No. 119, 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

REPLY BRIEF OF THE STATE OF CONNECTICUT, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES: **Page(s)**

CONSTITUTIONAL PROVISIONS AND STATUTES:

REPLY BRIEF OF THE STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of Connecticut, Commonwealth of Massachusetts, and State of Rhode Island hereby reply to specific points made by the State of New Hampshire ("defendant") in its recently filed Brief in Opposition to Motion for Leave to File Complaint, in order to clarify a number of mischaracterizations and errors in that brief.

I. NEW HAMPSHIRE HAS MISCHARACTERIZED THE NATURE AND EFFECT OF THE SEABROOK TAX.

The most serious error in New Hampshire's brief is its mischaracterization of the nature and effect of the New Hampshire "Tax on Nuclear Station Property" ("Seabrook Tax"), with its concomitant scheme of tax credits and exemptions. New Hampshire disingenuously, if not misleadingly, states that the tax is simply a property tax which "applies to each owner of nuclear property at the *same* rate, regardless of residency." (Defendant's br. 2). (emphasis in original). Similarly, New Hampshire characterizes the tax credit scheme as "available to *each* owner in the *same* degree, resident and nonresident alike," while noting that the former franchise tax "was repealed as to *all* electric utilities." (Defendant's br. 2) (emphasis in original). New Hampshire in effect asks this Court to read the Seabrook Tax package with blinders on, ignoring the clear intent and effect of the statute, which is to impose the tax ultimately almost entirely on out-of-state residents. This Court declined a similar invitation in *Maryland v. Louisiana*, 451 U.S. 725 (1981), stating:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty

to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Id.* at 756. (citations omitted)[1]

A review of the entire tax package creating the Seabrook Tax while simultaneously establishing the tax credit and exemption reveals that it was intended to benefit in-state utilities and their customers almost exclusively, while visiting virtually the entire burden of the Seabrook Tax on out-of-state consumers of electricity. This tax package could well have been modeled after the tax packages determined to be illegal in *Maryland v. Louisiana, supra,* and in *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979).

Although New Hampshire advises this Court that the business profits tax credit built into the Seabrook Tax package may be claimed by out-of-state owners to the same extent as in-state owners, it knows full well that such a "benefit" is illusory as it relates to out-of-staters: because of the apportionment formula utilized in New Hampshire for the calculation of the business profits tax by unitary businesses, RSA 77-A:3, the out-of-state owners who sell primarily to out-of-state consumers will derive virtually no benefit from this credit, while New Hampshire owners who sell electricity primarily to New Hampshire consumers may take its full benefit.

Similarly, the exemption created in the franchise tax for electric utilities benefits only those utilities which sell elec-

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[1] Similarly, in *American Trucking Assn. v. Scheiner,* 483 U.S. 266 (1987), the Court addressed the discriminatory nature of flat taxes applied to motor carrier vehicles. On its face, the tax in question applied equally to both in-state and out-of-state registered trucks. However, the fee for registered in-state truckers was reduced by the amount of the flat motor carrier tax.

The Court concludes at p. 296:

"The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect.' *Nippert v. Richmond,* 327 U.S. 416, 426, 66 S.Ct. [586,] 591, (1946)."

tricity within New Hampshire. In fact, as of March 1, 1992, some New Hampshire customers will begin paying *lower* electric rates as a direct result of the Seabrook Tax package, while many out-of-state customers are *already* paying higher rates. As with the New Mexico tax scheme struck down in *Arizona Public Serv. Co. v. Snead, supra,* and the Louisiana scheme struck down in *Maryland v. Louisiana, supra,* New Hampshire has attempted to use creative drafting to circumvent the law. However, the discriminatory intent and effect of the Seabrook Tax is just as transparent as were the New Mexico and Louisiana tax schemes, and the tax should be dispatched by this Court as quickly as possible.

II. THE PLAINTIFF STATES HAVE STANDING TO BRING THIS SUIT, AND THIS IS AN APPROPRIATE CASE FOR THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION.

A. The Plaintiff States Have Alleged Direct Injury to Themselves and to Their General Populations Sufficient to Establish Standing, and Have Already Suffered Actual Injury.

1. Contrary to New Hampshire's assertion, (Defendant's br. 7-9) the plaintiff States have alleged injury flowing directly from the imposition of the Seabrook Tax both to themselves and to a large portion of their combined populations as purchasers of large quantities of electricity from utilities subject to the Seabrook Tax. The plaintiff States have alleged that the tax imposed on these utilities has been or will be passed on to them in the form of higher electricity rates. This is precisely the same situation as existed in *Maryland v. Louisiana,* in which a First Use Tax was imposed on pipeline companies and not directly on the ultimate consumers. This Court unequivocally rejected Louisiana's identical argument that this type of injury, suffered when the ultimate consumers pay the cost of the tax through higher rates, was insufficient to confer standing on the plaintiff States. This Court found standing

based on the "substantial and real" injury suffered by the States and their citizens in the form of higher rates. *Id.* at 736-37.

2. Nor is the request for relief "premature," as New Hampshire has argued. (Defendant's br. 12). Unlike the situation before the Court in *Arizona v. New Mexico*, 425 U.S. 794 (1976), in which the affected utilities had chosen not to pay the tax while they pursued a state court challenge to its constitutionality, in the present case the utilities have *already made* an estimated tax payment to New Hampshire, in accordance with New Hampshire law. New Hampshire's claim that the tax returns have not yet been filed is frivolous. The first estimated tax payment has been made to New Hampshire, and this is sufficient to establish injury.

Further, many customers in the three plaintiff States have already begun paying higher rates to reflect the increased utility costs caused by the assessment and payment of the Seabrook Tax. In Massachusetts, hundreds of thousands of customers have already had their electric rates increased to reflect the Seabrook Tax, and nearly a million more are scheduled to have their rates increased as of March 1, 1992. In Rhode Island, a pass through of the tax to electric rates has already been put into effect in December, 1991 as to some customers, and many more will begin paying higher rates shortly. In Connecticut, the Department of Public Utility Control ("DPUC") has already noted that the tax paid by Connecticut utilities is unquestionably a cost which may be included in customer rates. (See DPUC ruling, Addendum to plaintiffs' principal brief pp. 62A-66A).

Thus, the plaintiff States and their citizens have already begun paying higher rates, or inevitably will be forced to pay them, as a direct result of the Seabrook Tax. This is not a speculative injury in any sense of the word. There is no need to wait until every single customer sees his rate increased to justify having the issue resolved by this Court.

B. The Injury Alleged by the Plaintiffs Is of a Serious Magnitude, Affecting Millions of Consumers in Three New England States

New Hampshire does not dispute the plaintiffs' claim that the injury to the plaintiff States and their citizens will total approximately $14 million per year, or nearly a half billion dollars over the useful life of Seabrook Station. Instead, they attempt to denigrate the impact on an individual consumer's electricity bill (Defendant's br. 13, n.14), asking the Court to conclude that such an injury, even if unconstitutional, is not worth the Court's time. Even if New Hampshire's projections of individual dollar increases were accurate, which they are not, this Court should reject such an offensive and self-serving argument.

This Court observed in *Maryland v. Louisiana* that the exercise of original jurisdiction was warranted in part because, given the relatively small amounts paid by each consumer in increased gas rates, those individual consumers were unlikely to bring a challenge to Louisiana's tax. *Id* at 739. The relatively small individual amounts involved did not cause the Court to deem the entire challenge insignificant. On the contrary, the Court focused on the aggregate injury of an anticipated $150 million tax passed on to millions of consumers in over 30 states. *Id.* at 743-44. The present case presents proportionately almost an exact replica of the injury suffered in that case. The Seabrook Tax will result in approximately $14 million in increased rates annually to millions of consumers in three New England States – a region which has been buffeted by both recession and an historic reliance on expensive foreign oil as an energy source. The magnitude of this injury to these citizens and this region is enormous, particularly since the Seabrook Tax directly conflicts with federal energy policy promoting the peaceful use of nuclear power, 42 U.S.C § 2011 *et. seq.*, and encouraging regional cooperation in the generation and transmission of electricity, 15 U.S.C. § 391.

C. No Adequate Alternative Forum Exists in Which to Challenge the Tax

New Hampshire does not contest the plaintiffs' assertion that the plaintiff States and their citizens would be unable to seek a New Hampshire administrative review and refund of the Seabrook Tax because they do not pay the tax directly. Nor does New Hampshire dispute the fact that the utilities which do pay the tax have not asserted a constitutional challenge to it. The possibility of a New Hampshire state court remedy remains speculative at best. Rather, the appropriate forum in which to contest the Seabrook Tax is in this Court through the exercise of the Court's original jurisdiction, which appears to be the only means through which the plaintiffs can obtain a federal forum to resolve issues of federal law and national significance. *See Wyoming v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2893 (1987).

D. An Extensive Fact-Finding Hearing Would Not Be Required to Determine the Legality of the Seabrook Tax

Contrary to New Hampshire's claim, an extensive hearing involving the testimony of experts and assessments of credibility would *not* be required to determine the legality of the Seabrook Tax. Virtually all of the relevant evidence can be presented through documents, such as corporate records, tax returns, and regulatory commission records, establishing the extent of ownership interests and the impact of the Seabrook Tax and credits. While New Hampshire claims possible factual disputes, it does not identify even *one* paragraph in the complaint which alleges a disputed fact. Rather, New Hampshire attempts to create factual issues centering around projected usage and exact dollar impact, which are not relevant to the central issue of the tax's constitutionality. The *fact* of the discriminatory impact, rather than its precise dimensions, is what is at issue.

B. The Seabrook Tax Is Patently Discriminatory, Favoring New Hampshire Consumers Over Out-of-State Consumers, and Is in Violation of the Commerce Clause.

The tax on the Seabrook Plant, in concert with the credit of the business profits tax and the exemption in the franchise tax, is discriminatory both in design and effect. The parallel between the New Hampshire scheme and the Louisiana First Use Tax addressed in *Maryland v. Louisiana*, 451 U.S. 725 (1981), is striking, and this Court's analysis in that case is equally applicable here.

C. The Seabrook Tax Violates the Equal Protection Clause.

Under the Equal Protection Clause, the burden of taxation associated with the Seabrook Plant should be borne equally by all the owners of the plant and ultimately by their customers, regardless of their residence. As has been demonstrated, there is unequal treatment without a constitutionally recognized rational basis. Through the system of tax credits and exemption enacted along with the tax, disparate treatment occurs which violates the Fourteenth Amendment.

D. The Seabrook Tax Violates the Privileges and Immunities Clause, and This Claim Has Been Properly Raised in This Action.

The cost of the Seabrook Tax is being and will continue to be paid through the electric bills of the consumers in the three plaintiff States. Virtually the entire populations of Connecticut and Rhode Island, along with a substantial portion of the Massachusetts population, have been affected. These persons have rights under the Privileges and Immunities Clause which may be asserted by the plaintiff States in their *parens patriae* capacities. The sovereign interest of the plain-

New Hampshire claims in its brief at pp. 15-16 that the Seabrook Tax is "not a tax on 'the generation or transmission of electricity,'" but is simply "a tax on nuclear *property*." (Emphasis in original). In making this argument, New Hampshire conveniently overlooks the statutory words "or with respect to" the generation or transmission of electricity. The Seabrook Tax, which applies solely to the only nuclear generating plant in New Hampshire, was imposed for the stated purpose of compensating the state for the "unique public safety requirements and burdens" purportedly arising from the generation of electricity in the plant. *See* Declaration of Purpose and Findings, RSA 83-D:1, c.354, of the 1991 New Hampshire Laws, Addendum to plaintiffs' principal brief, pp. 71A-72A. That being the case, it cannot be seriously disputed that the tax is imposed "with respect to the generation or transmission of electricity" as that term is used in 15 U.S.C. § 391. New Hampshire's argument is at odds with the language of the law and with accepted tenets of statutory construction.

2. Contrary to New Hampshire's assertions, the net effect of the Seabrook Tax package is to impose a greater tax burden on electricity transmitted in interstate commerce than on electricity transmitted in intrastate commerce. Nothing in *Arizona Public Service Co. v. Snead, supra,* suggests, let alone requires, that the Court may ignore parts of the *same statute* in deciding a claim under § 391. Quite the contrary. The Court must look at the effect of the entire package. *As a direct result of the Seabrook Tax package,* out-of-state consumers are already paying higher rates for electricity, while some New Hampshire customers face a rate *decrease.* Unquestionably, the Seabrook Tax conflicts with the express language of 15 U.S.C. § 391.

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tiff States in protecting the welfare of virtually their entire populations is at the very heart of this action. This case is thus unlike *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) cited in New Hampshire's brief at pp. 25-26.

IV. THE PLAINTIFF STATES HAVE PROPERLY REQUESTED RELIEF

In their complaint, the plaintiff States have sought declaratory and injunctive relief. Contrary to New Hampshire's assertion (Defendant's br. 26), the requested relief is appropriate, and the plaintiffs have properly alleged all necessary elements to obtain it. *See, Maryland v. Louisiana, supra*, 451 U.S. 760.

Respectfully submitted,

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