No. 131, ORIGINAL

In the
Supreme Court of the United States

THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion For Leave To File Bill Of Complaint

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") (enacted by North Carolina at N.C. GEN. STAT. § 104F-1 (repealed effective July 22, 1999) (App. at 5a-25a)), was enacted by each of the eight original member states and consented to by the United States Congress in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act.[1] Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986). North Carolina joined the Compact as a party state pursuant to legislation enacted by the 1983 North Carolina General Assembly. It was the intent of the party states, as stated in the Compact agreement, to:

> enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive

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[1]The original party states were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. South Carolina withdrew from the compact in 1995. North Carolina withdrew in 1999.

> waste management equitably among the party states, and ensure the ecological and economical management of low-level radioactive wastes.

Compact, Article I (App. at 6a).

The Compact agreement also created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission") to carry out the general administrative functions of the Compact. Compact, Article IV (App. at 11a-18a). Each party state was allowed to appoint two voting members to the Commission. The costs of the Commission's operations were to be funded by an initial $25,000 payment made by each party state and through surcharges to be levied on generators disposing waste at the regional facility. The first designated regional facility was the waste facility already operating in Barnwell County, South Carolina. Compact, Article IV(h) (App. at 15a-16a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, art. 7(H), 103 Stat. 1289 (1989).

Under the express terms of the Compact, it was agreed that each party state retained all elements of its sovereignty and that nothing in the Compact would be construed to "infringe upon, limit or abridge those rights." Compact, Article III (App. at 9a). The party states further agreed that nothing in the Compact would serve to "[a]lter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions" or "[a]ffect the rights and powers of

any party state and its political subdivisions to regulate and license any facility within its borders." Compact, Article VI(a)(7) and (9) (App. at 20a). Moreover, each party state, including North Carolina, reserved an unconditional right to withdraw from the Compact at any time up until thirty days after commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, 103 Stat. 1289 (1989).

The Commission selected North Carolina as the second host state in September, 1986. In response to the selection, the North Carolina General Assembly enacted legislation creating the Low-Level Radioactive Waste Management Authority (the "Authority") for the purpose of fulfilling its responsibilities under federal law and the Compact, while protecting public health, safety and the environment. N.C. Gen. Stat. § 104G (repealed effective July 1, 2000). The Authority initiated the complex, expensive and lengthy process of engaging consultants and contractors necessary to move forward with site selection, licensing and construction of a disposal facility.

In December, 1993, the Authority's primary contractor, Chem-Nuclear Systems, Inc. ("Chem-Nuclear"), submitted a license application for a site in Wake County, North Carolina to the State's licensing authority, the Division of Radiation Protection of the Department of Environment, Health, and Natural Resources (the "Department"). The Department is the designated state agency responsible for administration of

North Carolina's radiation protection program, with specific responsibility for the process of licensing low-level radioactive waste facilities. N.C. GEN. STAT. § 104E (1999). After extensive review by the Department, significant deficiencies were found in Chem-Nuclear's original application. Additionally, numerous technical concerns related to health and safety were revealed which required resolution prior to licensing the proposed Wake County site.

The issue of funding responsibility for host state disposal facilities is not specifically addressed by the Compact. Although Article IV(h) of the Compact provides for funding of the Commission's operations, there are no direct references to financial responsibility for the initial costs necessary for site identification, licensing and construction of a regional facility. Article I, however, does declare it to be Compact policy to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states."

In February, 1988 the Commission, in recognition of this policy, agreed that it would be "appropriate and necessary" to provide funding for "any state" developing the second disposal facility and thus authorized the use of the Commission's "State Assistance Trust Fund" "for the initial planning and administrative costs and other pre-operational costs associated with [North Carolina's] obligation to create and operate a regional facility." *See* Feb. 9, 1988 Resolution (Petitioner's Appendix (hereinafter "Pet. App.") at 1a). The monies in the "State Assistance Trust Fund" were part of the Commission's

operating budget financed through surcharges paid by generators utilizing the Barnwell disposal site.

In 1989, the Commission unanimously voted to levy an additional "Capacity Assurance Charge" on generators disposing waste at Barnwell. Under this system, payments made by generators were collected by Chem-Nuclear, which also operated the Barnwell facility, and forwarded to the Commission "[t]o assure the timely development of the second regional disposal facility in North Carolina." *See* Oct. 24, 1989 Minutes, Southeast Compact Commission (Pet. App. at 3a-16a, 7a). The Commission's policy of collecting surcharges and fees from generators to fund the development of the second disposal facility continued until South Carolina withdrew from the Compact in 1995. *See* Nov. 15, 1990 Minutes, Southeast Compact Commission (Pet. App. at 17a-31a); Sept. 28, 1992 Minutes, Southeast Compact Commission (Pet. App. at 32a-38a); Nov. 13, 1992 Minutes, Southeast Compact Commission (Pet. App. at 39a-40a).

North Carolina relied on the Commission's assurance of supplemental funding in moving forward with the site selection and licensing process. The State, however, in a good faith effort to fulfill its responsibilities under federal law and the Compact, also contributed substantial state funds and resources in furtherance of the project, which to date exceed $50 million. Generator fees were the source of all Commission funds provided to North Carolina for use in the facility licensing process, the other party states having made no financial

contribution to the Compact beyond their initial $25,000 payment.

In July, 1995 South Carolina withdrew from the Compact and closed Barnwell as a regional facility, purportedly due to North Carolina's inability to develop a second disposal facility within the original projected schedule. This withdrawal and immediate closure was a clear violation of the terms of the Compact agreement requiring that the Barnwell facility remain open for four years after notification of withdrawal. Compact, Article VII(g) (App. at 24a). The Commission, however, took no action (either in the form of sanctions or a legal proceeding) against South Carolina. Nor did the Commission act to ensure that the Barnwell disposal facility would remain available to all of the region's generators for the required four years. South Carolina subsequently re-opened the Barnwell facility to generators from all states other than North Carolina.

As a result of South Carolina's withdrawal from the Compact, the Commission lost the Barnwell disposal facility as a source of funding. Rather than initiating action against South Carolina, however, the Commission's reaction was to terminate funding to North Carolina. On January 5, 1996, the Commission Chairman notified North Carolina that future funds would not be available for development of the second regional disposal facility. *See* Jan. 5, 1996 Letter from Richard S. Hodes to Governor James B. Hunt (Pet. App. at 43a-47a).

In response, Governor Hunt advised the Commission that the Compact agreement contemplated an equitable distribution

of costs and reminded Dr. Hodes that North Carolina had at that time already contributed $30 million of state funds for the facility, while none of the other party states had directly provided any money beyond their original $25,000 contribution. Governor Hunt advised the Chairman that under such circumstances he would not recommend that the General Assembly "assume a greater portion [of] the financial responsibility for the project than it [had] done to date." *See* Apr. 8, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (App. at 27a-30a, 30a) and Jun. 14, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (Pet. App. at 53a-55a).

Despite the Commission's notification that funding would be terminated, sporadic funds were released, thereby allowing North Carolina to continue its progression toward a licensing decision. *See* Oct. 3, 1996 Minutes, Southeast Compact Commission (Pet. App. at 62a-69a); Apr. 18, 1997 Minutes, Southeast Compact Commission (Pet. App. at 70a-74a); Aug. 21, 1997 Minutes, Southeast Compact Commission (Pet. App. at 78a-81a). In December, 1997, however, the Commission did terminate all supplemental funding of the project, thereby shifting the total economic burden for the facility to the taxpayers of North Carolina. *See* Dec. 1, 1997 Letter from Richard S. Hodes to Low-Level Radioactive Waste Management Authority Chairman Warren G. Corgan (App. at 31a-32a). In response to the Commission's decision, North Carolina had no option but to discontinue site development activities. *See* Dec. 19, 1997 Letter from Warren G. Corgan to Richard S. Hodes (Pet. App. at 96a-103a).

In June, 1999 two party states, Tennessee and Florida, filed a complaint with the Commission under Article VII(f) of the Compact, seeking sanctions against North Carolina for cessation of facility development activities. Article VII(f) subjects any "party state" to potential sanctions for violation of the Compact terms.

On July 26, 1999 the North Carolina General Assembly enacted legislation repealing the Compact law and withdrawing North Carolina from the Compact. 1999 N.C. Sess. Laws 357 (App. at 1a-3a). This action was in accordance with the right of withdrawal reserved by each state pursuant to Article VII(g) of the Compact. The Commission was advised of North Carolina's withdrawal on the date the legislation was enacted.

On August 18, 1999, the Commission voted to initiate a formal sanctions hearing procedure against North Carolina. In November, 1999 the Commission notified North Carolina that a sanctions hearing would be held on December 8, 1999, with a decision regarding sanctions to be made on December 9, 1999. *See* Nov. 8, 1999 Letter from Kathryn V. Haynes, Executive Director, Southeast Compact Commission, to Governor James B. Hunt (Pet. App. at 115a-16a). In response to this notification, the North Carolina Attorney General sent a letter to the Chairman of the Commission advising him that the Commission had no jurisdiction over North Carolina subsequent to the State's withdrawal from the Compact. *See* Dec. 1, 1999 Letter from Attorney General Michael F. Easley to Richard S. Hodes (Pet. App. at 112a-14a).

Disregarding North Carolina's withdrawal from the Compact, the Commission held a hearing on December 8, 1999, and on December 9, 1999 voted to impose sanctions. *See* Compact Resolution adopted Dec. 9, 1999 (Pet. App. at 131a-32a). The Commission's resolution demanded repayment of $79,930,337 in generator surcharges, plus interest, payment of $10 million for lost future generator surcharges, and attorneys' fees. In a press release issued December 9, 1999 the North Carolina Attorney General gave notice to the Commission that North Carolina, having lawfully withdrawn from the Compact, would not recognize the Commission's attempt to impose sanctions. *See* Dec. 9, 1999 Press Release by Attorney General Michael F. Easley (Pet. App. at 117a-18a). On July 10, 2000 the Commission filed its Motion for Leave to File Bill of Complaint (the "Motion") and Bill of Complaint.

THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT SHOULD BE DENIED

Plaintiff's Motion constitutes an unprecedented request that this Court accept original jurisdiction of a suit brought by a compact commission against a party state of the compact. Contrary to the clear mandate of both Article III, § 2 of the United States Constitution and 28 U.S.C. § 1251(a), as well as principles of sovereign immunity and original jurisdiction established by this Court, the Plaintiff bringing this Motion is neither a sovereign state nor even a party to the Compact. The Commission itself is a distinct legal entity created by the party states of the Compact to handle administrative issues and functions related to the Compact's mission. The Commission,

however, possesses none of the core sovereign rights, immunities or interests of a state. In sum, the proposed Bill of Complaint is not brought by a state and, as such, does not implicate the original jurisdiction of this Court.

Nor does the nature of the case justify the exercise of this Court's original jurisdiction. Issues of contract and monetary damages involving neither the sovereign interests of a state nor critical elements of federal law do not require resolution at this point by the final appellate court of our judicial system. The nature of Plaintiff's allegations may also require presentation of extensive technical evidence and the development of factual findings and conclusions concerning site geology, radiation, and related technologies which will unduly burden the primary responsibilities of this Court. Moreover, contrary to Plaintiff's assertions, neither serious health concerns nor threats to public safety are at stake in this dispute. Disposal of low-level radioactive waste throughout the nation is being adequately and safely addressed in the absence of regional facilities. In fact, not a single facility has been constructed by a regional compact since enactment of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act in 1986. Pub. L. No. 99-240, 99 Stat. 1859 (1986).

Adequate alternative legal forums are clearly available for Plaintiff to pursue its grievance against North Carolina. Legal recourse in the State courts of North Carolina is as available to the Commission as to any other person alleging a breach of contract by the State, and any suggestion that North Carolina's

courts would be unwilling to render impartial judgment against the State is belied by precedent.

North Carolina, acting at all times in good faith, has invested over $50 million of state funds and resources in a cooperative effort with the Compact to develop a regional disposal site. It was only as a result of the Commission's unreasonable demand that North Carolina assume the entire remaining economic burden for licensure and construction of the facility that the North Carolina General Assembly terminated the project and exercised its right to withdraw from the Compact. The Commission, which is not a state and has no contractual relationship with North Carolina, now asks this Court to exercise its original jurisdiction to resolve the issues in dispute.

ARGUMENT

I. THE COMMISSION CANNOT INVOKE THE ORIGINAL JURISDICTION OF THIS COURT.

The constitutional premise that only a sovereign state has standing to invoke the original jurisdiction of this Court to hear a suit against another state has rarely been questioned. In *Ex parte Madrazzo*, 32 U.S. 627 (1833), a suit filed in the Supreme Court by a Spanish citizen against the State of Georgia was summarily rejected as "a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state." 32 U.S. at 632. With one exception, all subsequent original jurisdiction cases against a

state appear to have been brought by another sovereign state as required by Article III, § 2 of the United States Constitution.[2]

It cannot be questioned that the Plaintiff in this case is not a sovereign state authorized by the Constitution or 28 U.S.C. § 1251(a) to invoke the original jurisdiction of this Court. The Plaintiff is merely a commission created by the party states of the Compact to carry out specified administrative functions related to the Compact's mission. It is a legal entity separate and distinct from the party states, capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations. Compact, Article IV (App. at 11a-18a).

The Commission possesses none of the sovereign, or even quasi-sovereign, powers or immunities of a state, and a Compact cannot vest a Commission with such sovereign attributes. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (Brennan, J., concurring). This Court has made it abundantly clear that commissions created to carry out administrative functions of interstate compacts do not fill the role of states in our federal system. *See Hess,* 513 U.S. at 40.

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[2] In *Monaco v. Mississippi*, 292 U.S. 313 (1984), an application by the Principality of Monaco for leave to bring suit in the Supreme Court to recover bond proceeds from the State of Mississippi was rejected, the Court holding that the states are immune from suit by a foreign state absent consent.

As Justice Ginsberg observed in *Hess*, "[b]istate entities occupy a significantly different position in our federal system than do the States themselves." 513 U.S. at 40. Compact entities such as the Commission instead constitute cooperative efforts by the federal government and two or more states to address problems common to each, but which are not readily susceptible to resolution through normal political channels. Again quoting Justice Ginsberg:

> Because Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any "one of the United States," their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has:
>
> > "An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact. Such an agency under the control of special interests or gubernatorially appointed representatives is two or more steps removed from popular control, or even of control by a local government." M. Ridgeway, Interstate Compacts: A Question of Federalism 300 (1971).

> In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.

Id. at 42 (citations omitted).

Plaintiff glosses over the issue of its jurisdictional standing before this Court in a footnote. (Motion at 24, n. 5.) In that footnote Plaintiff advises the Court, without support or elaboration, that the remaining Compact members have by resolution authorized the Commission to act on their behalf, thereby establishing original jurisdiction in this Court.[3] In view of the historical role of this Court's original jurisdiction in our federal system, the legal premise upon which Plaintiff relies for the unprecedented proposition that a state may establish original Supreme Court jurisdiction through a routine delegation of authority to a commission is neither explained nor readily discernable.

Within the context of requests that the Supreme Court accept original jurisdiction of cases involving a suit by a state against a defendant other than a state, this Court has broadly

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[3] Article IV(e)(10) of the Compact gives the Commission the power "[t]o act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states, as an intervenor or party in interest before Congress, state legislatures, any court of law, or federal, state or local agency, board or commission which has jurisdiction over the management of wastes." (App. at 14a.)

intimated that original jurisdiction will be implicated only where the defendant is a state. This premise was applied in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), where the State of Illinois sought to enjoin the City of Milwaukee, its agencies, and three other Wisconsin cities from discharging untreated sewage into Lake Michigan. The Court declined jurisdiction, specifically concluding "that the term 'States' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions." 406 U.S. at 98. The Court observed that although Wisconsin, under appropriate pleadings, could have been named as a defendant it was not mandatory. The result of Illinois' election to name the City of Milwaukee, however, was a conclusion by the Court that jurisdiction was appropriate in a federal district court, rather than in the Supreme Court.

The case of *Missouri v. Illinois*, 180 U.S. 208 (1901), which was discussed by Justice Douglas in *Illinois v. City of Milwaukee*, involved a similar dispute in which Missouri sought to enjoin Illinois and the Sanitary District of Chicago from discharging raw sewage into the Mississippi River. Illinois' contentions that it was not a proper party and, as such, that the Supreme Court was without jurisdiction to hear the case were rejected. The Court concluded that the Sanitary District was an agency of the state acting within its lawful authority, and that Illinois' interest in the case was sufficient to allow intervention had it not been named a defendant. Therefore, naming Illinois as a defendant was both proper and sufficient to invoke the Court's original jurisdiction.

The principle to be drawn from these cases is that a plaintiff state may elect to name another state as a defendant and thereby establish original Supreme Court jurisdiction, or in the alternative name a proper defendant other than a state and bring suit in an alternative forum. It is beyond question, however, that a suit against a state must be brought by another state in order to invoke the original jurisdiction of this Court. Likewise, a compact commission cannot bring its grievance directly to the Supreme Court on the basis of administrative authority conferred by resolution of the compact's party states.

This premise is consistent with a recent conclusion of the United States District Court for the District of Nebraska in another compact commission case involving issues related to low-level radioactive waste disposal. *State of Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*, 974 F. Supp. 762 (1997). In that case, Nebraska filed suit challenging various actions by the Central Interstate Commission and demanded a jury trial. The Central Interstate Commission moved to strike the jury trial demand, arguing that it possessed "sufficient characteristics of sovereignty to bar a jury trial." 974 F. Supp. at 764. The court, in rejecting the Commission's "self professed 'modicum of sovereignty,'" *id.*, discussed the nature of the Compact's administrative arm:

> [T]he Central Interstate Low-Level Radioactive Waste Commission simply administers a regional waste compact -- it exercises authority only in a very narrow sphere and only as an amalgamation of the interests of its member states. *Concerned Citizens*, 970 F. 2d at

> 422-23. Its limited authority, and its dependence on member states of the Compact for that authority, is far too removed from the full power and autonomy of a state in our federal system for it to be considered a 'quasi-sovereign.' *See Hess, supra*, 115 S. Ct. at 404.

974 F. Supp. at 765.

It was therefore the court's conclusion that "[a]n examination of the history, purpose, and nature of interstate compacts reveals that the Commission is not a 'quasi-sovereign' as it claims." 974 F. Supp. at 764.

Here, Plaintiff asserts a right of delegated sovereignty which is contrary to all precepts of this Court's historical view of the nature and limitations of its original jurisdiction. The reasons for asserting the claims raised in the Bill of Complaint through the Commission, an entity which lacks even a direct contractual relationship with North Carolina, must be left to speculation. It should be clear, however, that the party states of the Compact cannot create original jurisdiction in this Court where none exists under the Constitution.

II. THE NATURE OF THE CASE DOES NOT JUSTIFY THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has consistently reiterated that its original jurisdiction should be invoked sparingly and only in appropriate cases. *Illinois v. City of Milwaukee*, 406 U.S. 91.

What is "appropriate" involves not only "the seriousness and dignity of the claim" but also the "availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. at 93. As early as 1900 the Court said that its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

The reasons for the Court's cautionary approach to its original jurisdiction were aptly described by Justice Harlan in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971):

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.
>
> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with

> which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

401 U.S. at 497.

In exercising this discretion, the Court has frequently observed that its primary role is that of the final appellate court in our judicial system, *id.* at 499, and that the expanding number of original jurisdiction cases may impair and interfere with the discharge of the Court's primary duties. *See Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

The Court has also emphasized the historical concerns of federalism which fostered the establishment of original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). Substantial consideration is more likely to be given to cases that "implicate[] serious and important concerns of federalism." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). Chief Justice Rehnquist has, in fact, suggested that the Court restrict its acceptance of suits between states to those involving issues of state sovereignty:

> I would require that the State's claim involve some tangible relation to the State's sovereign

> interests. Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but rather should be limited to complaints by States *qua* States. This would include the prototypical original action, boundary disputes, and the familiar cases involving disputes over water rights. In such cases, the State seeks to vindicate its rights as a State, a political entity.

Maryland v. Louisiana, 451 U.S. at 766 (Rehnquist, J. (now C.J.), dissenting).

Plaintiff in this case moves the Court to allow a compact commission to file a Bill of Complaint against the State of North Carolina alleging causes of action that, in essence, constitute little more than a contract dispute seeking compensatory damages. The proposed Bill of Complaint alleges breach of contract, bad faith/deceit, unjust enrichment, promissory estoppel, "money had and received," and "violation of member states rights under the Compact." Resolution of these allegations centers around the issue of whether North Carolina breached the Compact agreement. The relief requested is a straightforward demand that North Carolina be ordered to pay the Commission monetary damages.[4]

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[4] The resolution passed by the Commission on December 9, 1999, resolved that North Carolina should repay to the Commission the sum of $79,930,337, plus interest at the applicable legal rate from January 1, 1998; the sum of $10 million resulting from the loss of a source of Commission

Plaintiff's suit raises no issues related to the core sovereign interests of the State of North Carolina. Neither the nature of the case, the magnitude of the claim nor the rights asserted against the State are of sufficient scope or breadth to implicate issues of federalism and sovereign state interests requiring initial resolution by this Court.

Plaintiff further suggests that the Supreme Court should accept this case "because serious public health concerns are at stake." (Motion at 20.) This suggestion is neither legally nor factually supportable. Although it is clear that a state has a right as *parens patriae* to "bring suit to protect the general comfort, health or property rights of its inhabitants threatened by the proposed or continued action of another State," *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923), it is equally clear that "[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

Plaintiff's Bill of Complaint requests neither injunctive relief nor mandatory orders seeking protection of the public health or safety. The relief sought is purely monetary compensationto be returned to the Commission treasury, which

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funds for a twenty-year period; and the Commission's attorneys' fees from June 21, 1999. (Pet. App. at 131a-32a.)

is unlikely to be utilized for many years, if ever, for purposes related to public health or safety.

Nor does Plaintiff suggest any specific, much less clear and convincing, evidence that serious public health concerns are at stake in this case. In the fourteen years since enactment of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859, not a single regional low-level radioactive waste disposal site has been constructed by any of the numerous regional compacts throughout the nation. Environmental, technological, safety and political concerns have impeded the progress of site licensing and development in each compact region. During that period, however, existing public and private disposal facilities, combined with regulated on-premise storage programs at generator facilities, have established a demonstrated capability to safely manage low-level radioactive waste in the absence of new regional compact sites. Public policy concerning low-level radioactive waste disposal is being re-evaluated on a national basis. In the interim the "serious threat to the public health and safety" asserted by Plaintiff as a basis for original jurisdiction of this case simply does not exist. (Motion at 21.)

III. ALTERNATIVE FORUMS ARE AVAILABLE TO HEAR PLAINTIFF'S CASE.

This Court, in exercising its discretion to make case-by-case judgments as to the exercise of its original jurisdiction, has long considered the availability of an alternative forum to

be a paramount factor. *Texas v. New Mexico*, 462 U.S. 554 (1983); *Illinois v. City of Milwaukee*, 406 U.S. 91. In *Arizona v. New Mexico*, 425 U.S. 794 (1976), the Court declined to exercise original jurisdiction over a suit brought by Arizona challenging a tax imposed by New Mexico on electricity generated within New Mexico prior to sale to Arizona consumers. In concluding that pending litigation in state court provided an appropriate alternative forum the Court, quoting from the original jurisdiction standard recited by Justice Douglas in *Illinois v. City of Milwaukee*, 406 U.S. at 93-94, stated:

> We construe 28 U.S.C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

Arizona v. New Mexico, 425 U.S. at 796-97.

As Plaintiff concedes in its Motion, alternative forums, such as North Carolina state courts, are available to hear this case. (Motion at 28.) Plaintiff contends, however, that the

Supreme Court "is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact that regulates the relevant relationships among them." (Motion at 27-28.) Quoting from *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), Plaintiff argues that "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Id.* at 28; Motion at 28.

It is clear that the Court has not considered this *dicta* from *West Virginia ex rel. Dyer v. Sims*, dispositive of the question whether state courts may be appropriate alternative forums for original jurisdiction cases. That case involved a dispute among West Virginia state officials concerning the constitutionality of a state statute, and did not directly address the issue of appropriate alternative forums for disputes between two states.

This Court has, in fact, frequently concluded that state courts are appropriate alternative forums. *Arizona v. New Mexico*, 425 U.S. 794; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493; *Massachusetts v. Missouri*, 308 U.S. 1. Although Plaintiff cites *Ohio v. Wyandotte Chemicals Corp.*, in support of its contention that a state court could not adjudicate its claims in an impartial manner, this Court actually concluded that Ohio state courts were an appropriate alternative forum, stating:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction,

> have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.

401 U.S. at 500. Likewise, there is no merit in Plaintiff's contention that a contract dispute between the Commission and North Carolina cannot be fully and fairly heard in North Carolina state courts.

IV. NORTH CAROLINA DID NOT BREACH ITS OBLIGATIONS UNDER THE COMPACT.

Plaintiff requests that this Court order North Carolina to show cause why the Compact Commission's sanction decision should not be summarily affirmed and enforced. (Motion at 29.) Aside from the jurisdictional issues discussed herein, sound substantive legal reasons support North Carolina's refusal to honor the Commission's resolution. Most significantly, the Compact does not authorize the Commission to impose sanctions on a state which has withdrawn from the Compact. The Compact agreement allows any state to withdraw from the Compact as follows:

> Subject to the provisions of Article VII section (h), any party state may withdraw from the compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four

> years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the compact.

Compact, Article VII(g) (App. at 24a).

This withdrawal provision does not exempt party states designated as "host states." Nor is a reason required for a state to withdraw. The right to withdraw is, in fact, absolute up to thirty days following the commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a). The only requirement is that the State legislature enact a law repealing the Compact.

Furthermore, Article VII(f) only authorizes the Commission to impose sanctions on a "party state." Once the North Carolina General Assembly adopted legislation withdrawing North Carolina from the Compact, North Carolina was no longer a party state and the Commission lost its jurisdiction to impose sanctions.

The Commission relies on Article VII(f) of the Compact agreement for the proposition that the Commission's jurisdiction continued despite North Carolina's withdrawal. This provision states in part:

> Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in

> the resolution of the Commission imposing the sanction.

Compact, Article VII(f) (App. at 23a-24a, 23a). Read in the context of the sanction provision as a whole, this language does not attempt to address Commission jurisdiction over a state that has withdrawn from the Compact. Subsection (f), in fact, contemplates that the most severe sanction authorized would be expulsion from the Compact, which could have no application to a state which had already withdrawn.

Reading Article VII(f) in *pari materia* with Article VII(g) and (h) so as to give effect to each part requires the conclusion that any party state (other than one where a regional facility is located) has the absolute right to withdraw and immediately terminate its rights and obligations under the Compact. When North Carolina withdrew from the Compact in July, 1999 a sanction complaint had been filed by two party states, but no action had been taken by the Commission. The Commission did not initiate the formal sanction hearing procedure until August, 1999 and did not actually impose sanctions until December, 1999. It could not possibly have been contemplated by the states enacting the Compact that, in so doing, each state became indefinitely bound by the Commission's sanctioning power, even after withdrawal from the Compact. North Carolina was not a party state subject to the jurisdiction of the Commission at the time the sanctions were imposed and, therefore, has no legal obligation to recognize the Commission's demands.

Plaintiff's allegations that North Carolina has acted with deceit and in bad faith are equally without merit, legally or factually. North Carolina has at all times acted in good faith in its efforts to site and license a disposal facility for the Compact. Upon being chosen as the host state for the second regional disposal facility, North Carolina created the Authority to oversee site selection and development of the disposal facility. North Carolina contracted with Chem-Nuclear, an experienced operator of low-level radioactive waste disposal facilities, to develop the North Carolina site. The Authority provided extensive consultant and staff assistance to Chem-Nuclear in the site selection process and in the submittal of a license application to the Department. Additionally, throughout the period from 1986 to 1999 the Authority worked closely with the Commission, through North Carolina's two Compact Commissioners, to ensure the Commission was informed of North Carolina's progress as it attempted to navigate the myriad legal, technical and political roadblocks inherent in the development of a low-level radioactive waste disposal facility. North Carolina did, however, consistently insist that the party states continue to equitably "distribute" "the costs, benefits, and obligations of successful low-level radioactive waste management." Compact, Article I (App. at 5a).

It is well documented that project delays were attributable to multiple technical, legal and practical problems. Characterization of one of the initial sites identified for study was delayed by legal challenges and unforeseen geological problems. Poor performance by Chem-Nuclear in certain respects further compounded the difficulty of satisfying the

Department's technical experts that public safety and health issues had been fully addressed. Even at the time development activities ceased at the Wake County site in December, 1997, serious concerns for site suitability were still being debated. Throughout, however, documented progress was achieved within the limits of available funding.

In assuming the role of the second host state, North Carolina's primary responsibility to its citizens was to ensure that safety considerations were paramount in licensing any disposal facility to be constructed. The Compact agreement recognized this duty in reserving to each host state the authority to exercise complete control of the siting, licensing, and regulation of any disposal facility to be constructed within its borders. Compact, Article VI(a)(7) and (9) (App. at 20a). North Carolina exercised this authority in a judicious manner throughout the process: consistently progressing but never allowing demands of expediency to jeopardize the safety and health of its citizens. Any contention by the Plaintiff that North Carolina either acted or was obligated to act otherwise is rebutted by both law and the facts relevant to this dispute.

CONCLUSION

Plaintiff has failed to establish any compelling reason why this Court should accept original jurisdiction of a contract claim brought by a compact commission against the State of North Carolina, particularly where alternative forums are available. The Motion should therefore be denied.

Respectfully submitted,

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Edwin M. Speas, Jr.*
Chief Deputy Attorney General

Grayson G. Kelley
Senior Deputy Attorney General

Jennie Wilhelm Mau
Assistant Attorney General

September 11, 2000

**Counsel of Record*

APPENDIX

APPENDIX

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1999 N.C. SESSION LAWS 357

GENERAL ASSEMBLY OF NORTH CAROLINA
RATIFIED BILL

NORTH CAROLINA SESSION OF 1999

CHAPTER 357
SENATE BILL 247

1999 N.C. ALS 357; 1999 N.C. Sess. Laws 357; 1999 N.C. Ch. 357; 1999 N.C. SB 247

SYNOPSIS: AN ACT TO WITHDRAW NORTH CAROLINA FROM THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT, TO LIMIT THE AUTHORITY OF THE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND TO DIRECT THE RADIATION PROTECTION COMMISSION TO STUDY AND FORMULATE A PLAN FOR LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT.

The General Assembly of North Carolina enacts:

[*1] Section 1. In accordance with the provisions of G.S. 104F-1, Article VII, Section (g) of the General Statutes, North Carolina hereby withdraws from membership as a party state in the Southeast Interstate Low-Level Radioactive Waste Management Compact.

1999 N.C. SESSION LAWS 357

[*2] Section 2. Chapter 104F of the General Statutes is repealed.

[*3] Section 3. Notwithstanding any provision of Chapter 104G of the General Statutes to the contrary, the sole function of the North Carolina Low-Level Radioactive Waste Management Authority shall be to take all necessary actions to complete the process of closure and restoration of the proposed Wake County low-level radioactive waste site, and to finalize all other responsibilities and business of the Authority relating to closure and restoration on or before June 30, 2000.

[*4] Section 4. Chapter 104G of the General Statutes is repealed effective July 1, 2000.

[*5] Section 5. The North Carolina Radiation Protection Commission is directed to review and study the current and projected availability and adequacy of facilities for the management of low-level radioactive waste produced by North Carolina generators, and to formulate a recommended plan for complying with North Carolina's responsibilities under the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, and the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240,99 Stat. 1842, *42 U.S.C. 202* lb, et seq. The Commission shall report its findings and recommendations to the General Assembly on or before May 15, 2000. No license application for a low-level radioactive waste facility shall be issued or considered by the Department of Environment and Natural Resources prior to

action by the General Assembly establishing a plan for future management of low-level radioactive waste.

[*6] Section 6. Sections 1, 2, 3, 5, and 6 of this act are effective when they become law. Section 4 of this act becomes effective July 1, 2000.

HISTORY:
In the General Assembly read three times and ratified this the 20th day of July, 1999.

Signed by the Governor July 26, 1999.

SPONSOR: Lee

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N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

§ **104F-1.** Compact entered into; form of Compact

The Southeast Interstate Low-Level Radioactive Waste Management Compact is enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

Southeast Interstate Low-Level Radioactive Waste Management Compact

ARTICLE I. Policy and purpose

There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party states recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the state for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis. The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (P.L. 96-573), has provided for and encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within

the region requires that sufficient capacity to dispose of such waste be properly provided.

It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Implicit in the congressional consent to this compact is the expectation by the Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

1. Expeditious enforcement of federal rules, regulations and laws; and

2. Imposition of sanctions against those found to be in violation of federal rules, regulations and laws; and

3. Timely inspection of their licensees to determine their capability to adhere to such rules, regulations and laws; and

N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

4. Timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

ARTICLE II. Definitions

As used in this compact, unless the context clearly requires a different construction:

(a) "Commission" or "Compact Commission" means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

(b) "Facility" means a parcel of land, together with the structures, equipment and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage or disposal of low-level radioactive waste.

(c) "Generator" means any person who produces or possesses low-level radioactive waste in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage or disposal of wastes with respect to such waste generated outside the region.

(d) "High-level waste" means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel and solids into which such liquid wastes have been converted, and other high-

N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

level radioactive waste as defined by the U.S. Nuclear Regulatory Commission.

(e) "Host state" means any state in which a regional facility is situated or is being developed.

(f) "Low-level radioactive waste" or "waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel or by-product material as defined in section 11e.(2) of the Atomic Energy Act of 1954, or as may be further defined by federal law or regulation.

(g) "Party state" means any state which is a signatory party to this compact.

(h) "Person" means any individual, corporation, business enterprise or other legal entity (either public or private).

(i) "Region" means the collective party states.

(j) "Regional facility" means (1) a facility as defined in this Article which has been designated, authorized, accepted or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1992.

(k) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any other territorial possession of the United States.

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(*l*) "Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S. Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under section 274 of the Atomic Energy Act of 1954.

(m) "Waste management" means the storage, treatment or disposal of waste.

ARTICLE III. Rights and obligations

The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.

(a) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state each party state shall have the right to have all wastes generated within the borders stored, treated, or disposed of, as applicable at regional facilities, and additionally shall have the right of access to facilities made available to the region through agreements entered into by the Commission pursuant to Article IV (e)(9). The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

(b) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a

regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host states and approved by a two-thirds vote of the Commission.

(c) Each party state shall establish the capability to regulate, license and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post closure observation and maintenance, and the extended institutional control of their regional facilities, in accordance with the provisions of Article V, section (b).

(d) Each party state shall establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

(e) Each party state shall provide to the Commission on an annual basis, any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation herein defined.

(f) Each party state shall, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of wastes requiring disposal.

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ARTICLE IV. The Commission

(a) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission, ("the Commission" or "Compact Commission"). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alternate may act on behalf of the member only in the member's absence.

(b) Each Commission member shall be entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

(c) The Commission shall elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, by-laws which are consistent with this compact.

(d) The Commission shall meet at least once a year and shall also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission shall be open to the public.

(e) The Commission has the following duties and powers:

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(1) To receive and approve the application of a nonparty state to become an eligible state in accordance with Article VII (b); and

(2) To receive and approve the application of an eligible state to become a party state in accordance with Article VII (c); and

(3) To submit an annual report and other communications to the governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission; and

(4) To develop and use procedures for determining, consistent with considerations for public health and safety, the type and number of regional facilities which are presently necessary and which are projected to be necessary to manage waste generated within the region; and

(5) To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities; and

(6) To develop and adopt within one year after the Commission is constituted as provided for in Article VII, section (d), procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this Article. In accordance with these procedures and criteria, the Commission shall identify a host

state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article VII, section (d) and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

In developing criteria, the Commission must consider the following: the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic and ecological impacts on the air, land, and water resources of the party states.

The Commission shall conduct such hearings; require such reports, studies, evidence and testimony; and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility; and

(7) In accordance with the procedures and criteria developed pursuant to section (e)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility; and

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(8) To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities; and

(9) Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. Such authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of the host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facilities' capability to handle such wastes; and

(10) To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states, as an intervenor or party in interest before Congress, state legislatures, any court of law, or federal, state or local agency, board or commission which has jurisdiction over the management of wastes. The authority to act, intervene or otherwise appear shall be exercised by the Commission only after approval by a majority vote of the Commission; and

(11) To revoke the membership of a party state in accordance with Article VII (f).

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(f) The Commission may establish such advisory committees as it deems necessary for the purpose of advising the Commission on any and all matters pertaining to the management of low-level radioactive waste.

(g) The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

(h) Funding for the Commission shall be provided as follows:

(1) Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars ($25,000) to the Commission which shall be used for costs of the Commission's services.

(2) Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

a. Shall be sufficient to cover the annual budget of the Commission; and

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b. Shall represent the financial commitments of all party states to the Commission; and

c. Shall be paid to the Commission, provided, however, that each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection, and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

(3) The Commission shall set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities shall begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states, and shall remit to the Commission funds resulting from collection of such special fees and surcharges within 60 days of their receipt.

(i) The Commission shall keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds, and submit an audit report to the Commission. Such audit report shall be made a part of the annual report of the Commission required by Article IV (e)(3).

(j) The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person,

firm or corporation, and may receive, utilize and dispose of the same. The nature, amount and condition, if any, attendant upon any donation or grant accepted pursuant to this paragraph together with the identity of the donor, grantor or lendor, shall be detailed in the annual report of the Commission.

(k) The Commission shall not be responsible for any costs associated with (1) the creation of any facility, (2) the operation of any facility, (3) the stabilization and closure of any facility, (4) the post-closure observation, and maintenance of any facility, or (5) the extended institutional control, after post-closure observation and maintenance of any facility.

(*l*) As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated within non-party states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exportation of waste from the region for the purposes of management.

(m) (1) The Commission herein established is a legal entity separate and distinct from the party states, capable of acting in its own behalf, and shall be so liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not be personally liable for action taken by them in their official capacity.

(2) Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence

of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators, transporters of wastes, owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

ARTICLE V. Development and operation of facilities

(a) Any party state which becomes a host state in which a regional facility is operated, shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

(b) A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefor. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines Congress has materially altered the conditions of this compact.

(c) Each party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application

for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

(d) No party state shall have any form of arbitrary prohibition on the treatment, storage or disposal of low-level radioactive waste within its borders.

(e) No party state shall be required to operate a regional facility for longer than a 20-year period, or to dispose of more than 32,000,000 cubic feet of low-level radioactive waste, whichever first occurs.

ARTICLE VI. Other laws and regulations

(a) Nothing in this compact shall be construed to:

(1) Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress;

(2) Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under section 274 of the Atomic Energy Act of 1954 in which a regional facility is located;

(3) Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact;

(4) Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except

that any such facility shall comply with Article III, Article IV and Article V and shall be subject to any action lawfully taken pursuant thereto;

(5) Prohibit any storage or treatment of waste by the generator on its own premises;

(6) Affect any judicial or administrative proceeding pending on the effective date of this compact;

(7) Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions;

(8) Affect the generation, treatment, storage or disposal of waste generated by the atomic energy defense activities of the Secretary of the U.S. Department of Energy or federal research and development activities as defined in P.L. 96-573;

(9) Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

(b) No party state shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

(c) Upon formation of the compact no law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more inconvenient

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access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

(d) Restrictions of waste management of regional facilities pursuant to Article IV(1) shall be enforceable as a matter of state law.

ARTICLE VII. Eligible parties, withdrawal, revocation, entry into force, termination

(a) This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

(b) Any state not expressly declared eligible to become a party state to this compact in section (a) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to the provisions of this section. Upon satisfactorily meeting such conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become a party state in the same manner as those states declared eligible in section (a) of this Article.

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(c) Each state eligible to become a party state to this compact is declared a party state upon enactment of this compact into law by that state and upon payment of the fees required by Article IV (h)(1). The Commission shall be the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

(d) (1) The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article IV (h)(1) shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission, shall cause legislation to be introduced in the Congress which grants the consent of the Congress to this compact, and shall do those things necessary to organize the Commission and implement the provisions of this compact.

(2) All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of section (c) of this Article.

(3) The consent of the Congress shall be required for full implementation of this compact. The provisions of Article V, section (d) shall not become effective until the effective date of the import ban authorized by Article IV, section (*l*) as

approved by Congress. The Congress may by law withdraw its consent only every five years.

(e) No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

(f) Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only on the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the date of the meeting at which the Commission approves the resolution imposing such sanction, but in no event shall revocation take effect later than 90 days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

The Commission shall, as soon as practicable after the meeting at which a resolution revoking status as a party state is approved, provide written notice of the action along with a copy of the resolution to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of

N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

the party states, as well as chairmen of the appropriate committees of the Congress.

(g) Subject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the compact. The Commission, upon receipt of the notification, shall as soon as practicable provide copies of such notification to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states as well as the chairmen of the appropriate committees of the Congress.

(h) The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress. For purposes of this section, the low-level radioactive waste disposal facility located in Barnwell County, South Carolina shall be considered the first host state disposal facility.

(i) This compact may be terminated only by the affirmative action of the Congress or by the rescission of all laws enacting the compact in each party state.

N.C. GEN. STAT. § 104F-1 (REPEALED EFFECTIVE JULY 22, 1999)

ARTICLE VIII. Penalties

(a) Each party state, consistently with its own law, shall prescribe and enforce penalties against any person not an official of another state for violation of any provision of this compact.

(b) Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

ARTICLE IX. Severability and construction

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The provisions of this compact shall be liberally construed to give effect to the purposes thereof.

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APRIL 8, 1996 LETTER TO RICHARD S. HODES, M.D. FROM GOVERNOR JAMES B. HUNT, JR.

April 8, 1996

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission For Low-Level
Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603

Dear Dr. Hodes:

Thank you for your January 5, 1996, letter regarding future Southeast Compact funding of North Carolina's low-level radioactive waste (LLRW) disposal facility siting effort. While North Carolina has funded almost 30 percent of the project costs to date, the Southeast Compact has appropriately funded the major portion of our site development efforts. Accordingly, the potential interruption of Southeast Compact funding described in your letter is a matter of great concern.

You express understandable concern about the cost overruns and delays that we have experienced with the project. I share those concerns. I my view, they are attributable primarily to two factors. First, the North Carolina LLRW Management Authority (on the recommendation of its contractor Chem-Nuclear) selected a geologically complex site that has not proved easy to characterize and understand. It

remains unclear whether this site can be modeled and monitored with reasonable assurance, although the authority and its contractors continue to work to resolve those questions. Second, it has now been recognized by the Authority and its independent consultant, Harding Lawson Associations, that there were significant problems and shortcomings in the Chem-Nuclear license application that must be reworked and addressed. Toward that end, changes were made last year in Chem-Nuclear's management of the project and Harding Lawson Associates has been involved on an ongoing basis in designing a work plan to carry the project forward.

The conflicting reports from the Division of Radiation Protection (DRP) and the Authority which you reference pertain to the adequacy of the work plan proposed by the Authority in January and the likelihood that such a work plan will lead to a favorable licensing decision. Based on the reports I have received from recent meetings of our Inter-Agency Committee on LLRW, I am convinced that additional work needs to be done on this work plan.

At my direction the Authority and DRP have been engaged in a series of intensive meetings designed to produce a revised work plan which both agencies believe is realistic. This revised work plan will put us in a better position to provide the Compact Commission with a reasonable estimate

of the time and costs that will be involved in getting to a licensing decision as well as, with some intermediate decision points at which the project should be reevaluated in the event of unfavorable outcomes. However, because of the uncertainty of the outcome of the work that remains to be done, it will continue to be difficult, if not impossible, to forecast the likely outcome of this plan to work.

I appreciate your expression of the Commission's continuing support for our site development efforts. Please be assured that North Carolina remains committed to fulfilling its obligations under the Southeast Compact and will continue to work diligently toward that end. However, when the revised work plan is completed, it will be necessary and appropriate for the Compact Commission to decide whether it will provide continued funding for this project.

Based on your letter it appears that the prospects for future funding of the North Carolina siting efforts are not good. First, you indicate that the Compact Commission has conditioned any future funding on a financial investment in the project by Chem-Nuclear. My understanding is that Chem-Nuclear has declined to make such an investment. Second, you suggest that the Compact Commission will be unable to fund the completion of the project and that North Carolina will need to make "alternate plans" to fund the completion the project.

APRIL 8, 1996 LETTER TO RICHARD S. HODES, M.D. FROM GOVERNOR JAMES B. HUNT, JR.

It is highly unlikely that the North Carolina General Assembly would assume a greater portion or the financial responsibility for the project than it has done to date, and I would not recommend that it do so. If that means that the future of the project is in jeopardy, then I suggest the Compact Commission move immediately to determine how best to address this problem.

My warmest personal regards.

Sincerely

/s/ James B. Hunt, Jr.

JBH:caw

cc: Rep. George W. Miller, Jr.
Capt. William Briner
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

DECEMBER 1, 1997 LETTER TO WARREN G. CORGAN FROM RICHARD S. HODES, M.D.

December 1, 1997

Mr. Warren G. Corgan, Chairman
North Carolina Low-Level Radioactive Waste Management Authority
116 West Jones Street, Suite 2109
Raleigh, NC 27603-8003

Dear Warren:

I am in receipt of your letter of November 25 in which you relay the views of the Authority with regard to the draft Memorandum of Understanding (MOU). Since the letter neither discloses an agreement in principle with the MOU nor offers an alternative funding mechanism with the appropriate concurrences, it fails to meet the Commission's requirements for future funding expressed in the resolutions of the Commission dated August 21, 1997 and November 7, 1997. Accordingly, I cannot authorize the release of funds for work beyond November 30 nor would it be appropriate to convene a meeting of the Commission to consider the Authority's response at this time.

The Commission remains dedicated to work with the Authority and waste generators to develop a plan to share the cost for site development in North Carolina. We will meet at any time with the Authority and other parties to address the means to resolve the funding issue.

DECEMBER 1, 1997 LETTER TO WARREN G. CORGAN FROM RICHARD S. HODES, M.D.

The Commission continues to believe that it is the legal responsibility of North Carolina to fund site development activities as a part of its obligation as a host state. Until an integrated funding plan can be mutually agreed upon by all parties, the Commission expects the Authority to seek and expend State funds to enable continued site development activities without interruption and to keep the project on schedule. Please keep us informed of the Authority's efforts toward that end.

Sincerely,

Richard S. Hodes, M.D.
Chairman
cc: Commissioners and Alternate Commissioners
Richard Whisnant
Southeast Compact Electric Utilities Generators Group