No. 119, Original

In The

Supreme Court of the United States

October Term, 1992

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

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

On Exceptions To The Report Of The Special Master
Of December 30, 1992

PLAINTIFF STATES' REPLY BRIEF TO EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE

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QUESTIONS PRESENTED

1. Whether the Court should adopt the Special Master's recommendation that this case remains appropriate for the exercise of the Court's original jurisdiction? (Recommendation A)

2. Whether the Court should adopt the Special Master's recommendation that the Seabrook Tax and Credit violates 15 U.S.C. § 391? (Recommendation B)

3. Whether the Court should adopt the Special Master's recommendation that the Seabrook Tax and Credit violates the Commerce Clause? (Recommendation C)

4. Whether the Court should adopt the Special Master's recommendation that a refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy? (Recommendation D)

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JURISDICTION

The Motion For Leave To File Complaint invoking the original jurisdiction of this Court was granted on January 27, 1992. The Complaint alleges that this Court has jurisdiction under the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All relevant constitutional provisions and statutes are contained in the Brief of New Hampshire in Support of

Exceptions to Report of Special Master, 1-2. New Hampshire Rev. Stat. Ann. 83-D ("Tax on Nuclear Station Property") is set out in full in Exhibit A to Plaintiff States' Complaint.

STATEMENT

This suit, brought by the sovereign States of Connecticut, Massachusetts, and Rhode Island against the sovereign State of New Hampshire under the Supreme Court's original jurisdiction, challenges on constitutional and statutory grounds New Hampshire's "Tax on Nuclear Station Property," New Hampshire Revised Statutes Annotated ("R.S.A.") 83-D ("Seabrook Tax"), which also amended R.S.A. 77-A:5.[1] This Tax imposes an *ad valorem* property tax on nuclear power station property, and concomitantly provides a dollar-for-dollar credit against the New Hampshire Business Profits Tax. The intent and necessary effect of this statutory scheme is to discriminate against interstate commerce, and to impose 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. As such, it violates both the Commerce Clause and 15 U.S.C. § 391, and should be struck down.

A. Background

Effective July 1, 1991, the State of New Hampshire imposed a property tax on nuclear power station property at the rate of 0.64% of the property's valuation, to be assessed annually. R.S.A. 83-D:3; R.S.A. 83-D:4. Since the only nuclear power station in New Hampshire is the Seabrook Station in Seabrook, New Hampshire ("Seabrook Station"), it is the only property subject to the

[1] The Seabrook Tax, with its credit against the New Hampshire Business Profits Tax, was enacted by 1991 New Hampshire Laws, Chapter 354.

Nuclear Station Property Tax. Stip. ¶ 3.2.[2] Seabrook Station is jointly owned by a number of utility companies located in the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Stip. ¶ 3.4. These utility owners sell electricity generated at Seabrook Station in both intrastate and interstate commerce to retail customers in their respective service areas in those States, Stip. ¶¶ 3.4, 5.1, and are competitors in the wholesale sale of electricity. Stip. ¶ 5.1.

The Seabrook Tax is imposed on each owner of Seabrook in proportion to that entity's ownership interest in the Seabrook Station. However, as a nonseverable part of the legislation creating the Seabrook Tax, the New Hampshire legislature has provided a dollar-for-dollar credit against the Business Profits Tax, R.S.A. 77-A:5; Stip. ¶ 2.2, which is essentially a tax measured by the income of corporations doing business within the state according to a three-factor apportionment formula. This combination necessarily favors utilities as they conduct business within New Hampshire and effectively penalizes utilities as they conduct business on an interstate basis.

Because the tax is considered a cost of doing business for the utilities, it is passed on and paid through increased rates by their customers, including the plaintiff States and their citizens. Stip. ¶¶ 5.6-5.25. The plaintiff States of Connecticut, Massachusetts, and Rhode Island as consumers of electricity, Stip. ¶ 5.32, and substantial portions of their respective populations, have already been forced to bear the burden of the Seabrook Tax in the rates they pay for their electricity. Stip. ¶¶ 5.5-5.13; 5.15-5.23; 5.32-5.36.

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[2] On September 9, 1992, the parties filed with the Special Master a Stipulation of the Parties and a Stipulation of Exhibits, comprising the record in this case. References to the Stipulation will be to "Stip. ¶ ___."

B. History Of This Litigation

On October 30, 1991, the plaintiff States filed with the Supreme Court a Motion for Leave to File Complaint, invoking the Court's original jurisdiction under Article III, Section 2, clauses 1 and 2 of the United States Constitution, and 28 U.S.C. § 1251(a)(1). Over New Hampshire's objection that the plaintiff States lacked standing to bring the action and that this was not an appropriate case for the exercise of the Court's jurisdiction, (N.H.'s Brief in Opp., 6-13),[3] the Court granted the plaintiff States' motion on January 27, 1992. 112 S.Ct. 962 (1992). On April 27, 1992, the Court assigned the case to the Special Master. 112 S.Ct. 1756 (1992). The Court subsequently permitted intervention by six utility owners of Seabrook Station ("Intervenors"). 112 S.Ct 2961 (1992).

On September 9, 1992, the parties filed with the Special Master a Stipulation of the Parties and a Stipulation of Exhibits, comprising the record in this case. Briefs were submitted, and oral argument before the Special Master was held in Portland, Maine, on December 8, 1992. On December 30, 1992, the Special Master issued his Final Report containing four recommendations:

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.

Final Report, 14-15.

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[3] References to New Hampshire's Brief in Support of Exceptions to the Final Report will be to "N.H. Brief;" references to New Hampshire's Brief in Opposition to Plaintiffs' Motion for Leave to File Complaint will be to "N.H. Brief in Opp."

On February 1, 1993, the Special Master issued a Supplement to the Final Report, in which he recommended that no interest be added to the recommended refund, or, if interest is awarded, that it be set at the rate prescribed by 28 U.S.C. § 1961.

On March 15, 1993, New Hampshire filed Exceptions to the Recommendations of the Special Master and Brief in Support of Exceptions, urging the Court to reject each of the recommendations of the Special Master, to dismiss the complaints of the plaintiff States and Intervenors, and to enter judgment in favor of New Hampshire. (N.H. Brief, 79).

The plaintiff States now urge this Court to adopt the recommendations of the Special Master to retain its original jurisdiction, to hold that the Seabrook Tax and credit violate 15 U.S.C. § 391 and the Commerce Clause, and to order a refund in accordance with the recommendations in the Final Report.

SUMMARY OF ARGUMENT

I. The Seabrook Tax And Credit Violate The Commerce Clause (Recommendation C)

As the Special Master concluded, the Seabrook Tax and credit violate the Commerce Clause because together they provide preferential tax treatment to companies as they conduct intrastate activities, and place companies that conduct business on an interstate basis at a disadvantage. This preferential treatment of companies as they conduct business activities in New Hampshire violates the Commerce Clause under a number of prior decisions of this Court. *See, e.g., Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388 (1984); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Com'n.,* 429 U.S. 318 (1977).

The unconstitutionality of this tax scheme is underscored by its lack of "internal consistency." Like the tax schemes held unconstitutional in *Armco v. Hardesty,* 467 U.S. 638 (1984), and *Tyler Pipe Indus. v. Washington Dept. of*

Revenue, 483 U.S. 232 (1987), the New Hampshire tax/credit scheme unconstitutionally places Seabrook owners at risk of multiple taxation to the extent that they conduct business on an interstate basis.

Because the Seabrook Tax/credit scheme is structured to produce this discriminatory effect under every set of circumstances, it discriminates on its face against interstate commerce. The Special Master's Recommendation C should be adopted by this Court.

II. The Seabrook Tax And Credit Violate 15 U.S.C. § 391 (Recommendation B)

The Special Master correctly concluded that the Seabrook Tax and credit violate 15 U.S.C. § 391. The Seabrook Tax is a tax "on or with respect to the generation or transmission of electricity" within the meaning of that statute. As the Special Master recognized, the phrase "with respect to" would be superfluous if New Hampshire's narrow interpretation of the reach of Section 391 were adopted. Final Report, 18.

By definition and in its practical operation, the Seabrook Tax clearly concerns the generation of electricity. The Tax is imposed only on Seabrook Station, which functions solely to generate electricity for distribution, and which is owned by electric utility companies whose business is the distribution of electricity to customers in the New England States. Further, the Tax was enacted for the stated purpose of compensating New Hampshire for potential expenses and risks associated with the generation of electricity through nuclear fusion. R.S.A. 83-D:1. For these reasons, the Seabrook Tax falls within the ambit of Section 391.

Taken together, the Seabrook Tax and credit result 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," in violation of Section 391. The New Hampshire scheme violates that statute in the same manner and for the same reasons as the New Mexico statute at issue in *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979), by allowing a "credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce." Final Report, 20. The Special Master's Recommendation B should be adopted.

III. The Refunding Of All Seabrook Tax Paid Less Credits Taken Against The Business Profits Tax Is The Proper Remedy (Recommendation D)

The Special Master recommended that the Court apply its decision in this case retrospectively and "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." Final Report, 39. Under the facts and circumstances of this litigation, such a retroactive application is appropriate.

Far from depending on the creation of a new principle of law, the invalidity of the Seabrook Tax is the result of the application of principles easily derived from a series of cases of this Court in which state taxes have been struck down as favoring in-state interests. Consequently, New Hampshire cannot meet the threshold test of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), and can provide no basis to deny refunds in this case.

Nor does *McKesson v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), counsel otherwise. Through the nonseverability clause in the Seabrook Tax, the New Hampshire legislature has indicated its intent that the Seabrook property tax should fall if the credit provision is held invalid. Also, the Special Master has noted that, since this is an original jurisdiction case, there is no other tribunal to which remand is possible. Final Report, 43.

Lastly, since this case was brought by the plaintiff States on behalf of themselves and a substantial portion of their general populations, the Eleventh Amendment does not bar a refund. *Maryland v. Louisiana,* 452 U.S. 456, 457 (1981).

IV. The Court Should Retain Jurisdiction In This Case (Recommendation A)

As the Special Master concluded, the plaintiff States have standing to bring this action through injuries incurred in both their proprietary capacities and *parens patriae* capacities. Final Report, 16. Further, a consideration of all of the discretionary factors considered by this Court in determining whether the exercise of original jurisdiction is appropriate counsel for retention of jurisdiction. Final Report, 17. Finally, despite New Hampshire's claim to the contrary, there are no changed circumstances which would warrant a dismissal at this late stage of the case. As the Special Master noted, " . . . this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted." Final Report, 17.

ARGUMENT

I. THE SEABROOK TAX AND CREDIT VIOLATE THE COMMERCE CLAUSE (RECOMMENDATION C)[4]

The Special Master concluded that the Seabrook Tax, with its credit against the Business Profits Tax, is unconstitutional under the Commerce Clause because it "affirmatively places interstate commerce at a disadvantage by giving preferential tax treatment to companies with more significant intrastate activities." Final Report, 28-29. Because this conclusion is correct, the plaintiff States urge this Court to adopt the Special Master's Recommendation

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[4] The order of the plaintiff States' Argument conforms to the order of presentation of argument followed by New Hampshire in its brief.

C and hold that the Seabrook property tax and credit are unconstitutional under the Commerce Clause.

A. The Seabrook Tax/Credit Scheme Discriminates On Its Face Against Interstate Commerce.

The Seabrook Tax violates the Commerce Clause because it "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of [its] tax credit[] [provision]." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). In fact, the entire Seabrook Tax scheme, with its credit against the New Hampshire Business Profits Tax, is similar to schemes found to violate the Commerce Clause in *Maryland v. Louisiana* and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), and should be struck down for the same reasons.

In the area of taxation, the fundamental principle of the Commerce Clause[5] to which this Court has unwaveringly adhered is that "[n]o state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exch. v. State Tax Com'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959)). *See also Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 403; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). It is precisely this feature of the Seabrook Tax Package structure – its inevitable and intentional discrimination against interstate commerce – that renders it unconstitutional.

A state tax on an activity of interstate commerce will be sustained against Commerce Clause challenge if it "(1)

[5] The Commerce Clause, "even without implementing legislation by Congress is a limitation upon the power of the States, including the States' power to tax." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 403 (citations and internal quotation marks omitted).

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. *Washington Revenue Dept. v. Washington Stevedoring Assn.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed. 2d 682 (1978)." *Maryland v. Louisiana*, 451 U.S. at 754. *See also, Complete Auto Transit v. Brady*, 430 U.S. 274, 277-78 (1977). It is the third of these factors that the Seabrook Tax violates.

The discriminatory structure of the Seabrook Tax operates as follows. Section 1 of Chapter 354 of the New Hampshire Acts of 1991 (codified as New Hamp. R.S.A. 83-D) imposes an *ad valorem* tax upon the value of the Seabrook Nuclear Station at the rate of 0.64 percent of valuation upon each entity with an ownership interest in Seabrook in proportion to that interest. R.S.A. 83-D:2; 82-D:3; 83-D:4; 83-D:5. Standing alone, this tax appears to apply evenhandedly. However, the Seabrook Tax goes on to provide a dollar-for-dollar credit of the *ad valorem* tax against the Business Profits Tax, which is essentially a tax measured by the income of corporations doing business within the State, according to a three-factor statutory apportionment formula. R.S.A. 83-D:6; R.S.A. 77-A:3.[6]

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[6] R.S.A. 77-A:3, as amended by chapter 354:7 of the 1991 New Hampshire Laws, provides that, for purposes of the New Hampshire Business Profits Tax, income of corporations doing business within New Hampshire shall be apportioned as follows:

> The percentage of value of the total real and tangible personal property owned, rented and employed by the business organization everywhere as is owned, rented and employed by it in the operation of its business in New Hampshire, plus the percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within New Hampshire, plus 1.5 times the percentage of the total sales, including charges for services, made

Under this formula, the more business activities, defined in terms of property, sales, and payroll, that a corporation conducts in New Hampshire, the greater is its potential Business Profits Tax liability, and the more valuable the credit becomes. What makes this combination invidious is its inevitable – and intended – effect of favoring Seabrook utility owners doing substantial business within New Hampshire over utility owners doing substantial business in other States, and the necessary pressure this exerts on these owners of Seabrook to shift their business activities to New Hampshire in order to benefit more fully from the credit. As conceived by the New Hampshire Legislature,[7] this combination of tax and

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by the business organization everywhere, divided by 3.5.

[7] The favoritism that was a legislative motivation in enacting the Seabrook Tax/credit scheme is demonstrated by the remarks of the chairman of the legislative subcommittee that drafted the Seabrook Tax on the floor of the House:

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

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

This same intent was expressed in the New Hampshire Senate, as exemplified by the statement of Senator Russman during Senate debates:

credit necessarily means that to the extent that a Seabrook owner does business in New Hampshire, it will pay only one of the two taxes (property and business profits) to the point that the credit is exhausted. To the extent that an owner engages in business outside of New Hampshire, it runs the risk of paying both taxes: the Nuclear Station Property Tax and a tax on its corporate income or profits to the other State or States in which it operates.[8] This tax/credit combination has the effect of treating differently Seabrook owners that are similarly situated in all respects except for the percentage of their business activities conducted in New Hampshire. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 400. This discrimination is inimical to the very purpose of the Commerce Clause, which was to create a national free market in which commerce could flow unimpeded by local protectionism, *Boston Stock Exch. v. State Tax Com'n*, 429 U.S. at 328, and in which "State boundaries [are] a neutral factor in economic decision making." *American Trucking Assoc. Inc. v. Scheiner*, 483 U.S. 266, 283 (1987).

The necessary result of the structure of this tax/credit scheme, *under every set of circumstances*, is that businesses receive preferential treatment, and ultimately a competitive advantage,[9] as they conduct in-state

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

New Hampshire Senate Floor Debate Re: H.B. 64, May 29, 1991, page 3 (emphasis added).

[8] In fact, this "risk" is actual. Each of the owners of Seabrook Station is subject to taxation by other states, including the States of Connecticut, Massachusetts, and Rhode Island on their business profits that are attributable to those states. Rhode Island General Laws, §§ 41-13-1 *et seq*.; Massachusetts General Laws Annotated, Chapter 63, Section 52A; Connecticut General Statutes, §§ 12-213, *et seq*. Stip. ¶ 2.4.

[9] The utility joint owners of Seabrook are actual or potential competitors in the wholesale sale of electricity. Stip. ¶ 5.1.

activities, while businesses are penalized by the risk (and reality) of multiple taxation as they conduct out-of-state activities. There is no other outcome that can occur under the terms of the Seabrook Tax itself. Because the credit is valuable *only* to the extent that an owner conducts business activities in New Hampshire, an owner of Seabrook that conducts all of its business activities in New Hampshire will *never* have to pay two separate taxes (Nuclear Property Tax and Business Profits Tax, up to the amount of the credit), while an owner of Seabrook that conducts business activities out-of-state will *always* be at risk of paying two taxes (the New Hampshire Nuclear Property Tax and the Business Profits Tax in the state of activity). This discrimination could not be any plainer, and the necessary pressure that this fact exerts on businesses to shift business activities into New Hampshire to avoid this effect is patently unconstitutional under the prior decisions of this Court.

Contrary to New Hampshire's claim (N.H. Brief, 64), the plaintiff States do not ask this Court to declare "a new rule of law" or to expand Commerce Clause jurisprudence into areas hitherto unknown in order to arrive at this result. In fact, far from seeking an expansion of Commerce Clause jurisprudence, the plaintiff States seek to invoke the principles underlying numerous cases of this Court which found discrimination against interstate commerce in tax structures that necessarily favored intrastate business activities over interstate activities, and whose effect was to protect in-state business and to encourage companies to shift business into the offending State in order to benefit from the advantages and avoid the penalties created by the tax system. *See, e.g., Boston Stock Exch. v. State Tax Com'n*, 429 U.S. at 332, striking down a New York tax scheme that resulted in a greater tax on stock transactions involving out-of-state sales than most transactions involving in-state sales; *Maryland v. Louisiana*, 451 U.S. at 759, striking down a Louisiana tax scheme in which a series of tax credits and exemptions transformed an ostensibly neutral tax into one favoring local interests and encouraging gas companies to invest in exploration in Louisiana as opposed to other States; *Westinghouse Elec. Corp. v. Tully,* 466 U.S. at 406, striking down a tax whose accompanying credit for in-state activities had the result of favoring local business and pressuring businesses into shifting business activity into New York; *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984), striking down a West Virginia tax that resulted in companies engaging in both manufacturing and sales within the State to pay only one tax, while exposing out-of-state manufacturers making West Virginia sales to two taxes; *Tyler Pipe Industries v. Washington Dept. of Revenue,* 483 U.S. 232 (1987), striking down a Washington Tax scheme that resulted in the same effect as the tax in *Armco,* but was structured in the reverse; and *American Trucking Assoc. Inc. v. Scheiner,* 483 U.S. 266, striking down a Pennsylvania tax that resulted in a higher effective tax on out-of-state truckers traveling within Pennsylvania, thereby exerting an inexorable pressure on "interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' " *Id.* at 286-87.

These cases stand foursquare for the principles invoked by the plaintiff States: that tax schemes, no matter how they are labeled, are invalid under the Commerce Clause when they result in a greater tax burden, or risk of a greater tax burden, on businesses as they conduct business activities on an interstate basis rather than an intrastate basis, thereby resulting in a pressure to undermine tax-neutral business decisions and shift business activity into the taxing State.[10] That is precisely the situation

[10] As the Special Master noted, Final Report, 32, the recent merger of Public Service of New Hampshire ("PSNH") with Northeast Utilities ("NU") illustrates the pressure that is inherent in the Seabrook Tax. Businesses can succumb to this pressure by buying or merging with businesses in New Hampshire as well as by shifting activities into the state. Either way, the

created by the Seabrook Tax, and it is unconstitutional for precisely the same reasons.

The Seabrook Tax is similar to the tax schemes struck down in *Maryland v. Louisiana* and *Westinghouse Elec. Corp. v. Tully*. In *Maryland v. Louisiana*, Louisiana created a tax scheme which imposed a tax on the "First Use" of gas imported into the state. Although this tax was theoretically imposed on all owners of such gas at an equal rate, a number of exemptions and credits effectively exempted most in-state owners and consumers from the major portion of the tax. This Court struck the entire provision down as discriminating against interstate commerce. Rejecting Louisiana's request that it consider the First Use tax alone, the Court ruled that "[a] State tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. at 756. When it viewed the tax in conjunction with the credits, the Court concluded that "the obvious economic effect" was to encourage natural gas owners to invest in mineral exploration and production in Louisiana rather than in other States, *id.* at 757, and to protect substantially in-state producers and consumers of gas from the impact of the tax. *Id.* at 757-58. This inequality of treatment was a clear violation of the Commerce Clause.[11]

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pressure exerted by the tax scheme unconstitutionally forecloses tax-neutral decision-making in economic and commercial matters, thereby violating the Commerce Clause. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 406.

[11] The Court in *Maryland* rejected the Special Master's recommendation that further hearings be conducted in order to determine the extent of the discrimination, holding "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760. *See also Wyoming v. Oklahoma*, 112 S.Ct. 789, 799 (1992); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988).

Similarly, in *Westinghouse Elec. Corp. v. Tully*, New York imposed a franchise tax on corporations, to include the income of subsidiaries engaged in the export of goods, but then provided a partially-offsetting credit for receipts from exports shipped from a New York place of business. No such credit was provided for products shipped from outside New York. Although the plaintiff in that case, Westinghouse Electric Corporation, actually received a partial credit for that portion of its receipts attributable to exports shipped from New York, it contested the entire tax/credit structure as discriminatory under the Commerce Clause. The Court agreed, holding that the credit provision favored in-state activity over out-of-state activity, creating a strong incentive for corporations to shift a greater percentage of their shipping activities into New York in order to avail themselves of a higher credit. *Westinghouse*, 466 U.S. at 405-06. The fact that the credit was also available to Westinghouse did not save the tax. In fact, the pressure that it created on Westinghouse and other businesses to do more business within New York rather than "among the several States" was precisely the tax's undoing. The New Hampshire tax scheme operates in the same manner, and is unconstitutional for the same reason.

Contrary to New Hampshire's assertions (N.H. Brief, 47), the Seabrook Tax is not rendered any less discriminatory because all the Seabrook utility owners may claim the credit against the New Hampshire Business Profits Tax. New Hampshire has structured the tax so that utilities may benefit from the credit only to the extent that they conduct their business activities in New Hampshire, thereby rewarding corporations for in-state business activities and effectively penalizing them for out-of-state activities. As was the case in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse v. Tully*, the fact that all owners can utilize the credit to the extent that they conduct or shift business into New Hampshire does not *defeat* the plaintiff States' claim of unconstitutionality; it *establishes* it.[12]

B. The Seabrook Tax/Credit Scheme Is Not Internally Consistent.

The unconstitutionality of this tax scheme is underscored by its lack of "internal consistency." This Court first expressly applied the requirement of internal consistency in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983), in the context of proper apportionment of taxes under the second *Complete Auto* factor, and has more recently required it in State taxes which, like the Seabrook Tax scheme, facially discriminate against interstate commerce. *See e.g., American Trucking Ass'ns. Inc. v. Scheiner*, 483 U.S. at 284-86; *Tyler Pipe Indus. Inc. v. Washington Dept. of Revenue*, 483 U.S. at 240-43 (implicitly); *Armco Inc. v. Hardesty*, 467 U.S. at 644-45.

As the Court explained in *Armco*:

> In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983), 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

[12] In fact, the unconstitutionality here is even more apparent than in *Westinghouse*. In *Westinghouse*, the tax and the credit were self-contained, whereas the Seabrook Tax involves a cross-credit between two non-compensating unrelated taxes, with the payment of one tax relieving the obligation of another tax. Significantly, New Hampshire does not even attempt to justify the linkage of the two taxes by claiming that one compensates for the other. *See Tyler Pipe*, 483 U.S. at 242-44; *Armco v. Hardesty*, 467 U.S. at 642-43; *Maryland v. Louisiana*, 451 U.S. at 759.

Contrary to New Hampshire's apparent suggestion (N.H. Brief, 29-30), the fact that the two taxes (property tax and Business Profits Tax) are not compensating does not help New Hampshire's argument; rather, it emphasizes the glaring unconstitutionality of its tax scheme.

> no impermissible interference with free trade. In 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.
>
> *Id.* at 644.

Under this analysis, when examining a tax scheme like New Hampshire's that discriminates on its face against interstate commerce, the Court hypothesizes that every State employs the same taxing scheme as the one under scrutiny. The Court then determines whether a taxpayer would be subject to the risk of multiple taxation if it were to conduct business under this taxing scheme on an interstate basis rather than solely on an intrastate basis. If it would, then the taxpayer need not prove actual discriminatory impact by demonstrating that it is subject to a higher tax burden due to the tax structures of other States. *Tyler Pipe Indus.*, 483 U.S. at 247; *Armco*, 467 U.S. at 644. Rather, the risk of multiple taxation thus created is sufficient to establish the scheme's unconstitutionality. As this Court has explained:

> Any other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.
>
> *Id.* at 644-45 (footnote omitted).

For example, in *Armco*, West Virginia imposed a tax on manufacturing performed in West Virginia, and a separate tax on the gross receipts of companies selling tangible property at wholesale in the state. However, the sales or wholesaling tax created an exemption for West Virginia manufacturers. Therefore, the necessary result of this tax structure was that companies which both manufactured goods and made wholesale sales within West Virginia were subject to only one tax (the manufacturing tax), while those which manufactured out-of-state but sold at wholesale within West Virginia were at risk of paying two taxes: the West Virginia wholesale tax, plus a manufacturing tax to its home State.

Armco, the plaintiff, was not required to prove that it had actually been subjected to two taxes. Rather, the Court assumed for purposes of its analysis that Ohio, Armco's home State, imposed a manufacturing tax identical to West Virginia's, and concluded that the risk of multiple taxation engendered by the West Virginia scheme was sufficient to render it unconstitutional. *Id.*

Similarly, in *Tyler Pipe,* the State of Washington imposed a multiple activities tax on the activities of manufacturing and selling at wholesale within the state, but exempted local manufacturers from the manufacturing tax to the extent that they paid the wholesale tax. The result was that in-state manufacturers who made wholesale sales within Washington paid only one tax, while in-state manufacturers making out-of-state sales, or out-of-state manufacturers making in-state sales, were at risk of paying two taxes.

In finding the Washington tax unconstitutional, the Court assumed that other States imposed a similar tax scheme, and concluded that the risk of multiple taxation for businesses operating on an interstate basis created the same fatal flaw as did the West Virginia tax scheme in *Armco. Tyler Pipe Indus. v. Washington Dept. of Revenue,* 483 U.S. at 248.

The Seabrook Tax operates in a parallel manner, and New Hampshire's assertion that its tax scheme "bears no relation to the taxes invalidated in *Armco* or *Tyler Pipe*" (N.H. Brief, 38) is flatly contradicted by a comparison of the tax structures.

New Hampshire imposes a property tax on the utility owners of Seabrook Station, which "manufactures" or generates electricity in New Hampshire, plus a Business Profits Tax on income apportioned to New Hampshire, measured by property, payroll, and sales attributed to New Hampshire, with an extra emphasis on in-state sales.

As the Special Master found, assuming that other States had the same tax system, the Seabrook Tax/credit combination ensures that Seabrook owners operating entirely intrastate will pay only the property tax and will effectively be exempted from the Business Profits Tax (to the extent of the credit), while Seabrook owners conducting some or all of their business activities (other than ownership of Seabrook Station) outside of New Hampshire will be subject to two taxes: the Seabrook Property Tax and the Business Profits Tax of the other State or States in which their activities are conducted. Final Report, 37-38. The Seabrook Tax structure is thus the parallel of the West Virginia tax structure found unconstitutional in *Armco*, as well as the similar scheme found unconstitutional in *Tyler Pipe*.

New Hampshire's claim that the Special Master, in evaluating the internal consistency of the Seabrook Tax, made "an incorrect assumption" (N.H. Brief, 36-37), demonstrates its fundamental misunderstanding of the concept itself. The Special Master assumed that every State had adopted a tax scheme in which it "allow[ed] a credit for taxes on local nuclear property only against taxes on local business profits," and concluded that, in such an event,

> 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.

Final Report, 37.

This assumption is the correct one, and is similar to assumptions that this Court made in both *Armco* and *Tyler Pipe*. In arguing otherwise, New Hampshire first misstates and then belittles the Special Master's hypothesis by claiming that it requires an assumption that "other States would impose nuclear property tax systems but would have no nuclear property within their borders." (N.H. Brief, 37). Clearly, that is not part of the Special Master's assumption at all. What New Hampshire seeks to do is to inject additional assumptions into the test, *viz.*, that each utility owning nuclear property in New Hampshire would also own nuclear property in every other State in which it conducts business, and would pay a tax on that property sufficient to offset any tax it would owe to that State on its income. Not only do these additional assumptions change the actual situation with the Seabrook Tax, it also is contrary to the analyses engaged in by this Court in *Armco* and *Tyler Pipe*.[13]

The Special Master correctly concluded that, like the tax scheme in *Armco*, *Tyler Pipe*, and *Scheiner*, "[t]he 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." Final Report, 38.

This conclusion is correct and supports the Special Master's Recommendation C that the Seabrook Tax and credit violate the Commerce Clause.

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[13] In both *Armco* and *Tyler Pipe*, the Court hypothesized that all states imposed a tax on manufacturing and a tax on wholesaling. It did not also assume that each state provided a discriminatory exemption for in-state manufacturers that would offset its liability under one of the taxes. Yet New Hampshire argues that the Special Master erred by not making that additional assumption.

C. New Hampshire's Exceptions In Its Brief Are Premised On Its Mischaracterization Of The Nature Of The Seabrook Tax And Its Misapplication Of The Law.

1. In its brief in support of its exceptions to the Final Report, New Hampshire repeatedly misstates the plaintiffs' arguments and the Special Master's analysis, and misapplies the relevant law. But its most serious flaw, which underlies and ultimately distorts its entire argument, is its mischaracterization of the nature of the Seabrook Tax with its concomitant credit against the Business Profits Tax. New Hampshire attempts to separate the two elements of the tax scheme and ignore the fact that the elements are linked inseverably through the language of the credit provision and the express mandate of the Legislature's non-severability clause.[14] Thus, New Hampshire discusses at length cases upholding *ad valorem* property taxes (N.H. Brief, 14-17), and then separately addresses the right of a State to tax properly apportioned income of corporations doing business within its borders. (N.H. Brief, 33-35). In making its argument in this manner, New Hampshire either deliberately or inadvertently misstates the plaintiff States' challenge to the tax, which is that the *linkage* of the property tax and the business profits tax by means of the credit creates an unconstitutional advantage for businesses conducting business on an intrastate basis and a concomitant disadvantage for

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[14] 1991 New Hampshire Laws ch. 354, § 19 provides: Nonseverability. It is the intent of the legislature that sections 1 and 2 [creating the nuclear property tax and credit] of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

businesses as they operate, and precisely to the extent that they operate, on an interstate basis.[15]

Consequently, New Hampshire's discussion of cases dealing with *ad valorem* property taxes standing alone, or with properly apportioned income taxes, is irrelevant to the issues before this Court. The plaintiff States have never claimed that an *ad valorem* property tax falls outside the legitimate taxing authority of a State, despite New Hampshire's apparent claim to the contrary. (N.H. Brief, 14-20). Nor do the plaintiff States question the authority of States to impose taxes on the properly apportioned income of businesses operating within their borders. What the plaintiff States do claim, however, is that *any* tax, no matter how labeled, that imposes a burden on interstate commerce must be assessed in light of the four-factor test of *Complete Auto Transit, Inc. v. Brady*, and that the Seabrook Tax, which consists of *both* the *ad valorem* property tax *and* the nonseverable credit against the Business Profits Tax, cannot satisfy the third *Complete Auto*

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[15] New Hampshire disingenuously describes the credit as simply a "decision not to tax a portion of the business profits that it is clearly entitled to tax," (N.H. Brief, 34-35) and an after-the-fact "excess profits tax." (N.H. Brief, 12). New Hampshire's label does not change the consitutional flaw in its credit scheme. The credits at issue in *Maryland, Westinghouse, Armco, Tyler Pipe, Boston Stock Exch.* could likewise have been labeled "decisions not to tax," but that label would not have changed the result in those cases.

Whatever may have been the constitutional ramifications if New Hampshire had simply repealed its Business Profits Tax or enacted an excess profits tax is unknown, and not before the Court in this case. The fact is, New Hampshire took neither of these options, but instead linked two local taxes by a credit which favors local business activities. This distinction is one of constitutional significance. *See American Trucking Assoc. Inc. v. Scheiner*, 483 U.S. at 305 (Scalia, J., dissenting). It is this system – the one New Hampshire *actually* created – that the plaintiffs have challenged, and that the Special Master concluded was unconstitutional.

factor because it discriminates against interstate commerce.[16]

2. New Hampshire argues that the likelihood that a Seabrook owner would shift business activities to New Hampshire in order to benefit from the credit is "completely unrealistic." (N.H. Brief, 41 n. 19). The identical argument was expressly rejected by the Court in *Boston Stock Exch.*, 429 U.S. at 334 n. 13:

> 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.

3. New Hampshire argues at length that, if the Seabrook Tax scheme is held to be unconstitutional, then "[a] large number of tax credits that have long been widely used by the States would be vulnerable." (N.H. Brief, 49). The Court in *Westinghouse* and *Boston Stock Exchange* flatly rejected similar arguments. *Westinghouse*, 466 U.S. at 406 n. 12;[17] *Boston Stock Exchange*, 429 U.S. at 336-37.

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[16] New Hampshire incorrectly suggests that the plaintiff States' challenge to the constitutionality of the Seabrook Tax is an attempt by the utilities and ultimately their customers to avoid paying "their fair share" of taxes to New Hampshire (N.H. Brief, 9, 11, 20). The plaintiff States have never challenged New Hampshire's authority to tax; they have simply and consistently challenged New Hampshire's authority to tax on an unconstitutional basis.

[17] New Hampshire miscites this passage in *Westinghouse*, focusing on the portion that says "it is not the provision of the credit that offends the Commerce Clause," and somehow ignoring the impact of the following phrase, "but the fact that it is allowed on an impermissible basis." (N.H. Brief, 5, 48-49). It has consistently been the plaintiffs' claim, which was endorsed by the Special Master, that the credit in this case is effectively

Any credit challenged must be evaluated according to Commerce Clause principles. If a credit does not violate these principles, then it will not run afoul of the Commerce Clause.

4. New Hampshire claims that no discrimination has been demonstrated because some non-New Hampshire utilities have benefited from the credit while the New Hampshire utilities, Public Service of New Hampshire ("PSNH"), EUA Power Corporation, and New Hampshire Coop, have realized no profits since the Seabrook Tax was enacted, and have been unable to benefit from the credit thus far. (N.H. Brief, 52-54). This argument misses the point of the plaintiffs' challenge and the Special Master's recommendations.

As discussed above, due to the inherent nature of the Business Profits Tax, the Seabrook credit can only be valuable to the extent that an owner conducts business activities in New Hampshire. New Hampshire's argument that the value of the credit turns on the level of a company's profitability is thus misleading. Clearly, the value of the credit turns, in the final analysis, on the extent that a company conducts business activities within New Hampshire. No matter how profitable a company is in the aggregate, its use of the credit depends on the extent of its business activities in New Hampshire.[18]

The Court should reject New Hampshire's attempt to hinge the constitutionality of the Seabrook Tax on the level of profitability of the utilities. Obviously, a statute's

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allowed on an impermissible basis, *i.e.*, on the basis of the extent of a utility's business activities within New Hampshire.

[18] This principle is illustrated by the example used by the Special Master of two owners similarly situated in all respects except for the amount of income allocated to New Hampshire, based on the percentage of business activities performed there. It is clear from this example that the owner that operates solely intrastate enjoys a distinct tax advantage over the owner that operates on an interstate basis, despite the fact that the two owners have the same level of profits. Final Report, 22-24, 29.

facial constitutionality cannot turn on something so ephemeral as the amount of money a particular corporation earns in a particular year, any more than it can turn on "the shifting complexities of the tax codes of 49 other States." *Armco, Inc. v. Hardesty*, 467 U.S. at 645. The statute cannot be constitutional so long as PSNH is insolvent and become unconstitutional the day PSNH shows a profit. The Special Master recognized this when he found that "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." Final Report, 22 (emphasis in original).

Rather, the facial constitutionality of the Seabrook Tax must be determined by its structure: the operation of the tax and credit *as structured* necessarily provides a benefit to owners *as they conduct their business activities in New Hampshire*. The value of the credit is thus a function of the location of the business activities, not the State of incorporation of the business. Concomitantly, the operation of the tax structure subjects Seabrook owners to the risk and reality of multiple taxation *to the extent that* they conduct their business activities "among the several States," and necessarily exerts a pressure on these owners to conduct these activities in New Hampshire in order to realize the benefit and avoid the burden. Since this is the only result of the tax under any circumstances, the Seabrook Tax on its face discriminates against interstate commerce in violation of the Commerce Clause and should be struck down.

II. THE SEABROOK TAX AND CREDIT VIOLATE 15 U.S.C. § 391 (RECOMMENDATION B)

In Recommendation B of the Final Report, the Special Master concluded that the Seabrook Tax and credit violate 15 U.S.C. § 391 ("Section 391"), the federal statutory provision prohibiting state taxes that discriminate against electricity generated and transmitted in interstate commerce.[19] The Special Master found, first, that the Seabrook Tax is a tax "on or with respect to" the generation or transmission of electricity within the meaning of Section 391, notwithstanding that the tax takes the form of an *ad valorem* tax on property. He found, next, that the Tax and credit discriminate against electricity generated and transmitted in interstate commerce, in violation of Section 391. Both conclusions are correct, and this Court should adopt Recommendation B and declare that the Seabrook Tax and credit violate Section 391.

A. The Special Master Correctly Concluded That The Seabrook Tax Is A Tax "On Or With Respect To The Generation Or Transmission Of Electricity" Within The Meaning Of 15 U.S.C. § 391.

The Special Master rejected New Hampshire's argument that Section 391 does not apply to the Seabrook Tax merely because it takes the form of an *ad valorem* tax on property, concluding correctly that the Tax falls within the federal statute's broad prohibition on discriminatory taxes "on or with respect to" the generation or transmission of electricity. Emphasizing that the Seabrook Tax imposes a tax exclusively on property that is defined

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[19] 15 U.S.C. § 391 (1988) (the codification of Section 2121(a) of the Tax Reform Act of 1976), provides:

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

solely by reference to its use in producing or distributing electricity, the Special Master correctly concluded that, notwithstanding its form as a property tax, the Seabrook Tax "is in substance and reality a tax 'with respect to' generation or transmission of electricity" within the meaning of Section 391. Final Report, 19.

The Special Master's conclusion that the Seabrook Tax falls within Section 391 is consistent with the broad language of the statute.[20] The phrase "on or with respect to" evidences Congress' intent broadly to proscribe any discriminatory state tax affecting generation or transmission of electricity, not only those taxes that are imposed directly "on" generation or transmission. As the Special

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[20] As the Special Master found, in the leading case interpreting Section 391, *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979), the Court did not have occasion to address the meaning of the phrase "on or with respect to," since the New Mexico tax at issue there – a tax on "any person generating electricity" in New Mexico, measured by the volume of electricity generated (*see* 441 U.S. at 143 n. 4) – was "concededly a tax on the generation of electricity." 441 U.S. at 149.

The legislative history of Section 391 does not shed light on the meaning of the phrase "on or with respect to." As the Court explained in *Snead,* the original House bill adopting the Tax Reform Act of 1976 did not contain the provision that was subsequently codified as Section 391. 441 U.S. at 146-47. The Senate Finance Committee added the provision, *see* 441 U.S. at 146-47, which from the time of its origination contained the phrase "on or with respect to" the generation of electricity. *See* H.R. 10612, § 1323; S. Rep. No. 938, pt. I, pp. 437-38, 94th Cong. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 3439, 3865-66. Subsequent amendments to the provision did not alter or otherwise relate to the phrase "on or with respect to the generation or transmission of electricity." S. Rep. No. 1236, 94th Cong. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 4118, 4206. The Congressional debates concerning the provision similarly did not contain any discussion of the phrase. *See* 122 Cong. Rec. 32770 (July 26, 1976); 122 Cong. Rec. 24324-429 (July 28, 1976).

Master recognized, the phrase "with respect to" would be superfluous if the statute were construed too narrowly. Final Report, 18. As he further noted, the breadth of the language "on or with respect to" is echoed in the statute's broad definition of discrimination to include both taxes that "directly" and "indirectly" result in a greater tax burden on electricity in interstate commerce. *Id.* Moreover, Congress' choice of the words "with respect to" is indicative of its intent that the provision be construed broadly. That phrase "customarily signals broad application." *Id. See also Morales v. Trans World Airlines,* ___ U.S. ___, 112 S.Ct. 2031, 2036-37 (1992) (broadly construing phrase "relating to" in preemption provision of Airline Deregulation Act); *Ingersoll-Rand Co. v. McClendon,* ___ U.S. ___, 111 S.Ct. 478, 482-83 (1990) (use of the phrase "relate to" in ERISA preemption provision evidenced Congress' intent as to breadth of ERISA preemption).

The Seabrook Tax clearly falls within Section 391's broad prohibition of discriminatory taxes "on or with respect to" the generation or transmission of electricity. By its very terms, the Tax falls exclusively on property defined solely by reference to its use in generating and transmitting electricity; the tax defines "nuclear station property" (the only property subject to the tax) as property used "in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." R.S.A. 83-D:2.[21] The Tax does not fall on property used for any other purpose. Although New Hampshire throughout its brief attempts

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[21] The full text of the provision defines "nuclear station property" as:

> land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

R.S.A. 83-D:2.

to depict the Tax as a common property tax, even it concedes that the Tax was imposed because of concerns over the activity conducted on the property, *i.e.*, the generation of electricity through nuclear power. (N.H. Brief, 6-8). It is that activity to which Section 391 is addressed.

In its practical operation as well, the Tax clearly concerns generation and transmission of electricity. The Seabrook Station, the only "nuclear station property" in New Hampshire, generates electricity for distribution in New England. Stip. ¶¶ 3.2, 3.3, 6.6-6.15. The Tax is paid by electric utility companies (the joint owners of Seabrook) whose business is the distribution of electricity generated at Seabrook to wholesale and retail customers in New England, including the plaintiff States. Stip. ¶¶ 5.6-5.25. The Tax can be, and in many instances already has been, passed through to consumers, thus imposing a "tax burden" on electricity. *Id.* Final Report, 19.

New Hampshire's argument to the contrary should be rejected. In the first place, New Hampshire's restrictive interpretation of Section 391 is at odds with the broad language of the statute, which prescribes taxes "on *or* with respect to" generation or transmission and which either "directly *or* indirectly" result in discrimination (emphasis added).[22] New Hampshire has pointed to

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[22] New Hampshire argues that the language "with respect to" should be construed narrowly, citing two lower federal court cases, both of which are inapposite. (N.H. Brief, 56-57). *Henshel v. Guilden*, 300 F. Supp. 470, 472 (S.D.N.Y. 1969), held that a declaratory action to determine which of two entities was liable for a federal tax assessment did not fall within the exception to the Declaratory Judgment Act for cases "with respect to Federal taxes," since the action did not seek a determination as to either the existence or the extent of federal tax liability, but only which of two entities was liable for the otherwise unchallenged assessments. *King v. United States*, 390 F.2d 894, 914 (Ct. Cl. 1968), *rev'd on other grounds*, 395 U.S. 1 (1969), similarly held that a declaratory action to determine the plain-

nothing in the legislative history of Section 391 to suggest that Congress intended that statute to be so narrowly construed, or to apply *only* to the New Mexico tax at issue in *Snead*.

Further, New Hampshire cites no authority for its proposition that a tax "on" generation must necessarily vary with the output or use of a power plant, and common sense requires the contrary conclusion. Thus, for example, a flat tax of $500 on "any person who generates electricity" clearly would be a tax "on" generation, but such tax would not vary with the level of electricity produced. In any event, the fact that the Seabrook Tax does not vary with output is irrelevant, since Section 391 broadly prohibits not only discriminatory taxes "on" generation or transmission but also discriminatory taxes "with respect to" generation or transmission, language that encompasses the New Hampshire tax irrespective of its form as a property tax.

Finally, New Hampshire's attempt to rely on language in *Snead* in support of its argument that Section 391 does not apply to property taxes is unavailing. New Hampshire cites the Court's statement that "[t]o look narrowly to the type of tax the federal statute names . . . is to be faithful not only to the language of the statute but also to the expressed intent of Congress in enacting it." (N.H. Brief, 59 (quoting *Snead*, 441 U.S. at 149-50)). But in the quoted statement, the Court was not addressing the issue of the scope of the language "on or with respect to the generation or transmission of electricity." Rather, the Court made the statement in the context of its discussion as to whether Section 391 was coextensive with the Commerce Clause. *See* 441 U.S. at 149-50. As

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tiff's right to a disability retirement did not fall within the exception in the Declaratory Judgment Act for cases "with respect to" Federal taxes, since the action did not seek a determination as to the plaintiff's tax liability. Neither of the cases stands for the proposition that the phrase "with respect to" should be construed narrowly.

noted above, *see supra* note 20, the Court in *Snead* did not consider the scope of the language "on or with respect to the generation or transmission of electricity," and nothing in the Court's opinion supports New Hampshire's argument that Section 391 does not apply to property taxes.[23]

B. The Special Master Correctly Concluded That The Seabrook Tax And Credit Violate 15 U.S.C. § 391.

The Special Master concluded that the Seabrook Tax and credit, in combination, result 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," in violation of Section 391. Final Report, 20. In reaching his conclusion, the

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[23] Neither of the two state cases that addressed the issue of the applicability of Section 391 aid New Hampshire's narrow construction of the statute. *Nevada v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984), held that a tax on the value of the right to receive electric power was encompassed within Section 391. The Court reasoned that although the tax in question "purports to tax only the value of the right to receive electricity, the difference is one without a distinction" since the tax "directly impacts on the transmission of electricity to [California cities], who in turn, must increase the cost of electrical power to their resident consumers." 100 Nev. at 603, 691 P.2d at 848.

Pacific Power & Light Co. v. Martana Dept. of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 493 U.S. 1050 (1990), held that Montana's beneficial use tax on the use of federally owned tax-exempt transmission lines was not encompassed within Section 391 because it was not a tax "upon" generation or transmission of electrical power, but rather a tax on the use of facilities. 237 Mont. at 91-92, 773 P.2d at 1185. The Montana court was not, however, considering a tax on "Nuclear Station Property" defined by reference to property used solely for generation and transmission of electricity. The Montana court did not address the meaning of the phrase "or with respect to."

Special Master found that the Seabrook Tax scheme "replicates the flaw identified by this Court in the New Mexico Electrical Energy Tax scheme" at issue in *Snead*, insofar as the New Hampshire tax statute, like the New Mexico tax statute, allows a credit against a separate tax assessed on "inherently" in-state activity – the gross receipts tax on intrastate sales of electricity, in the case of New Mexico, and the Business Profits Tax, in the case of New Hampshire. Final Report, 20. Drawing on hypothetical examples as well as on facts in the stipulated record concerning the actual operation of the Seabrook Tax and credit, the Special Master demonstrated how the Tax and credit impose a greater burden on "manufacturers, producers, wholesalers, [and] retailers" of electricity generated and transmitted interstate commerce, and against their customers as "consumers," in violation of Section 391. Final Report, 24.

The Special Master correctly concluded that the Seabrook Tax and credit violate Section 391.[24] The "critically material feature" of the Tax and 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)." Final Report, 22. Consequently, the New Hampshire tax statute "ensures that [a utility that allocates all of its income to New Hampshire] 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." Final Report, 22.

The Seabrook Tax scheme suffers from the same discriminatory defect as the New Mexico electrical energy

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[24] The Special Master rejected the alternative argument asserted by the Intervenors (but not raised by the plaintiff States) that the Seabrook Tax, standing alone without the credit, discriminates in violation of Section 391. Final Report, 19 n. 11.

tax at issue in *Snead*:[25] "allowance of a credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce. Payers 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. Payers 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." Final Report, 20-21 (footnotes omitted).

The Court in *Snead* held that the Electrical Energy Tax violated Section 391, because the effect of the tax was to discriminate against sales of electricity made outside New Mexico. The discriminatory effect of the tax resulted from the fact that

> a generating company's 2% tax is completely offset by the credit against the 4% retail sales tax when its electricity is sold within New Mexico. But to the extent that the electricity generated in New Mexico is not sold at retail in the State, there is no gross receipts tax liability against which to offset the electrical energy tax liability of the generating company.

441 U.S. at 145.

The Court found that the New Mexico tax "is concededly a tax on the generation of electricity." 441 U.S. at 149. Furthermore,

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[25] The New Mexico Electrical Energy Tax imposed a 2% energy tax "on any person generating electricity" within the state. 441 U.S. at 143 n. 4. The tax applied to electricity generated in New Mexico and sold either within or outside the state. *Id*. The Act further provided that the Electrical Energy Tax could be credited against a company's tax liability under the state's general gross receipts tax (a 4% tax that applied to retail sales of electricity within New Mexico) when the electricity was generated and consumed within New Mexico.

> [t]he tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State. To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-50 (emphasis in original) (footnote omitted).[26]

Because sales are one component of the three-part allocation formula upon which New Hampshire's Business Profits Tax is based (and likewise are one component of the similar allocation formulas used to measure taxable income in each of the plaintiff States, see Conn. Gen. Stat.

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[26] Because the Court in *Snead* concluded that the New Mexico statute was invalid under Section 391, it did not reach the plaintiff's claim under the Commerce Clause and other constitutional claims. 441 U.S. at 146. The remarks of several Senators during the floor debate suggest an independent reason for enacting Section 391 even if the federal statute was, as New Mexico had argued, no more than an affirmative statement of the protection afforded by the Commerce Clause; Senators Fannin, Goldwater, and Cranston indicated their hope that enactment of the federal statutory prohibition would resolve the issue of discrimination on interstate electricity sooner than the constitutional issues could be resolved in the then-pending state court challenge to the New Mexico tax. *See* 122 Cong. Rec. 24327-29 (July 28, 1976). *See*, e.g., statement of Senator Cranston that consumers outside New Mexico "should not have to wait for years of litigation for relief." 122 Cong. Rec. 24327.

§§ 12-213, *et seq.*; Mass. Gen. L. ch. 63, § 52A; R.I. Gen. Laws §§ 41-13-1, *et seq.*; Stip. ¶ 2.4), sales of electricity in New Hampshire necessarily enable an owner to derive greater benefit from the credit provision than would sales outside the state. The New Hampshire credit provision thus "*itself* indirectly but necessarily discriminates against electricity sold outside [New Hampshire]," 441 U.S. at 150, and so violates Section 391.

The discriminatory effect of the credit provision is illustrated by the hypothetical scenario set forth in the Final Report, as well as by the actual operation of the Tax as shown by facts drawn from the stipulated record, and cited by the Special Master. *See* Final Report, 22-24, 29-33, and Appendix C. As the Special Master concluded, the less a joint owner's income is allocable to New Hampshire, the less benefit that owner is able to derive from the credit. This "greater relative 'burdening' " of certain owners, solely because they conduct less business activity in New Hampshire, "results 'indirectly from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391.' " Final Report, 24.

New Hampshire takes exception to the Special Master's conclusion that the Seabrook Tax and credit violate Section 391, arguing that his conclusion is foreclosed by his finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." (N.H. Brief, 59 (quoting Final Report, 16)). Apparently misunderstanding the import of the foregoing finding, New Hampshire then goes on to assert that "[t]he evidence established and the Special Master agreed that there is no greater tax burden on electricity transmitted to utilities and customers in the Plaintiff States than on electricity transmitted to utilities and their New Hampshire customers." (N.H. Brief, 59).

Once again, New Hampshire misses the point. The Special Master found that the property tax provision of the Seabrook Tax scheme standing alone "even handedly affects interstate and intrastate commerce," insofar as it is "assessed on all owners of Seabrook in direct proportion to their ownership interests, regardless of final destination of Seabrook electricity." Final Report, 20. However, he went on to conclude that the tax in combination with the credit provision results in discrimination by ensuring 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)." *Id.* at 22. Contrary to New Hampshire's assertion, the Special Master expressly determined that the tax and credit result in a greater burden on electricity transmitted in interstate commerce: "[t]his greater relative 'burdening' " of owners who engage in less business activity in New Hampshire "results directly from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391." Final Report, 24.

New Hampshire also challenges the Special Master's conclusion by attempting to distinguish *Snead*, arguing that the tax credit provided by the New Mexico statute was unavailable to "out-of-state interests." (N.H. Brief, 61). New Hampshire goes on to quote the Court's statement in *Snead* that the New Mexico tax statute allowed a credit only for electricity generated and consumed in New Mexico, thereby ensuring that " 'locally consumed electricity is subject to no tax burden . . . while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State.' " (N.H. Brief, 61 (quoting *Snead*, 441 U.S. at 149)). But far from providing a basis upon which to distinguish *Snead*, the quoted statement only serves to highlight that the New Hampshire tax statute "replicates the flaw," *see* Final Report, 20, of the New Mexico tax statute, by ensuring that an owner of Seabrook necessarily derives a greater benefit from the credit provision for electricity generated and consumed in New Hampshire than for electricity generated and consumed outside the state.

The fact that the text of the New Mexico statute specified that the credit was available only for electricity consumed within the state does not distinguish the New Mexico tax from the tax at issue here; as the Special

Master explained, the same discrimination would have resulted in the absence of such language, since the gross receipts tax against which the credit was available itself applied only to receipts from electricity sold within New Mexico. Final Report, 20-21 n. 12. The New Hampshire tax statute, by allowing a credit against a tax assessed only on local activity – the Business Profits Tax – likewise ensures that the credit is available only as an owner shifts taxable business activity (and therefore income) to New Hampshire. The greater burden on interstate electricity that results from the credit provision violates Section 391.[27]

III. THE REFUNDING OF ALL SEABROOK TAX PAID LESS THE CREDITS TAKEN AGAINST THE BUSINESS PROFITS TAX IS THE PROPER REMEDY (RECOMMENDATION D)

The Special Master recommended that the Court apply its decision in this case retrospectively, and "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." Final Report, 39. At the outset of this case, New Hampshire conceded that the same remedy would be appropriate. (N.H. Brief in Opp., 26). For the reasons that follow,

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[27] New Hampshire further seeks to distinguish *Snead* on the basis that the tax credit available under the New Mexico statute "was certain to provide a dollar for dollar benefit to the favored local interests in every case" because both the generating tax and the gross receipts tax in effect were measured by gross receipts. (N.H. Brief, 61). The effect of the New Hampshire Tax statute instead varies depending on the extent of income allocable to New Hampshire, the profitability of a Seabrook owner in any given year, and the owner's percentage share of Seabrook. Final Report, 21. As the Special Master correctly concluded, that fact only affects the *extent* of discrimination, not its existence. *Id.*

the plaintiff States urge this Court to adopt Recommendation D.

A. There Is No Basis For Limiting Relief To A Prospective Application.

The retroactive application of the finding of unconstitutionality is appropriate in this case, given the clear and unique language of the New Hampshire statute and established doctrine regarding retrospective relief. Thus, the plaintiff States urge this Court to adopt the recommendation of the Special Master on this point.

New Hampshire contends that refunds would be an inappropriate remedy under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Although the continued vitality of this case has been called into question following *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439 (1991), as well as in the pending case of *Harper v. Virginia Dept. of Taxation*, Supreme Court Docket No. 91-794, *Chevron* provides no basis for New Hampshire's claim that retroactive relief is inappropriate. Under *Chevron*, the Court considered three factors in determining whether a retroactive remedy is appropriate:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may 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 [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for

> avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron, 404 U.S. at 106-07 (citations omitted).

The first of the three is most critical and is a threshold that must be met. If the determination of invalidity is to be given merely prospective application, as New Hampshire urges, then it is incumbent upon New Hampshire to prove that a new principle of law has been established – and this it cannot do. As discussed above, the invalidity of the Seabrook Tax is the result of the application of principles easily derived from a series of cases of this Court in which state taxes have been struck down as favoring in-state interests. *Boston Stock Exch. v. State Tax Com'n.*, 429 U.S. 318; *Westinghouse Electric Corp. v. Tully*, 466 U. S. 388; *Armco, Inc. v. Hardesty*, 467 U.S. 638; *Tyler Pipe Industries v. Washington Dept. of Revenue*, 483 U.S. 232; *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266. Therefore, this case is similar to *Ashland Oil Inc v. Caryl*, ___ U.S. ___, 110 S.Ct. 3202, 3205 (1990), in which the Court held that *Armco*, although "unquestionably contribut[ing] to the development of our dormant Commerce Clause jurisprudence," was to be given retroactive effect.

> *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil, supra*, 404 U.S., at 106, 92 S.Ct., at 355. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," *id.*, at 257, 107 S.Ct., at 2825 (Scalia, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

Id.

In light of the clear precedents supporting the plaintiffs in this case, any claim by New Hampshire that a finding of unconstitutionality as to its Seabrook Tax "was not clearly foreshadowed" is truly specious. Since New Hampshire has failed to meet the threshold test of the first prong of *Chevron*, there is no basis to deny refunds in this case.

B. There Is No Basis Under The *McKesson* Decision To Refrain From Ordering Refunds.

In *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the Court held that a Florida liquor excise tax favored local over out-of-state products and thus violated the Commerce Clause. The Court declined to order refunds, but instead remanded the case to the state court for further proceedings to address the appropriate remedy for the unlawful discrimination, *e.g.*, refunds to injured taxpayers or retrospective imposition of taxes upon those who had benefitted from the discrimination.

A comparable resolution here is not appropriate under the unique circumstances of this case. First, the Legislature of New Hampshire has already stated in its legislation that the imposition of the Seabrook Tax is to be inextricably bound to the allowance of the credit to offset liability under its Business Profits Tax. The remedy of refunds is mandated by the clear language of the nonseverability clause of the New Hampshire statute itself:

> Nonseverability. It is the intent of the legislature that sections 1 [enacting the Tax on Nuclear Station Property] and 2 [enacting the credit for the Business Profits Tax] of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is

> declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

1991 New Hampshire laws, Ch. 354:19.[28]

This statutory declaration stands in stark contrast to the provision immediately subsequent to the non-severability clause, which makes severable all other provisions of the Act *except for* the Seabrook property tax and credit provisions. Ch. 354:20.

The New Hampshire Legislature has thus stated that if the credit provision (section 2) is invalid, then the tax (section 1), by the terms in the very legislative act that creates it, must be held invalid. New Hampshire, having contemplated the possibility of its tax or credit provision being held invalid, has already spoken, making remand unnecessary and inappropriate.

Second, New Hampshire has already spoken on the issue of refunds in another way. In its Brief in Opposition to Motion for Leave to File Complaint, at 26, filed with the Court in this case, New Hampshire opposed a preliminary injunction, stating:

> In fact, any taxes found to have been wrongly collected would be refundable, with interest, under New Hampshire law (App. 75A; R.S.A. 83-D:10), and the ratepayers, it is expected, could be reimbursed in rates for any overcollections.[29]

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[28] New Hampshire's attempt to rewrite the nonseverability clause by claiming that it should only be applied prospectively (N.H. Brief, 69) is contrary to the plain language of the statute and to any common sense interpretation of this and any nonseverability clause.

[29] It is noted that R.S.A. 83-D:10 was repealed as of May 19, 1992, and subsequent to the initiation of the action. Such legislation should have no effect on the present case, based upon R.S.A. 21:37: "Effect of Repeal. The repeal of an act shall in no case affect any act done, or any right accruing, accrued, acquired or established, or any suit or proceeding had or com-

Lastly, the Special Master correctly states that since this case is an original jurisdiction action, there is no other tribunal to which remand is possible. Final Report, 43. This Court, acting as both trial court and court of last resort, should itself provide complete and final relief.

In summary, in the specific circumstances of this case, the refund recommended by the Special Master is the proper remedy.

C. The Eleventh Amendment Is Not A Bar To The Ordering of Refunds.

Contrary to New Hampshire's claim (N.H. Brief, 69), the Eleventh Amendment is not a bar to the refunding of taxes collected, under the specific and unique facts in this proceeding.

The Eleventh Amendment does not bar original actions, including actions for refunds, *Maryland v. Louisiana*, 451 U.S. at 745 n. 21. This Court stated "an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually seeking to recover for injuries *to specific individuals." Id.* (emphasis added).

The plaintiff States did not bring this action on behalf of "specific individuals." Rather, the plaintiff States invoked this Court's jurisdiction solely to protect themselves as consumers of electricity and, as *parens patriae*, millions of their citizens, from the harm of electric rates increased by taxes improperly imposed by New Hampshire upon the sellers of the electricity. Contrary to New Hampshire's suggestion (N.H. Brief, 70-71), the ratepayers will be fully entitled to a refund in their names if the utilities receive a refund on their taxes. *See, e.g.*, Mass. Gen. L. ch. 164, § 94G.

Neither the existence of the utility-owners of the Seabrook plant as intermediaries or nominal taxpayers of

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menced in any civil case, before the time when repeal shall take effect."

the Seabrook Tax, nor their participation here as intervenors changes the nature or purpose of this proceeding in any way. *Arizona v. California*, 460 U.S. at 613-14; *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981). The ordering of a refund of an invalid tax is within the Court's authority pursuant to its jurisdiction to hear cases between States, pursuant to Article III, Section 2 of the Constitution, and is not prohibited by the Eleventh Amendment.

IV. THE COURT SHOULD RETAIN JURISDICTION OF THE CASE (RECOMMENDATION A)

The Special Master concluded that the case "remains appropriate for the exercise of the Court's original jurisdiction." Final Report, 15. New Hampshire's exception to this recommendation is premised on the same mischaracterization of both the Seabrook Tax and credit scheme and the plaintiff States' challenge to it that has permeated its Brief in Support of Exceptions to the Special Master's Report. (N.H. Brief, 74-78). The Court should reject this argument and retain jurisdiction of the case.

This Court has recently noted that, while it surely has the power in original jurisdiction cases to reassess and ultimately reverse its grant of jurisdiction following receipt of the Special Master's Report, it will not do so unless it is "convinced" that it was "clearly wrong in accepting jurisdiction" in the first place. *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. at 796. At the least, New Hampshire bears the burden to show a "change of circumstances, whether of fact or law[,]" that would justify dismissal of the complaint at this late stage. *Id.* New Hampshire has not made, and cannot make, such a showing.

A. The Plaintiff States Have Standing To Maintain An Original Action Against The Seabrook Tax.

When the plaintiff States sought to invoke the Court's original jurisdiction, they premised their standing on two separate injuries: injury to themselves in their proprietary capacities, and injury to substantial portions of their general populations, whom they represent in their *parens patriae* capacities. (Plaintiffs' Brief in Support of Motion to File, 15-19). This Court granted the States' motion on this basis, despite New Hampshire's objections that, *inter alia,* the plaintiff States lacked standing to bring the action because they did not directly pay the tax and had suffered no harm from the payment of the tax by the utilities. (N.H. Brief in Opp., 7-9).

Subsequent events have only reaffirmed the appropriateness of the Court's exercise of jurisdiction. The stipulated facts show that the plaintiff States are indeed "substantial consumers" of electricity whose costs have increased as a result of the Seabrook Tax, Stip. ¶¶ 5.2-5.8; 5.11-5.13; 5.15-5.20; 5.23; 5.32-5.36, and that millions of consumers in the plaintiff States have already paid and continue to pay the Seabrook Tax in their rates. Stip. ¶¶ 5.2-5.13; 5.15-5.20; 5.23-5.24. *See Maryland v. Louisiana,* 451 U.S. at 739. These consumers will bear approximately $10-15 million in annual additional costs as a result of the unconstitutional tax-and-credit scheme, Stip. ¶¶ 4.1-4.5, 5.1-5.31, and these annual costs will recur for the expected thirty-five year life of the Seabrook Station. Stip. ¶ 3.2.

As the Special Master concluded, the plaintiff States' alleged injury "fairly can be traced to the challenged action of the defendant[.] That asserted wrong in turn would furnish[] ground for judicial redress[.]" Final Report, 16 (internal quotation marks and citations omitted).

Because the plaintiff States have established such an injury, they have standing to bring this action and the Court should retain jurisdiction over this case. *Maryland v. Louisiana,* 451 U.S. at 735-45; *Wyoming v. Oklahoma,* 112 S.Ct. at 798-800.

B. No Changed Circumstances Support Dismissal Of The Complaint At This Late Stage Of The Case.

In seeking to reverse the grant of original jurisdiction, New Hampshire argued to the Special Master, and argues again to this Court, that "changed circumstances" have now rendered this case inappropriate for original jurisdiction. Specifically, New Hampshire argues that "[p]laintiffs, the States of Connecticut, Massachusetts and Rhode Island are not Nuclear Property Tax payers and their citizens as consumers are not bearing a higher New Hampshire tax burden than consumers in New Hampshire." (N.H. Brief, 74).

The Special Master rejected this argument, concluding that the case remained appropriate for the Court's exercise of original jurisdiction. Final Report, 16-17. The plaintiff States urge the Court to reject New Hampshire's argument and adopt the Special Master's Recommendation A because (1) the Court has already rejected the same argument made by New Hampshire in opposing plaintiffs' Motion for Leave to File the Complaint, (2) the argument is "an argument on the merits rather than an assertion of a jurisdictional flaw," Final Report, 16, and (3) New Hampshire's argument mischaracterizes the claim of the plaintiff States and the findings of the Special Master.

First, New Hampshire's sole exception to original jurisdiction was also made in its opposition to the plaintiff States' motion for leave to file their complaint. In that opposition, New Hampshire specifically addressed the relative rates for electricity paid by New Hampshire and other States' consumers, stating that New Hampshire consumers would pay the Seabrook Tax in their rates, and that New Hampshire utilities would be unable to benefit from the credit while some "out-of-state" utilities would likely employ at least some of the credit. (N.H. Brief in Opp., 23-24). The plaintiff States did not contest these facts in 1991, nor do they contest them now, but neither fact undermines the original jurisdiction of the Court, and neither fact constitutes a "changed circumstance" that supports dismissal of the case at this late stage.

Second, the Special Master correctly described New Hampshire's argument as "an argument on the merits rather than an assertion of a jurisdictional flaw." Final Report, 16. Indeed, when New Hampshire made the same point in its Brief in Opposition to Motion for Leave to File Complaint (22-24), it included the point in a section on the merits. The argument addresses the merits of plaintiffs' claim of a discriminatory tax, not their jurisdictional claim of a "controversy between two or more States" under Article III, Section 2, and 28 U.S.C. § 1251(a). The Special Master therefore correctly concluded that payments by New Hampshire consumers in 1991 and 1992 did not affect the standing of the plaintiff States or the existence of a case or controversy. The Special Master found that "the Plaintiff States and Intervening Utilities assert sufficient injury" to create standing and "furnish ground for judicial redress." Final Report, 16 (citations omitted).

Third, the Court should reject New Hampshire's alleged "changed circumstances" because its argument mischaracterizes plaintiffs' claim and the findings of the Special Master. New Hampshire relies on stipulated facts showing that New Hampshire consumers have paid the Seabrook Tax in their rates, and that New Hampshire utilities have been unable to utilize the credit thus far due to lack of profitability or exemption. (N.H. Brief, 75). New Hampshire then argues that these facts demonstrate that out-of-state consumers have not been burdened by the Seabrook Tax and cites the Special Master's finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." Final Report, 16.

New Hampshire's argument in this regard ignores the crux of the plaintiff States' claim of discrimination and the conclusions of the Special Master. Contrary to New Hampshire's arguments, the Special Master did *not* find (1) that the relative burden of the Seabrook Tax on in and out-of-state consumers will remain the same for the life of the tax, or (2) that consumers in the plaintiff States have not borne a greater *total* burden, when taxes in all States are considered. Rather, he concluded that the ultimate and inevitable effect of the Seabrook Tax and credit scheme will be to reduce the total burden on ratepayers in New Hampshire who are likely to buy electricity from a company that conducts substantial business in New Hampshire, and that the Seabrook Tax credit " 'backstopped' any intrastate utility, *guaranteeing* that, no matter what its profit picture or tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid." *Id.* (emphasis in original). New Hampshire has ignored the latter finding, and mistakenly suggests that the Master found that the relative burdens of the Seabrook Tax on consumers in all States will always be the same, and that there is no current discrimination against non-New Hampshire consumers. The Master correctly rejected both of these arguments, and determined that, in any event, they do not affect the Court's original jurisdiction.

C. The Special Master Correctly Concluded That All Other Relevant Factors Support Original Jurisdiction.

As discussed above, the Special Master correctly rejected New Hampshire's claim that "changed circumstances" have rendered this case inappropriate for original jurisdiction. Indeed, the Special Master added that "this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted." Final Report, 17. In reaching this conclusion, the Special Master correctly applied the factors that inform the Court's discretionary judgment to exercise its original jurisdiction:[30]

> 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.

Final Report, 17.

Significantly, New Hampshire has not challenged the exercise of jurisdiction on any of these grounds.

In summary, no changed circumstances support the dismissal of this case at this late stage. The Special Master correctly recommended that "this Court retain jurisdiction of this most pressing and serious matter," *id.*, and the plaintiff States urge this Court to adopt that recommendation.

CONCLUSION

For all the foregoing reasons, the Court should adopt Recommendations A through D of the Special Master, retain its original jurisdiction, and enter judgment for the

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[30] *See Mississippi v. Louisiana*, ___ U.S. ___, 113 S.Ct. 549, 552-53 (1992); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citations omitted); *Wyoming v. Oklahoma*, 112 S.Ct. at 798 (referring to "prudential" and "equitable" standards). *But see California v. West Virginia*, 454 U.S. 1027, 1028 (1981) (Stevens, J., dissenting from order denying motion for leave to file complaint); *Wyoming v. Oklahoma*, 112 S.Ct. at 811 n. 1 (Thomas, J., dissenting).

plaintiff States in accordance with the recommendations of the Special Master.

Respectfully submitted,

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