No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

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TABLE OF CONTENTS

Page

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

A. The Special Master's Conclusion That There Is A Difference Between Nuclear And Non-Nuclear Plants Was Supported By The Record 7

B. Intervenors Did Not Meet Their Burden Of Proof That A Property Tax Discriminates Against Interstate Commerce 12

C. Intervenors' Attempted Distinctions Of The Cases Relied On By The Special Master Are Unavailing .. 15

D. Intervenors' References To Comments By One State Legislator Are Irrelevant 19

E. New Hampshire Is Exercising Its Rights Under *McKesson* 21

F. Conclusion 23

APPENDIX 1-A

TABLE OF AUTHORITIES

Page

Cases:

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 5, 11, 16-18, 20

Complete Automobile Transit Inc v. Brady, 430 U.S. 274 (1977) 6-8, 11, 17-18

Cotton Petroleum Corporation v. New Mexico, 104 L. Ed. 2d 209 (1989)..... 12

Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980)..... 11

Goldberg v. Sweet, 109 S. Ct. 582 (1989)..... 11

Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922) . 19

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)..... 6, 21

Nordlinger v. Hahn, 112 S. Ct. 2326 (1992)..... 5, 15-17

Spector Motor Service v. O'Connor, 340 U.S. 602 (1951)..... 17

West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991) 19

Constitution and Statutes:

Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 ..... 2-3, 5, 15-18, 23

U.S. Const. Art. VI, cl. 2 2

15 U.S.C. § 391 ..... 2-3, 6, 18-19, 23

N.H. Rev. Stat. Ann. 83-D:1 10

Miscellaneous:

House Bill 64 Hearing (May 2, 1991) 20

Intervenors' Exceptions 9, 14

Intervenors' Brief 5, 10, 11-14, 16-17, 19

Litigation Management Order No. 4 8

New Hampshire's Brief in Support of Exceptions ... 4, 21-22

Plaintiffs' Reply Brief 3

Reply Brief For Intervenors 3

Final Report of the Special Master 3-8, 18, 22

Stipulation 9-10, 13-15, 20-21

Transcript of Argument, 12/8/92 3

Transcript of Meeting of Counsel 9/9/92 8

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QUESTION PRESENTED

Whether the record established that the New Hampshire Tax on Nuclear Station Property statue, by itself, is invalid under the Commerce Clause of the United States Constitution or under 15 U.S.C. § 391.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the Constitution of the United States provides as follows:

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

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

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

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

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

STATEMENT OF THE CASE

Plaintiffs, the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut, argued before the Special Master that New Hampshire's Nuclear Station Property Tax statute violated the Commerce Clause and 15 U.S.C. § 391 because it allowed Seabrook owners to claim a credit against their New Hampshire business profits tax obligation. As Plaintiffs stated in their brief to the Special Master: ". . . the discrimination in this case arises from the interplay of the *ad valorem* tax with the credit against the Business Profits Tax." Plaintiffs' Reply Brief at 14. Intervenors' principal argument was also that the combination of the tax and the credit violated the constitution and Section 391. They stressed to the Special Master that "our facial challenge is to the tax *and* the credit." Reply Brief For Intervenors at 5.

Intervenors raised an additional, "fallback," argument before the Special Master that New Hampshire's Nuclear Station Property Tax, by itself, discriminated against interstate commerce. The Special Master's Final Report notes that Plaintiffs did not advance this argument. Final Report at 13. Intervenors themselves gave it little emphasis. Indeed, their counsel conceded at oral argument, when asked by the Special Master for "the best case" supporting the fallback theory, that "I don't think there is a case in point." Transcript of Argument, 12/8/92 at 34.

Nonetheless, the Special Master considered Intervenors' fallback argument and rejected it, concluding that "the Seabrook Tax standing alone (without the credit) [is not] violative of the Commerce Clause." Final Report at 26 n.17. The Special Master reached the same conclusion under Section 391, recommending rejection of Intervenors' "alternative contention that the Seabrook tax alone, without the credit" violates 15 U.S.C. § 391. Final Report at 19 n.11.

In recommending rejection of Intervenors' unprecedented challenge to an *ad valorem* property tax, the Special Master followed the long line of decisions discussed in Section A, pages 13-22, of New Hampshire's Brief In Support Of Exceptions. Those authorities establish that New Hampshire is entitled to impose property taxes and to determine classifications of property subject to taxation. As Intervenors have acknowledged, no case has ever held that a property tax, standing alone, discriminates against interstate commerce. Despite all these factors, Intervenors have filed an exception to the portions of the Special Master's Final Report dealing with the fallback argument and this brief responds to that exception.

SUMMARY OF ARGUMENT

The Special Master concluded that there was a difference between nuclear and non-nuclear generating plants and that New Hampshire could impose a property tax on one and not the other. The record supports this conclusion because it reflects that New Hampshire is responsible for the health and welfare of its citizens; that the Seabrook communities lack resources to deal with emergencies at the plant and that the resources of State government could therefore be called upon, just as they were in Pennsylvania and New Jersey when the Three Mile Island accident occurred. The record also indicates that the property tax revenue is deposited where it belongs — in the State's General Fund — which is used to finance police, fire and general welfare expenditures of the type that Seabrook might require. The evidence demonstrates that special funds, such as the decommissioning fund, mentioned by Intervenors are likely to be inadequate if early decommissioning is necessary or if other events make the estimates on which deposits into the fund were based incorrect.

Even more evidence that nuclear plants impose special risks and burdens would have been introduced in this case but it was

not necessary to do so. It was not necessary because Plaintiffs and Intervenors stipulated that the Nuclear Property Tax was fairly related to the State's services. In reliance on that stipulation, New Hampshire agreed to streamline the factual presentation in order to meet the Special Master's goal of expediting submission of the case.

Intervenors' argument that, despite the differences between nuclear and non-nuclear property, New Hampshire lacked the power to impose a tax on nuclear property is based on assertions that are not supported by the record. Intervenors assert that Seabrook is predominately engaged in interstate commerce and is owned primarily by out-of-state businesses. The record establishes that Seabrook is engaged in substantial intrastate commerce and that a large percentage of Seabrook's output goes to New Hampshire. Moreover, approximately 50% of the plant is owned by New Hampshire corporations, each of which pays the tax.

Although Intervenors' argument is primarily based on factual assertions, they also seek to distinguish the decisions on which the Special Master relied. Their distinctions are unavailing. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), strongly supports the Final Report's recommendation that New Hampshire's classification be upheld. The differences between nuclear and non-nuclear property that support the statute's classification under the Equal Protection Clause would support it under the Commerce Clause as well.

Intervenors acknowledge that *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), holds that a State tax may fall "predominately on interstate commerce" without violating the Commerce Clause and that a property tax could be imposed on electrical generating plants, even if the electricity produced "largely traveled out of state." Intervenors' Brief at 15. The distinction Intervenors seek to make between a property tax

on electrical generating plants and a property tax on nuclear plants is unsupported by anything in the *Montana* decision.

Nothing in *Complete Auto Transit Inc v. Brady*, 430 U.S. 274 (1977), supports Intervenors' fallback claim. The footnote from *Complete Auto* on which Intervenors rely emphasizes the importance of applying the four factor analysis adopted by the Court therein rather than deciding Commerce Clause cases based on labels. Here, the parties agree that three of the factors are satisfied and any view of the economic realities and practical effects, as are stressed by the *Complete Auto* Court, leads to the conclusion that the Nuclear Property Tax itself does not discriminate.

Intervenors' references to isolated comments by an individual New Hampshire representative are irrelevant to the issue presented here. The validity of the Nuclear Property Tax turns on the tax itself, not on what someone says about it. Equally unavailing is Intervenors' argument that 15 U.S.C. § 391 assists them. Section 391 does not focus on whether taxpayers are out-of-state businesses; it focuses only on whether whatever portion of electricity goes into interstate commerce bears a greater Nuclear Property Tax burden than electricity consumed in New Hampshire. Because the same tax rate is applied to all sales, whether in interstate or intrastate commerce, there is no greater burden on interstate sales.

Finally, New Hampshire advises the Court that on March 26, 1993, a bill was introduced in the New Hampshire legislature exercising New Hampshire's rights under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), to effect a cure of the defects identified by the Special Master in his Final Report. When adopted, the statute will resolve the problems raised by the Special Master in the Final Report and will eliminate the basis for the recommendation that the statute be invalidated.

ARGUMENT

A. The Special Master's Conclusion That There Is A Difference Between Nuclear And Non-Nuclear Plants Was Supported By the Record

The Special Master concluded that:

> It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

Final Report at 27 n.17. Intervenors take exception to this conclusion, but make no mention of the substantial evidence in the record supporting it. The record provides ample basis for the Special Master's finding and provides no basis for rejecting it.

In assessing the record, it is noteworthy that, at the urging of the Special Master and in reliance on a waiver of certain arguments previously raised by Plaintiffs and Intervenors, New Hampshire agreed to limit the evidence it would introduce in this case. The result was that lengthy evidentiary proceedings concerning the reasons for imposing a tax on Nuclear Station Property, rather than on other types of property such as fossil fuel and hydro plants, were avoided. Thus, at the Fourth Meeting of Counsel, New Hampshire's counsel stated that:

> [I]n preparing the record, New Hampshire agreed to streamline some of the statements of fact, and it did so in part in reliance on statements that were made in the pretrial memorandum about the issues that would be involved in the case, and particularly, our understanding that the plaintiffs were not going to be making a contention independently that this tax fails to satisfy test four under *Complete Auto* [—] the test of fair relation to state services . . . . And in our discussion about the stipulation, we talked about including such a state-

> ment in the stipulation, and the conclusion was that this is a factual document, so we should not include it here, but [Intervenors' counsel] did offer to make a representation to the court on the record to that respect, and so I would ask that we have that representation.

Transcript, 9/9/92 at 31. Intervenors' Counsel agreed that this understanding had been reached and confirmed that neither Intervenors nor Plaintiffs intended to argue "that the services provided by the State of New Hampshire do not bear a fair relation to the tax imposed." Transcript at 32. Intervenors noted that they were considering advancing an argument that there had been a "singling out of this particular facility for a particular tax," but did not "regard those as qualifications" of the representation that no fairly related to state services argument would be made. *Id.*

Based on this record, the Special Master entered Litigation Management Order No. 4, memorializing Intervenors' and Plaintiffs' representation that they would not contend that the tax "is unrelated to services provided by the State." Order at 3. The Final Report similarly observes that Plaintiffs have "waived" their claim that the Nuclear Station Property Tax is "unrelated to services provided by New Hampshire." Final Report at 13.

Because New Hampshire streamlined its factual presentation when Plaintiffs dropped their fair relation to state services argument, detailed information about the special risks and burdens posed by Seabrook was not included in the record. But detailed factual information is not needed because the parties stipulated to the conclusion that such facts would be offered to support.

The parties did stipulate to facts emphasizing the special risks presented by Seabrook and the costs that may be incurred by New Hampshire. For example, it was stipulated that

"New Hampshire state government . . . ultimately bears responsibility for assuring the safety and health of New Hampshire residents" (Stipulation ¶ 13.1); that "local authorities in communities in the Seabrook vicinity currently have insufficient resources themselves to provide all of the emergency services that might be required" in the event of a nuclear accident at Seabrook (Stipulation ¶ 13.9); that the resources of New Hampshire State government may be necessary to address such emergency situations, *id.*, and that, when the accident at Three Mile Island occurred, the cost of the clean-up alone was $973 million and Pennsylvania and New Jersey state governments had to fund a portion of the cost. Stipulation ¶ 13.8.

Intervenors suggest that the fact that revenue from the Nuclear Station Property Tax is credited to New Hampshire's General Fund means that the funds are unavailable to finance the costs of dealing with Seabrook. But that is not the case. The General Fund "finances a wide variety of State services." Stipulation ¶ 11.4. Those services include "police and fire protection" as well as "general welfare programs" and "general services." *Id.* For example, if emergency services are needed in the communities surrounding Seabrook, General Fund revenue could finance those services. If New Hampshire were required to deal with demonstrations by concerned citizens at the Seabrook site, General Fund revenue could pay the costs. *See* Stipulation ¶ 13.4. Because the General Fund finances general welfare programs and general services, it could also be used to finance the costs of economic development and welfare programs in the event that the State's tourist industry suffers from the presence of a nuclear reactor on the New Hampshire's coastline. The General Fund is precisely where the Nuclear Property Tax revenue should be deposited to meet the special burdens and risks posed by Seabrook.

Intervenors also argue that General Fund revenue will not be necessary to deal with any problems caused by Seabrook because "[t]he State addresses concerns specific to Seabrook

through other, additional measures . . . ." Intervenors' Exceptions at 2. One of those concerns is the need to "decommission" Seabrook when it ceases to operate. Intervenors point to the existence of the separate nuclear decommissioning fund and assert that "the record belies any attempt to suggest that the tax is meant to compensate for the unusual burdens occasioned by nuclear power." Intervenors' Brief at 7. But the record demonstrates just the opposite.

The parties stipulated that "the costs of decommissioning . . . could exceed the balance then available in the decommissioning fund . . . ." Stipulation ¶ 13.1. And the Record reflects that the United States General Accounting Office has studied the problem of decommissioning and has concluded that estimates of the costs of decommissioning are difficult to make and probably understate the true cost of the process.

> No large commercial nuclear power plant has been decommissioned in this country. As a result, little actual cost data exists, and decommissioning estimates range from the tens of millions to $3 billion for a plant.
> Most experts we contacted believe that NRC's [1985-1987] estimates are too low. . . . The effect of low estimates is that nuclear facility operators may not have sufficient funds available for decommissioning activities when the plants' useful lives end.

Stipulation ¶ 13.3.

In short, the Special Master's conclusion that New Hampshire was entitled to treat nuclear power plants differently for purposes of taxation than conventional generating facilities was supported by the record. Plaintiffs and Intervenors agreed that the tax was fairly related to the State's services. The legislature found that there was a significant difference in the burdens posed by nuclear power plants. Ch. 83-D:1. The record showed that there are special risks and burdens presented by

nuclear power plants. It showed that the resources of the State must be available to finance enormous costs to deal with events that cannot be predicted and to deal with events, like decommissioning, that are certain to occur, but the cost of which is difficult to estimate.

Finally, the Special Master's conclusion was supported by the decisions holding that, contrary to Intervenors' suggestion, tax revenues do not have to be "accumulated or otherwise segregated in a special fund for future use" for services related to the taxpayer's activities. Intervenors' Brief at 4. No test under *Complete Auto* calls for "a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity." *Commonwealth Edison Co v. Montana*, 453 U.S. 609, 627 (1981). The *Montana* Court rejected the argument that such an inquiry was required as "a misconception about a court's role in cases such as this." 453 U.S. at 627.

Intervenors' implicit suggestion that they have no responsibility to support the general services provided by the State of New Hampshire is indefensible. All citizens must bear a share of the general costs of government and none is entitled to an *a la carte* accounting of the costs of those services they use directly. *Goldberg v. Sweet*, 109 S.Ct. 582, 592 (1989) ("[I]nterstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit'.") The Nuclear Property Tax is not a "user fee" or a "specific charge" for state services, but rather, like the severance tax in *Montana*, is "imposed for the general support of the government." General revenue taxation does not simply recover the costs and "specific" burdens associated with the taxed activity, but rather the revenues primarily contribute to "the cost of providing °police and fire protection, the benefit of a trained work force, and the advantages of civilized society." *Montana*, 453 U.S. at 624 (quoting *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207,

228 (1980)). "The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Cotton Petroleum Corporation v. New Mexico,* 104 L. Ed. 2d 209, 235-36 (1989).

In short, Intervenors' argument that there is no difference between nuclear property and other types of property is wrong and their suggestion that New Hampshire had to segregate Nuclear Property Tax revenue for specific purposes is also incorrect. Intervenors' entire challenge to the Special Master's recommendation that New Hampshire was entitled to classify Nuclear Property differently from fossil fuel and hydro plants for purposes of taxation is unsupported by the record or, as Section C below indicates, by the law.

B. Intervenors Did Not Meet Their Burden Of Proof That A Property Tax Discriminates Against Interstate Commerce

Intervenors assert that the Special Master should not have approved New Hampshire's classification because it results in discrimination. But Intervenors failed to meet their burden of proof by demonstrating that any discrimination results from the Nuclear Property Tax. They essentially concede that the property tax by itself is "facially neutral" and that no discrimination "appears on the face of the tax statute." Intervenors' Brief at 10. No other conclusion is possible because, as Intervenors admit, "each owner pays tax at the same rate regardless of whether it serves interstate or intrastate commerce." Intervenors' Brief at 13.

Intervenors therefore argue that the Special Master's conclusion was inconsistent with "showings of discriminatory effect." Intervenors' Brief at 6. But there were no such showings. The

facts in the record demonstrate that the Nuclear Property Tax standing alone has had absolutely no discriminatory effect.

Intervenors' first suggest that discrimination was shown because Seabrook is "predominantly engaged in interstate commerce." Intervenors' Brief at 6. They assert elsewhere that the plant is a facility "primarily serving interstate commerce." *Id.* at 8. Even if this were relevant in determining whether the property tax itself is discriminatory, the record establishes a very different factual picture than the one Intervenors attempt to paint.

The record does not support Intervenors' contention that Seabrook primarily serves interstate commerce. It demonstrates that the plant serves both intrastate and interstate commerce, that the plant's intrastate activity is very substantial and, although it cannot be determined precisely from the record, that such intrastate activity may even exceed its interstate activity.

The record plainly establishes that "[e]lectricity generated at Seabrook Station is sold in both intrastate and interstate commerce." Stipulation ¶ 5.1. Power from the plant flows into the New England Power Pool transmission grid "in accordance with the physical laws of electricity." Stipulation ¶ 6.5. It is distributed throughout the network "based on relative impedances of alternate paths." Stipulation ¶ 6.5. Some of those paths lead to New Hampshire; others lead to the Plaintiff States. But it can hardly be said from this record that the plant is primarily serving interstate commerce.

The record in fact contains evidence that a very significant portion of the power generated at Seabrook is sold to customers in New Hampshire. More than 35% of the output of the plant has gone to Public Service Company of New Hampshire ("PSNH") and still goes to PSNH, despite the transfer of PSNH's interest in Seabrook to North Atlantic Energy Corpo-

ration ("North Atlantic"), a subsidiary of Northeast Utilities, as part of the bankruptcy reorganization of PSNH. Stipulation ¶ 5.26. More than 2% of the electricity goes to New Hampshire's other major electric utility, the New Hampshire Co-op. Stipulation ¶ ¶ 5.28-5.29. A portion of New England Power's 9.95% interest in Seabrook's output goes to another New Hampshire utility, Granite State Electric Company. Stipulation ¶ ¶ 5.11, 5.14. Finally, a New Hampshire wholesale utility, EUA Power Company, obtains more than 12% of Seabrook's electricity. The record does not reflect whether all of this output is ultimately consumed in New Hampshire or whether some of it goes out of state because the disposition of the power changes from time to time, depending on transactions in the wholesale market for electricity. Stipulation ¶ ¶ 3.17, 5.31.

Intervenors make a related argument that the Nuclear Property Tax discriminates because it imposes "a special tax burden largely on out-of-state business." Intervenors' Brief at 4. They assert that the statute "targets out-of-state interests for a special burden," Intervenors' Exceptions at 3. They explain this contention by asserting that the plant is "owned predominantly by 'out-of-state interests,'" stating at one point that "close to 98%" of the plant is now owned by such interests. Intervenors' Brief at 7, 12 n.7. These assertions are inconsistent with the evidence in the record and misleading.[1]

The record establishes that 35.56942% of Seabrook is owned by a New Hampshire corporation, North Atlantic, that sells all

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[1] The record does indicate that about 98% of any future benefits from the credit against the Business Profits Tax will go to out-of-state owners and holding companies, but that is because Business Profits Taxes are paid for combined groups and some of Seabrook's New Hampshire owners — North Atlantic/PSNH and EUA Power — are owned by out-of-state holding companies. The New Hampshire owners and their customers continue to pay the Nuclear Property Tax themselves. As indicated herein, they pay about one half of the tax.

of its share of the plant's electricity to PSNH, which serves New Hampshire customers. Stipulation ¶ ¶ 3.7, 5.26-5.27. Another 2.17391% is owned by the New Hampshire Co-op, which sells to customers in New Hampshire. Stipulation ¶ ¶ 3.8, 5.28-5.30. When added to the 12.13240% of Seabrook owned by New Hampshire's EUA Power Company, the total percentage of Seabrook owned by "in-state businesses" is 49.88%.[2] Thus, Intervenors' contention that the tax is targeted at out-of-state businesses is inconsistent with the facts in the record.

C. Intervenors' Attempted Distinctions Of The Cases Relied On By The Special Master Are Unavailing

Intervenors conceded at oral argument before the Special Master that there is no case in point supporting their argument that New Hampshire lacks the power to classify Nuclear Station Property for taxation. The Special Master appropriately cited this Court's recent decision in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), for the proposition that states have broad power to classify for purposes of taxation. This broad authority, coupled with the legislative findings set forth in the preamble to the statute and the facts in the record demonstrating that there are special risks and burdens posed by nuclear reactors, required rejection of Intervenors' challenge to the statute's classification.

Intervenors dismiss the Special Master's citation of *Nordlinger*, suggesting that, even if New Hampshire's classification of nuclear (as opposed to non-nuclear) property is permissible under the Equal Protection Clause, it is impermissible under the Commerce Clause. But insofar as Intervenors are arguing that there is no difference between nuclear and non-

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[2] Also, Granite State collects a portion of New England Power's Nuclear Property Tax through rates charged in New Hampshire resulting in over 50% of the tax being paid by New Hampshire concerns. Stipulation ¶ 5.14.

nuclear property, the same factors that sustain the classification under the Equal Protection Clause would sustain it under the Commerce Clause. Intervenors have cited no authority for the proposition that the result of an assessment of the differences between nuclear and non-nuclear property would vary depending upon the clause of the Constitution at issue.

Insofar as Intervenors are arguing that nuclear property is an invalid classification under the Commerce Clause because half or more of the burden of the Nuclear Property Tax falls on interstate utilities, their classification argument has been rejected by the Commerce Clause cases. With respect to this aspect of their argument, Intervenors concede that there is no discrimination on the face of the statute because it applies to all owners of nuclear property. Intervenors' Brief at 10. Intervenors could hardly argue that the statute discriminated against interstate commerce if Seabrook had been owned entirely by New Hampshire utilities serving New Hampshire customers. Yet on the face of the statute this could well have been the case.

Thus, Intervenors' entire Commerce Clause classification argument is that the statute discriminates in effect. But their evidence is merely the "adventitious consideration" that half or more of Seabrook is presently owned by interstate utilities, a consideration that was rejected as evidence of discrimination in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). Intervenors attempt to distinguish the *Montana* case cited by the Special Master is as unsuccessful as their attempt to distinguish *Nordlinger*. The distinction assumes the conclusion — that a statute classifying Nuclear Station Property would be discriminatory — because Intervenors contend that the only nuclear plant in New Hampshire (Seabrook Station) is "used primarily in interstate commerce" and therefore cannot be separately classified for taxation. Intervenors' Brief at 15. Intervenors concede that *Montana* holds that a State tax may fall "predominately on interstate commerce" without violating the Commerce Clause. *Id.* They also concede that, under the

principles of *Montana*, a property tax could be imposed on electrical generating plants, even if the electricity produced "largely traveled out of state." *Id.* And yet they argue that when the words of the property tax statute are changed from "electrical generating property" to "nuclear generating property," the Constitutional result changes. The line Intervenors seek to draw is a line that does not appear in the *Montana* decision and the Special Master's refusal to make such an artificial distinction was consistent with the caselaw and the Commerce Clause.

The only other authority cited by Intervenors in support of their fallback claim, *Complete Auto Transit Inc v. Brady*, 430 U.S. 274 (1977), provides no basis for rejecting the Special Master's conclusion. The footnote from *Complete Auto* on which Intervenors rely explained why the Court's new focus on the practical effects and economic realities of state taxes was more appropriate than the per se rule of *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which focused on labels and invalidated taxes if they were on the "privilege" of engaging in an interstate business. 430 U.S. 288-289 n.15. The point of the footnote is that not only a "privilege" tax but any other form of tax could be "tailored to single out interstate businesses" and, therefore, the effects of the tax, not its form, should determine its constitutionality.

Here, the parties have stipulated that three of the four *Complete Auto* tests that footnote 15 addressed are satisfied. With respect to the only test at issue — the test of discrimination — the facts in the record demonstrate that the Nuclear Property Tax does not single out interstate businesses for taxation that local businesses avoid, any more than the severance tax in *Montana* did. The same arguments based on *Complete Auto's* footnote 15 were made and rejected in the *Montana* case. 453 U.S. at 638-644. And the facts in this case cited in support of the

"tailored tax" argument are substantially less persuasive than the facts that the Court found insufficient to support the argument in *Montana*.

In *Montana*, the "great bulk of the coal mined in Montana," as much as 90%, was exported to other states. 453 U.S. at 639. As a result, consumers in those states had to bear the burden of a tax that raised almost 20% of Montana's total tax revenue. *Id.* at 642. Here, it is undisputed that the property being taxed is engaged in intrastate *and* interstate commerce; that about one half of the tax is paid by New Hampshire corporations; that a large percentage of the tax is ultimately passed on to New Hampshire consumers of electricity and that, in total, the tax accounts for only about 3.5 % of New Hampshire's General Fund expenditures. Stipulation Exhibit 6 at 26. There is nothing in the *Complete Auto* Court's footnote 15 that would invalidate such a tax.

Finally, as with their other arguments, Intervenors' contention that the Nuclear Property Tax, standing alone, violates 15 U.S.C. § 391 is unsupported by any decision. The Special Master was correct in rejecting the Section 391 argument "for the same reasons" he recommended rejection of Intervenors' argument under the Commerce Clause. Final Report at 19 n.11. Not only is there no decision supporting the claim, but the language of the statute to which Intervenors refer rejects it. Section 391 discrimination exists if there is "a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391. The statute is not concerned with whether the tax is paid primarily by in-state or out-of-state taxpayers, which is all that Intervenors' fallback argument considers. The statute is concerned instead with whether the Seabrook owners who sell electricity in New Hampshire pay property taxes at the same rate as owners who sell in other states. The answer, of course, is that they do because the same rate applies to everyone. Thus, there is no way

that electricity sold in interstate commerce bears a "greater tax burden", as the statute requires, than electricity sold in New Hampshire. Intervenors' classification argument under Section 391 is inconsistent with the very statutory language they cite.

D. Intervenors' References To Comments By One State Legislator Are Irrelevant

Intervenors quote some statements made by an individual legislator, Representative Hayes, in the New Hampshire House of Representatives in support of the proposition that The Nuclear Property Tax targets out-of-state interests. Intervenors' Brief at 5. But "[w]hether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it." *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922). Moreover, the best evidence of the purpose of the statute is the statute itself and its detailed preamble, not "statements of individual legislators . . . during the course of the enactment process." *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991). The statute and its preamble reveal no suggestion that out-of-state businesses are being targeted.

And, when the actual effect of the statute is considered, the facts in the record demonstrate that the Nuclear Property Tax does not target out-of-state interests. It is paid by the owners of Nuclear Station Property in proportion to their ownership interests. Because roughly half of Seabrook is owned by out-of-state corporations, half of the tax is paid by them. Any argument that nonresidents owning property in New Hampshire and engaging in interstate commerce cannot be required to pay their proportionate share of an *ad valorem* property tax is foreclosed by settled law discussed at pages 17-20 of New Hampshire's Brief in Support of Exceptions.

The comments of Representative Hayes are no different than the observations of one of the principal sponsors of the severance tax bill upheld in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641 n.6 (1981). They do not affect the validity of New Hampshire's Nuclear Property Tax any more than they affected the validity of Montana's severance tax. At most, the comments of Representative Hayes reflect how politically sensitive the task of raising revenue is in a State, such as New Hampshire, that has chosen not to impose a personal income tax or a sales tax. Stipulation ¶ 11.2. Legislators, such as Representative Hayes, are confronted with the unpopular fact that New Hampshire residents pay substantial income taxes to adjoining states. Fifty two percent of New Hampshire's citizens live in the two counties closest to Boston, Hillsboro and Rockingham, Massachusetts. Many of these residents live in New Hampshire, but work in Massachusetts, paying Massachusetts income taxes.[3] Stipulation ¶ 12.1. Many of the fifty seven percent of Massachusetts residents who live in the four counties bordering New Hampshire may derive their living in New Hampshire, but, because the state has no income tax, contribute no income tax revenue to New Hampshire. Stipulation ¶ 12.2. It is not surprising, therefore, that Representative Hayes remarked that the out-of-state owners of Seabrook, who receive the benefits of the power generated by a large nuclear reactor without having to live with it in their own state — "the other fellows" — will be paying their fair share of the tax burden from the Nuclear Property Tax. In a state, such as New Hampshire, that relies heavily on property taxes to finance local governments, the occasional presence of out-of-state owners of a significant piece of property is a factor worthy of note in legislative debate. There is nothing whatsoever untoward

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[3] In the hearing on House Bill 64 held on May 2, 1991, Representative Hayes indicated that "there are over 50 million dollars of taxes paid by New Hampshire citizens to the Commonwealth of Massachusetts."

about Representative Hayes' comments and they provide no support for Intervenors' fallback claim.

E. New Hampshire Is Exercising Its Rights Under *McKesson*

In its opening Brief in Support of Exceptions, New Hampshire advised the Court that it wished to exercise its right under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), to effect a cure of any defect that may be found in its Nuclear Property Tax statute. On March 26, 1993, a bill was introduced in the New Hampshire Senate and House of Representatives in General Court to effect such a cure. The bill, a copy of which is attached as Exhibit A, repeals the Nuclear Property Tax credit against the Business Profits Tax effective as of July 1, 1991 and provides for collection of all Business Profits Taxes that were avoided by Seabrook Owners by use of the Credit.[4] It also substitutes as of July 1,1991 a severability clause for the nonseverability clause on which the Special Master relied in his Final Report and reaffirms the General Court's original intent that, under the previous clause, if the entire statute were ever invalidated, the invalidation was to have been prospective only. Finally, to eliminate any question about the need for a "backward-looking" remedy, the bill provides that the $35.455 million of Nuclear Property Taxes collected since the Nuclear Property Tax statute was enacted will be refunded in the future over a three year period ($33

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[4]Because the Nuclear Property Tax took effect on July 1, 1991 and Business Profits Tax returns are filed annually (often after extensions), the only returns filed as of the date of the Final Report were returns for 1991. Four out-of-state owners claimed a total of $1,470,620 of credits on those returns. Stipulation ¶ ¶ 7.10, 7.15, 7.33 and 7.40. Plaintiffs' projections indicated that $4,829,644 of credits may be claimed on the 1992 returns to be filed this year. Stipulation ¶ ¶ 8.5, 8.7, 8.13 and 8.23.

million in the first two years) through offsets against future Nuclear Property Tax payments.

When adopted, these amendments to the statute will resolve the issues raised in the Special Master's Final Report and will eliminate the bases on which he recommended that the tax be invalidated. New Hampshire will inform the Court immediately when the legislation has been enacted and signed by the Governor.

F. Conclusion

For the foregoing reasons, the Special Master's Recommendation that the Court hold that the Nuclear Property Tax standing alone (without the credit) is valid under the Commerce Clause and 15 U.S.C. ¶ 391 should be adopted. For the reasons stated in New Hampshire's opening brief and because of the pending amendment to the Nuclear Property Tax statute, the Complaints of Plaintiffs, the Intervening Utilities and the amici curiae challenging the Nuclear Property Tax should be dismissed and judgment should be entered in favor of New Hampshire.

Respectfully submitted,

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April 7, 1993 **Counsel of Record*

No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

APPENDIX

Exhibit A

2060B
93-1099
08

HOUSE BILL NO: 53-FN-A
INTRODUCED BY:
REFERRED TO:
AN ACT: repealing the credit to the business profits tax payment of the nuclear property tax, repealing the nonseverability of the credit to the business profits tax, and reinstating the franchise tax on electric utilities.

ANALYSIS

This bill:

(1) Repeals the nuclear property tax credit against the business profits tax as on July 1, 1991.

(2) Adds electric utilities to the list of utilities under the franchise tax.

(3) Refunds nuclear property tax revenues collected to date by providing a credit against the nuclear property tax over a 3-year period.

(4) Collects business profits tax avoided through the use of the nuclear property tax credit by reducing the refund credit allowed for the nuclear property tax by the amount of business profits tax avoided.

(5) Increases the nuclear property tax rate from .64 to .78 percent of valuation.

This bill is a request of the governor.

EXPLANATION: Matter added appears in ***bold italics.***
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-three

AN ACT

REPEALING THE CREDIT TO THE BUSINESS PROFIT TAX FOR PAYMENT OF THE NUCLEAR PROPERTY TAX, REPEALING THE NONSEVERABILITY OF THE CREDIT TO THE BUSINESS PROFITS TAX, AND REINSTATING THE FRANCHISE TAX ON ELECTRIC UTILITIES.

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

1 Declaration of Purpose and Finding for Repeal of Credit and the Nonseverability Clause under 1991, 354:19. The general court finds that:

I. The constitutionality of the nuclear property tax has been called into question by a lawsuit initiated in the United States Supreme Court.

II. A Special Master appointed by the United States Supreme Court has recommended that the Court invalidate the nuclear property tax asserting that the credit against the business profits tax, provided in RSA 83-D:6 and RSA 77-A:5, VI is discriminatory and that the nonseverability provision of 1991, 354:19 indicates an intent that if the nuclear property tax is invalidated, such invalidation be as of the date of enactment, July 1, 1991.

III. If the United States Supreme Court adopts the recommendations of its Special Master, the state could no longer collect the nuclear property tax, and all moneys collected under the nuclear property tax would be refunded.

IV. The nuclear property tax is an important source of revenue for the state and, while the general court believes the tax as enacted is constitutional, the state cannot afford to risk losing the revenue from the tax.

V. To avoid the risk of (a) losing the future revenues of the tax and (b) having to refund the moneys collected under the nuclear property tax within 30 days after an adverse ruling by the United States Supreme Court as recommended by the Special Master, the credit to the business profits tax should be repealed as of July 1, 1991.

VI. The general court enacted 1991, 354:19 to ensure the prospective termination of 1991, 354:1, in the event 1991, 354:2 is declared unconstitutional, but the report of the Special Master recommends retroactive termination; the repeal of 1991, 354:19 reaffirms the general court's original intent to make the nonseverability clause prospective only.

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

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

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

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

4 Nuclear Station Property Tax Rate. Amend RSA 83-D:3 to read as follows:

83-D:3 Tax Imposed. A tax is imposed upon the value of nuclear station property at the rate of [.64] *.78* percent of valuation, to be assessed annually as of April 1 and paid in accordance with this chapter.

5 New Paragraph; Credit for Nuclear Property Tax Previously Collected. Amend RSA 83-D:7 by inserting after paragraph V the following new paragraph:

VI. The commissioner of revenue administration shall allow aggregate credits against the tax imposed by this chapter in the amount of $16,500,000 for such taxes due on January 15, 1994, $16,500,000 for such taxes due on January 15, 1995, and $2,455,793 for such taxes due on January 15, 1996. The aggregate credit shall be allocated to each person in the same proportion as such person's nuclear property ownership interest bears to the entirety of the ownership in the property.

6 Severability Clause. Amend 1991, 354:20 to read as follows:

354:20 Severability. [Except as provided in section 19,] If any provision of this act or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this act are severable.

7 Collection of Business Profits Tax. The commissioner of revenue administration shall collect whatever business profits tax may have been avoided by a person through application of the credit provided by RSA 77-A:5, VI, in the following manner: the portion of the credit due January 15, 1994, allocable to a person under RSA 83-D:7, VI, shall be reduced by an amount equal to the amount of business profits tax previously avoided

by that person through application of the credit provided by RSA 77-A:5, VI. If such reduction is insufficient to recover all the additional business profits tax due from a person, that person's allocable share of the credits due in 1995 and 1996 under RSA 83-D:7, VI, respectively, shall be reduced until the business profits tax avoided by the person has been recovered. No interest or penalty shall be assessed for taxes collected under this section.

8 Repeal. The following are repealed:

I. RSA 77-A:5, VI, relative to a credit against the business profits tax for payment of the nuclear property tax.

II. RSA 83-D:6, relative to providing a credit against the business profits tax for payment of the nuclear property tax.

III. 1991, 354:19, relative to the nonseverability of the business profits tax credit from the imposition of the nuclear property tax.

9 Effective Date.

I. Sections 1 and 6-8 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991.

II. Section 5 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1993.

III. Section 4 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1994.

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

LBAO
LSR 93-1099
3/25/93

FISCAL NOTE for an act repealing the credit to the business profits tax for payment of the nuclear property tax, repealing the nonseverability of the credit to the business profits tax, and reinstating the franchise tax on electric utilities.

FISCAL IMPACT:

The Nuclear Property Tax produces approximately $24 million each year, with approximately $35 million received to date. The proposed amendments would substantially increase the likelihood that the United States Supreme Court will not invalidate the Nuclear Property Tax. Prospectively, the Nuclear Property Tax will produce approximately $24 million each year, which will be reduced by $16.5 million in 1993, $16.5 million in 1994, and approximately $2.5 million in 1995. The effect of removing the NPT credit for 1991 and 1992 will be to increase the BPT receipts for 1993 by approximately $4 million. It is estimated that the repeal of RSA 77-A:5, VI will produce approximately $2 million in Business Profits Tax revenues in 1993 and $4 million in 1994. The reimposition of the Franchise Tax is estimated to produce approximately $6 million in 1993 and $10 million in 1994.