reform Act of 1986 on public service companies having seventy-five thousand customers or more and shall report its findings and recommendations to the joint standing committee of the general assembly having cognizance over matters relating to energy and public utilities not later than January 8, 1988.

Connecticut General Statutes § 16-19a

Sec. 16-19a. Periodic review, investigation, hearing re gas and electric companies' rates and service. The department of public utility control shall, at intervals of not more than four years from the last previous general rate hearing of each gas and electric company having more than seventy-five thousand customers, conduct a complete review and investigation of the financial and operating records of each such company and hold a public hearing to determine whether the rates of each such company are unreasonably discriminatory or more or less than just, reasonable and adequate, or that the service furnished by such company is inadequate to or in excess of public neces-

sity and convenience or that the rates do not conform to the principles and guidelines set forth in section 16-19e . In making such determination, the department shall consider the gross and net earnings of such company since its last previous general rate hearing, its retained earnings, its actual and proposed capital expenditures, its advertising expenses, the dividends paid to its stockholders, the rate of return paid on its preferred stock, bonds, debentures and other obligations, its credit rating, and such other financial and operating information as the department may deem pertinent.

Massachusetts General Laws Chapter 164 § 94

§ 94. Schedules of rates, prices and charges: contracts; filing; proposed changes; notices; investigations; hearing

Gas and electric companies shall file with the department schedules, in such form as the department shall from time to time prescribe, showing all rates, prices and charges to be thereafter charged or collected within the commonwealth for the sale and distribution of gas or electricity, together with all forms of contracts thereafter to be used in connection therewith. Rates, prices and charges in such a schedule may, from time to time, be changed by any such company by filing a schedule setting forth the changed rates, prices and charges, but until the effective date of any such change no different rate, price or charge shall be charged, received or collected by the company filing such a schedule from those specified in the schedule then in effect; provided, that a company may continue to charge, receive and collect rates, prices and charges in accordance with a contract heretofore lawfully entered into, or, until the department otherwise orders, after notice to the company and a public hearing and determination that public interest so requires, may sell and distribute gas or electricity under a special contract hereafter made at rates or prices differing from those contained in a schedule in effect, providing a copy of the contract in each instance is filed with the department, except that a contract of a company whose sole

business in the commonwealth is the supply of electricity in bulk need not be filed except as may be required by the department. Whenever the department receives notice of any changes proposed to be made in any schedule filed under this chapter which represent a general increase in rates, prices and charges for gas or electric service, it shall notify the attorney general of the same forthwith, and shall thereafter hold a public hearing and make an investigation as to the propriety of such proposed changes after first causing notice of the time, place and the subject matter of such hearing to be published at least twenty-one days before such hearing in such local newspapers as the department may select. Unless the department otherwise authorizes, the rates, prices and charges set forth in such a schedule shall not become effective until the first day of the month next after the expiration of fourteen days from the filing thereof. Such rates, prices and charges shall apply to the consumption shown by meter readings made after the effective date of such rates, prices and charges, unless the department otherwise orders. So much of said schedules shall be printed in such form and distributed and published in such manner as the department may require.

The department, either upon complaint or upon its own motion, may investigate the propriety of any proposed rate, price or charge and may, pending such investigation and decision thereon, by order served upon the company affected thereby, suspend the taking effect thereof, from time to time, but not for a period longer than ten months beyond the time when such rate, price or charge would otherwise become effective. An order by the department directing a change in any schedule filed shall have the same effect as if a schedule with such changes were filed by the company, and shall become effective from such time as the department shall order.

Unless the department otherwise orders, all contracts for the sale of gas or electricity by gas or electric companies, except contracts for sale by a company whose sole business in this commonwealth is the supply of electricity in bulk, shall be filed with the department and shall not become effective

until thirty days after filing. The department may investigate the propriety of any such contract, both before and after such contract has become effective, and may, after notice and a public hearing, make such order relative to the rates, prices, charges and practices covered by such contract as the public interest requires. Any order made under the provisions of this section or of section ninety-three, may be enforced as provided in section seventy-nine. This section shall not apply to contracts for the sale of electricity to an electric company made in accordance with the provisions of section ninety-four A except as therein provided.

Massachusetts General Laws Chapter 164 § 94G

§ 94G. Proposed performance program; unit heat rate audit; public hearing; periodic report; deductions; fuel charge; base rates; rates and regulations

(a) At least once a year, on dates set by the department, each electric company having a fuel charge approved by the department shall file with the department and simultaneously with the attorney general a proposed performance program relating to fuel procurement and use. Such program shall describe for the time period or periods designated reasonably attainable targets which shall include a thermal efficiency target for the performance of the company, consistent with reasonable regional power exchange requirements; provided, however, that such requirements do not impede an individual utility within the regional power exchange system from producing and distributing electric power at optimum efficiency and economy in a manner not detrimental to the public interest. Such program also shall provide for the efficient and cost-effective operation of individual generating units by an electric utility company in meeting the minimum needs of each unit of said company to maintain sufficient reserves of power for purposes of reliability and efficiency. Such program also shall describe the historic data, industry standards or reports, simulation models or other information and tech-

niques upon which projections of the company's performance are based and shall include, as goals for individual and system plant performance, availability, equivalent availability, capacity factor, forced outage rate, heat rate on a unit by unit basis and such other factors or operating characteristics required by the department. Any such program may specify a value or a range of values for the operating characteristic in question and shall reflect operating conditions when overall performance is optimized.

Each company shall provide with the above filing the results of a unit by unit heat rate audit supervised and certified by the department or such independent auditing or engineering firm designated by the department and a statement prescribed under the pains and penalties of perjury that said company has used all reasonable means to procure the lowest possible costs for all fuel and purchased power. In addition, the department shall require each company to file as part of any review or investigation pursuant to this section, all fuel contracts, invoices and agreements with fuel suppliers, and such other information and reports as the department deems necessary. The department also shall require each company to file any reports of tests, studies or audits conducted or compiled for filing with or for review by any regional power exchange, research association or federal agency to which said company is affiliated, associated, or is required to report to, as the case may be. The department shall review, and may investigate upon its own motion or upon motion of the attorney general, any agreements, practices, and procedures which exist between the electric company and any of its suppliers of fuel or purchased power to determine whether such agreement, practices and procedures are in the best interest of the retail customers of such company.

Upon receipt of such filing, the department shall, after public notice, hold a public hearing to review the proposed program. In its proceedings to evaluate a performance program, the department may consider studies, analyses, audits and other tests relative to the program or any part thereof,

any of which the department may perform itself or require the company to provide. The department shall within ninety days of such filing approve such program for each company as proposed or as modified by order of the department after such hearing. In no event shall such program allow for the recovery of zero power costs as defined herein.

Each such electric company shall file with the department, with the frequency and in the standardized form established by the department, data and reports on the actual unit by unit and system performance of the company with respect to each target set forth in the approved performance program. If any such periodic report indicates that actual system performance varied from the approved targets, upon order by the department or petition of any party to the proceeding the company shall, at the next following fuel charge hearing under subsection (b), present evidence explaining such variance. In the course of such hearing, the department shall investigate such variance, may otherwise inquire into an issue related to the procurement or use of fuel or purchased power included in the fuel charge and properly raised by any party, and, in either event, shall make a finding whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exchange requirements to achieve the lowest possible overall costs to the customers of the company for the procurement and use of fuel and purchased power included in the fuel charge. If the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance. The department may continue the hearing into any such performance issue for a period of up to ninety days after its commencement, during which period the department shall render its decision; pro-

vided, however, that any such continuance shall not delay the approval by the department of any proposed fuel charges. At such time or times, the department shall specify, the portion, if any, of the fuel charges which is conditionally approved pending resolution of the performance issue. If the hearing results in a finding of unreasonable or imprudent performance, the department shall deduct from the fuel charge for the next following quarter the imprudently incurred fuel costs with interest calculated at such rate and for such period as the department deems appropriate to make the customers whole.

Any deductions ordered by the department pursuant to this subsection shall be subject to judicial review and the electric company shall be made whole with interest if the department's finding of imprudence is overruled. The department may allow for the deduction of imprudently incurred fuel costs from the fuel charge over a fixed period of time, as determined to be appropriate by the department, whenever, in its judgment, the full deduction, as provided in the preceding paragraph, of such costs would jeopardize the financial integrity of the company or otherwise be contrary to the public interest.

All materials required to be filed with the department pursuant to this section shall be in such standardized form and with such frequency as established by the department.

(b) The department may approve an itemized fuel charge in rates filed by electric companies to reflect changes in prudently incurred reasonable costs of fuels and power purchased by such companies. Such fuel charge may be based on reasonable estimates of the total costs of fuel to be used in generating or supplying electricity to customers and power purchased for resale to customers, as appropriate in accordance with the company's fuel charge rate schedule, during the quarter in which the charge shall apply. The burden of proof shall be upon the utility company to demonstrate the reasonableness of energy expenses sought to be recovered through the fuel charge. The fuel charge shall be billed to all customers of the company at uniform per kilowatt-hour rates and the

total amount of such costs to a customer shall be itemized on the customer's bill. Such rates may be time-differentiated but shall not otherwise differ among classes of customers or by the amount of a customer's usage.

Electric companies shall file quarterly under the pains and penalties of perjury, proposed fuel charges with the department which shall be filed simultaneously with the attorney general. No such fuel charge shall be billed to customers without the specific approval of the department after a public hearing. Such hearing shall be held within fourteen days after the filing by the electric company of a proposed fuel charge. Upon receipt of such a filing, the department shall forthwith cause notice of the time, place and subject matter of the public hearing to be published once at least seven days prior to such hearing in a newspaper of general circulation in the area served by the filing company. At such hearing the department shall consider and investigate the filing of the company with all related materials and reports of actual fuel and purchased power costs and fuel charge revenues for the three months preceding the month of the filing which shall be subscribed and sworn to by the company under the pains and penalties of perjury. The department shall render its decision within thirty days following the commencement of such hearing, except as provided under subsection ninety-four G (a). The approved fuel charge shall reflect a reconciliation for any differences between the fuel charge revenues and actual fuel and purchased power costs, less zero power costs as defined herein, for the three months preceding the month of the filing as well as estimated differences for the month of the filing and all other adjustments determined by the department pursuant to this subsection and subsection (a).

In the event of overcollection of fuel charges by a utility for the preceding three month period, the department shall determine what part, if any, of such overcollection is attributable to the overestimation of unit fuel prices by the utility and shall order that interest on that part, calculated at a rate to be determined by the department, be returned to the rate-

payers; provided, however, that such rate of interest shall be applied to that part of the overcollection only in the event that the estimates of unit fuel prices for the preceding three months exceeded the actual unit fuel price by more than five per cent. Any such overcollection and interest payments shall be returned to the ratepayers in the aforementioned reconciliation process at a fuel charge hearing held quarterly pursuant to the provisions of this section. In no case shall such interest payments be included in any fuel charge or in the normal operating costs of each such electric utility company.

Electric companies filing fuel charges shall submit monthly data in a standardized format determined by the department, of fuel costs, purchased power charges with the accompanying service classification for each type of power received or dispatched, zero power costs, kilowatt-hour usages, revenues derived from fuel charges and any other such information as the bureau may require for monitoring such fuel and purchased power costs. If, after review of said data, the bureau determines that a utility company is operating an individual generating unit in a manner inconsistent with its most recently approved annual performance program, or otherwise does not provide its consumers with energy in an efficient and cost-effective manner, the bureau shall notify the department of its findings. Upon receipt of such notification, the department shall order the company to present evidence, at the next following fuel charge hearing held pursuant to this section, explaining such variance or submit plans and specifications to repair or improve said unit. In the course of such hearings, the department shall investigate such variance and if the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter the amount of those fuel costs determined by the department to be directly attributable to the company's defective operation of such generating unit above its minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency.

The department shall also take additional steps as it deems necessary to ensure compliance with this subsection. Such monthly data, all electric company fuel and power supply contracts and agreements, fuel invoices and all reports required pursuant to subsection (a) shall be included with, or submitted prior to, the company's fuel charge filing and shall become part of the department's records.

Upon request of an electric company, the department, after public hearing, may approve an interim adjustment in the fuel charge then in effect for such company upon a finding that actual fuel costs exceed the approved quarterly estimates by more than ten per cent, and upon a finding that the company has demonstrated by clear and convincing evidence that all reasonably possible efforts were made to meet the standards established pursuant to subsection (a). Whenever an electric utility company determines that collections from the approved quarterly fuel charge will exceed the actual fuel costs of an electric company by more than ten per cent, said electric utility company shall forthwith notify the department and the department may, after public hearing, approve an interim adjustment in the fuel charge then in effect for such company.

(c) The department shall from time to time review the participation of an electric company in a regional power exchange and report its findings to the clerk of the senate and the clerk of the house, along with its recommendations. The department may petition the appropriate federal regulatory authority to implement its findings and recommendations.

(d) Upon request filed by an electric company, the department may allow interim adjustments to the base rates of such company to reflect extraordinary increases in operating, maintenance or capital costs for fuel procurement or the improvement of efficiency in operating generation facilities whenever the department finds by clear and convincing evidence after a public hearing that such increased expenditures were neither incurred as a result of company imprudence nor incurred

in the ordinary course of business and would result in a net reduction in the cost of electric service by virtue of a reduction in fuel or purchased power costs in excess of the costs of such increased expenditures.

Nothing in this subsection shall be interpreted to authorize such interim adjustments to the base rates of any electric company for operation and maintenance expenses incurred as a result of a forced or unscheduled outage. Nothing herein shall be interpreted to authorize such interim adjustments for the immediate recovery by a utility company of the costs of construction work in progress.

(e) The department may promulgate such rules and regulations as it deems appropriate to carry out the provisions of this section and may, after public hearing, incorporate the use of any factors, in addition to and not inconsistent with factors set forth in this section, in its considerations under any subsection hereof.

(f) For the purpose of this section, the following terms shall have the following meanings: –

"Line losses", the unavoidable losses of electricity that occur during the transmission and distribution of electric power.

"Retail customer", any purchaser of electricity regulated by the department.

"Zero power costs", fuel costs attributable to a utility company's generation of electricity which was neither purchased nor consumed by a retail customer of said company and is in excess of minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency, as determined by the fuel charge monitoring bureau, and to maintain the most economical levels of operation, consistent with reasonable regional power exchange requirements; provided, however, that such electricity shall not include line losses as defined herein.

New Hampshire Revised Statutes Chapter 83-C Prior to Amendments by 1991 N.H. Laws c. 354

FRANCHISE TAX

83-C:1 Terms Defined.
83-C:2 Tax Imposed.
83-C:3 Returns and Declarations.
83-C:4 Payments.
83-C:5 Additional Returns.
83-C:6 Extension of Time for Returns.
83-C:7 Utility Records.
83-C:8 Failure to Make Returns; False Returns or Records.
83-C:9 Adjustments; Procedure.
83-C:10 Appeal.
83-C:11 Witnesses.
83-C:12 Fees.
83-C:13 Collection.
83-C:14 Disposition of Revenue.
83-C:15 Saving Clause.

83-C:1 Terms Defined. The following terms when used in this chapter shall have the meanings set forth below, except when the context in which they are used requires a different meaning:

I. "Franchise tax," hereinafter referred to as the "tax," means the tax computed on the franchises of a public utility under this chapter on the business conducted by such utility within this state.

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 or electric energy.

III. "Commissioner" means the commissioner of revenue administration.

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

V. "Taxable year" means the calendar year.

83-C:2 Tax Imposed. Every public utility shall pay to the state, annually, a special tax upon the franchise exercised by such public utility within the state, such tax to be assessed at a rate equal to one percent of the gross receipts such public utility derives in this state during the calendar year of assessment from the exercise of such franchise.

83-C:3 Returns and Declarations.

I. On or before March 15 in each year in which a public utility as the holder of such franchise exercises or proposes to exercise the privileges and accepts or proposes to accept the obligations conferred thereby, it shall file with the commissioner on a form prescribed by the commissioner, a return of its gross receipts for the previous calendar year, together with such additional information as the commissioner shall require. All returns shall be signed by its authorized representative, subject to the pains and penalties of perjury.

II. At the same time the return is filed, as required by paragraph I, every public utility as defined in RSA 83-C:1 shall, in addition, file a declaration of its estimated gross receipts and estimated franchise tax for its subsequent taxable period.

III. For the calendar year 1983, the public utility shall be required to file a return covering the period from July 1, 1983, through December 31, 1983, on or before March 15, 1984.

Such return shall also include a statement of income as required under RSA 83-B:3 covering the period from January 1, 1983, through June 30, 1983. At the same time such return is filed, every public utility as defined in RSA 83-C:1, II shall, in addition, file a declaration of its estimated gross receipts and estimated franchise tax for the calendar year 1984.

83-C:4 Payments. One quarter of the public utility's estimated franchise tax for the subsequent taxable period is due and payable on the fifteenth day of the fourth month of the subsequent taxable year; ¼ is due and payable on the fifteenth day of the sixth month of the subsequent taxable year; ¼ is due and payable on the fifteenth day of the ninth month of the subsequent taxable year; and ¼ is due and payable on the fifteenth day of the twelfth month of the subsequent taxable year. If the return required by RSA 83-C:3, I 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, the commissioner shall refund such overpayment to the utility or shall allow the utility a credit against a subsequent payment or payments due, to the extent of the overpayment, at the utility's option.

83-C:5 Additional Returns. When the commissioner has reason to believe that a utility has failed to file a return or to include any part of its gross receipts in a filed return, the commissioner may require the utility to file a return or a supplementary return showing such additional information as the commissioner prescribes. Upon the receipt of the supplementary return, or if none is received within the time set by the commissioner, the commissioner may find and assess the amount due upon the information that is available. If any tax or addition to tax is not paid when due, interest at the rate of 1¼ percent per month shall be added to it from the date due until the time of payment. The utility shall also be liable for any other additional charges and penalties imposed by law.

83-C:6 Extension of Time for Returns. For good cause, the commissioner may extend the time within which a utility is required to file a return, and if such return is filed during the period of extension no penalty or late payment charge may be imposed for failure to file the return at the time required by this chapter, but the utility shall be liable for interest at the rate of 1¼ percent per month on payments not made when they otherwise would be due but for the grant of extension.

83-C:7 Utility Records. Every utility shall:

I. Keep such records as may be necessary to determine the amount of its liability under this chapter;

II. Preserve such records for the period of 3 years or until any litigation or prosecution hereunder is finally determined;

III. Make such records available for inspection by the commissioner or his authorized agents, upon demand, at reasonable times during regular business hours.

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-C:8 Failure to Make Returns; False Returns or Records. The following acts or omissions are unlawful:

I. Failing to make any return or declaration required by this chapter;

II. Making, causing to be made or permitting to be made any false or fraudulent return or declaration or false statement in any return or declaration, with intent to defraud the state or to evade payment of the tax or any part of the tax imposed by RSA 83-C:2.

III. Making, causing to be made or permitting to be made

any false entry in books, records or accounts with intent to defraud the state or to evade the payment of the tax or any part of the tax imposed by RSA 83-C:2 or keeping, causing to be kept or permitting to be kept more than one set of books, records or accounts with such intent.

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-C:9 Adjustments; Procedure. The commissioner is empowered to determine whether there has been error in the assessment of the tax imposed by RSA 83-C:2, in accordance with the following provisions:

I. The utility may demand such a determination in writing, within 3 years after the tax was due;

II. The commissioner may, on his own motion, undertake such a determination upon written notice to the utility given within 3 years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the utility, the commissioner shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commissioner shall be assessed against the utility 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 utility and any balance due the utility shall be certified to the state treasurer who shall pay the balance to the utility. Such credit and payment together may not exceed the amount of the tax originally paid.

83-C:10 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner under RSA 83-C:9, a utility 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 utility 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-C:11 Witnesses. At any hearing held pursuant to this chapter, the commissioner or his designee shall have the power to compel the attendance of witnesses and the production of books, records, papers, vouchers, accounts and documents of any public utility believed by the commissioner or his designee to be liable for the payment of a tax under this chapter, or of any person believed to have information or knowledge pertinent to any matter under investigation or examination by the commissioner.

83-C:12 Fees. The fees of witnesses required to attend any hearing shall be the same as those allowed witnesses in the superior court and shall be paid by the state.

83-C:13 Collection. The department of revenue administration shall possess all of the powers of a collector of taxes, as defined in RSA 80, to collect any overdue tax.

83-C:14 Disposition of Revenue. The revenue derived hereunder shall be covered into the general funds of the state.

83-C:15 Saving Clause. If any part or parts of this chapter shall be held to be invalid, such invalidity shall not affect the validity of the remaining parts of this chapter.

New Hampshire Revised Statutes Chapter 77-A prior to Amendments by 1991 N.H. Laws c. 354

BUSINESS PROFITS TAX

77-A:1 Definitions.
77-A:2 Imposition of Tax.
77-A:2-a Minimum Tax Due.

77-A:2-b Conditions for Employment of Only Water's Edge Combination.
77-A:3 Apportionment.
77-A:4 Additions and Deductions.
77-A:4-a Special Rule for "Safe Harbor" and Other Similar Leases.
77-A:5 Credits.
77-A:6 Returns, Declarations, and Combined Reporting.
77-A:7 Payments Due With Returns and With Estimates.
77-A:7-a Interest.
77-A:8 Additional Returns.
77-A:9 Extension of Time for Returns.
77-A:10 Corrections.
77-A:11 Taxpayer Records.
77-A:12 Failure to Make Returns; False Returns or Records.
77-A:13 Adjustments; Procedure.
77-A:14 Appeal.
77-A:15 Administration.
77-A:16 Confidentiality of Department of Revenue Administration Records. [Repealed.]
77-A:17 Preference.
77-A:18 Certifications for Dissolution, Withdrawal and Good Standing.
77-A19 Lien for Tax.
77-A.20 Distribution of Increase in Revenue.
77-A:21 Severability.

77-A:1 Definitions. When appearing in this chapter:

I. "Business organization" means any enterprise, whether corporation, partnership, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code as defined in RSA 77-A:1, XX. Each enterprise under this definition shall be subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this chapter to be treated otherwise, such as, but not limited

to, combined reporting. The use of consolidated returns as defined in the United States Internal Revenue Code as defined in RSA 77-A:1, XX is not permitted. A partnership, estate, trust, "S" corporation, real estate investment trust, regulated investment company, or any other such entity whose net income is reportable by the true owners either directly or indirectly shall be subject to tax at the entity level, and no part of such earnings or loss shall be included in the calculation of the gross business profits of the owners of such entity.

II. "Commissioner" means the commissioner of revenue administration.

III. "Gross business profits" means:

(a) In the case of a corporation, except "S" corporations, or any other business organization required to make and file a United States corporation income tax return, or in the case of a corporation which does not make and file a separate United States corporation income tax return for itself because it is a member of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, the amount of taxable income as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX before the application of any net operating loss deduction, special deductions shown on line 29 of the federal corporate income tax return, or any other special deductions allowable only to a certain class of corporate taxpayer.

(b) In the case of "S" corporations or any other business organizations required to make and file an "S" corporation return, the net profit from all business activity determined in accordance with rules adopted by the department of revenue administration under RSA 541-A.

(c) In the case of a partnership or any other business organization required to make and file a United States partnership return of income, the amount of ordinary income as

would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX increased by the amounts shown as payments to partners on the federal partnership return of income, the net amount of any gains from the sale of partnership assets, items of income specifically allocated to partners and decreased by any deductions specifically allocated to partners or losses on the sale of partnership assets.

(d) In the case of a proprietorship, the amount of net profit or loss from a business, profession, rental, or farming activities as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX adjusted by the amount of any gains or losses from the sale of assets held or used in business activity.

(e) In the case of a trust, estate, or any other business organization engaging in business activity, the amount of net profit from such business activity and the net amount of any gains from the sale of assets held for use in business activity.

(f) In the case of any business organization which is part of a water's edge combined group and which does not make or file a United States income tax return or schedule under subparagraphs (a)-(d), the amount of net income as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for such business organizations.

IV. "Taxable business profits" means gross business profits adjusted by the additions and deductions provided in RSA 77-A:4 and then adjusted by the method of apportionment provided in RSA 77-A:3.

V. "Taxable period" means the calendar year or fiscal year which the taxpayer uses for United States income tax purposes, or that part of a year for which a return is made.

VI. "Gross business income" means all income for federal

income tax purposes from whatever source derived in the conduct of business activity, including but not limited to gross proceeds from sales, compensation for rendering services, gross proceeds realized from trading in stocks, bonds, or other evidences of indebtedness, gross proceeds realized from sale of assets used in trade or business, interest, discount, gross rents, royalties, fees, commissions, dividends, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense paid or accrued and without any deduction on account of losses.

VII. "Prescribed Filing Date" means the original statutory due date, or approved extended due date.

VIII. "Prescribed Payment Date" means the original statutory due date.

IX. "Qualified charitable contributions" means a charitable contribution of tangible personal property as defined in section 1221(1) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, but only if all of the following conditions are met:

(a) The contribution is either to an educational organization which is described in section 170(b)(1)(A)(ii) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to an institution of higher education as defined in section 3304(f) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to both an educational organization and an institution of higher education as defined in this subparagraph.

(b) The contribution is made not later than one year after the date the manufacture or purchase of the property is substantially completed.

(c) The original use of the property is by the donee.

(d) The property is a computer, scientific equipment, or apparatus, all of the use of which by the donee is directly for the education of students in the state of New Hampshire.

(e) The property is not transferred by the donee in exchange for money, other property, or services.

(f) The taxpayer receives from the donee a written statement representing that its use and disposition of the property shall be in accordance with these provisions.

(g) The contribution is made between July 1, 1983, and June 30, 1984.

X. "Qualified research contribution" means a charitable contribution by a taxpayer of tangible personal property as defined in section 1221(1) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, but only if all of the following conditions are met:

(a) The contribution is either to an educational organization which is described in section 170(b)(1)(A)(ii) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to an institution of higher education as defined in section 3304(f) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to both an educational organization and an institution of higher education as defined in this subparagraph.

(b) The contribution is made not later than 2 years after the date the manufacture or purchase of the property is substantially completed.

(c) The original use of the property is by the donee.

(d) The property is scientific equipment or apparatus, substantially all of the use of which by the donee is for research or experimentation, or for research training in physical or biological sciences for students.

(e) The property is not transferred by the donee in exchange for money, other property, or services.

(f) The taxpayer receives from the donee a written statement representing that its use and disposition of the property shall be in accordance with these provisions.

XI. "Business asset" means any tangible or intangible property, whether real or personal, previously used, currently used, or available for use in any business activity.

XII. "Business activity" means a group of actions performed by a business organization for the purpose of earning income or profit from such actions and includes every operation which forms a part of, or a step in, the process of earning income or profit from such group of actions. The actions ordinarily include, but are not limited to, the receipt of money, property, or other items of value and the incurring or payment of expenses.

XIII. "Combined net income" means the revenues less expenses as would be determinable under the provisions of the Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for all business organizations conducting a unitary business regardless of whether such business organizations are required to file a federal income tax return.

XIV. "Unitary business" means one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions.

XV. "Water's edge combined group" means a group of business organizations as defined in RSA 77-A:1, I operating a unitary business, except for overseas business organizations, as defined in paragraph XIX; provided, however, overseas business organizations shall only be excluded from the definition

of "water's edge combined group" if the following criteria are met:

(a) The taxpayer certifies that transactions conducted between such business organizations and other members of the group are on a comparable basis to transactions between other business organizations owned or controlled by the taxpayer and any members of the water's edge combined group; and

(b) The taxpayer agrees to report to the commissioner any adjustments as finally determined by the United States Internal Revenue Service with respect to such transactions between any related business organizations as may have a bearing on the comparability of transactions referred to in subparagraph (a). These adjustments shall be made to the 80/20 business organizations so that a comparable basis shall be maintained for New Hampshire tax purposes. Such report shall be made in the manner and within the time limits as provided in RSA 77-A:10. Nothing in this paragraph shall exclude from taxation any business organization carrying on business activity within the state.

XVI. "Water's edge method" means the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for the members of the group, and apportioning the result as provided in RSA 77-A:3.

XVII. "Foreign dividends" as used in RSA 77-A:3, II means dividend income received from affiliated business organizations, which have 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

XVIII. "Foreign property, payroll and sales" as used in RSA 77-A:3, II means the property, payroll and sales data of affiliated business organizations which have 80 percent or

more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia, and which have paid dividends to a member of the water's edge combined group.

XIX. "Overseas business organizations" means business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

XX. "United States Internal Revenue Code" means:

(a) The United States Internal Revenue Code without the rules, regulations, forms, and procedures of the United States Internal Revenue Service. The rules, regulations, forms and procedures of the United States Internal Revenue Service may, however, be used by the commissioner of revenue administration in formulating rules for adoption under RSA 541-A. This definition shall be operative unless and until a specific statutory exception to its adoption is provided in this chapter, or until the application of one of its provisions is held to violate the New Hampshire constitution.

(b) For all tax years beginning before January 1, 1987, the United States Internal Revenue Code (1954) as amended; and

(c) For all tax years beginning after December 31, 1986, the United States Internal Revenue Code of 1986 in effect on December 22, 1987; and

(d) For all tax years beginning after December 31, 1987, the United States Internal Revenue Code of 1986 in effect on November 10, 1988.

77-A:2 Imposition of Tax. A tax is imposed at the rate of 8 percent upon the taxable business profits of every business organization.

77-A:2-a Minimum Tax Due.

[Repealed 1982, 42:70, eff. July 1, 1982.]

77-A:2-b Conditions for Employment of Only Water's Edge Combination.

I. The commissioner shall determine liability for any business organization subject to the tax imposed under RSA 77-A:2 for the elements of both tax base and apportionment by the water's edge method except as provided in paragraph II.

II. The commissioner shall not be compelled to apply the water's edge method if the taxpayer fails to comply with the rules adopted by the department of revenue administration or the procedural requirements of RSA 77-A.

77-A:3 Apportionment.

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, equal weight to be given to each:

(a) The percentage of value of the total real and tangible personal property owned, rented and employed by the business organization everywhere as is owned, rented and employed by it in the operation of its business in this state. Property owned by the business organization shall be valued at its original cost. Property rented by the business organization shall be valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the business organization from subrentals.

(b) The percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within this state. Such compensation is deemed to be disbursed for services in this state if the service is performed entirely within this state, or if the service is performed both within and without this state and the service performed without this state is incidental to the service within this state, or some of the service is performed in this state and (1) the

base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual performing such service resides within this state.

(c) The percentage of the total sales, including charges for services, made by the business organization everywhere as is made by it within this state. Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of f.o.b. point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and (1) the purchaser is the United States government, or (2) the business organization is not taxable in the state of the purchaser. Sales other than sales of tangible personal property are in this state if the income-producing activity is performed in this state, or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

II. (a) The average of the 3 percentages in paragraph I 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 commissioner may require, in respect to all or any part of the business organization's business activity, if reasonable:

(1) The exclusion of any one or more of the apportionment factors;

(2) The inclusion of one or more additional apportionment factors which will fairly represent the business organization's business activity in the state; or

(3) The employment of any other method to effect an equitable apportionment of the business organization's gross business profits.

(b) For foreign dividends from unitary sources, the following formula shall be used to modify factors relating to included dividends:

(1) Determine a percentage for each dividend payor consisting of dividends paid divided by taxable income which has been computed using United States standards.

(2) Apply this percentage to the dividend payor's foreign property, payroll, and sales.

(3) Sum the results in subparagraph (2) for all dividend payors.

(4) Add the result in subparagraph (3) to the denominators of the combined water's edge group. The numerator will remain the New Hampshire numerator.

(5) Apply the resulting percentage to the foreign dividends.

(6) Add this amount to the amount of New Hampshire taxable business profits computed pursuant to RSA 77-A:3, I and II(a).

III. When 2 or more related business organizations are engaged in a unitary business, as defined in RSA 77-A:1, XIV, a part of which is conducted in this state by one or more members of the group, the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II.

IV. The business organization is entitled to a hearing by the commissioner on request in connection with any change in its apportionment procedure and has the right of appeal from the commissioner's determination as provided in RSA 77-A:14.

77-A:4 Additions and Deductions. The following adjustments shall be made to gross business profits in determining taxable business profits:

I. In the case of a business organization which is subject to taxation under RSA 77, a deduction of such amount of gross business profits as is attributable to income which is taxable or is specifically exempted from taxation under RSA 77.

II. A deduction of such amount of gross business profits as is attributable to income derived from interest on notes, bonds or other securities of the United States.

III. 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 enterprise. 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. Such amounts would generally be the amount reported as earned income on federal income tax returns, but would also include compensation for operating rental property, amounts deemed to be reasonable commissions on the sale of property, and other amounts due to services rendered. If there is occasion to determine the reasonableness of a deduction claimed under this paragraph, the commissioner shall consider the claimed deduction 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 of the proprietorship or partnership of the labor of its employees, the proprietor, or any of the partners, and the use of their property and any other factor which may reasonably assist the commissioner in making a determination. Such determination by the commissioner shall be deemed reasonable unless the taxpayer proves to the commissioner, by a preponderance of the evidence upon the

standards set forth in this paragraph and after notice and hearing, that the deduction claimed by the taxpayer is not grossly excessive. Provided, that a taxpayer ascertaining its gross business profits in this state by the allocation procedure established in RSA 77-A:3 is allowed only such percentage of the deductions allowable in paragraphs II, III, and IV as has been applied by it in ascertaining its gross business profits in this state. Provided further that subject to the preceding sentence, a minimum deduction of $3,000 shall be allowed on account of the proprietor or each partner actually devoting time and effort in the operation of the enterprise.

IV. In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

V. In the case of a business organization which is a participant in a joint venture which itself is taxable under this chapter or a partnership which is a partner in a second partnership which itself is taxable under this chapter, a deduction of such amounts of gross business profits as are derived from distributions from the joint venture to the business organizations or from the partnership to the second partnership and which have already been subject to taxation under this chapter during the same or an overlapping fiscal period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a joint venture and its participating business organizations or a partnership which is a partner in a second partnership.

VI. In the case of a corporation which is the parent of a

domestic international sales corporation (DISC) as defined in section 992 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of the distribution to the parent company by the DISC required by the provisions of subsection 995(b)(1)(D) of the Internal Revenue Code as defined in RSA 77-A:1, XX, if the profits from which said distribution is made have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a DISC and its parent company.

VII. In the case of a business organization which takes any deduction for a net income tax, a franchise tax measured by net income, or a capital stock tax assessed by any state or political subdivision, an addition to gross business profits for the amount of all such deductions.

VIII. In the case of a corporation, having adopted a plan of liquidation subsequent to June 30, 1981, which has a nonrecognized gain as a result of the application of the United States Internal Revenue Code (1954) section 337, as amended, or meets the exception requirements allowing the federal nonrecognition provisions of section 337 as provided in section 633 of the Tax Reform Act of 1986, an addition to gross business profits for the amount of such gain.

IX. In the case of a business organization required to adjust a portion of its wages under section 280C of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction from gross business profits in the amount of such adjustment.

X. In the case of a business organization which receives certain intangible income from non-unitary sources, a deduction from gross business profits for the amount of such income net of related expenses.

XI. A deduction of such amount of gross business profits

as is attributable to foreign dividend gross-up as determined in accordance with section 78 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX.

XII. In the case of a business organization which makes qualified charitable contributions as defined in RSA 77-A:1, IX, or qualified research contributions as defined in RSA 77-A:1, X, the gross business profits of the organization shall be adjusted by:

(a) Adding to gross business profits the amount deducted under section 170 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX in arriving at federal taxable income; and

(b) Deducting from gross business profits an amount equal to the sum of the taxpayer's basis in the contributed property plus 50 percent of the unrealized appreciation, or twice the basis of the property, whichever is less.

XIII. A deduction for the amount of the net operating loss carryover determined under section 172 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX; provided, however, that in calculating such net operating loss carryover, the election permitted under section 172(b)(3)(C) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX shall not be allowed. A net operating loss shall be apportioned in the year incurred according to RSA 77-A:3 and such apportioned net operating loss may only be carried forward for the 5 years following the loss year. The amount of net operating loss generated in a tax year that may be carried forward may not exceed $250,000. In the case of a business organization not qualifying for treatment as a subchapter C corporation under the United States Internal Revenue Code, such deduction shall be the amount that would be determined under section 172 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX if the business organization were a subchapter C corporation and as limited by this section. A deduction for the amount of the net operating loss carryover

shall be limited to losses incurred on or after January 1, 1989.

XIV. In the case of a business organization where an interest or beneficial interest in the organization has been sold or exchanged, an addition to gross business profits of an amount equal to the net increase in the basis of all underlying assets transferred or sold through the sale or exchange of the interest. The increase in the basis of the assets shall be determined in accordance with the provisions of the Internal Revenue Code as defined by RSA 77-A:1, XX.

77-A:5 Credits. The following credits are allowed against the tax due under this chapter:

I. Taxes paid pursuant to RSA 83-C, and taxes paid pursuant to RSA 83-B covering the period from January 1, 1983, through June 30, 1983;

II. Taxes paid pursuant to RSA 84, Taxation of Banks;

III. Taxes paid pursuant to sections of RSA 400-A relating to taxation of insurance companies;

IV. [Repealed.]

V. The investment tax credit as computed in RSA 162-L:10.

Provided, that the total amount of any such credit allowed shall not exceed the tax due under this chapter.

77-A:6 Returns, Declarations, and Combined Reporting.

I. Every business organization having gross business income in excess of $12,000 as defined by RSA 77-A:1, VI, during the taxable period, shall on or before the fifteenth day of the third month in the case of organizations required to file a United States corporation tax return, and the fifteenth day of the fourth month in the case of all other business organizations, following expiration of its taxable period, make a

return to the commissioner. The commissioner of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to the form of such return and the data which it must contain for the correct computation of taxable business profits and gross business income attributable to this state and the tax assessed on it. All returns shall be signed by the taxpayer or by its authorized representative, subject to the pains and penalties of perjury.

II. Every business organization shall in addition file a declaration of its estimated business profits tax for its subsequent taxable period; provided, however, if the estimated tax is less than $200, a declaration need not be filed; and provided further that a declaration shall be filed at the end of any quarter thereafter in which estimated tax exceeds $200. The declaration shall be filed when payments are due under RSA 77-A:7.

III. Any return or declaration shall be deemed to be timely filed and the payment due with it timely made if received in the office of the department of revenue administration on or before the last day of the month in which the original statutory due date or approved extended due date falls.

IV. A business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business organization or he may adjust the tax or income in such other manner as he shall determine to be equitable if he determines it to be necessary in order to clearly reflect the net income earned by such organization from business done in this state. This provision shall not authorize the application of worldwide combined reporting except as provided in RSA 77-A:2-b, II.

77-A:7 Payments Due With Returns and With Estimates.

I. All business organizations required under RSA 77-A:6, II to make payments of estimated tax shall make such payments in installments as follows: 30 percent is due and payable on the fifteenth day of the fourth month of the subsequent taxable year; 30 percent is due and payable on the fifteenth day of the sixth month of the subsequent taxable year; 20 percent is due and payable on the fifteenth day of the ninth month of the subsequent taxable year; and 20 percent is due and payable on the fifteenth day of the twelfth month of the subsequent taxable year.

If the return required by RSA 77-A:6, I, 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, the commissioner shall refund such overpayment to the taxpayer or shall allow the taxpayer a credit against a subsequent payment or payments due, to the extent of the overpayment, at the taxpayer's option.

II. [Repealed.]

77-A:7-a Interest. Any business organization which fails to make payment with a return when due shall pay interest as prescribed in RSA 21-J:28.

77-A:8 Additional Returns. When the commissioner has reason to believe that a taxpayer has failed to file a return or to include any part of its gross business profits in a filed return, the commissioner may require the taxpayer to file a return or a supplementary return showing such additional information as the commissioner prescribes. Upon the receipt of the supplementary return, or if none is received within the time set by the commissioner, the commissioner may find and assess the amount due upon the information that is available. The making of such additional return does not relieve the taxpayer of any penalty for failure to make a correct original return or relieve it from liability for interest imposed under

RSA 77-A:7-a or any other additional charges imposed by the commissioner.

77-A:9 Extension of Time for Returns. For good cause, the commissioner may extend the time within which a taxpayer is required to file a return, and if such return is filed during the period of extension no penalty or late payment charge may be imposed for failure to file the return at the time required by this chapter, but the taxpayer shall be liable for interest as prescribed in RSA 21-J:28.

77-A:10 Corrections. Each taxpayer shall report to the commissioner of revenue administration any change in the amount of its gross business profits as finally determined by the United States Internal Revenue Service with respect to any previous year for which the taxpayer has made a return under this chapter. Such a report shall be made not later than the due date of the next annual return after the taxpayer has received notice that such change has finally been determined.

77-A:11 Taxpayer Records. Every business organization shall:

I. Keep such records as may be necessary to determine the amount of its liability under this chapter;

II. Preserve such records for the period of 3 years or until any litigation or prosecution hereunder is finally determined;

III. Make such records available for inspection by the commissioner or his authorized agents, upon demand, at reasonable times during regular business hours. Whoever violates the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

77-A:12 Failure to Make Returns; False Returns or Records. The following acts or omissions are unlawful:

I. Failing to make any return or declaration required by this chapter;

II. Making, causing to be made or permitting to be made any false or fraudulent return or declaration or false statement in any return or declaration, with intent to defraud the state or to evade payment of the tax or any part of the tax imposed by this chapter;

III. Making, causing to be made or permitting to be made any false entry in books, records or accounts with intent to defraud the state or to evade the payment of the tax or any part of the tax imposed by RSA 77-A or keeping, causing to be kept or permitting to be kept more than one set of books, records or accounts with such intent. Whoever violates the provisions of RSA 77-A:12 shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

77-A:13 Adjustments; Procedure. The commissioner is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing within 3 years after the tax was due;

II. The commissioner may, on his own motion, undertake such a determination upon written notice to the taxpayer given within 3 years after the tax was due or paid, whichever is later, except that where the taxpayer has reported a correction pursuant to RSA 77-A:10, such notice must be given within 6 months of the report;

III. After hearing, if requested by the taxpayer, the commissioner shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commissioner shall be assessed against the taxpayer 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 taxpayer; and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer. Such credit and payment together may not exceed the amount of the tax originally paid.

77-A:14 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner under RSA 77-A:13, a taxpayer 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 taxpayer resides or, if not a resident of the state, in the county in which it was 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 de novo the correctness of the commissioner's action.

77-A:15 Administration.

I. The commissioner shall collect 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 of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The administration of the business profits tax; and

(b) The recovery of any tax, interest on tax, or penalties imposed by RSA 77-A.

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 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 77-A:13. 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 are 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.

77-A:16 Confidentiality of Department of Revenue Administration Records.

[Repealed 1977, 203:2, eff. Aug. 13, 1977.]

77-A:17 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-A:18 Certifications for Dissolution, Withdrawal and Good Standing.

I. (a) No corporation organized under any law of this state may be dissolved until all taxes and interest imposed upon the corporation under this chapter have been fully paid. The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a statement from the commissioner of revenue administration that no returns, tax, interest, or penalties for taxes administered by the department are due and unpaid.

(b) A corporation wishing to dissolve shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the corporation's records, the commissioner determines that no returns, tax, interest, or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement in accordance with subparagraph (a).

II. A business organization wishing to obtain a statement for withdrawal, in accordance with RSA 293-A:126, I(f), shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the business organization's records, the commissioner determines that no returns, tax, interest or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement for withdrawal for the purposes required under RSA 293-A:126, I(f).

III. A business organization wishing to obtain a state-

ment that it is in good standing with the department of revenue administration shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the business organization's records, the commissioner determines that no returns, tax, interest or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement of good standing.

77-A:19 Lien for Tax. No lien upon real estate for taxes imposed by this chapter is valid and binding against any person other than the taxpayer until notice of such lien stating the name and address of the taxpayer and the amount of the tax due shall have been filed and recorded in the registry of deeds in the grantor index in the county in which such real estate is located. Not withstanding the provisions of any other law, the lien shall continue and shall be valid and binding until the liability for the sum, with interest and costs, is satisfied or becomes unenforceable.

77-A:20 Distribution of Increase in Revenue.

[Repealed 1981, 568:122, III, eff. July 1, 1984.]

77-A:21 Severability. If any provision of this chapter 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 chapter are severable.

New Hampshire Revised Statutes Annotated § 107-B:1 through 107-B:6

CHAPTER 107-B

NUCLEAR PLANNING AND RESPONSE PROGRAM

107-B:1 Nuclear Emergency Response Plan.

I. The director of emergency management shall, in cooperation with affected local units of government, initiate and carry out a nuclear emergency response plan as specified in the licensing regulations of each nuclear electrical generating plant. The chairman of the public utilities commission shall assess a fee from the utility, as necessary, to pay for the cost of preparing the plan and providing equipment and materials to implement it.

II. The director of emergency management shall conduct an annual review of the nuclear emergency response plans for those municipalities located in the emergency planning zone, as defined in Nuclear Regulatory Commission regulation Title 10, Code of Federal Regulations, Part 50.

107-B:2 Annual Emergency Response Budget. The municipalities shall submit annually their emergency response budget to the director of emergency management who shall provide a reasonable opportunity for public comment and consideration. The director shall also receive and review the appropriateness of any budget request from any other state agency necessary for radiological emergency preparedness as outlined in the plan. The director shall then submit an approved total annual budget to the chairman of the public utilities commission for assessment against the utility or utilities.

107-B:3 Assessment.

I. The cost of preparing, maintaining, and operating the nuclear planning and response program shall be assessed against each utility which has applied for a license to operate or is licensed to operate a nuclear generating facility which affects municipalities under RSA 107-B:1, II, in such proportions as the chairman of the public utilities commission determines to be fair and equitable.

II. Assessments under this section shall not be charged to the normal operating costs of any company before the issuance of an operating license.

107-B:4 Collection of Assessment. The chairman of the public utilities commission shall certify to the state treasurer the amount to be assessed against each utility, and the state treasurer shall bill each utility for the amount assessed against it. The bill shall be sent by registered mail, and shall constitute notice of assessment and demand for payment. Payment shall be made to the state treasurer within 30 days after the receipt of the bill. If any utility shall fail or refuse to pay the assessed fee within 30 days, the chairman shall add to the fee a late penalty fee and certify the amount of the delinquent fee and penalty to the attorney general for collection.

107-B:5 Fund Established. All funds collected under this chapter shall be deposited in the state treasury as "restricted revenues." The full amount shall be credited to the New Hampshire nuclear planning and response fund and shall be used exclusively for the New Hampshire nuclear planning and response program.

107-B:6 Authority in Radiological Emergency. In the event of a radiological emergency at a nuclear electric generating facility where the responsible utility is unable to control the situation as necessary to protect public health and safety, the governor shall regulate the utility under RSA 107:6.

New Hampshire Revised Statutes § 162-F:14 through 162-F:26

Decommissioning of Nuclear Electric Generating Facilities

162-F:14 Definitions. As used in this subdivision:

I. "Committee" means a nuclear decommissioning financing committee established pursuant to RSA 162-F:15.

II. "Decommissioning of a nuclear electric generating facility" means, but is not limited to, any or all of the following as may be required by any federal or state agency with jurisdiction when any radioactive portion of the facility is permanently removed from service:

(a) Removal, relocation, shipment, containment, demolition, dismantling or storage or a combination thereof of any radioactive equipment, materials, nuclear wastes or contaminated structures and future and present storage of radioactive debris.

(b) Restoration and rehabilitation of the physical and aesthetic appearance of the decommissioning site.

III. "Facility" means any nuclear electric generating facility subject to decommissioning pursuant to this subdivision.

IV. "Fund" means a nuclear decommissioning financing fund established pursuant to RSA 162-F:19.

V. "Lead company" means the utility designated by the owner or owners of the facility.

162-F:15 Committee Established.

I. A nuclear decommissioning financing committee shall be established for each nuclear electric generating facility which is required to be approved under this chapter.

II. Each committee shall consist of one person who is a resident of the town or city in which the facility is to be located and who shall be appointed by the selectmen of the town or the mayor and council of the city, the chairman of the public utilities commission, the chairman and the vice-chairman of the legislative fiscal committee, the state treasurer or his designee, the commissioner of the department of health and human services or his designee, the commissioner of the department of safety or his designee, and a representative

of the lead company as designated by the owner or owners of the facility.

III. The person appointed by the selectmen of the town or the mayor and council of the city shall serve a 3-year term and any vacancy shall be filled for the unexpired term in the same manner as the original appointment. In the event that more than one facility is licensed to be built in the state, the committee as designated in RSA 162-F:15, II shall serve in the same capacity, except that the appointed member who is a resident of the city or town shall be selected in the manner prescribed by this section.

162-F:16 Overlapping Jurisdictions. If a facility is located in more than one city or town, for the purpose of selecting a nuclear decommissioning financing committee, it shall be deemed to be located in the city or town in which the largest part of the main nuclear reactor building is located.

162-F:17 Organization of Committees.

I. The temporary chairman, who shall be the chairman of the public utilities commission, shall call an organizational meeting within 90 days of May 4, 1981. At the organizational meeting, the committee shall select a chairman to serve for a 3-year term, elect such other officers as the members shall determine, and establish a schedule of meetings for determining the requirements of the decommissioning fund. The committee shall determine the requirements for the fund and shall prepare a payment schedule under RSA 162-F:19 on or before October 1, 1982.

II. In the event that additional nuclear electric generating facilities receive certificates of site and facility, each committee shall organize within one year of the receipt of such certificate.

III. After the requirements for the funds have been established, the committees shall meet at least once a year and,

for good cause, the committees may increase or decrease the amount of the funds pursuant to RSA 162-F:22, I, or may alter the funding schedules because of changed circumstances delineated in RSA 162-F:22, II. Each committee may hire such temporary help as it deems necessary to carry out its duties under this subdivision. The appointed resident member of each committee is authorized $40 for each day actually engaged in the duties of the committee.

162-F:18 Expenses of Committee. The reasonable expenses of each committee, including clerical and technical assistance, shall after approval by the public utilities commission be a charge against the owner or owners of the facility.

162-F:19 Decommissioning Fund Established.

I. A separate nuclear decommissioning financing fund shall be established in the office of the state treasurer for each nuclear electric generating facility in the state. The monies in such fund shall not be subject to any federal or state taxes and shall not provide any monetary profit to the owner or owners of the facility.

II. The committee shall establish a regular monthly schedule for payment of monies into the fund by the owner or owners of the facility. The monthly payment shall not be less than necessary to reach the specified amount needed for decommissioning as determined by the committee. The Collection of money and payment to the fund shall commence in the billing month which reflects the first full month of service from the facility.

III. The public utilities commission shall permit the utility to charge its customers on a per kilowatt hour basis the amount it pays directly into the fund created under this section. The charge, as determined by the public utilities commission, shall be designated a nuclear decommissioning charge and shall be separately stated on the customer's billing statement.

162-F:20 Administration of Fund.

I. The state treasurer shall administer each fund established under this subdivision. The treasurer and the committee shall take every reasonable precaution to preserve the integrity of each non-taxable fund. Interest, dividends and other earnings of the fund shall, after deducting the expenses of administering the fund, be added to the fund and shall be considered payments to the fund until the specified amount is reached.

II. Upon completion of decommissioning, any earnings of the fund in excess of the specified amount, after deducting the reasonable expenses of administration, shall be returned to the owner or owners required to make deposits in such fund and shall cause an adjustment of the rates paid by the utility's customers. The committee, upon completion of decommissioning of the facility, shall forward a report to the public utilities commission relative to the status of the account and the surplus to be derived by the owner or owners of the facility. Based on the committee's report and any other information the public utilities commission may request, the commission shall determine an equitable method for a reduction in the rates charged to the utility's customers to compensate for the overpayment to the fund.

162-F:21 Funding Requirements Established; Report; Public Hearing.

I. Each committee shall hold at least one public hearing to receive information on funding requirements for each fund. The committee shall have the authority to subpoena witnesses and administer oaths and to compel by subpoena duces tecum the production of any accounts, books, contracts, records, documents, memoranda and papers in order to determine the amount needed for the fund.

II. The amount of the fund shall be sufficient to cover all costs of decommissioning the facility when carried out by

methods which have been proven to be workable and capable of achieving and maintaining the level of decommissioning required by the United States Nuclear Regulatory Commission or its successor organization, or standards set by any state agency with jurisdiction over decommissioning which are not less than those levels set by the United States Nuclear Regulatory Commission.

III. Each committee shall rely on all available data and experience in determining the amount of such fund including, but not limited to, information from the United States Nuclear Regulatory Commission or its successor organization; the public utilities commission; the owner or owners of the facility; counsel for the public appointed under RSA 162-F:9; counsel for the legislative utility consumers council; and relevant construction cost indices. The committee shall publish a transcript of all proceedings during which information was presented or offered into testimony and a detailed analysis of the facts and figures used in determining the amount of the fund.

IV. Following the committee's deliberation and prior to final hearing, the plan for scheduled payments into the fund and relevant evidence, including the transcripts and analysis published pursuant to RSA 162-F:21, III, shall be available for public review in the clerk's office of the city or town where the facility is located and in the office of the public utilities commission at least 30 days prior to the one or more public hearings on the committee's proposed plan. At least one hearing shall be held in the city or town where the facility is located. A notice of the time and place of each hearing shall be posted in 2 appropriate public places in the city or town where the facility is located and shall be printed at least twice in a newspaper of general circulation for that city or town and in a newspaper of state-wide circulation 2 weeks prior to each hearing. Testimony presented at the hearings held pursuant to this paragraph shall be taken into consideration by the committee when they formalize the payment schedule plan. All testimony shall be transcribed and made a permanent record.

162-F:22 Changes in Funding Requirements.

I. At any time during the energy-producing life of the facility the committee may determine whether the amount of the funds shall be increased or decreased for reasons including, but not limited to, changes in circumstances, need, or technological advances. Prior to altering the amount of the fund, the committee shall hold at least one public hearing in the city or town where the facility is located. All testimony shall be transcribed and made a permanent record.

II. (a) If during the anticipated energy-producing life of the facility:

(1) A state or federal agency with jurisdiction orders the facility to be decommissioned any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the decommissioning order is issued;

(2) The owner or owners voluntarily close the facility for more than 6 months other than for scheduled or unscheduled repairs, any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the end of the 6-month closing;

(3) The public utilities commission ascertains the facility is no longer generating electrical energy and that decommissioning of the facility should be commenced because of such non-use, any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the commission's determination is made.

(b) Upon the discontinuation of customer billing for the fund, the committee shall institute a revised schedule for funding requirements to cover the expenditures of the decommissioning. The revised funding schedule may include, but not be limited to, a resumption of customer charges authorized

pursuant to RSA 162-F:19, III, payments made by the owner or owners separate from customer charges, and available revenue sources from the federal and state governments. The committee shall hold at least one public hearing relative to establishing the revised funding schedule consistent with the public hearing requirements delineated in RSA 162-F:21. All testimony shall be transcribed and made a permanent record. Any funding schedule which includes the assessment of charges to utility customers shall be reviewed and approved by the public utilities commission pursuant to RSA 162-F:19, III.

162-F:23 Use of Fund. The fund shall remain intact until the beginning of a facility's decommissioning. The committee shall review all expenditures from such fund during actual decommissioning to properly maintain the fund's tax-exempt status. The unused portion of the fund shall revert to the owner or owners at the completion of decommissioning pursuant to RSA 162-F:20, II. If perpetual, continual surveillance of a facility is necessary, the fund shall be maintained at a level sufficient to yield income to maintain such surveillance.

162-F:24 Enforcement. The superior court may enjoin any act in violation of a determination of a nuclear decommissioning financing committee, or it may require the owner or owners to comply with any determination or order of such committee. Failure by an owner to make the payments required by this subdivision shall create a debt owing to the state which may be collected by the attorney general in an action at law. If any owner fails to pay any judgment ordered by a court of competent jurisdiction, the attorney general may levy against the property of such owner to satisfy such judgment.

162-F:25 Penalty. Any person who wilfully violates any order or determination of a committee shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

162-F:26 Appeal. Any person who is aggrieved by an

order or a decision of a nuclear decommissioning financing committee may appeal under RSA 541.

Excerpts from Decision of Connecticut Department of Public Utility Control in Application of Connecticut Light and Power Company Docket No. 90-12-03, August 1, 1991.

F. Expenses and Expense Adjustments

Based on its review, of the Company's testimony and exhibits, coupled with a field audit of its books and records, the Authority finds that the pro forma operating expenses claimed are allowed except as discussed below.

1. Merger Synergies

The Company's pro forma operating expenses include an adjustment to reflect the savings (synergies) and costs associated with the acquisition of Public Service Company of New Hampshire ("PSNH"). The Company indicates that the combination and subsequent joint operation of the existing NU and the PSNH systems are expected to produce significant cost reductions when compared to the operation of the systems separately. (Roman PFT, p. 21) The adjustment on Revised Schedule C-3.38, which reflects an effective merger date of 9/1/91, identifies several areas in which ratepayers will benefit:

a) a reduction in operation and maintenance expenses resulting from North Atlantic Energy Corporation's operation of Seabrook No. 1.

b) a reduction in the energy expenses of the combined NU/PSNH system because of the more efficient own-load dispatch of its generating units, and

c) a reduction in CL&P's administrative and general

(A&G) expenses due to the combining of many functions now performed separately by PSNH and NU.

In Docket No. 90-01-01, *DPUC Investigation of Northeast Utilities Plan to Acquire Public Service Company of New Hampshire,* CL&P described and addressed these benefits. In subsequent proceedings before the New Hampshire Public Utilities Commission and the Federal Energy Regulatory Commission ("FERC"), the amount of the benefits was revised. The amounts included in Revised Schedule C-3.38 reflect the updated synergies. Also included in Revised Schedule C-3.38 is CL&P's share of the costs of accomplishing the acquisition. These costs represent CL&P's allocated portion of the charges associated with the Department and FERC proceedings related to the merger.

The Company provided data that indicate that the magnitude of PSNH related services in the rate year will grow and are projected into perpetuity to total $225 million in cumulative net present value. (Response to Interrogatory EL-282 Supp., p. 5) Data were provided that show that the Company's rate request would increase by $15,332,000 if the NU/PSNH merger did not go forward. (Late Filed Exhibit No. 2-133) Authority analysis of the various synergies indicates that joint dispatch savings account for the major portion. These savings are derived based on the comparison of the combined system own load simulation with that of NU and PSNH, at 4/1/91 fuel prices. The Company's updated projections reflect a substantial decrease in the joint dispatch savings caused by a drop in fossil fuel prices.

In developing NU's share of the Joint Dispatch Savings, the benefits were allocated fifty percent between PSNH and NU, as described in the PSNH Sharing Agreement. If the NUG&T agreement were used, 65 percent of the savings would accrue to NU. The Company indicated that it would not be appropriate to apply the NUG&T Agreement in deriving NU's share of the joint dispatch savings because the Authority is bound by the Sharing Agreement, which is part of the FERC

approval Agreements. (TR 5/1/91, p. 45; Brief p. 83)

The Authority is not bound by the Sharing Agreement. The Department has made no determination regarding the proposed merger, and will not prior to the issuance of the Decision in the merger docket. The Company has chosen to include certain savings from the proposed merger and must bear the risk of uncertainty. Synergy savings of 50% could be as elusive as savings of 65%. The Authority will allow the 50% allocation for purposes of this Decision, but advises the Company that the allowance is in no way dispositive of the issue. The Department will revisit it in Docket No. 90-01-01, when it considers all aspects of the proposed merger, including this issue.

2. PSNH Acquisition Costs

The Company seeks reimbursement from Connecticut ratepayers for the cost it has incurred at the Federal Energy Regulatory Commission and the proceeding before this Department to acquire the bankrupt Public Service Company of New Hampshire.

Because the acquisition is pending and unresolved at the current time and because this Company is regulated in large part on a forward looking basis, some assumptions had to be made regarding the proposed acquisition. The Company selected and assumed for purposes of its presentation that the acquisition would obtain the necessary approvals and become effective during September 1991. The expectations flowing from this assumption are contained in sundry adjustments throughout the case.

When this case started, the projected "benefits" to Connecticut ratepayers of the takeover were over 20 million dollars. During the pendency of this case, those benefits had declined by almost two-thirds. CL&P asserts that because ratepayers can still anticipate some benefits they should pay the acquisition costs.

The proposition that the Authority should equate possible benefits flowing from the proposed merger with acquisition costs is wrong. Possible acquisition benefits must be evaluated against possible acquisition risks. In the instant case, only the benefit side of the equation was explored in depth and as we have seen and already noted, these benefits are transient and volatile. The equitable risks associated with the acquisition will be fully explored in Docket No. 90-01-01. Indeed, the Company's own witness indicated that the post acquisition capital structure of the NU holding company will be very highly leveraged; therefore, at least for a period of time, more risky because of the merger. Whether or not possible benefits outweigh possible risks will be decided in that docket. The only question we need resolve here is the allocation of the aforementioned acquisition cost. This is separate and distinct from benefits and risks and must be evaluated independently.

We resolve it by not permitting one penny of these costs to be charged to Connecticut ratepayers. To assert that CL&P ratepayers should pay the acquisition costs incurred in bailing PSNH out of bankruptcy is an affront. The white knight is being charged for the privilege of rescuing the damsel; the lifeguard is billed for saving the floundering swimmer.* We reduce pro forma expense by $7,684,000.

In its written exceptions, the Company again claims that it is entitled to recover $2,813,000 associated with the Department's investigation of this merger in Docket No. 90-01-01. To that claim we again respond ". . . not . . . one penny of these costs (will be) charged to Connecticut ratepayers."

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*The suggestion that Connecticut ratepayers pay for the privilege of assisting New Hampshire is made even more irksome by the enactment of New Hampshire public law, HB-FN-A, codified at Chapter 83-D of New Hampshire Revised Statutes Annotated, wherein New Hampshire has enacted a lasso tax whose loop only captures out of state Seabrook Station owners. This tax, if not overturned, would cost Connecticut ratepayers almost 5 million dollars per annum.

Let us get a couple of things straight. We did not order the Company or Northeast Utilities to engage in a bidding war before the Bankruptcy Court to acquire this moribund utility. This it did on its own initiative. The joinder of Public Service of New Hampshire into Northeast Utilities has profound implications for CL&P. Is the Company seriously suggesting that Connecticut regulators ignore this matter? To contend that because we did our duty Connecticut ratepayers should be charged is an affront. The Company with scolding tone notes that we engage Booz-Allen & Hamilton, Inc. to assist in our analyzing NU's undertaking and that the bills have been large. Who should we have hired, Roto-Rooter? This is an exceedingly complex, multi-faceted proposition. We engaged competent assistance. We have scrupulously overseen both the level of effort and expense to assure that no more than is necessary is expended. But, none of these efforts and none of these expenditures would have been necessary but for the unsolicited, gratuitous actions of NU.

There is nothing in § 16-8 of the Conn. Gen. Stat. that requires us to allow the Company to charge ratepayers for these expenses. The statute contemplates recovery only when this Department determines that such costs are reasonable and proper for recovery, as business expenses of the Company. Under the aforenoted circumstances and in view of the fact that this activity is not part of the ordinary course of CL&P's business, this is a finding we cannot and will not make.

Excerpts from New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991.

MR. SPEAKER: The Chair recognizes the member from Concord, Representative Hayes, to speak to the Hayes floor amendment.

MR. HAYES: Thank you, Mr. Speaker. I rise in support of the new Committee amendment. I'd be less than frank if I didn't say this is one of the most complex taxes I've seen

in my time in State government, but the broad outlines are understandable, and they've been covered to some extent by previous speakers. This amendment, which is the bill, eliminates the current electric franchise tax. Thus, as has been said, if you're served by (Inaudible), Granite State, the Co-op, Connecticut Valley, you will see a rate decrease. In addition, Public Service will not be paying a one per cent retail tax on the service it provides. The constitutional issues were talked about by the Majority Leader. The federal constitutional issues we believe we have avoided by going to a property tax by not using credits against the retail tax as was done in the New Mexico case and by not having a match. The State constitutional question is unchanged from previous, and we believe that the prior court opinions justify this classification. The third issue is the business profits tax credit, which is very similar to the credit the utilities enjoyed under the franchise tax. Essentially, we're exchanging a somewhat uncertain business profits tax for a more certain tax up front. This is done in a number of different taxes. Finally, the property tax itself. It is at a rate of 0.64 per cent upon the nuclear plant itself. It raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests. If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are financing this increase in the utility taxes that we're going to pay. Over the seven-year term of the rate agreement, I am assured by those who know that this will have no increase or negligible increase in rates, that you will not be able to see this in the negotiated five and a half per cent rate increase which this House has approved. Turning now to a few final issues, the courts have clearly said in their decisions that it is legal for both the State and the local government to impose an (Inaudible) property tax on the same property at the same time. So there is no problem with town taxes. I would point out that this 14 million dollar increase is an essential part of the budget package which was explained to you earlier today. You can look at your white sheet and tell

what it's going to fund. I would say that this is a tax in the New Hampshire tradition of finding some way for the other fellow to pay. This is a tax package that I believe has broad consensus. This is a tax package which will not be vetoed. This is a tax package which deserves your support, and I urge you to vote yes. Thank you, Mr. Speaker.

MR. SPEAKER: Member yield to a question. Member yields. Representative Brown, you may inquire.

MR. BROWN: Thank you, Mr. Speaker. Representative Hayes, are you telling this body, for the record, that this bill will have no affect on the Town of Seabrook's tax rate whatsoever, and that's going to be the legislative intent, is that correct?

MR. HAYES: Your question, as I understood it, was this bill will have no affect on the Town of Seabrook taxes, and I can assure you that this bill will not, for the record.

MR. SPEAKER: Are there further questions? Member yields. You may inquire.

MALE VOICE: Thank you, Mr. Chairman. Representative Hayes, did I understand correctly when you stated that there would be no increase or very little increase in the ratepayer's bills, was that correct?

MR. HAYES: I believe that's what I said and I believe that to be the case. I've been assured that this–
(Off the record.)

MR. HAYES: – change the negotiated rate agreement for Public Service. It will have a change if you're served by Granite State, by Unitel or Connecticut Valley, and that it will decrease your rates.

MALE VOICE: Further question.

MR. SPEAKER: Member yields. You may further inquire.

MALE VOICE: Did you also state that 65 per cent of these were out-of-state that would be paying this 14 million, or would it be the total plant that would be assessed for this?

MR. HAYES: The way the bill is written, which you have in your calendar, I believe, says that each owner is responsible for their share, so that as their share changes, they will in fact change what they owe. Your first part of the question, I believe was, is 65 per cent correct. Sixty-five per cent is the ownership interest other than Public Service. The number of out-of-state owners is actually 10 out of the 12, I believe. So you can draw your percentages where you wish.

MALE VOICE: Further question.

MR. SPEAKER: Member yield to further question? Member yields. You may inquire.

MALE VOICE: What's going to happen when Northeast Utilities takes over Public Service's share of the nuclear plant? That's going to be pretty near – when they get through, they'll have pretty near 50 per cent, won't they, and they're an out-of-state utility.

MR. HAYES: The owner, as I understand it, after the merger will be North Atlantic Energy Company, who will be the owner and operator, I guess, of the plant. It is true that Northeast Utilities has a subsidiary which owns a small share of the plant. That subsidiary is the Connecticut Light and Power Company. It owns 4.05985 per cent. So that together, if you wish to add those up, you will find that that is less than 40 per cent. However, neither N.U. directly owns either share is both indirectly, because they are the parent.

MALE VOICE: Further question.

MR. SPEAKER: Member yields. You may further inquire.

MALE VOICE: Did you ever see a tax that was placed on someone that wasn't collected from the consumer?

MR. HAYES: I would be willing to state that if a business does not pass a tax through to a consumer, then it's going out of business, sir. However, in this case we have taken a three tier tax system involving the property tax, the franchise tax and the business profits tax with complex inter-relations between the three and we've done the impossible. We don't believe this is going to show up in the rate base.

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, 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 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.]