No. 119, Original

In The

Supreme Court of the United States

October Term, 1992

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

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

FINAL REPORT OF THE SPECIAL MASTER

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December 30, 1992

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DECEMBER 30, 1992

I. BACKGROUND

A. Procedural History

On October 30, 1991, the State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations ("Plaintiff States") sought to invoke this Court's original jurisdiction by moving for leave to file a complaint against the State of New Hampshire challenging the constitutionality of a newly enacted *ad valorem* tax on nuclear station property (the "Seabrook Tax")[1] and related tax changes.

Suing in a proprietary capacity as themselves substantial consumers of electricity generated at Seabrook, and also in a *parens patriae* capacity as representatives of their citizen-consumers, the Plaintiff States urged this Court to declare the Seabrook Tax scheme unconstitutional on the grounds that it contravened (1) the Supremacy Clause of the United States Constitution, art. VI, cl. 2, by imposing a discriminatory tax in violation of 15 U.S.C. § 391; (2) the Commerce Clause, art. I, § 8, cl. 3, by imposing an undue burden on interstate commerce; (3) the Fourteenth Amendment, by depriving the Plaintiff States and their citizens of equal protection of the laws; and (4) the Privileges and Immunities Clause, art. IV, § 2, cl. 1.

On December 27, 1991, the New England Council and the Associated Industries of Massachusetts, representing private users of electricity, filed an amicus curiae brief in support of the States' motion to file.

On December 30, 1991, New Hampshire filed its brief in opposition to the motion to file, arguing that (1) the Plaintiff States, which did not themselves directly pay the Seabrook Tax, lacked standing to sue; (2) the suit was premature, in that the first tax returns reflecting imposition of the tax had not then been filed and the tax not yet passed through to customers in electric rates; (3) relief

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[1] The only nuclear generating station in New Hampshire (and thus the only facility affected by the tax) is the Seabrook Station located in the town of Seabrook, New Hampshire.

was available in an alternative forum; (4) extensive evidentiary hearings would be required; (5) injury was nonexistent or insubstantial; and (6) the Plaintiff States could not prevail on the merits.

The Plaintiff States filed their reply brief on January 10, 1992. On January 27, 1992, this Court granted the States' motion to file, allowing the Defendant State of New Hampshire 60 days to answer (Rehnquist, C.J., and Scalia, J., would have set the motion for oral argument; Souter, J., did not participate). Shortly after New Hampshire answered on March 25, 1992, two groups moved to intervene: (1) the Connecticut Office of Consumer Counsel ("Consumer Counsel") and (2) six of the utility owners of Seabrook Station; namely, The United Illuminating Company ("UI"), New England Power Company ("NEP"), The Connecticut Light and Power Company ("CL&P"), Canal Electric Company ("Canal"), Montaup Electric Company ("Montaup") and Taunton Municipal Lighting Plant ("Taunton") (collectively, "Utilities" or "Intervening Utilities").

On April 27, 1992, the Court appointed the undersigned special master in this case (Souter, J., not participating). After taking the oath of special master on May 1, 1992, I called a first meeting with counsel on May 15, 1992. By Order dated May 18, 1992, the Court referred to me the pending motions to intervene (Souter, J., not participating). On May 26, 1992, I filed with the Court my First Interim Report recommending that the Court deny the Consumer Counsel's motion to intervene, and grant the motion of the six Utilities.[2] On June 15, 1992, the Court accepted the recommendations of the First Interim Report (Souter, J., not participating).

Following the first meeting of counsel on May 15, the parties, with outstanding professionalism and diligence, set about under my direction shaping up the issues and stipulating to the record. Counsel met with me again on June 15 and July 31, 1992, and worked intensively among themselves throughout the summer, culminating, at a final meeting with me on September 9, 1992, in their submission of an entire stipulated record for the presentation of the contested issues of law to the Court. The parties, in addition, had narrowed the legal issues in the case, with the Plaintiffs paring from four to two their alternative grounds for relief (retaining only their causes of action based on the Commerce Clause and 15 U.S.C. § 391).

The need for an evidentiary hearing having been obviated, I directed the Plaintiff States, the Intervening Utilities and the Amici to submit their briefs on the

[2] For purposes of the proceedings before me, I likewise denied the motion of the Consumer Counsel and granted the motion of the six Utilities to intervene, nonetheless affording the Consumer Counsel amicus curiae status. Subsequently, I permitted two groups to participate as amici curiae in proceedings before me: the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), a governmental entity and a joint owner of Seabrook Station, and a trade group consisting of the New England Council, the Associated Industries of Massachusetts and the Connecticut Business & Industry Association. This Court granted MMWEC amicus curiae status by order dated June 22, 1992 (Souter, J., not participating).

merits by October 9, 1992, New Hampshire to submit its brief on the merits by November 9, and the Plaintiff States, the Intervening Utilities and the Amici to submit any reply briefs by November 23. All parties complied. Oral argument was held before me at the Edward T. Gignoux United States Courthouse in Portland, Maine, on December 8, 1992. I now submit this Final Report.

B. Factual Summary

The parties have stipulated a full record for submission of the legal issues to the Court. I present the following factual synopsis to explain the background for my recommended conclusions of law.

1. The Setting of This Litigation

The largest of the eight nuclear generating stations in New England, the Seabrook Station is the only one located in New Hampshire. Seabrook is owned jointly as tenants in common by 12 utilities doing a retail electric business, either directly or through affiliates, in the States of New Hampshire, Connecticut, Massachusetts, Rhode Island and Vermont. Those 12 utility owners of Seabrook and their respective percentage shares are set forth in Appendix A attached to this Report.

The Seabrook Station began generating electricity in May 1990, nearly 15 years after the Nuclear Regulatory Commission first issued a permit for its construction. The project had been marked by much controversy and delay, with three Seabrook owners – Public Service Company of New Hampshire ("PSNH"), New Hampshire Electric

Cooperative, Inc. ("New Hampshire Co-op") and EUA Power Corporation ("EUA Power") – filing for bankruptcy.

Following the start of power generation at the Seabrook Station, the State of New Hampshire reexamined the manner in which its sole nuclear facility was taxed. At the time, Seabrook's owners were subject to two possible State taxes: the New Hampshire Franchise Tax (assessed upon receipts from the sale of gas or electricity pursuant to franchises granted by the State of New Hampshire) and the New Hampshire Business Profits Tax (assessed on the share of a company's, or unitary business's, profits allocable to New Hampshire on the basis of a three-part formula).[3]

New Hampshire's reexamination culminated in the enactment of Chapter 354 of the 1991 Laws of New Hampshire, which, effective July 1, 1991, (1) repealed the application of the Franchise Tax to electric utilities, (2) created the Seabrook Tax[4] and (3) granted a credit for the amount paid in Seabrook Tax against any Business Profits Tax owed. N.H. Rev. Stat. Ann. §§ 83-D:2-3, 83-D:6, 77-A:5(VI); 83-C:1 (II) & (IV). Two provisions – the Seabrook Tax and the credit against the Business Profits Tax for

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[3] The Seabrook Station is also subject to *local* property taxes and *State* assessments for special purposes, including nuclear plant decommissioning and the preparation, maintenance and operation of the State's emergency nuclear response program.

[4] New Hampshire imposes no other statewide *ad valorem* tax on electric utility property; however, the State has imposed statewide property taxes on other types of business, including a tax on railroad property.

Seabrook Tax paid – were declared nonseverable in the event either were found unconstitutional. 1991 N.H. Laws ch. 354, § 19.

2. The Seabrook Tax

The Seabrook Tax is an *ad valorem* tax, assessed annually at 0.64 percent of the valuation of:

> 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. § 83-D:2. The tax is assessed on each of the joint owners of nuclear station property in proportion to its ownership share. N.H. Rev. Stat. Ann. § 83-D:5.[5]

Going into effect on July 1, 1991, the Seabrook Tax was limited to a half-year collection in that year, based on a total valuation set by the Legislature of $3.5 billion. N.H. Rev. Stat. Ann. § 83-D:9. For the last half of 1991, Seabrook's joint owners collectively paid $11.2 million in Seabrook Tax.

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[5] Revenues derived from the Seabrook Tax are credited to New Hampshire's General Fund and are not segregated or reserved for the payment of costs attributable to the operation of a nuclear power plant. The General Fund finances a wide variety of State services, among them police and fire protection, maintenance of the judicial system and various educational programs.

Chapter 354 provided for subsequent valuation by the New Hampshire Department of Revenue Administration. N.H. Rev. Stat. Ann. § 83-D:4. The valuation for 1992 is expected to increase to approximately $3.75 billion. Based upon that figure, Seabrook Tax payments for 1992 will total approximately $24 million.

3. The Impact of the Seabrook Tax

i. The Plaintiff States' Proprietary Consumption

The Plaintiff States are themselves substantial consumers of electricity purchased from owners of the Seabrook Station or their affiliates. The record shows that in the fiscal year ended June 30, 1992, Massachusetts purchased from them approximately $11.5 million of electricity and Rhode Island, approximately $14.9 million of electricity. During the prior fiscal year Connecticut had purchased approximately $38.8 million of electricity from Seabrook owners.

ii. The Plaintiff States' Citizens' Consumption

Approximately 97 percent of the population of Connecticut, 64 percent of the population of Massachusetts and 100 percent of the population of Rhode Island purchase electricity from joint owners of the Seabrook Station or their affiliates.

iii. The Pass-Through of the Seabrook Tax Cost to Consumer Rates

The Federal Energy Regulatory Commission ("FERC") regulates the sale of electricity at wholesale between certain Seabrook owners and (1) their retail subsidiaries, (2) their retail affiliates and/or (3) other utilities. State regulatory authorities regulate the rates of retail sales of electricity by most of the joint owners of Seabrook or their retail affiliates. For at least one of the utility owners of Seabrook, the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), neither FERC nor State approval is necessary to pass through Seabrook Station costs to consumer rates.

Utilities regulated by FERC and/or the States have, with regulatory approval, begun passing through the cost of the Seabrook Tax to customer rates in the States of New Hampshire, Massachusetts and Rhode Island. *See* Appendix B. Utilities not subject to rate regulation have also passed the cost through to customers in those States. *Id.* In addition, the Connecticut Department of Public Utility Control has authorized UI to begin recovering the cost of the Seabrook Tax in retail rates charged to the State of Connecticut and other Connecticut consumers beginning on January 1, 1993.

4. The New Hampshire Business Profits Tax

New Hampshire imposes a Business Profits Tax upon the profits of all businesses operating in New Hampshire save for tax-exempt nonprofit corporations. N.H. Rev. Stat. Ann. §§ 77-A:1(I), 77-A:2.

The Business Profits Tax is imposed on a "unitary business" basis, with New Hampshire in effect piercing the corporate veil for tax purposes by taxing New Hampshire's allocable portion of any holding group's entire income, rather than the income in isolation of the member or members of the group doing business in New Hampshire. N.H. Rev. Stat. Ann. §§ 77-A:1(XIV), 77-A:3(III). Businesses (or unitary groups) deriving "gross business profits from business activity both within and without this state" must apportion profits "so as to allocate to this state a fair and equitable proportion of such business profits." N.H. Rev. Stat. Ann. § 77-A:3(I).

Allocation, in turn, is accomplished by applying a three-part statutory formula through which the interstate business (or unitary group):

– calculates its percentage of in-state property compared with all property everywhere;

– calculates its percentage of in-state compensation paid compared with all compensation paid everywhere; and

– calculates its percentage of in-state sales compared with all sales everywhere.

N.H. Rev. Stat. Ann. § 77-A:3(I); *see* note 13 below. The business (or unitary group) then adds the property factor to the compensation factor and 1.5 times the sales factor. N.H. Rev. Stat. Ann. § 77-A:3(II)(a). That total divided by 3.5 equals the percentage of income allocable to New Hampshire. *Id.* The share of income allocable to New Hampshire is then taxed at a rate of 8 percent. N.H. Rev. Stat. Ann. § 77-A:2.

i. The Interaction of the Seabrook Tax Credit and the Business Profits Tax

The 1991 New Hampshire Legislature in the same Chapter 354 that enacted the Seabrook Tax provided a credit for that tax against any Business Profits Tax liability of a Seabrook owner or, as applicable, its unitary group. N.H. Rev. Stat. Ann. § 77-A:5(VI). The Seabrook Tax credit may be taken in full, dollar-for-dollar, against Business Profits Tax liability in the year for which Seabrook Tax is paid; unused credit may not be carried forward.

For 1991, the year at the midpoint of which the Seabrook Tax took effect, only one owner of the Seabrook Station paid any Business Profits Tax to the State of New Hampshire. *See* Appendix C. This owner's unitary business, New England Electric System ("NEES"), used its Seabrook Tax credit of $1,115,258 with other credits to reduce its Business Profits Tax liability to $127,382; it would have paid no Business Profits Tax at all in 1991 if the Seabrook Tax had been in effect for the full year. In 1991 three others used their Seabrook Tax credit to wipe out completely their Business Profits Tax liability; five were not subject to the Business Profits Tax because they are tax-exempt; and the remaining three did not incur any Business Profits Tax liability because they (or their unitary group) did not have net profits. *Id.*

The Plaintiffs project that for both 1992 and 1993, no Seabrook joint owner will pay the Business Profits Tax for the same mix of reasons – tax-exemption, lack of net profits and use of the Seabrook Tax credit.[6] *See* Appendix C.

ii. The Seabrook Tax Credit in the Context of Interstate Taxation

The three Plaintiff States, Connecticut, Massachusetts and Rhode Island, all impose business profits taxes and

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[6] The Plaintiffs acknowledge that projections are based on assumptions and that final results could be different; they introduce these projections merely for purposes of illustrating the operation of the New Hampshire tax system.

apply to interstate income allocation formulas based on the same three factors used by New Hampshire. Conn. Gen. Stat. §§ 12-213 *et seq.*; Mass. Gen. L. ch. 63, § 52A; R.I. Gen. Laws §§ 41-13-1 *et seq.* None of the three Plaintiff States either imposes a statewide *ad valorem* tax on nuclear station property or affords a credit against its own business profits taxes for Seabrook Tax paid. As a result, Seabrook owners (or their unitary groups) remain liable for taxation in the Plaintiff States on all of their income not attributable to New Hampshire. *See* Appendix C.

5. Distribution of the Ownership of the Seabrook Station

At the outset of this action, the largest share of the Seabrook Station (35.56942 percent) was owned by PSNH, which serves retail electric customers in New Hampshire. Most of the balance of the Seabrook ownership (about 60 percent) was held by utilities that, directly or indirectly, serve customers outside New Hampshire. *See* Appendix A. On June 5, 1992, by a Plan of Reorganization approved in its Chapter 11 bankruptcy proceeding, PSNH became a wholly owned subsidiary of Northeast Utilities ("NU") and transferred to another newly formed subsidiary of NU, North Atlantic Energy Corporation ("North Atlantic"), its ownership in Seabrook Station, retaining, however, by contract the right to continue to receive the entire 35.56942 percent share of the Seabrook production for as long as the Station operates. For purposes of the New Hampshire Business Profits Tax, PSNH by its reorganization in bankruptcy became a member of the "unitary business" consisting of NU and its subsidiaries, including another Seabrook owner, The Connecticut Light and Power Company ("CL&P"). *See* Appendix A.

C. The Contentions of the Parties

The Plaintiffs, having pared down the number of grounds for their constitutional challenge to the Seabrook Tax scheme,[7] press the following contentions before this Court:

1. This case falls within, and remains appropriate for the exercise of, the Court's original jurisdiction.

2. The Seabrook Tax and credit scheme offends the Supremacy Clause of the United States Constitution in that it discriminates against interstate commerce in violation of 15 U.S.C. § 391 (proscribing discriminatory State taxation "on or with respect to" the generation or transmission of electricity).[8]

3. The Seabrook Tax and credit scheme discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.[9]

4. The Court, in addition to entering a permanent injunction against the collection of the Seabrook Tax,

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[7] The Plaintiffs have waived contentions that the Seabrook Tax scheme violates the Equal Protection and the Privileges and Immunities Clauses of the United States Constitution. They have in addition waived two of their three original grounds for Commerce Clause attack: that the scheme is (1) unfairly apportioned and (2) unrelated to services provided by New Hampshire.

[8] The Intervening Utilities in addition contend that the Seabrook Tax standing alone violates Section 391. *See* notes 11, 17 below.

[9] The Intervening Utilities in addition contend that the Seabrook Tax standing alone violates the Commerce Clause. *See* note 17 below.

should order retrospective relief through refund of the Seabrook Tax paid minus amounts owed on the Business Profits Tax in the absence of the Seabrook Tax credit.

New Hampshire, for its part, contends that:

1. New facts reveal that the Plaintiffs lack standing to bring this case and that, in addition, this case is non-justiciable.

2. Neither the Seabrook Tax standing alone, nor the Seabrook Tax and credit scheme, offends Section 391.

3. Neither the Seabrook Tax standing alone, nor the Seabrook Tax and credit scheme, offends the Commerce Clause.

4. Retrospective relief is barred by the Eleventh Amendment or, alternatively, is inappropriate because the Plaintiffs have suffered no injury and because New Hampshire should be permitted to revise its own tax system retrospectively to cure any defect.

II. RECOMMENDED CONCLUSIONS OF LAW

A thorough review of the Stipulated Record and careful consideration of the parties' excellent briefs and oral argument have led me to the following conclusions of law, which I now recommend to the Court for adoption:

A. This case remains appropriate for the exercise of the Court's original jurisdiction.

B. The Seabrook Tax and credit violate 15 U.S.C. § 391.

C. The Seabrook Tax and credit violate the Commerce Clause.

D. A refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy.

My reasons for making these recommendations follow.

RECOMMENDATION A: This case remains appropriate for the exercise of the Court's original jurisdiction.

New Hampshire argues that one changed circumstance now undermines original jurisdiction of this case: That the evidence now shows there is no "case or controversy" because there is no discrimination against the Plaintiff States. *Cf. Wyoming v. Oklahoma,* 112 S. Ct. 789, 796 (1992) (noting Oklahoma's failure to point to "any change of circumstance, whether of fact or law," justifying dismissal of case for lack of standing). Initially, as New Hampshire notes, the Plaintiff States contended before this Court that in-state consumers effectively were exempt from the Seabrook Tax while out-of-state consumers bore its brunt. The Stipulated Record has since shown that (1) all Seabrook owners have paid, and are projected to pay, the Seabrook Tax; (2) none (save one in 1991) has paid, or is projected to pay, the Business Profits Tax; (3) in-state owners have been unable to use the credit because they, being tax-exempt or nonprofitable, have not been liable for any Business Profits Tax; and (4) customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States.

New Hampshire's "changed circumstance" strikes me as an argument on the merits rather than an assertion of a jurisdictional flaw, but assuming that it is relevant, it does not suffice to oust the Court of jurisdiction. New Hampshire's argument presupposes that the stipulated facts reveal no possible pattern of discrimination or injury and therefore do not suffice to confer standing on the Plaintiff States and the Intervening Utilities or to present a justiciable controversy to the Court. To the contrary, the Plaintiff States and the Intervening Utilities assert sufficient injury upon which to premise jurisdiction by demonstrating that the Intervening Utilities are liable for and have been paying the challenged tax, the Plaintiff States and their citizens have been purchasing electricity generated by the Seabrook Station, and the cost of the Seabrook Tax has generally been passed through to them as consumers of Seabrook-generated electricity. Assuming the Seabrook Tax and credit are in some respect unconstitutional (the legal question to be resolved by the Court), the Plaintiffs' "injury" (the burden of an unconstitutional tax) " 'fairly can be traced to the challenged action of the defendant[.]' " *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). That asserted wrong in turn would "furnish[] ground for judicial redress[.]" *Id.* at 735-36 (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). No more is required for standing and justiciability.

In no other respect does New Hampshire at this stage take issue with the Court's grant last January of the

Plaintiff States' motion for leave to commence this original jurisdiction action. Nonetheless, I note that this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted. No other suit to date has been filed that raises the issues herein presented, nor is there a readily identifiable alternative forum in which all of the parties could assert their claims. This case, involving a tax on New Hampshire's only nuclear power plant that affects four other New England States, is one of the utmost seriousness and dignity. Considerations of judicial economy, in addition, now weigh in the balance. The parties have expended considerable energy and resources to stipulate the facts and fully brief and argue the issues before me. The matter is ripe for decision.

I have no hesitation in recommending that this Court retain jurisdiction of this most pressing and serious matter.

RECOMMENDATION B: The Seabrook Tax and credit violate 15 U.S.C. § 391.

Pursuant to 15 U.S.C. § 391, 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." A tax is discriminatory, for purposes of Section 391, "if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

The Seabrook Tax is in my view a tax "with respect to the generation or transmission of electricity" that, in combination with its credit, discriminates in contravention of Section 391.

1. Section 391 applies to the Seabrook Tax and credit.

No legislative history elucidates the meaning of the phrase "on or with respect to" in Section 391; nor did the Court have occasion to consider the question in the leading case applying the statute, *Arizona v. Snead,* 441 U.S. 141 (1979). The phrase "with respect to," however, customarily signals broad application. *See, e.g.,* The Random House Dictionary of the English Language 1640 (2d ed. 1987) (defining "respect" in the phrase "with respect to" as "relation or reference"). *See also Morales v. Trans World Airlines, Inc.,* 112 S. Ct. 2031, 2036-37 (1992) (construing similar phrase, "related to," broadly in context of Airline Deregulation Act preemption). The correctness of this construction resonates in the interstices of the statute itself. The full phrase is "on *or* with respect to"; the phrase "with respect to" would be mere surplusage if too narrowly construed. The disjunctive "or" in the full phrase is echoed in the later definition of discrimination, proscribing taxation that "directly *or indirectly*" results in disproportionate burdens. Indirect higher tax burdens can result from taxes not directly on (but nonetheless affecting) generation or transmission of electricity.[10]

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[10] Two State high courts have addressed the question whether a tax falls "on or with respect to" generation or transmission of electricity for purposes of Section 391. The Supreme

In form, the Seabrook Tax is a property tax; however, it is in substance and reality a tax "with respect to" generation or transmission of electricity. It is a tax exclusively on property that by definition is "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. § 83-D:2. It is paid by taxpayers whose business is the generation of electricity. It can be (and in many instances already has been) passed through to consumers, thus imposing a "tax burden" on electricity.

2. The Seabrook Tax and credit discriminate against interstate commerce in violation of Section 391.[11]

Having determined that the Seabrook Tax falls within the ambit of Section 391, I next examine whether the

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Court of Nevada held (correctly, in my view) that a tax on the right to receive electricity from tax-exempt property (the Nevada side of the Hoover Dam) fell within the purview of Section 391. Although the statute at issue "purport[ed] to tax only the value of the right to receive electricity, the difference is one without a distinction. Nevada's tax directly impacts on the transmission of electricity to Cities, who in turn, must increase the cost of electrical power to their resident-consumers." *Nevada v. Burbank*, 691 P.2d 845, 847 (Nev. 1984). *Cf. Pacific Power & Light Co. v. Montana Dep't of Revenue*, 773 P.2d 1176, 1185 (Mont. 1989), *cert. denied*, 493 U.S. 1049 (1990) (holding, in the alternative, that "beneficial use" tax was not encompassed by Section 391 because it fell "neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities").

[11] The Intervening Utilities make an alternative contention that the Seabrook Tax alone, without the credit, discriminates against out-of-state consumers in violation of Section 391. I recommend rejection of that contention for the same reasons as I recommend rejection of the parallel assertion that the Seabrook Tax by itself violates the Commerce Clause. *See* note 17 below.

Seabrook Tax and credit combination "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

The Seabrook Tax, like the New Mexico Electrical Energy Tax at issue in *Arizona v. Snead*, 441 U.S. 141, is a tax on in-state activity (ownership of generating station property in one case; generation of electricity in the other) that in itself evenhandedly affects interstate and intrastate commerce. The two percent Electrical Energy Tax was assessed on all generation of electricity within the State of New Mexico, regardless of final destination. The Seabrook Tax likewise is assessed on all owners of Seabrook in direct proportion to their ownership interests, regardless of final destination of Seabrook electricity.

The Seabrook Tax scheme, in addition, replicates the flaw identified by this Court in the New Mexico Electrical Energy Tax scheme: allowance of a credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce. Payors of the New Mexico Electrical Energy Tax were allowed a credit against a tax inherently assessed only on in-state activity – the gross receipts tax on intrastate sales of electricity.[12]

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[12] The New Mexico tax statute provided that the credit could be taken only for Electrical Energy Tax paid on "electricity generated inside this state and consumed in this state[.]" 441 U.S. at 143 n.4. As a practical matter, the same result would have obtained even if the statute had allowed all Electrical Energy Tax paid to be credited against the gross receipts tax. The coverage of the gross receipts tax (in-state sales of electricity, *i.e.*, electricity consumed within the State) was coextensive with the

Payors of the Seabrook Tax likewise are allowed a credit against a tax inherently assessed only on in-state activity – the Business Profits Tax, assessed on income allocable to New Hampshire by virtue of a formula based on sales, payroll and property ownership in-state.[13]

It is true that the New Hampshire tax scheme differs from the New Mexico tax scheme in that, whereas the New Mexico scheme had a determinate outcome (the credit always halved the amount of gross receipts tax due), the effect of the New Hampshire scheme varies depending on such factors as the extent of income allocable to New Hampshire, the profitability in any given year of a Seabrook owner (or its unitary group) and the percentage share of Seabrook owned. Still, the fact that the *extent* of discrimination fluctuates should not obfuscate its existence. *See, e.g., Maryland v. Louisiana,* 451 U.S. at 760 (noting, in context of Commerce Clause analysis, "We

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coverage of the Electrical Energy Tax paid on electricity generated within and consumed within the State.

[13] Under New Hampshire's apportionment formula, a business (or unitary group) compares its percentage of "property owned, rented and employed" in New Hampshire versus everywhere; its percentage of "total compensation paid" to employees in New Hampshire versus everywhere; and its percentage of "total sales, including charges for services" in New Hampshire versus everywhere. N.H. Rev. Stat. Ann. § 77-A:3(I)(a)(b) & (c). New Hampshire then provides that "[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." N.H. Rev. Stat. Ann. § 77-A:3(II)(a).

need not know how unequal the Tax is before concluding that it unconstitutionally discriminates").

The bottom line – and the critically material feature – of the Seabrook Tax-credit combination is that, the more of a utility's total net income is allocated to New Hampshire, the greater that utility's ability to shelter total income from taxation (up to the amount of Seabrook Tax paid). The discriminatory workings of this feature are most readily apparent with respect to a utility that operates only in New Hampshire and therefore allocates 100 percent of its income to New Hampshire. The credit ensures that such a utility will pay only one tax, the Seabrook Tax, up to the point where its Business Profits Tax liability exceeds the amount of the Seabrook Tax. The two intrastate utilities owning shares of Seabrook in 1991 happened to pay no Business Profits Tax that year for reasons unrelated to the credit – tax-exemption (New Hampshire Co-op) and lack of net profit (PSNH) – but the Seabrook Tax credit "backstopped" any intrastate utility, *guaranteeing* that, no matter what its profits picture or tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid.

Assume, for example, that Seabrook Station is owned in equal shares by Owner A and Owner B. All of Owner A's income, and 50 percent of Owner B's income, is allocable to New Hampshire. Owner A and Owner B each earn $100,000,000. At the statutory rate of 8 percent, Owner A's Business Profits Tax liability is $8,000,000; Owner B's, $4,000,000. Owner A and Owner B each pay

$10,000,000 in Seabrook Tax.[14] Using the Seabrook Tax credit, Owner A escapes Business Profits Tax on *all* of its income (and hence passes through only one tax, the Seabrook Tax, to its customers); Owner B escapes tax in New Hampshire on only 50 percent of its total income and is subject to tax in other States for the balance.[15]

While a discriminatory impact is most easily perceptible in this in-state versus out-of-state comparison, the New Hampshire tax scheme operates to discriminate in varying degrees among Seabrook owners with interstate operations, again depending on how much total income is allocable to New Hampshire. To revisit my previous hypothetical, assume three Seabrook owners: Owner A with 50 percent of its income allocable to New Hampshire, Owner B with 30 percent and Owner C with 20 percent. Each earns $100,000,000 and pays $10,000,000 in Seabrook Tax. Owner A is subject to $4,000,000 in Business Profits Tax; Owner B, $2,400,000; and Owner C, $1,600,000. Using the Seabrook Tax credit, Owner A shelters 50 percent of its total income from profits taxation, Owner B 30 percent and Owner C 20 percent, each remaining liable for corporate income taxation in the States of Connecticut, Massachusetts and Rhode Island

[14] The Seabrook Tax is projected to outstrip the Business Profits Tax owed by every joint owner liable therefor in 1992 and 1993. Had the Seabrook Tax been assessed for the full year instead of half-year in 1991, it would have outstripped Business Profits Tax liability for all owners in that year as well. *See* Appendix C.

[15] The discriminatory effect is also illustrated by an example drawn from the Stipulated Record, discussed in my section on the Commerce Clause at pp. 29-34 below.

(as is in actual fact the case). Owner A is able to use 40 percent of its total possible Seabrook Tax credit; Owner B, 24 percent; and Owner C, 16 percent. Owner A is better off than Owner B, and Owner B is better off than Owner C, for one reason: greater business activity in New Hampshire.[16] This greater relative "burdening" of Owner C and Owner B ("manufacturers, producers, wholesalers, retailers") results "indirectly" from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391.

RECOMMENDATION C: **The Seabrook Tax and credit violate the Commerce Clause.**

To determine whether the New Hampshire tax scheme violates the Commerce Clause, I begin my analysis by noting the principle underlying the Clause: "The very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). In order to implement the explicit dictate of the Commerce Clause that "Congress shall have Power . . . To regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, as well as the free trade principle underlying it, the Clause has been interpreted to give

[16] Again, the "skeleton" revealed in this hypothetical is fleshed out by facts of record, as discussed at page 33 below and displayed in the charts of Appendix C.

affirmative protection to free trade among the several States:

> [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.

Boston Stock Exchange, 429 U.S. at 328 (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)). While the constitutional structure guarantees the "power of the states to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat 1, 199 (1824), the Commerce Clause operates to ensure that taxes imposed by the States do not discriminate against interstate commerce. "No State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

The test for validity of a tax under the Commerce Clause is four-fold. A State tax is permissible if it "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Maryland v. Louisiana*, 451 U.S. at 754 (citing *Washington Revenue Dep't v. Washington Stevedoring Ass'n*, 435 U.S. 734, 750 (1978)). This four-factor test, earlier stated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-78 (1977), is often referred to as the *Complete Auto* test.

Determining the validity of a State statute under the Commerce Clause involves a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requir[ing] a case-by-case analysis . . . ." *Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388, 403 (1984). *See also Freeman v. Hewit,* 329 U.S. at 252-53. Such case-by-case analysis has left " 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation'." *Boston Stock Exchange,* 429 U.S. at 329 (quoting *Northwestern States,* 358 U.S. at 457). Nevertheless, application of the Court's decisions in *Boston Stock Exchange* and *Westinghouse* to the facts of the case at bar leave little room for controversy and confusion here.

1. The Seabrook Tax and credit discriminate against interstate commerce both facially and in effect.

Although New Hampshire maintains that it has only enacted an *ad valorem* property tax, the total tax scheme is obviously more than a mere property tax.[17] Rather, it is a

[17] The fact that about 60 percent of the Seabrook Station is owned by utility companies selling electricity directly or indirectly to out-of-state consumers does not make the Seabrook Tax standing alone (without the credit) violative of the Commerce Clause. *See Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 624-25 (1981) (Montana severance tax on coal mined in the State upheld against Commerce Clause challenge despite fact that 90

hybrid tax scheme involving both a property tax and a credit against the Business Profits Tax up to the full amount of property tax liability. The fact that the Seabrook Tax and the credit provision were enacted in the same legislative act suggests that they were intended to function together to impose a new property tax levy and simultaneously to provide relief in the same amount from the Business Profits Tax on income allocable to New Hampshire business activity. Indeed, the two are firmly linked by a nonseverability clause that provides that the Seabrook Tax and the credit provision must stand or fall together in the face of a challenge to their constitutionality. The two provisions operate in tandem to impose a property tax liability, on the one hand, and to relieve liability to New Hampshire for the Business Profits Tax to the full extent of the property tax liability, on the other.

The Court has repeatedly struck down State tax statutes that impose a greater tax burden on economic activities taking place outside the State than on similar in-state activities. *Maryland v. Louisiana*, 451 U.S. 725; *Boston Stock Exchange*, 429 U.S. 318; *Westinghouse*, 466 U.S. 388. In *Maryland v. Louisiana*, the Court invalidated a Louisiana statute that imposed a "first-use" tax on natural gas brought into the State but also provided local users with

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percent of coal was shipped out of State); *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (California property tax permitting longer term property owners to pay lower taxes than new owners of comparable property upheld as a reasonable tax classification). It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

a number of credits and exemptions. 451 U.S. at 756. Similarly, in *Boston Stock Exchange,* the Court invalidated a New York stock-transfer tax that imposed a lesser tax on nonresidents for in-state sales than for out-of-state sales and capped residents' tax liability for in-state sales, but not for out-of-state sales, at a statutory maximum. 429 U.S. at 330-32. The New York tax scheme examined in *Boston Stock Exchange* violated the Commerce Clause requirement that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." 429 U.S. at 337. Most recently, in *Westinghouse,* the Court invalidated a New York tax scheme that provided a tax credit against the New York Franchise Tax to Domestic International Sale Corporations ("DISCs") for export shipments made from New York but not from other States. 466 U.S. at 393, 407. The Court declared these tax schemes unconstitutional because they "encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on similar activities within the State." 466 U.S. at 404.

The New Hampshire tax scheme plainly falls within the ambit of this prohibition because the credit against the Business Profits Tax is valuable only to the extent that a Seabrook owner conducts taxable business activities in New Hampshire. The Seabrook Tax scheme adopted by New Hampshire lowers the tax burden of any Seabrook owner as its New Hampshire sales, employees and property increase and thereby affirmatively places interstate commerce at a disadvantage by giving preferential tax treatment to companies with more significant intrastate activities. Like the Louisiana first-use tax, New Hampshire's taxing scheme provides a credit that discriminates against interstate commerce in favor of local interests. The structure of the Seabrook Tax and credit adopted by New Hampshire necessarily benefits those owners with more significant New Hampshire activities by wiping out their Business Profits Tax to the extent of their Seabrook Tax liability. For example, two Seabrook owners with the same share of ownership in Seabrook and the same total income, but one with a 100 percent in-state business and the other with only 50 percent in-state, are treated quite differently. (*See* discussion of hypothetical at pages 22-24 above.) The owner that operates only in New Hampshire will pay only one tax, the Seabrook Tax,[18] whereas the owner that operates interstate will have to pay both the Seabrook Tax and also out-of-state taxes on the 50 percent of its income allocated elsewhere.

Because the New Hampshire Business Profits Tax is determined by a formula based on employees, sales and property in New Hampshire, owners with a significant Seabrook Tax liability have an incentive to shift employees, sales and additional property into New Hampshire in order to use up the Seabrook Tax credit and to shield income from taxation in other States. That

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[18] Experience with the Seabrook Tax and credit in operation in 1991 and as projected in 1992 and 1993 demonstrates that the Seabrook Tax will as a practical matter exceed the Business Profits Tax. *See* Appendix C. In 1991 that was not true for New England Electric System ("NEES") (the "unitary business" group of which New England Power Company ("NEP") is a member) only because the Seabrook Tax was in effect for six months, instead of a full year.

incentive is strongly illustrated by the actual consequences of the June 5, 1992, acquisition of New Hampshire's largest electric retailer, Public Service Company of New Hampshire ("PSNH"), by Northeast Utilities ("NU"). *See Chart 1.* In 1991 NU through its subsidiary, The Connecticut Light and Power Company ("CL&P"), owned a 4.05985 percent interest in the Seabrook Station and, because in New Hampshire it had no other property and almost no sales or payroll, only about ²/₃ of one percent (0.68%) of the NU Group's income was allocable to New Hampshire for tax purposes.[19] As a result, in 1991 the NU Group could use only about 13.4 percent of its full-year Seabrook Tax credit.[20]

That situation changed radically on June 5, 1992, when NU acquired PSNH as a subsidiary and took over PSNH's 35.56942 percent share in Seabrook through a newly formed subsidiary, North Atlantic Energy Corporation ("North Atlantic").[21] *See* Appendix A. By that

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[19] For 1991 the breakdown of the NU Group's business activities in New Hampshire and systemwide is: property ownership, 2.2904 percent ($159,217,025 in New Hampshire and $6,951,521,899 everywhere); compensation paid employees, 0.0792 percent ($332,420 in New Hampshire and $419,594,843 everywhere); and sales, 0.00445 percent ($125,528 in New Hampshire and $2,818,519,581 everywhere).

[20] In order to compare the years 1991 and 1993 (i.e., the years before and after the PSNH reorganization of June 5, 1992), I assume that a full year of Seabrook Tax is paid in both years.

[21] No change occurred in the body of customers served by PSNH's 35.56942 percent share of the Seabrook production. By a contract lasting as long as the Seabrook Station operates, PSNH continues to be entitled to that full share of the power from Seabrook.

CHART 1

NORTHEAST UTILITIES ("NU") GROUP

Comparison of NU Group's Use of Seabrook Tax Credit – 1991 and 1993
Before and After Public Service Company of New Hampshire Came into the Group

	% Share Owned in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Business Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
1991	4.05985%	0.6789%	$224,921,764	$454,704 ($909,408 - for full year)	$122,160	99.3%	26.9% (13.4%)*
1993	39.62927%	20.67% (estimated)	$505,637,000 (estimated)	$9,505,525	$8,361,213 (3,719,306)**	79.3%	88.0% (39.1%)**

* Assuming that the Seabrook Tax had been in effect throughout 1991.

** Assuming that the NU Group in 1993 has only the same combined net income ($224,921,764) as it had in 1991, rather than its projected income of $505,637,000.

transaction the percentage of the NU Group's systemwide income that is allocable to New Hampshire in 1993 increased some 30-fold to a projected 20.67 percent.[22] Even assuming that the NU Group has only the same systemwide income in 1993 as in 1991 (the NU Group actually projects that it will have more than twice as much income in 1993), it will in 1993 use 39 percent of its Seabrook Tax credit, as compared with only 13.4 percent in 1991.[23]

On June 5, 1992, the NU Group did exactly what the Seabrook Tax and credit scheme creates a strong incentive to do: By acquiring PSNH it increased many-fold its sales, employment and property ownership in New Hampshire. The NU Group thereby benefits from preferential tax treatment under the Seabrook Tax and credit scheme both in absolute terms (using a projected credit of $8,361,213 to wipe out its projected 1993 Business Profits Tax as compared with a usable credit of only $122,160 in 1991) and in relative terms (being able to use at least 39 percent of its credit in 1993 as compared with 13.4 percent in 1991

[22] For 1993 the projected breakdown of the NU Group's New Hampshire activities is: property owned in New Hampshire, 16.57 percent ($1,442,700,000 in New Hampshire and $8,707,596,000 everywhere); compensation paid to employees, 23.19 percent ($87,272,000 in New Hampshire and $376,313,000 everywhere); and sales, 21.73 percent ($841,194,000 in New Hampshire and $3,870,828,000 everywhere).

[23] If in 1993 the NU Group has income of $505,637,000 as it now projects – rather than its 1991 income of $224,921,764 – it will take advantage of 88.0 percent of its Seabrook Tax credit.

for the same amount of income).[24] Such preferential tax treatment of in-state activities is prohibited by the Commerce Clause.

The unconstitutionally preferential treatment accorded the NU Group, which now includes the largest retail electric business in New Hampshire, is also dramatized by comparing its situation with that of the Seabrook owners that have no business activity whatever in New Hampshire other than holding an ownership share in Seabrook. Canal Electric Company ("Canal") (owning 3.52317 percent of Seabrook) has no employees or sales in New Hampshire and in 1992 expects to be able to use only 8.2 percent of its Seabrook Tax credit. *See* Appendix C, p. C-2. For the same reason, The United Illuminating Company ("UI") (owning 17.5 percent of Seabrook) expects to be able to use only 6.8 percent of its Seabrook Tax credit in 1992. *Id.* The Commerce Clause prohibits this patently preferential treatment of the Seabrook owner on the basis of its greater in-state business activity.

The incentive to shift business into the State is buttressed by the certitude that Seabrook owners will be subjected to similar business profits or corporate income taxes in the other States in which they operate on that portion of their total income that is not allocated to New Hampshire. Under the Seabrook Tax and credit scheme, a Seabrook owner who pays $1 million in Seabrook Tax is allowed to avoid tax on up to $12.5 million in business

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[24] The NU Group also gets a preferential tax treatment in 1992, but it is proportionately reduced by the fact that PSNH did not come into the Group until June 5 in this year.

profits but only if those profits are earned in New Hampshire. In fact, all three of the Plaintiff States also tax business profits and use allocation formulas based on the same three factors used by New Hampshire: property, payroll and sales. Seabrook owners are exposed to multiple taxation to the extent that they conduct their business activities "among the several States" and do not get the full advantage of their Seabrook Tax credit.

Whether the incentive established by the Seabrook Tax and credit scheme is strong enough alone to cause Seabrook owners in fact to move business activity into New Hampshire is immaterial to a finding of discrimination against interstate commerce. Also it is completely immaterial that another opportunity, comparable to that of acquiring PSNH, by which an electric utility could so dramatically increase its New Hampshire allocation of income, is unlikely to present itself soon. The Court has rejected the argument that a substantial and actual effect on business conduct is requisite to holding a State tax discriminatory under the Commerce Clause:

> Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of State: that inhibition is an unconstitutional barrier to the free flow of commerce.

Boston Stock Exchange, 429 U.S. at 334 n.13. So long as an actual incentive to favor in-state business activities is established, the extent of the discrimination does not need exact calibration. In *Maryland v. Louisiana*, 451 U.S. at 760, the Court declined to hold further hearings to determine the exact extent of discrimination, once it was satisfied that some discrimination did in fact exist:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

The Court has often laid down the principle that a State may not use its power to tax in a manner that places interstate commerce at a disadvantage in competition with intrastate commerce.[25] The Seabrook Tax and credit violate that principle.

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[25] The large number of tax credits used by States would not be endangered by the ruling I recommend, any more than they were by the Court's ruling in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), declaring invalid a New York tax credit that could be taken only for export shipments made from New York. The Court rejected the parade of horribles presented by New York in *Westinghouse*, reasoning that only tax credits allowed on an impermissible basis violate the Commerce Clause:

> The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits. . . . We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it

2. The Seabrook Tax and credit scheme does not pass the "internal consistency" test.

The unconstitutionality of the New Hampshire Seabrook Tax and credit scheme is confirmed by application of the "internal consistency" test. That test, first announced in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), was applied there to determine whether a tax was properly apportioned under the second *Complete Auto* factor. The Court has, in more recent cases, applied the internal consistency test also to the third *Complete Auto* factor, to determine whether a tax discriminates against interstate commerce. *See, e.g., American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 284-86 (1987); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240-43 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984). In *Armco*, 467 U.S. at 644, the Court explicitly declared that the internal consistency test is properly used on the discrimination question:

> In *Container Corp. of America v. Franchise Tax Board* [citations omitted], the Court noted that a tax must have "what might be called internal consistency – that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. In

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> is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York.

Id. at 406 n.12. Further, even if a State statute appears discriminatory on its face, the statute may be saved by a showing that "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (dictum).

> that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.

Thus, *Armco* unambiguously applied an internal consistency analysis to the discrimination question by considering whether "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.*

Without question, the Seabrook Tax and credit scheme fails the internal consistency test. If every State were to adopt that tax scheme – allowing a credit for taxes on local nuclear property only against taxes on local business profits – then utilities owning "nuclear property" in one State but earning part of their income elsewhere would face a risk of multiple taxation not faced by utility owners conducting all of their business activity within a single State. Seabrook owners earning profits on business activity only in New Hampshire pay only one tax up to the level of the Seabrook Tax. In contrast, Seabrook owners earning equivalent profits from business activity in part elsewhere, but owning no other nuclear property, are subject to two taxes, the Seabrook Tax plus a business profits tax owed to other States. Thus, the New Hampshire tax scheme favors those Seabrook owners earning profits on business activity in New Hampshire over those owners earning equivalent business profits partly in other States. This result is contrary to the basic Commerce Clause principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. at 642.

The Seabrook Tax and credit scheme also fails the internal consistency test because, as already discussed, it creates an incentive to shift business activities into a State in which a nuclear station owner has an unused amount of nuclear property tax credit. If companies holding nuclear property in several States do not shift their activities to use fully the available tax credits, they would operate under a heavier total tax burden than similarly situated companies earning profits solely or mainly in one state. The effect on companies with unused tax credits would be to exert "an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' U.S. Const., art. I, § 8, cl. 3." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 286-87. In *Scheiner*, the Court applied the internal consistency test to invalidate a Pennsylvania axle tax that applied equally to Pennsylvania-registered and non-Pennsylvania-registered vehicles. The Court reasoned that, if every other State imposed an equal flat axle tax, the cumulative effect of several States' flat axle taxes would severely burden interstate motor carriers that would pay multiple flat taxes in all the States they traverse whereas intrastate carriers would pay only one tax. 483 U.S. at 284-86. The Seabrook Tax and credit scheme, if imposed in every State, would have a similar effect of imposing a severe financial burden on those utilities holding nuclear properties in several States and unable to use their full tax credits in each State.

RECOMMENDATION D: A refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy.

Having recommended that the Court hold that the Seabrook Tax and its accompanying credit violate both 15 U.S.C. § 391 and the Commerce Clause, I turn to a consideration of the appropriate remedy. New Hampshire contends that in these circumstances any relief should be prospective only. I recommend, however, that the Court (1) apply its decision retrospectively; (2) determine that the Eleventh Amendment does not bar retrospective monetary relief; and finally (3) order New Hampshire to refund all Seabrook Tax collected by it, reduced by the amounts of Business Profits Tax due as a result of the elimination of the Seabrook Tax credit.

1. This decision should apply retroactively.

As an initial matter, I recognize that the continued viability of the retroactivity analysis used by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), may be in doubt. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). In any event, even assuming that the *Chevron* analysis still is good law, the circumstances of today's recommended decision do not in my view warrant deviation from the customary rule of retrospective application. *Chevron* delineated three factors to be weighed in making the determination whether a decision should apply only prospectively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application . . . .

Chevron, 404 U.S. at 106-07 (citations omitted). Of these factors, the first is decisive. The decision recommended today results from a straightforward application of existing law to the present facts. The decision apparently would for the first time invalidate a tax-and-credit combination based on a property tax and a credit against an income tax. Nonetheless, the principles underlying my recommendation were enunciated in *Arizona v. Snead*, 441 U.S. 141 (as regards Section 391), and in a long line of Commerce Clause cases, most notably *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, *Maryland v. Louisiana*, 451 U.S. 725, and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388. This Court repeatedly has struck down tax-and-credit combinations that have the effect of favoring in-state interests by crediting a local tax paid against a local tax owed.

Both the second and third *Chevron* factors likewise counsel retrospective application. The purposes of the Commerce Clause and of Section 391 appear to me to be best served by enforcing a decision retroactively because it reasonably should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality. No legitimate reliance expectation of New Hampshire is disturbed. To the extent New Hampshire suffers hardships as a result of a retroactive decision, they are largely of its own making. *Cf. American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 183 (1990) (noting, under third factor of *Chevron* analysis, that invalidation of tax had "the potential for severely burdening the State's operations . . . [but that] burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent").

2. The Eleventh Amendment is no bar to ordering refunds to the payors of the Seabrook Tax.

Monetary relief in an original jurisdiction action violates the Eleventh Amendment only if damages are awarded on behalf of specific individuals. *Maryland v. Louisiana*, 451 U.S. at 745 n.21; *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972) ("An action brought by one state against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals").

In this case, as the Court implicitly determined in granting the motion to file a complaint, the Plaintiff States are *not* "actually suing to recover for injuries to designated individuals." They sue to recover for injuries to themselves, as well as to the great majority of their citizens, that are directly traceable to the Seabrook Tax and credit combination. Refund to the taxpayers (the 12

Seabrook owners) is merely the mechanism through which the States seek to be made whole.

The Eleventh Amendment does not bar such a refund order in an original jurisdiction action, as this Court acknowledged by employing a similar channel of relief in *Maryland v. Louisiana,* 452 U.S. 456, 457 (1981) (ordering refund of Louisiana's first-use tax to "taxpayers"); 451 U.S. at 731 (noting that taxpayers are pipeline companies and producers).

3. A refund is the proper retrospective remedy.

The Seabrook owners were "under duress" to pay the Seabrook Tax when due and were relegated to postpayment refund action.[26] For that reason, a retroactive application of my recommended decision requires that the Plaintiffs be given "meaningful backward-looking relief[.]" *McKesson Corp. v. Division of Alcoholic Beverages,* 496 U.S. 18, 31 (1990).

The question remains, however, whether refund is the proper and appropriate avenue to provide such relief. In cases of tax discrimination (which theoretically could be remedied in a number of ways), this Court has tended to remand to State courts to allow States the initial chance to correct the offending tax system. *See, e.g., McKesson,* 496 U.S. at 32 n.16; *Tyler Pipe Indus., Inc. v. Washington*

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[26] New Hampshire imposes various sanctions on nonpayment of taxes. *See, e.g.,* N.H. Rev. Stat. Ann. § 21-J:28 (imposing interest on amounts not paid when due); N.H. Rev. Stat. Ann. § 21-J:28-d (authorizing distraint of property); N.H. Rev. Stat. Ann. § 21-J:31 (imposing penalty for failure to file return).

Dep't of Revenue, 483 U.S. at 252-53. A *McKesson*-type remand nonetheless is inappropriate in this case for two reasons. First, unlike *McKesson* or *Tyler*, this case is an original jurisdiction action. The Court is acting simultaneously as the trial court and the court of last resort; it literally cannot "remand" to any other tribunal, and it accordingly should itself provide complete and final relief. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789, 803 (1992) (noting, in rejecting Special Master's recommendation that question of severability be remanded to State, "[t]his action is one between two States presented under our original jurisdiction; this Court is the appropriate forum to decide issues necessary to afford the complaining State complete relief. . . . We deem it proper and advisable to address the issue of severability ourselves").

Second, and more importantly, New Hampshire explicitly declared the Seabrook Tax and credit nonseverable. 1991 N.H. Laws ch. 354, § 19 ("It is the intent of the legislature that sections 1 and 2 of this act [creating the Seabrook Tax and credit] 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"). This is a critical distinction from *McKesson*, in which "the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce." 496 U.S. at 39. New Hampshire thus shut its own door on the *McKesson* invitation to "reformulate and enforce the . . . [t]ax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause." *Id.* at 40. New Hampshire contends that its nonseverability clause by using the phrase "*shall* be invalid" meant that only a prospective invalidation would result; however, New Hampshire's clear intent that its tax package be nonseverable, combined with the recommended retroactivity of this decision (an entirely separate analysis for this Court, rather than New Hampshire, to make), compel the conclusion that the Seabrook Tax and credit scheme should be struck down retroactively in its entirety.

In the case at bar there appears to be no legal justification for departing from the usual rule of full retroactivity for the recommended decision. Application of the usual rule, recognizing that the Seabrook Tax and credit were unconstitutional from the start, would put the parties back into the positions they would have held if New Hampshire had never adopted its unconstitutional tax scheme. That result can be achieved by permitting New Hampshire to retain out of its Seabrook Tax collections only the amounts of Business Profits Tax it would have collected from the Seabrook owners if the offending tax statute had not been enacted.

III. CONCLUSION

On the basis of the above conclusions of law, I recommend that the Court permanently enjoin the State of New Hampshire from collecting the Seabrook Tax and that the Court order the State of New Hampshire to refund to each owner of the Seabrook Station all sums collected from it in Seabrook Tax, less the total amount of credits for that tax taken by that owner against its liability for the Business Profits Tax. At this time I make no recommendation as to interest on the refunds, for the reason that the parties have not yet been heard on that issue. A proposed Decree embodying my recommendations is attached as Appendix D.

Respectfully submitted,

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December 30, 1992

APPENDIX A

THE OWNERS OF SEABROOK STATION

1. North Atlantic Energy Corporation ("North Atlantic"), a New Hampshire corporation and a subsidiary of Northeast Utilities ("NU"), a Massachusetts association, owns 35.56942 percent. At relevant times prior to June 5, 1992, this 35.56942 percent share was owned by the bankrupt Public Service Company of New Hampshire ("PSNH"), a New Hampshire corporation. On that date, pursuant to the Plan of Reorganization in its bankruptcy proceeding, PSNH transferred its Seabrook ownership share to North Atlantic, a newly formed NU subsidiary, and PSNH itself became an NU subsidiary also. By contract PSNH is entitled to North Atlantic's entire 35.56942 percent pro rata share of the electricity generated at the Seabrook Station.

2. The United Illuminating Company ("UI"), a Connecticut corporation, owns 17.5 percent.

3. EUA Power Corporation ("EUA Power"), a New Hampshire corporation and a subsidiary of Eastern Utilities Associates ("EUA"), a Massachusetts association, owns 12.13240 percent.

4. Massachusetts Municipal Wholesale Electric Cooperative ("MMWEC"), a political subdivision of Massachusetts, owns 11.59340 percent.

5. New England Power Company ("NEP"), a Massachusetts corporation and a subsidiary of New England Electric System ("NEES"), a Massachusetts association, owns 9.95766 percent.

6. The Connecticut Light and Power Company ("CL&P"), a Connecticut corporation and a subsidiary of NU, owns 4.05985 percent.

7. Canal Electric Company ("Canal"), a Massachusetts corporation and a subsidiary of Commonwealth Energy System ("COM/Energy"), a Massachusetts association, owns 3.52317 percent.

8. Montaup Electric Company ("Montaup"), a Massachusetts corporation that is a subsidiary of Eastern Edison Company ("Eastern Ed"), which is in turn a subsidiary of EUA, owns 2.89989 percent.

9. New Hampshire Electric Cooperative, Inc. ("New Hampshire Co-op") owns 2.17391 percent.

10. Vermont Electric Generation & Transmission Cooperative, Inc. ("Vermont Co-op"), located in the State of Vermont, owns 0.41259 percent.

11. Taunton Municipal Lighting Plant ("Taunton"), a department of the City of Taunton, Massachusetts, owns 0.10034 percent.

12. Town of Hudson (Massachusetts) Light and Power Department ("Hudson") owns 0.07737 percent.

APPENDIX B

SELECTED RATE PASS-THROUGHS

With FERC authorization, North Atlantic included the Seabrook Tax in wholesale rates charged to PSNH, which in turn passed the tax along to retail customers in New Hampshire.

With FERC authorization, Canal included the Seabrook Tax in wholesale rates charged to Commonwealth Electric Company and Cambridge Electric Light Company, which in turn included the tax in retail rates charged to their Massachusetts customers pursuant to approvals given by the Massachusetts Department of Public Utilities in October 1991.

With FERC authorization, NEP included the Seabrook Tax in wholesale rates charged to various affiliated companies, which then passed the tax on to customers in Massachusetts, Rhode Island and New Hampshire.

With FERC authorization, Montaup included the Seabrook tax in wholesale rates to affiliated companies, which passed the tax on to customers in Massachusetts and Rhode Island.

MMWEC, which does not require FERC authorization, has passed along the Seabrook Tax to municipal light departments in Massachusetts, which in turn passed it along to retail customers.

Taunton and Hudson, neither of which is required to obtain regulatory approval, have already included the Seabrook Tax in the calculation of rates charged to customers in Massachusetts.

APPENDIX C
PROFILES OF SEABROOK OWNERS
1991

	% Ownership Share in Seabrook*	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States**	% of Seabrook Tax Credit Used**
Canal (part of COM/Energy Group, a unitary business)	3.52317%	3.9993%*** ($1,272,827)	$31,826,238	$394,435	$101,826 paid 0 after credit	96%	25.8%
UI	17.5%	13.3827%*** ($1,726,517)	$12,901,110	$1,960,000	$131,376 paid 0 after credit	86.6%	6.7%
NEP (part of NEES Group, a unitary business)	9.95766%	7.9199% ($20,181,143)	$254,815,631	$1,115,258	$1,614,491 paid $127,382 after credit****	92.1%	100%
CL&P (part of NU Group, a unitary business)	4.05985%	0.6789%*** ($1,526,994)	$224,921,764	$454,704	$122,160 paid 0 after credit	99.3%	26.9%

* Five of Seabrook Station's 12 owners, Taunton, Hudson, MMWEC, Vermont Co-op and New Hampshire Co-op, were not subject to Business Profits Taxation in 1991 and are not expected to be in 1992 or 1993 because they are non-profit entities. Three owners incurred losses in 1991 and are expected to incur losses in 1992, resulting in no liability for Business Profits Tax: PSNH, Montaup and EUA Power.

** I have extrapolated the percentages in the last two columns from data of record.

*** Allocation of income to New Hampshire based solely on ownership in Seabrook.

**** In 1991 the Seabrook Tax was in effect for only 1/2 year. If it had been in effect for the full year 1991, the amount of the Seabrook Tax would have been double and the credit would have eliminated all Business Profits Tax for the NEES Group.

1992 (Estimated)

	% Ownership Share in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
Canal (part of COM/Energy Group, a unitary business)	3.52317%	4.1152%** ($869,731)	$21,134,598	$844,729	$69,578 paid 0 after credit	95.9%	8.2%
UI	17.5%	13.5467%** ($3,576,329)	$26,400,000	$4,197,571	$286,106 paid 0 after credit	86.5%	6.8%
NEP (part of NEES Group, a unitary business)	9.95766%	7.93% ($20,036,874)	$252,671,800	$2,388,456	$1,602,950 paid 0 after credit	92.1%	67.1%
CL&P and North Atlantic (parts of NU Group, a unitary business)	4.05985% 35.56942% since 6/5/92 for North Atlantic Total= 39.62927%	14.29%* ($35,887,620)	$251,138,000	$5,856,058	$2,871,010 paid 0 after credit	85.7%	49%

* On June 5, 1992 PSNH, under a plan of reorganization in its Chapter 11 bankruptcy proceeding, became part of the NU Group, transferring its ownership share in Seabrook to North Atlantic, another member of the NU Group.

** Allocation of income to New Hampshire based solely on ownership in Seabrook.

1993 (Estimated)

	% Ownership Share in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
Canal (part of COM/Energy Group, a unitary business)	3.52317%	3.9805%* ($1,161,430)	$29,178,000	$845,072	$92,914 paid 0 after credit	96%	11%
UI	17.5%	13.5467%* ($3,975,956)	$29,350,000	$4,197,571	$318,076 paid 0 after credit	86.5%	7.6%
NEP (part of NEES Group, a unitary business)	9.95766%	7.93% ($19,285,633)	$243,198,400	$2,388,456	$1,542,851 paid 0 after credit	92.1%	64.6%
CL&P and North Atlantic (parts of NU Group, a unitary business)	4.05985% 35.56942% Total= 39.62927%	20.67% ($104,515,168)	$505,637,000	$9,505,525	$8,361,213 paid 0 after credit	79.3%	88%
Montaup and EUA Power (parts of EUA Group, a unitary business)	2.89989% 12.13240%	10.9857% ($1,904,042)	$17,332,000	$3,605,663	$152,323 paid 0 after credit	89%	4.2%

* Allocation of income to New Hampshire based solely on ownership in Seabrook.

APPENDIX D

PROPOSED DECREE

CONNECTICUT, et al. v. NEW HAMPSHIRE

No. 119, Original.

Decided ____________ Decree Entered ______________

Decree carrying into effect this Court's opinion of ___, ___ U.S. ___ (199).

DECREE

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having stated its conclusions in its opinion announced on ___, ___ U.S. ___, and having considered the positions of the respective parties as to the terms of the decree, IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The New Hampshire Tax on Nuclear Station Property and the credit against the New Hampshire Business Profits Tax, both as enacted by 1991 N.H. Laws ch. 354, now codified at N.H. Rev. Stat. Ann. §§ 83-D and 77-A:5(VI), are unconstitutional and unenforceable.

2. Effective with the date of entry of this decree, the Defendant State of New Hampshire and its officers, agents, and employees are permanently enjoined and prohibited from collecting the New Hampshire Tax on Nuclear Station Property.

3. Within thirty (30) days after the entry of this decree, the Defendant State of New Hampshire shall

refund [,with interest at the rate of %,] to each owner of a share of the Seabrook Nuclear Facility the total sum heretofore collected from that owner on account of the New Hampshire Tax on Nuclear Station Property, less the total amount of credits for that tax taken by that owner against its liability for the New Hampshire Business Profits Tax.

4. Within thirty (30) days after the entry of this decree, the Defendant State of New Hampshire also shall render to the Plaintiff States, and shall file with the Court, a full and accurate account of all moneys that are due to be paid, or have been paid, by the State of New Hampshire pursuant to the preceding paragraph of this decree.

5. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.