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No. __, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

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MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Plaintiffs, four of the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact and the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), by their undersigned counsel and their respective Attorneys General and pursuant to 28 U.S.C. § 1251(a) and to Rule 17 of the Rules of this Court, move for leave to file their Complaint against the State of North Carolina, for the reasons stated herein.

This is the second motion for leave to file a bill of complaint addressing the dispute among the member States of the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"). This Court denied the initial motion after requesting and receiving from the United States a brief *amicus curiae* that expressed the view that this Court did not have exclusive original jurisdiction

over a suit filed *solely* by the Commission against a member State of the Compact. App. A 1a-23a. The United States also expressed its view that this Court would have exclusive original jurisdiction over an action by "one or more States that are parties to the Compact . . . against another party State to enforce the Compact and seek an appropriate remedy." U.S. Brief at 18 (citing cases) (App. A 21a). This motion seeks leave to file such a suit.

INTRODUCTION

In 1980, the United States Congress enacted the Low-Level Radioactive Waste Policy Act, which was amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. See Pub. L. No. 96-573, 94 Stat. 3347 (1980) and Pub. L. No. 99-240, 99 Stat. 1859 (1986) (collectively, the "Federal Acts"). The Federal Acts recognized that it is primarily the responsibility of the states to dispose of low-level radioactive waste, and encouraged the states to form regional interstate compacts to develop disposal facilities in an efficient and effective manner. The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which is both a contract among the member States and a statute, was formally adopted by North Carolina in N.C. Gen. Stat. § 104F. The legislatures of all the other member States[1] similarly entered into the Compact by enacting enabling legislation. On January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Congress consented to the Compact, thereby making it a federal law. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986).

When the Compact was enacted, South Carolina already had a disposal facility which could be used by the member

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[1] The original party states to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. Pub. L. No. 99-240, Art. 7(A), 99 Stat. 1859, 1878 (1986).

States, but was scheduled to close it within several years of the enactment of the Compact. Consequently, one of the missions of the Commission that was created by the Compact was to develop criteria and procedures for identifying one of the member States as a host for the next regional disposal facility. In September 1986, after a lengthy technical review and screening process by the Commission and outside consultants, North Carolina was designated by the Commission as the next host State. North Carolina willingly accepted this designation and commenced efforts to select and license a site. North Carolina also willingly accepted significant financial assistance from the Commission. Nevertheless, after more than a decade, no disposal facility ever has been licensed, let alone constructed, in and by North Carolina.

The language of the Compact is clear that the host State has complete responsibility for site development and that the Commission bears no responsibility to pay the costs associated with building a disposal facility. However, at the request of North Carolina and to promote the timely creation of a new facility, the Commission provided nearly $80 million to North Carolina for the purpose of facilitating North Carolina's efforts. This money was raised exclusively by levying fees and surcharges on wastes being disposed of at the first regional disposal facility in Barnwell, South Carolina. When, in 1995, South Carolina withdrew from the Compact, due in large part to the State's frustration over the inordinate delays encountered with the North Carolina project, the Barnwell facility was no longer available as the regional facility for the Southeast Compact. This action had the practical effect of eliminating the Commission's only source of revenue, such that the Commission no longer had funds to assist North Carolina's efforts to license and construct a disposal facility. Although not obligated to do so, the Commission made repeated attempts to develop funding alternatives acceptable to North Carolina. Rather than

working with the Commission in its attempts to resolve the issue cooperatively, North Carolina erroneously asserted that the Commission was required to continue to provide funding and was in breach by failing to do so. Eventually, North Carolina closed down the project when the Commission had no option but to cease sending money to North Carolina.

As a consequence of North Carolina's intransigence, Florida and Tennessee filed with the Commission a Sanctions Complaint, alleging that North Carolina was in breach of the Compact and seeking sanctions against North Carolina. After notice and a hearing presided over by an impartial administrative law judge at which evidence was taken, the Commission unanimously found that North Carolina was in breach of the Compact. As Commissioner Richard Hunter of Florida explained:

> North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and . . . when it came time for them to do their part . . . they were unable to meet those obligations in a timely manner and ultimately decided that they would not play.

Statement of Commissioner Hunter, December 8, 1999 Sanctions Hearing Transcript (hereinafter "Tr.") at 34-35 (App. B 25a). Based on the record evidence demonstrating both breach and the amount of money provided by the Commission to North Carolina, the Commission concluded that North Carolina should disgorge the monies paid by the Commission. Accordingly, the Commission ordered North Carolina to repay to the Commission $79,930,337, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998. In addition, the Commission ordered North Carolina to pay $10 million for the loss of a source of funds for the Commission's operating budget for a period of 20 years, and attorney's fees. North Carolina has defied the Commission's order and refused to pay the sanction.

Accordingly, Plaintiffs invoke this Court's exclusive original jurisdiction to vindicate their rights under the Compact and any other rights they may have at common law to recover the money that North Carolina accepted without fulfilling its corresponding duty to create a disposal facility, and to enforce the Sanction Order entered against North Carolina by the Commission.

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was enacted by each State, including North Carolina, see, *e.g.*, N.C. Gen. Stat. § 104F (repealed eff. July 22, 1999), and subsequently was consented to by the United States Congress on January 15, 1986 as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. Compact, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986). The original member States in the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. *Id.*, Art. 7(A), 99 Stat. at 1878.

The Compact was enacted in recognition of several policy objectives. First, by entering into the Compact, the States "recognize[d] and declare[d] 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," and that "management of low-level radioactive waste is handled most efficiently on a regional basis." *Id.*, Art. 1, 99 Stat. at 1871. Further, the States "recognize[d] 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." *Id.* at 1872. In addition, "[i]t 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 [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive waste generated in the region." *Id.*

The Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or "Compact Commission"), consisting of two voting members from each member State, to be appointed according to the laws of each State. *Id.*, Art. 4(A), 99 Stat. at 1874. The first disposal facility serving the member States was the existing low-level radioactive waste disposal facility located in Barnwell County, South Carolina. Pub. L. No. 101-171, sec. 2, Art. 7(H), 103 Stat. 1289, 1289 (1989). Among the Commission's duties was to develop and adopt procedures and criteria for identifying a State as a host State for a regional facility and to identify a host State for the development of a second regional disposal facility. Compact, Art. 4(E)(6), 99 Stat. at 1875. Further, the Commission was authorized to ensure that this second regional disposal facility would be licensed and ready to operate as soon as required, but in no event later than 1991. *Id.*

The Compact requires that each member State that is designated as a host State must take "appropriate steps" to ensure that an application for a license to construct and operate a facility is filed with and issued by the appropriate regulatory authority. *Id.*, Art. 5(C), 99 Stat. at 1877. Further, Article 3(C) states that host States "are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities." *Id.* at 1873-74. Moreover, the Compact expressly states that the Commission is "not responsible for any costs associated with: (1) the creation of any facility." *Id.*, Art. 4(K), 99 Stat. at 1876.

The Compact also vests in the Commission the power to revoke the membership of a member State that "willfully

creates barriers to the siting of a needed regional facility." *Id.*, Art. 4(E)(7), 99 Stat. at 1875. If the Commission resolves to revoke the status of a State as a party to the Compact, it must provide written notice of the action to the Governors, Presidents of the Senates, and Speakers of the Houses of Representatives of the member States, as well as to the chairpersons of the appropriate committees of Congress. *Id.*, Art. 7(F), 99 Stat. at 1879. The Compact further provides for other remedies against recalcitrant member States:

> 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. . . . 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.

Id.

B. The Present Controversy.

In September 1986, following a lengthy screening and review process by the Commission and outside consultants, the Commission, by a two-thirds majority vote, selected the State of North Carolina as the second host State. The designation of North Carolina as the host State obligated North Carolina to develop and operate a facility to receive the region's low-level radioactive waste for disposal for a period of 20 years. As provided in the Compact, North Carolina, as the host State, had the responsibility for financing, siting, licensing and constructing the facility. In turn, North Carolina would be repaid for its expenses from revenues generated by the facility, once operational. North Carolina acknowledged this financial arrangement by the enactment of N.C. Gen. Stat. § 104G-15 (repealed eff. July 1, 2000), which

speaks of recovery of the State's costs through the imposition of fees by the operating facility.

Following the designation of North Carolina as host State, the North Carolina General Assembly considered, but rejected in August 1987, a bill to withdraw from the Compact. Instead, the General Assembly enacted a law developing the siting authority: the North Carolina Low-Level Waste Management Authority (the "North Carolina Authority"). As further evidence of its recognition of its host State status, North Carolina proposed amendments to the Compact concerning the length of time a disposal facility was required to act as the regional facility and concerning the terms for withdrawing from the Compact. The proposed amendments, which made it more difficult for States to withdraw after the second disposal site opened, were adopted by all member States and consented to by Congress. Pub. L. No. 101-171, sec. 2, 103 Stat. at 1289.

Although not obligated to do so, see Compact, Art. 4(K), 99 Stat. at 1876, in response to a request from North Carolina, the Commission determined in 1988 that it was "appropriate and necessary" for it to provide financial assistance to any State designated as the next host State "for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility." See Feb. 9, 1988 Resolution (App. C 34a). Accordingly, the Commission voted to appropriate $200,000 in its annual budget to a trust fund for that purpose. In total, the Commission provided $1,200,000 to North Carolina through this fund.

In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992. Subsequently, in 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to the Barnwell, South Carolina facility to provide funds "[t]o assure the timely development of the

second regional disposal facility in North Carolina." See Oct. 24, 1989 Commission Minutes (App. D 39a). These funds were intended to support the licensing phase of North Carolina's site development. The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992.

In July 1990, after years of assurances that the January 1, 1993 target date for completion of the construction of the facility was feasible, the North Carolina Authority submitted a revised work plan, which put completion of the project two years behind schedule and nearly doubled the cost, excluding construction costs. To assist with the increased costs, the Commission established an Access Fee on regional waste going to the Barnwell, South Carolina facility. Once again, these funds were intended for use in the development of the facility in North Carolina. See Nov. 15, 1990 Commission Minutes at Attach. A (App. E 51a-52a). A total of $12,012,795 in Access Fees was collected and provided to North Carolina.

In October 1991, the North Carolina Authority announced a new siting schedule, with the site's opening set for February 1996. In February 1992, the Commission recommended that the Barnwell facility remain open, provided certain conditions were met, including meeting certain milestones with regard to the development of the North Carolina facility. In June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996.

In its continued effort to assist North Carolina in developing the much-needed second disposal facility, the Commission implemented an Out-of-Region Access Fee on out-of-region waste going to the Barnwell, South Carolina facility during the period January 1, 1993 through June 30, 1994. See Sept. 28, 1992 Commission Minutes at 2-5 (App. F 60a-65a). The charge was $220 per cubic foot of out-of-

region waste, with $160 of this fee going to South Carolina and $60 going to the Commission. Through the collection of this fee, the Commission provided an additional $23,459,786 to North Carolina for use in connection with the licensing and development of the disposal facility.

In addition to the foregoing, at North Carolina's request, the Commission levied $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995 "[i]n order to assure the continued development of the second regional disposal facility for low-level radioactive waste . . . in North Carolina." See Nov. 13, 1992 Commission Minutes at 3 (App. G 66a). A total of $23,405,699 of this access fee was collected and provided to North Carolina. By December 1993, the North Carolina Authority had selected a proposed site in Wake County, North Carolina and had submitted a license application for that site.

Next, the Commission granted North Carolina's request for the advancement of money from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million." See Apr. 29, 1994 Commission Minutes at 6 (App. H 68a). In August 1994, the North Carolina Division of Radiation Protection, the State's licensing authority, announced there would be a 15-month delay in the licensing process, thereby further postponing the opening of the North Carolina facility until at least June 1997, assuming no construction or litigation delays. In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the opening of the new facility until 1998.

By this time, South Carolina leaders were incensed by North Carolina's lack of progress and doubted that North Carolina ever would open the second regional facility. In May 1995, the Commission met twice to consider a South Carolina proposal intended to punish North Carolina for its lack of progress and to create a sense of urgency in North

Carolina to open the disposal facility. The proposal would have denied access to Barnwell to North Carolina until North Carolina issued the license for the new facility. Because the denial of access for North Carolina was considered a sanction against North Carolina, the vote required a two-thirds majority for approval. The Commission voted on South Carolina's proposal twice, and both times the resolution failed by a single vote.

Due the lack of assurance that North Carolina ever would open a second regional disposal facility, South Carolina withdrew from the Compact in July 1995. Consequently, the Commission no longer could levy fees and surcharges on waste disposed of at the Barnwell facility. This eliminated the traditional source of revenue to fund the Commission's operations, as well as the source of revenue from which the Commission had been providing funds to North Carolina to assist in site development activities. See Tr. at 54 (App. B 27a) (Question (by Mr. Jones): "When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?" Answer (by Commissioner Mobley): "No. We had no other funding other than some interest on our accrued funds."); *id.* at 83-84 (App. B 30a) (same).

On January 5, 1996, the Chairman of the Commission, Richard S. Hodes, M.D., wrote to North Carolina Governor James B. Hunt, Jr. to explain that the Commission, up to that point in time, had contributed $55 million to North Carolina in furtherance of the facility development project but that additional Commission funds would eventually be unavailable. Chairman Hodes encouraged Governor Hunt to begin considering alternative funding opportunities, consistent with North Carolina's obligations under the Compact. See Jan. 5, 1996 Hodes letter to Hunt at 3 (App. I 73a). Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated

host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding. See, *e.g.*, Apr. 25, 1996 Hodes letter to Hunt (App. J 75a-77a); May 10, 1996 Hodes letter to Hunt (App. K 78a-79a).

Nevertheless, on June 14, 1996, Governor Hunt informed the Commission that "North Carolina [was] not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed." See June 14, 1996 Hunt letter to Hodes at 2 (App. L 81a). In taking this position, Governor Hunt ignored the plain language of the Compact, which clearly states the Commission is "not responsible for any costs associated with: (1) the creation of any facility." Compact, Art. 4(K), 99 Stat. at 1876. Neither Governor Hunt nor the North Carolina Authority made a request to the North Carolina General Assembly to appropriate the necessary funds. Further, the General Assembly was aware of the problem yet made no effort to provide the funds. Nevertheless, the Governor continued to blame delays on the Commission's alleged failure to provide North Carolina with adequate funds. See July 18, 1996 Hunt letter to Hodes (App. M 82a) (North Carolina requested $4 million necessary to go forward with the project; "If the project is delayed, it will be the result of the Commission turning down the funding request."). Contrary to Governor Hunt's allegations, however, the Commission continued to offer interim funding to North Carolina. See July 9, 1996 Hodes letter to Hunt (App. N 85a). The fact is that the delays actually were caused by North Carolina itself. *E.g.*, July 18, 1996 Hodes letter to Hunt (App. O 86a-87a). For example, in June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until 2001, assuming no construction or litigation delays, for reasons wholly apart from funding issues. Implementation of the Licensing Work

Plan alone would have cost an additional $26 million – more than the total amount of funds remaining available to the Commission.

Despite the foot-dragging of North Carolina and in a good faith effort to move the licensing and construction project along, the Commission authorized, subject to compliance by North Carolina with five conditions, the release of funds on a quarterly basis to the North Carolina Authority to cover amounts expended by the Authority in performing the licensing work plan developed by the Authority. See Oct. 3, 1996 Commission Minutes at 2-4 (App. P 88a-93a). In order to implement this program, the Commission authorized providing a total of $6.5 million to restart and move forward with the North Carolina project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds.

In 1997, the Commission voted to release an additional $2.9 million to the North Carolina Authority, based on the affirmative recommendation of the Authority that it "ma[de] sense to proceed with the project." See Apr. 18, 1997 Commission Minutes at 4 (App. Q 96a). Subsequently, the Commission voted to approve the North Carolina Authority's request for additional funding up to $1.4 million for the months of August and September. Funding beyond the $1.4 million would be considered upon receipt by the Commission of a successful progress report by the North Carolina Department of Environment and Natural Resources. See July 22, 1997 Commission Minutes (App. R 102a). Finally, in August 1997, the Commission voted to provide interim stop-gap funding to the North Carolina Authority up to $1.2 million. See Aug. 21, 1997 Commission Minutes at 5 (App. S 105a).

Despite the Commission's numerous efforts to resolve (and to urge North Carolina to resolve) the funding problems, no solution was reached. Consequently, the Commission organized a Task Force for Facility Funding (the "Task

Force") to study the issue and make recommendations for funding alternatives. The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public. The Task Force issued a consensus report in May 1997 that included specific recommendations for funding. The Commission approved the recommendations in July 1997.

A group of regional waste generators developed a draft Memorandum of Understanding ("MOU") that implemented the Task Force's recommendations. The Commission transmitted to Governor Hunt the draft MOU in August 1997. See Aug. 28, 1997 Hodes letter to Hunt at 1 (App. T 106a-107a). Under the proposed MOU, the Commission and volunteer generators would have funded the remainder of the licensing costs in return for certain commitments from North Carolina. Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding by December 1, 1997, as a condition of future funding. More than two months later, and more than ten years after North Carolina accepted the designation as the next host State, Governor Hunt responded to the Commission by raising several concerns about the proposal, but without making any commitment to proceed absent the Commission "com[ing] up with some . . . approach that provides the relatively few dollars needed to complete *licensing* without jeopardizing the future operation and financing of the facility." Nov. 3, 1997 Hunt letter to Hodes at 2 (App. U 111a-112a) (emphasis added). Governor Hunt did not accept the Commission's offer to fund the project through the Memorandum of Understanding, nor did he suggest an alternative method of funding.

Chairman Hodes responded by, among other things, reiterating that it was "the intent of the compact law to [distribute costs] by obligating each party state, in turn, to develop and operate a facility. It has always been the intent

of the law that each host state would be repaid for its expenses from facility revenues." Nov. 14, 1997 Hodes letter to Hunt at 2 (App. V 116a); see also Tr. at 40, 62-63 (App. B 26a, 28a). Chairman Hodes also restated the Commission's position that, if an agreement in principle regarding funding could not be reached by December 1, 1997, the Commission would not provide funding for work performed after November 30, 1997. Nov. 14, 1997 Hodes letter to Hunt at 2 (App. V 116a); see also Tr. at 82-84 (App. B 29a-31a).

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan. Instead, the Chair of the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project" pending instruction from the North Carolina Legislature or the Commission's reversal of its position regarding funding. See Dec. 19, 1997 Corgan letter to Hodes at 3 (App. W 119a). Chairman Corgan stated that it was "North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible." *Id.* at 1 (App. W 117a). Like Governor Hunt, Chairman Corgan attempted to lay the blame on the Commission for North Carolina's failure to develop a disposal facility in the over eleven years since North Carolina had been designated the next host State: "It is extremely unfortunate that the Compact's actions have caused the project to be stopped. . . . The Authority has no real choice but to commence a project shutdown given . . . the Compact's unwillingness to spend its existing funds." *Id.* at 3 (App. W 120a). The Commission notified the North Carolina Authority in January 1998 that the shut down constituted a breach of the Compact by North Carolina.

Between January 1998 and April 1999, the Commission participated in efforts to negotiate with the North Carolina Authority to resolve the dispute between North Carolina and

the Commission and the other States in the Compact. No satisfactory resolution was reached.

On April 26, 1999, Chairman Hodes notified Governor Hunt that the "Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed" with the development of the disposal facility. See Apr. 26, 1999 Hodes letter to Hunt (App. X 124a-125a). Hodes asked that North Carolina provide the Commission with a written plan and schedule for North Carolina to bring itself into compliance with compact law and to provide a disposal facility for the region. North Carolina took no action in response.

Due to North Carolina's failure to fulfill its obligations, the States in the Compact found themselves without a new regional disposal facility after waiting more than twelve years for North Carolina to develop one. During those twelve years, North Carolina enjoyed the benefits of being a member of the Compact, including access to waste management and disposal services and reduced disposal fees. Nevertheless, after paying directly or indirectly most of the $80 million provided to North Carolina, the member States had nothing to show for this enormous investment. Frustrated and without other recourse, on June 21, 1999, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina. (App. Y 127a-131a). The Sanctions Complaint alleged that North Carolina failed to fulfill its obligations as a member State in the Compact and as the designated host State by not providing a disposal facility for the region. Further, the Sanctions Complaint requested, among other things, return of the $79,930,337 in funds the Commission had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina

ceased activities to develop the requisite facility, January 1, 1998.

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact. 1999 N.C. Sess. Laws 357. North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach (by terminating supplemental funding as of December 1, 1997) of the Compact. See Dec. 1, 1999 Easley letter to Hodes at 1 (App. Z 133a).

In August 1999, the Commission adopted the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina. On November 8, 1999, the Commission provided North Carolina with formal notice of a sanctions hearing to be held on December 8, 1999. See Nov. 8, 1999 Haynes letter to Hunt (App. AA 135a-136a). Attorney General Easley mistakenly asserted that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission. Further, he claimed that the Commission lacked authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact. See Dec. 1, 1999 Easley letter to Hodes at 2 (App. Z 133a). Finally, Mr. Easley informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding and would "vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction" over the State. *Id.* (App. Z 133a-134a).

The Commission held a Sanctions Hearing on December 8, 1999. The Commission heard testimony and received documentary evidence from the States of Florida and Tennessee. All of the Commissioners were permitted to ask questions and make comments. Comments also were received from members of the public. In addition, North Carolina, which had a representative present at the hearing, again was provided the opportunity to offer any testimony or

other evidence on its behalf. North Carolina steadfastly chose not to exercise its rights under the Compact to defend itself.

By a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact. Consequently, the Commission voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission for use in licensing and developing a disposal facility, plus interest from January 1, 1998, the date North Carolina ceased activities to develop the requisite facility. The Commission also voted to require North Carolina to pay $10 million for the loss of the source of funds the facility would have provided to the Commission's operating budget for 20 years, and the Commission's attorneys' fees. North Carolina was given until July 10, 2000 to comply with this order. See Dec. 9, 1999 Resolution (App. BB 137a-138a). Immediately following the announcement of the Commission's decision, the North Carolina Attorney General stated in a press release that North Carolina would not repay the funds. See Dec. 9, 1999 Press Release (App. CC 139a-140a).

The deadline for North Carolina to comply with the order passed with no action. As a result, on July 10, 2000, the Commission, on behalf of the remaining member States (with the exception of North Carolina), moved for leave of this Court to file a bill of complaint against the State of North Carolina. The Commission asked the Court to exercise its original jurisdiction over the dispute based on a provision of the Compact which vests the Commission with authority to stand in the shoes of the member States in litigation before any court. Compact, Art. 4(E)(10), 99 Stat. at 1875. In September 2000, North Carolina filed its Brief in Opposition to the Commission's motion, arguing primarily that the case was not appropriate for the exercise of original jurisdiction because the Commission is not a state.

In October 2000, this Court invited the views of the Solicitor General regarding the Commission's suit against

North Carolina. On May 30, 2001, the Acting Solicitor General responded to the Court's request by filing a Brief as Amicus Curiae, asserting that the Commission is not a State and that it is unclear whether Congress may permissibly authorize an entity created by an interstate compact to invoke the Court's original jurisdiction on behalf of its member States. The brief did point out that the absence "of original jurisdiction over a suit by the Commission would not . . . preclude one or more States that are parties to the Compact from bringing an original action under 28 U.S.C. 1251(a) against another party State to enforce the Compact and seek an appropriate remedy." U.S. Brief at 17-18 (App. A 21a).

In June 2001, this Court denied the Commission leave to file its bill of complaint without addressing the merits of the complaint.

Since June 2001, North Carolina has taken no steps to resolve matters with the Commission or the States. The gravity of the situation has not changed, however, for the States that are members of the Compact. The States remain without a regional disposal facility. Currently, waste generators from the member States send their waste either to Barnwell, South Carolina or to a facility in Utah. The Barnwell facility is scheduled to close to all waste generators outside of the Atlantic Compact region in 2008, and is scaling back on the amount of out-of-region waste it will accept each year until then. The facility in Utah currently accepts only limited types of low-level radioactive waste. The problem is apparent – the member States are gradually running out of alternatives for disposing of their waste and need funds to enhance their ability to secure new disposal alternatives.

Consequently, the States of Alabama, Florida and Tennessee and the Commonwealth of Virginia, along with the Commission, have accepted the implicit invitation of the United States to file an original action against North Carolina pursuant to 28 U.S.C. § 1251(a), see U.S. Brief at 17-18 (App. A 21a). They bring this action against North Carolina

to enforce the Compact or otherwise to obtain redress for North Carolina's wrongful conduct.

REASONS THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

This case involves a dispute among North Carolina, on the one hand, and the remaining member States and the Commission, on the other. At issue is the proper interpretation and enforcement of the Compact's requirements. Plaintiffs urge this Court, *inter alia*, to determine under the Compact: (1) whether the imposition of the sanctions in this case, including the disgorgement of the $79,930,337 provided to North Carolina to license and develop a regional disposal facility that was never licensed, let alone completed, was a valid exercise of the Commission's sanction authority, as set forth in Article 4(F) of the Compact; and (2) whether North Carolina is obligated to comply with the Sanctions Order issued by the Commission, including repaying to the Commission $79,930,337 plus interest. Having previously recognized its exclusive original jurisdiction to resolve disputes among sovereign states arising under compact laws, this Court is uniquely competent to interpret the relevant interstate compact provisions.

Action by this Court is particularly warranted because serious public health concerns are at stake in this dispute. The States belonging to the Compact have been without a regional disposal facility since 1995, when South Carolina withdrew from the Compact in frustration over North Carolina's steadfast failure to develop a disposal facility. Moreover, since 1995, the Commission has been without any means of raising the significant funds needed to obtain disposal capacity or to fund Commission operations. The States and generators must either find a way to store their radioactive wastes at hundreds of locations throughout the region or discontinue the activities that generate the waste. As a result, the objectives of Congress in enacting the Low-

Level Radioactive Waste Policy Act have been thwarted and there exists a serious threat to the public health and safety the longer this region remains without a regional disposal facility.

Critically, too, this case is not susceptible to expeditious, impartial resolution in any other forum. This Court has exclusive original jurisdiction over controversies among states. The Compact establishes the authority of the Commission to impose sanctions against member States that fail to fulfill their obligations under the Compact, Compact, Art. 7(F), 99 Stat. at 1879, but does not provide for judicial review of such sanctions determinations. Accordingly, where disputes about sanctions arise between member States of the Compact, the resolution of those disputes necessarily falls to this Court. See *Texas* v. *New Mexico*, 462 U.S. 554, 569-70 (1983); see also *Kansas* v. *Colorado*, 514 U.S. 673 (1995).

Specifically here, Florida and Tennessee pursued the only mechanism expressly available to them, *viz.*, a sanctions hearing before the Commission against North Carolina. North Carolina was provided with formal notice and a full opportunity to be heard.[2] A hearing was presided over by an experienced, impartial officer who was a retired state court judge. Testimony was heard, documentary evidence was received, and the decision to impose sanctions, including restitution, was unanimously approved by the Commission. North Carolina, despite two invitations to participate in the proceeding and present evidence on its behalf,[3] opted not to participate in the Sanctions Hearing.

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[2] North Carolina was served with notice by certified mail. Nov. 8, 1999 Haynes letter to Hunt (App. AA 135a). Receipt of notice was acknowledged by the Attorney General of North Carolina. *See* Dec. 1, 1999 Easley letter to Hodes at 1 (App. Z 132a).

[3] North Carolina, which had a representative present at the Sanctions Hearing, again was urged to present evidence at the Hearing itself. *See* Tr. at 93 (App. B 32a-33a).

At a fundamental level, North Carolina's attempt to shirk the responsibilities it voluntarily assumed by becoming a member of the Compact would have a chilling effect on other states in similar situations if North Carolina were permitted to succeed. As Commissioner Charles Hawkins of Virginia noted during the Sanctions Hearing:

> If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart. . . . This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens. . . .
>
> . . . [I]f something is not in place to bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts, knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body. And that's no way to build agreements . . . .

Tr. at 91-92 (App. B 31a-32a). Commissioner Hawkins' concerns were shared by Alternate Commissioner A.C. McNeer of Virginia :

> [I]f we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble.

Id. at 92 (App. B 32a). The Commission did just that, within the bounds of its contractual and statutorily created authority, and its decision should be upheld and enforced.

Because North Carolina has refused to comply with its obligations and with the Sanctions Order, Plaintiffs must seek judicial relief to declare the Sanctions Order valid and to

enforce the Commission's action. The circumstances of this case, in which a super-majority of the member States have imposed a sanction on another State, pursuant to the method agreed upon by the States at the time of ratification of the Compact, warrant the exercise of this Court's exclusive original jurisdiction. Were this Court to decline to exercise jurisdiction, the sanctions mechanism provided for in the Compact would be rendered useless and the member States would be without an alternative forum in which to enforce their claims. Plainly this was not the intent of the parties or Congress, and this Court is the appropriate institution to protect those expectations.

ARGUMENT

This Court traditionally has considered two factors in determining whether to exercise its original jurisdiction under Article III, Section 2 of the United States Constitution,[4] and 28 U.S.C. § 1251(a):

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to the "nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim" . . . . Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. *Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Significantly, the Court rarely has declined to exercise its original jurisdiction in a case such as this one, which involves a dispute among sovereign states concerning the interpretation and enforcement of an interstate compact. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and

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[4] "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2.

our first and last order of business is interpreting the compact.") (citation omitted).

A. The Nature Of The States' Interest Is Of Sufficient "Seriousness And Dignity" To Warrant The Court's Exercise Of Original Jurisdiction.

Resolution of a fundamental and irreconcilable difference among the States concerning the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive, original jurisdiction. This Court consistently has recognized its "'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Arizona* v. *California*, 373 U.S. 546, 564 (1963)).

Here, the Compact was enacted by eight States and consented to by Congress for the express purpose of "promot[ing] the health and safety of the region." Compact, Art. 1, 99 Stat. at 1872. Since South Carolina withdrew from the Compact in 1995 due to North Carolina's failure to develop the next regional disposal facility, the member States have been without a regional facility. Without the requisite funds to obtain disposal capacity, the Compact faces the "prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive material due to the lack of disposal facility." Tr. at 13 (App. B 24a). Thus, the States' attempt to provide for the safe and efficient disposal of low-level radioactive waste for the region was prevented by the actions and failures to act of North Carolina. These acts and omissions violated North Carolina's obligations under the Compact in two ways: first, by failing to perform its contractual duties as the designated second host State; and second, by failing to comply with the Sanctions Order validly issued against it.

By signing on to the Compact, North Carolina agreed to accept a designation as a host State. It also formally accepted the designation by enacting N.C. Gen. Stat. §§ 104F and 104G and by appropriating funds for site development. That designation carried with it the responsibility of funding, licensing, developing and operating a regional disposal facility for 20 years. In return, North Carolina would have been repaid fully for its expenses from the revenue generated by the facility. Moreover, subsequent facilities would have been sited in other States, ensuring North Carolina's ability to have a safe and convenient location for disposing of its low-level radioactive waste for generations to come.

North Carolina refused to honor this arrangement or to accept its manifest responsibility for the project. Although for years the Commission provided funds to North Carolina to assist with the project, when the Commission's source of revenue was eliminated and the Commission no longer could contribute to the project, North Carolina refused to cooperate with the Commission and others to find alternative funding sources. Instead, North Carolina terminated the project, thereby disavowing its statutory, contractual and equitable obligations to serve as the next host State under the Compact.

Second, North Carolina has refused to comply with the Sanctions Order imposed by the Commission following a full and fair hearing. In fact, North Carolina refused entirely to participate in the Sanctions Hearing, claiming that it no longer was subject to the jurisdiction of the Commission, having announced its intention to withdraw from the Compact in July 1999. North Carolina is mistaken. Although North Carolina enacted legislation with the intent to withdraw from the Compact in July 1999, its preexisting obligations under the Compact did not cease until either the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction. See Compact, Art. 7(F), 99 Stat. at 1879. Therefore, the Commission retained plenary authority to impose the sanction at issue here, having found

after a full and fair hearing that North Carolina failed to fulfill its obligations both under and arising out of the Compact. In sum, North Carolina has refused without justification to comply with the Commission's Sanction Order.

North Carolina's actions have left the remaining member States in a precarious position vis-à-vis the disposal of low-level radioactive waste and have exposed the states to potentially serious threats to the public health and safety of their citizens. As this Court explained in *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901), in instances in which "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy. And given that "[d]iplomatic powers and the right to make war hav[e] been surrendered to the general government," the remedy must be found in the constitutional provision of original jurisdiction in this Court. *Id.* As Commissioner Mobley of Tennessee noted during the Sanctions Hearing, "nothing can reclaim the time that has been lost." Tr. at 13 (App. B 24a). However, this Court's timely and appropriate exercise of original jurisdiction to resolve the dispute will help mitigate the greater problems looming ahead for the member States if this matter is not resolved expeditiously.

B. The States Have No Adequate Alternative Forum For Resolving Their Dispute With Another Sovereign State.

This Court has exclusive subject matter jurisdiction over suits among States. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Indeed, the United States expressly recognized that a suit by a member State of the Compact against another member State "to enforce the Compact and seek an appropriate remedy" would fall within this Court's exclusive original jurisdiction. U.S. Brief at 18 (App. A 21a). See *supra* at 19.

Moreover, this 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 relationship among them. As the Court stated in *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951):

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation.

Id. at 28 (citation omitted).

Plaintiffs came to this Court only after their failed attempt to resolve this dispute through the Congressionally-approved mechanism set forth in the Compact. There is no pending proceeding on this matter in any other jurisdiction, nor is there another jurisdiction available in which a State would not be "its own ultimate judge in a controversy with a sister State." *Id.* Requiring Plaintiffs to submit the determination of their compact claims to a North Carolina court, or any other lower federal or state court, is inconsistent with one of the central purposes of this Court's original jurisdiction: "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971) (citing *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793)). Moreover, requiring the parties to litigate this dispute elsewhere will result only in delay and expense. This matter ultimately would return to this Court, but only years and many hundreds of thousands of

dollars later – time and money the Commission and the States do not have to spare. This problem is particularly acute given that the States are subject to ongoing injury and the threat of even greater harm until this matter is resolved and the member States are able to obtain the disposal capacity North Carolina solemnly undertook to develop but failed to construct, even after the Commission provided almost $80 million to assist North Carolina in those efforts.

CONCLUSION

The Court should grant Plaintiffs' motion for leave to file the Complaint. Plaintiffs further request that the Court order North Carolina to show cause why the Compact Commission's sanction decision should not be summarily affirmed and enforced.

Respectfully submitted,

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June 3, 2002

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BILL OF COMPLAINT

IN THE

Supreme Court of the United States

No. __, Original

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

BILL OF COMPLAINT

1. The States of Alabama, Florida, and Tennessee, the Commonwealth of Virginia and the Southeast Interstate Low-Level Radioactive Waste Management Commission, by and through undersigned counsel and their respective Attorneys General, for their Complaint against the State of North Carolina allege as follows:

PARTIES

2. The State of Alabama is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact. The Compact was codified by the legislature of Alabama at Ala. Code § 22-32-1. The filing of this Complaint has been authorized by Attorney General Bill Pryor pursuant to Ala. Code § 36-15-12.

3. The State of Florida is a member of the Southeast Interstate Low-Level Radioactive Waste Management

Compact. The Compact was codified by the legislature of Florida at Fla. Stat. Ann. § 404.30. The filing of this Complaint has been authorized by Attorney General Bob Butterworth.

4. The State of Tennessee is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact. The Compact was codified by the legislature of Florida at Tenn. Code Ann. § 68-202-701. The filing of this Complaint has been authorized by Attorney General Paul G. Summers.

5. The Commonwealth of Virginia is a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact. The Compact was codified by the legislature of Virginia at Va. Code Ann. § 10.1-1500. The filing of this Complaint has been authorized by Attorney General Jerry Kilgore.

6. The Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or the "Compact Commission") was created by statute to, among other things, administer the Southeast Interstate Low-Level Radioactive Waste Management Compact. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986) (hereinafter cited as "Compact"). By statute, the Commission was delegated the authority to "act or appear on behalf of any state or states . . . before Congress, state legislatures, [and] any court of law." *Id.*, Art. 4(E)(10), 99 Stat. at 1875.

7. The State of North Carolina has been a party to the Southeast Interstate Low-Level Radioactive Waste Management Compact. The Compact was codified by the legislature of North Carolina at N.C. Gen. Stat. § 104F (repealed eff. July 22, 1999).

JURISDICTION

8. This Court has exclusive original jurisdiction over this Complaint pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

SUMMARY

9. This action is brought by the States of Alabama, Florida, and Tennessee, the Commonwealth of Virginia and the Commission for violation of the member States' rights under the Compact, breach of contract, unjust enrichment, promissory estoppel and money had and received against the State of North Carolina. North Carolina was a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact and properly was designated as the next host State for the construction of a low-level radioactive waste disposal facility. In order to ensure that North Carolina would locate an appropriate site and construct an adequate facility, the Commission provided nearly $80 million to North Carolina. Over the course of more than ten years, North Carolina accepted the funds, conducted some preliminary search and analysis efforts to locate an appropriate site, but never even issued the necessary license for the project, let alone completed construction of the facility. The other member States to the Compact were harmed not only by the fact that they found themselves without a site within their region at which to dispose of low-level radioactive waste, but also because close to $80 million of the Commission's funds were converted by North Carolina without North Carolina fulfilling its obligations undertaken pursuant to the Compact.

FACTUAL BACKGROUND

10. The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was consented to by the United States Congress on January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Compact

Consent Act. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986).

11. The original member States to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

12. The Compact was designed to provide "the instrument and framework for a cooperative effort" to provide sufficient facilities for the proper management of low-level radioactive waste generated in the region.

13. To assist in the implementation of the Compact's objectives, the Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), consisting of two voting members from each member State.

14. Among the Commission's duties was to identify a host State for the development of the second regional disposal facility. The first regional disposal facility was the pre-existing facility located in Barnwell County, South Carolina. Pub. L. No. 101-171, sec. 2, Art. 7(H), 103 Stat. 1289, 1289 (1989).

15. The Compact requires that each member State designated as a host State take appropriate steps to finance, site, license and construct the necessary disposal facility.

16. The Compact expressly states that the Commission "is not responsible for any costs associated with: (1) the creation of any facility." Compact, Art. 4(K), 99 Stat. at 1876.

17. The Compact also vests in the Commission the power to impose sanctions upon member States that fail to comply with the provisions of the Compact or that fail to fulfill the obligations incurred by becoming a member State to the Compact. Compact, Art. 7(F), 99 Stat. at 1879.

THE PRESENT CONTROVERSY

18. In September 1986, following a lengthy screening and review process by the Commission and outside consultants, North Carolina was designated as the second host State.

19. In August 1987, the North Carolina General Assembly formally acknowledged acceptance of this designation by creating and funding the siting authority for the project: the North Carolina Low-Level Radioactive Waste Management Authority (the "North Carolina Authority"). N.C. Gen. Stat. § 104G (repealed eff. July 1, 2000). The facility North Carolina was to build was targeted to be completed by January 1, 1993.

20. Although not obligated to do so, the Commission determined in 1988 that it was prudent for it to provide financial assistance to the designated host State – North Carolina – to assist with planning and administrative costs. Accordingly, the Commission voted to appropriate $200,000 in its annual budget to a trust fund for that purpose. In total, the Commission provided $1,200,000 to North Carolina through this fund.

21. In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992.

22. In 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to Barnwell to provide funds to "assure the timely development of the second regional disposal facility in North Carolina" by supporting the licensing phase of the project. The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992.

23. In July 1990, the North Carolina Authority notified the Commission that it would not meet the January 1, 1993

scheduled opening date for the facility. Instead, completion of the project was estimated to take an additional two years and cost close to twice as much to complete.

24. To assist with these alleged increased costs, the Commission established an Access Fee on regional waste going to the Barnwell facility. The Commission provided $12,012,795 to North Carolina through collection of these fees.

25. In October 1991, the North Carolina Authority notified the Commission that it would not meet its revised target date for opening the facility. Instead, the site was scheduled to open in February 1996.

26. In June 1992, at the request of the Commission, which was prompted by delays with the North Carolina facility, the South Carolina legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996.

27. In September 1992, the Commission adopted an Out-of-Region Access Fee on out-of-region waste going to the Barnwell facility during the January 1, 1993 through June 30, 1994 period. A total of $23,459,786 was provided to North Carolina through the collection of these fees.

28. In November 1992, at North Carolina's request, the Commission agreed to levy $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995. A total of $23,405,699 of this fee was provided to North Carolina.

29. In April 1994, the Commission granted North Carolina's request for the advancement of funds from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million." See Apr. 29, 1994 Commission Minutes at 6 (App. H 68a).

30. Also in April 1994, the Commission approved the transfer of up to $7 million in additional funds to North Carolina on an as-needed basis.

31. In August 1994, the North Carolina Division of Radiation Protection, the State entity responsible for issuing the license for the disposal facility, announced there would be a 15-month delay in the licensing process, further postponing the scheduled opening of the facility until at least June 1997.

32. In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the scheduled opening until June 1998.

33. In May 1995, the Commission met twice to consider a South Carolina proposal intended to punish North Carolina for its lack of progress and to create a sense of urgency to open the disposal facility. The proposal would have denied access to Barnwell for North Carolina's waste until North Carolina issued a license for the new facility. The proposal was voted upon twice, and each time failed by a single vote.

34. In July 1995, South Carolina withdrew from the Compact.

35. South Carolina's withdrawal from the Compact eliminated the Commission's principal source of revenue to fund its operations as well as site development activities – the levying of fees and surcharges on waste disposed of at the Barnwell facility. The Commission's only remaining source of funding was interest on its accrued funds.

36. Because the Commission no longer had a revenue stream from which to provide funding assistance to North Carolina and because the projected expenses to complete the project exceeded the Commission's remaining funds, the Commission notified North Carolina in January 1996 that North Carolina should consider alternative funding opportunities for completing the project.

37. In June 1996, Governor James B. Hunt, Jr. of North Carolina informed the Commission that North Carolina would not fulfill its existing commitment to pay the project costs. Governor Hunt attempted to put the burden on the Commission, contrary to the clear language of the Compact, to fund the project.

38. In June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until at least 2001.

39. In October 1996, in a good faith effort to move the North Carolina project along, the Commission authorized the release of funds to North Carolina on a quarterly basis, subject to North Carolina's compliance with certain conditions. To implement this plan, the Commission authorized providing a total of $6.5 million to North Carolina to restart and move forward with the project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds.

40. In April 1997, the Commission voted to release an additional $2.9 million to North Carolina.

41. Also in 1997, the Commission approved North Carolina's request for up to $1.4 million for the months of August and September.

42. In August 1997, the Commission voted to provide interim stop-gap funding to North Carolina up to $1.2 million.

43. In 1997, because other attempts to resolve the funding problem had failed, the Commission organized a Task Force for Facility Funding (the "Task Force") to study the funding issue and recommend funding alternatives. The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public.

44. In August 1997, the Commission submitted to Governor Hunt a proposed Memorandum of Understanding that had been drafted by waste generators based upon the

recommendations of the Task Force. The proposal called for the Commission and volunteer generators to fund the remainder of the licensing costs. The Commission asked the North Carolina Authority either to approve the proposal or to propose any other method of funding by December 1, 1997, or the Commission would cease providing funding to North Carolina.

45. By December 1, 1997, North Carolina had neither endorsed the proposal nor proposed an alternative funding plan. Instead, on or about December 19, 1996, the Chairman of the North Carolina Authority notified the Commission of the Authority's decision to begin shutting down the project pending instructions from the North Carolina Legislature or the Commission's reversal of its position regarding funding.

46. In January 1998, the Commission notified the North Carolina Authority that the shut down constituted a breach of the Compact by North Carolina.

47. Between January 1998 and April 1999, the Commission engaged in formal mediation with the State of North Carolina in an attempt to resolve matters, but no resolution was reached.

48. In April 1999, the Commission again notified North Carolina that it was in breach of the Compact and requested that North Carolina provide a written plan and schedule for North Carolina to bring itself into compliance with the Compact and to provide a disposal facility for the region. North Carolina did nothing.

49. In June 1999, the States of Florida and Tennessee filed a Sanctions Complaint against North Carolina with the Commission. The Sanctions Complaint alleged that North Carolina had failed to fulfill its obligations as a member State and as the designated host State by not providing a disposal facility for the region. The Sanctions Complaint sought, among other things, the disgorgement of the $79,930,337 that the Commission had provided to North Carolina to assist in

the licensing and development of the disposal facility, plus interest from the date North Carolina ceased activity to develop the requisite facility, January 1, 1998.

50. In July 1999, North Carolina purported to withdraw from the Compact, pursuant to Article 7(G).

51. In August 1999, the Commission approved the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina.

52. On November 8, 1999, the Commission formally notified North Carolina of the Sanctions Hearing to be held on December 8, 1999.

53. On December 1, 1999, the Attorney General of North Carolina, Michael F. Easley, informed the Commission that North Carolina would not participate in the Sanctions Hearing, taking the position that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission. North Carolina effectively waived its rights under the Compact.

54. The Commission held a Sanctions Hearing on December 8, 1999. The Commission heard testimony and received evidence from all interested parties, except for North Carolina, which persisted in its refusal to participate in the process and thus knowingly waived its rights.

55. On December 9, 1999, by a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact and voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998. The Commission also voted to require North Carolina to pay $10 million in sanctions, as compensation for the loss of a source of funds for the Commission's operating budget for 20 years, and attorneys'

fees. North Carolina was given until July 10, 2000 to comply with this order.

56. The July 10, 2000 deadline passed. North Carolina neither repaid the funds nor gave the Commission any indication of its intent to do so.

57. On July 10, 2000 the Commission moved this Court for leave to file a Bill of Complaint against North Carolina.

58. On September 11, 2000, North Carolina filed its Opposition to the Commission's motion.

59. In October 2000, the Court sought, and in May 2001 received, the view of the Solicitor General on the Commission's motion. The Acting Solicitor General took the position that the Commission was not a State and that it was unclear whether Congress could properly authorize a Compact-created entity to invoke this Court's original jurisdiction on behalf of the Compact's member States. The brief for the United States did expressly indicate that an action brought by any of the States to enforce the Compact would be an appropriate case for this Court to exercise its exclusive original jurisdiction.

60. In June 2001, this Court denied the Commission's Motion for Leave to File a Bill of Complaint.

61. North Carolina's actions and failures to act violate North Carolina's obligations under the Compact and otherwise create common law rights for return of the monies paid to North Carolina.

COUNT I – VIOLATION OF MEMBER STATES' RIGHTS UNDER THE COMPACT

62. Plaintiffs hereby reallege Paragraphs 1 through 59 as if fully set forth herein.

63. As alleged, the Compact is an agreement among the States that has the force of federal law. The Compact

imposes an express statutory obligation on the member States to fulfill their obligations to fund, construct and operate a regional disposal facility when such State is designated as the host State.

64. North Carolina was designated as the host State, but failed to fund, license, construct or operate a regional disposal facility. North Carolina's actions constitute a violation of the member States' rights under the Compact.

65. As a result of North Carolina's violation of its obligations under the Compact, Plaintiffs have suffered and will suffer significant monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT II – BREACH OF CONTRACT

66. Plaintiffs hereby reallege Paragraphs 1 through 63 as if fully set forth herein.

67. As alleged, the Compact is a federal law and is a legally binding and enforceable contract.

68. Under the contract, North Carolina was obligated, as the designated second host State, to site, license, construct and operate a regional low-level radioactive waste disposal facility.

69. The allegations contained hereinbefore constitute breaches of said contract by North Carolina.

70. As a direct result of these breaches, Plaintiffs have suffered and will suffer substantial monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT III – UNJUST ENRICHMENT

71. Plaintiffs hereby reallege Paragraphs 1 through 68 as if fully set forth herein.

72. North Carolina received close to $80 million from the Commission to be used for the licensing and development of the next regional disposal facility.

73. North Carolina acknowledged the funds received from the Commission, and even repeatedly demanded that the Commission provide additional funds.

74. North Carolina has retained the nearly $80 million it received from the Commission, despite the fact that North Carolina failed to deliver the regional disposal facility it was obligated as the next host State to provide.

75. As a result, North Carolina has been unjustly enriched in an amount equal to $79,930,337 and should be ordered to pay this amount in restitution to Plaintiffs.

COUNT IV – PROMISSORY ESTOPPEL

76. Plaintiffs hereby reallege Paragraphs 1 through 73 as if fully set forth herein.

77. As alleged, North Carolina accepted the designation of host State and through its governors repeatedly confirmed that it would provide a facility, thereby promising the other member States that it would construct and operate a regional disposal facility in North Carolina.

78. Plaintiffs reasonably and foreseeably relied upon North Carolina's promise to construct and operate a regional disposal facility.

79. North Carolina unjustifiably failed to construct and operate a regional disposal facility.

80. Plaintiffs have suffered and will suffer significant harm as a result of their reliance on North Carolina's promise,

including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT V – MONEY HAD AND RECEIVED

81. Plaintiffs hereby reallege Paragraphs 1 through 78 as if fully set forth herein.

82. As alleged, North Carolina has received $79,930,337 from the Commission.

83. These funds were intended to further the completion of the construction of a regional disposal facility in North Carolina.

84. The regional disposal facility in North Carolina never was constructed.

85. North Carolina has retained the $79,930,337 from the Commission, in exchange for which the Commission has received nothing.

86. North Carolina, in equity and good conscience, should pay over to the Commission $79,930,337.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court:

1. Declare that North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions, despite North Carolina's purported attempt to withdraw from the Compact on July 26, 1999.

2. Declare that the Sanctions Hearing conducted by the Commission was fair and valid.

3. Declare that the sanctions against North Carolina imposed by the Commission upon receipt of all evidence in

the Sanctions Hearing were fair and reasonable and are subject to enforcement.

4. Award Plaintiffs such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

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APPENDIX A

No. 131, Original

In the Supreme Court of the United States

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION, PLAINTIFF

v.

STATE OF NORTH CAROLINA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether this Court has, and should exercise, exclusive original jurisdiction, under 28 U.S.C. 1251(a), over a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission, a body created by an interstate compact and consisting of representatives of several States, against one of the States that is a party to the compact.

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In the Supreme Court of the United States

No. 131, Original

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION, PLAINTIFF

v.

STATE OF NORTH CAROLINA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

STATEMENT

Article III, Section 2 of the United States Constitution provides that this Court shall have original jurisdiction over cases "in which a State shall be Party." U.S. Const. Art. III, § 2. Congress has provided for this Court to have original and exclusive jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The issue in this case is whether the Court has, and should exercise, original jurisdiction over a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission (Commission), a body created by interstate compact and consisting of representatives of several States, against one of the States that is a party to the compact.

1. The Compact Clause of the Constitution provides that "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State." U.S. Const. Art. 1, § 10, Cl. 3. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Congress has enacted legislation consenting to the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) and a number of other regional compacts for the disposal of low-level nuclear waste. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859; see generally *New York* v. *United States*, 505 U.S. 144, 149-154 (1992); U.S. Br. at 2-15, *New York* v. *United States*, *supra* (No. 91-543). The Southeast Compact is an agreement originally among the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Compact, Art. 7(A), 99 Stat. 1878 (Br. in Opp. (Opp.) App. 21a). Each State enacted legislation enabling it to enter into the Compact. *E.g.*, N.C. Gen. Stat. § 104F-1 (1998) (repealed effective July 22, 1999).

The States entered into the Compact for the purpose of, *inter alia*, creating "the instrument and framework for a cooperative effort" to "provide sufficient facilities for the proper management of low-level radioactive waste generated in the region." See Compact, Art. 1, 99 Stat. 1872 (Opp. App. 6a). Under the Compact, a pre-existing facility in Barnwell County, South Carolina, initially provided for the disposal of the region's low-level radioactive waste, but the Compact stated that "in no event shall this disposal facility serve as a regional facility beyond December 31, 1992." See Compact, Art. 2(10), 99 Stat. 1873 (Opp. App. 8a).

The Compact created the Commission to "develop and adopt * * * procedures and criteria for identifying a party state as a host state for a regional facility" and to choose a host State for that facility. Compact, Art. 4(E)(6), 99 Stat.

1875 (Opp. App. 12a-13a). The Commission consists of two representatives from each party State, each of whom is entitled to one vote. Compact, Art. 4(A) and (B), 99 Stat. 1874 (Opp. App. 11a). Upon becoming a party to the Compact, each State was required to pay $25,000 to the Commission for use in covering the Commission's costs. Compact, Art. 4(H)(1), 99 Stat 1876 (Opp. App. 15a). In addition, the Compact requires each State hosting a regional waste disposal facility to levy "special fees or surcharges on all users of such facility" to be paid to the Commission, to the extent required to cover its annual budget. Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a-16a).

The Compact confers on the Commission various duties and powers. Compact, Art. 4(E), 99 Stat. 1874-1875 (Opp. App. 11a-14a). Among other things, the Commission, upon a majority vote of its members, is authorized:

> 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 any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact makes clear, however, that the Commission "is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a). Accordingly, "[l]iabilities of the Commission shall not be deemed liabilities of the party states." *Ibid.*

The Compact also provides that "[a]ny 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." Compact, Art. 7(F), 99 Stat. 1879 (Opp. App. 23a). Sanctions may be imposed "only upon the affirmative vote of at least two-thirds of the Commission members." *Ibid.*

2. The present controversy arises from the Commission's decision to sanction the State of North Carolina. In 1986, the Commission chose North Carolina as the host State for a regional waste disposal facility. See Mot. for Leave to File Bill of Complaint (Mot.) 7. To assist in developing the facility, the Commission appropriated money from its annual budget for a trust fund for North Carolina's use in creating the facility. Mot. 9; Opp. 4-5. The Commission also adopted a Capacity Assurance Charge on waste sent to the Barnwell County, South Carolina facility "[t]o assure the timely development of the second regional disposal facility in North Carolina." Mot. 9; Opp. 5. In 1990, however, North Carolina notified the Commission that it could not meet the January 1, 1993 target date for completion of the facility. See Mot. 9. The Commission nonetheless continued to help fund the development of the facility through the assessment of additional fees on waste sent to the Barnwell County facility. See Mot. 9-10.

In December 1994, North Carolina informed the Commission that the opening of the new facility would be postponed until 1998. Mot. 11. In 1995, South Carolina withdrew from the Compact after the Commission rejected that State's proposal to extend the operation of the Barnwell County facility for all of the party States except North Carolina. *Ibid.* After South Carolina's withdrawal, the Commission informed North Carolina that additional Commission funding would be unavailable, because the Commission could no longer obtain fees from the Barnwell County site. See Mot. 11-12. In June 1996, North Carolina notified the Commission that it could not continue developing the second facility without further

funding from the Commission. Mot. 12-13. The Commission and North Carolina engaged in further discussions regarding the funding issue, but were unable to resolve their differences. See Mot. 13-16.

On June 21, 1999, the Florida and Tennessee Commission representatives filed with the Commission a sanctions complaint against North Carolina. Mot. 17. The complaint alleged that, by failing to provide the second disposal facility for the region, North Carolina had violated the Compact. *Ibid.* The complaint sought, *inter alia*, the return of nearly $80 million in funding that the Commission had provided to North Carolina to assist in developing the facility. *Ibid.* On July 26, 1999, North Carolina withdrew from the Compact, taking the position that the Commission had violated the Compact by cutting off supplemental funding of the facility and stating that it "had no option but to" withdraw. See Mot. 18. In November 1999, the Commission sent North Carolina notice of a hearing on the sanctions complaint. *Ibid.* The hearing was held in December 1999, but North Carolina did not participate. Mot. 18-19. North Carolina asserted that the Commission lacked jurisdiction to hold the sanctions hearing because North Carolina had voluntarily withdrawn from the Compact.

After the hearing, the Commission unanimously found that North Carolina had violated the Compact. Mot. 19. It ordered North Carolina to repay $79,930,337 to the Commission, plus interest accruing from January 1, 1998, the date when North Carolina stopped its work on the second facility. *Ibid.* The Commission also ordered North Carolina to pay the Commission's attorney's fees and $10 million for the loss of revenue that the Commission would have received from the facility in North Carolina. *Ibid.* The Commission directed North Carolina to comply with the sanctions order by July 10, 2000. *Ibid.* North Carolina has not complied with the order. See *ibid.*

In its Motion for Leave to File a Bill of Complaint, the Commission asks this Court to determine (1) whether, under the Compact, the Commission had authority to issue the sanctions order against North Carolina, and (2) whether North Carolina is obligated to comply with the sanctions order. Mot. 20. The Commission contends that this Court has exclusive original jurisdiction over the case under Article III, Section 2 of the Constitution and 28 U.S.C. 1251(a) because it involves a dispute between "two or more States." See Mot. 24; Bill of Complaint (Complaint) 1-2. The Commission asserts that it may invoke this Court's exclusive original jurisdiction because it "stands in the shoes of the member States in this action" by virtue of the Compact authorization for the Commission "'[t]o act or appear on behalf of any party state or states' before any court of law." Mot. 24 n.5 (quoting Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a)).

North Carolina argues that the Commission is not a State and thus cannot invoke this Court's original jurisdiction. Opp. 11-12. North Carolina contends that the Commission instead is "a legal entity separate and distinct from the party states," which is "capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations." *Id.* at 12 (citing Compact, Art. 4, 99 Stat. 1874-1877 (Opp. App. 11a-18a)).

The parties thus disagree about (1) whether this Court has exclusive original jurisdiction over the Bill of Complaint, and (2) whether, if so, the present case warrants the Court's exercise of its jurisdiction. See Mot. 24-29; Opp. 11-25.

DISCUSSION

THIS COURT SHOULD NOT EXERCISE JURISDICTION OVER THIS SUIT

The Court should deny the Commission's Motion for Leave to File a Bill of Complaint. This Court would have

exclusive original jurisdiction over a suit brought by one or more of the States that are parties to the Southeast Interstate Low-Level Radioactive Waste Interstate Compact against North Carolina based on that State's alleged violations of the Compact. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (suit by Kansas against Colorado for enforcement of interstate compact). The same cannot be said, however, of a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission against North Carolina. The Commission, which was created by the Compact, is not itself a State under our constitutional structure. There is, moreover, no reason to believe that, when Congress approved the Compact, it intended to authorize the Commission either to act as a "State" for purposes of invoking this Court's original jurisdiction or to invoke this Court's original jurisdiction on behalf of the States that are parties to the Compact. The present case accordingly does not fall within the Court's exclusive original jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The Court therefore should deny the Commission's motion for leave to file a bill of complaint, and the dispute should be resolved in another forum or through other means.[1]

A. The Commission Is Not A State

The Constitution grants this Court original jurisdiction over suits "in which a State shall be Party," U.S. Const. Art. III, § 2, but Congress has limited the Court's exclusive original jurisdiction to "controversies between two or more States,"

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[1] Because this case does not fall within the Court's exclusive original jurisdiction, we do not address whether the circumstances of the case present a sufficiently serious matter, and are otherwise appropriate, to warrant this Court's exercise of that jurisdiction. See *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (the Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

28 U.S.C. 1251(a). The Commission itself is plainly not a State, and it should not be treated as one for present purposes. The Commission therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive original jurisdiction.

1. "The States, as separate sovereigns, are the constituent elements of the Union." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). The Commission, by contrast, is an interstate body created by the Compact. The Commission exists solely for purposes of administering the Compact. The party States entered into the Compact by enacting enabling legislation, and Congress consented to the Compact in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859. The Commission is a Compact Clause entity that "owe[s] [its] existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Hess*, 513 U.S. at 42.

This Court's decisions in *Hess* and *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), are instructive. In each of those cases, a Compact Clause entity sought to invoke the party States' Eleventh Amendment immunity from suit by private individuals, and in each instance the Court rejected that invocation. See *Hess*, 513 U.S. at 40-52; *Lake Country Estates*, 440 U.S. at 401-402. The Court noted that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." *Hess*, 513 U.S. at 42. There is similarly good reason not to treat a Compact Clause entity as a State for purposes of invoking this Court's original jurisdiction.

The Commission contends that *Hess* and *Lake Country Estates* are inapposite because "[o]riginal jurisdiction, unlike sovereign immunity, spares states not from the indignity of being brought into *federal* court, but rather from the dangers

inherent in entering the court of another state for relief." Reply Br. 2. But that observation, even if true, misses the point. The Commission is not a State, and it therefore does not face any "dangers inherent in entering the court of *another* state." *Ibid.* (emphasis added). The Commission, by the terms of the Compact, is a separate entity. See Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a) (the Commission is "a legal entity *separate and distinct* from the party states capable of acting in its own behalf and is liable for its actions") (emphasis added); see also *ibid* (the Commission's liabilities "shall not be deemed liabilities of the party states").[2]

2. The Constitution grants the States access to this Court's original jurisdiction precisely because they are "the constituent elements of the Union." *Hess*, 513 U.S. at 40. The States entered the Union on the understanding that they were separate sovereigns and were surrendering only a portion of their sovereign powers. They retained, through the Compact Clause, a portion of their formerly unfettered authority to resolve interstate disputes through agreement. And they have, through the Eleventh Amendment, a portion of their sovereign immunity from suit. But they agreed to confer on this Court, through Article III's grant of original jurisdiction, judicial power to resolve interstate disputes "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." See *North Dakota* v. *Minnesota*, 263 U.S. 365, 372-373 (1923). See, *e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would

[2] The Commission's inability to invoke the Court's original jurisdiction in its own right as a State in no way suggests that the States that are parties to the Compact may not invoke that jurisdiction on the basis of a proper cause of action.

amount to *casus belli* if the States were fully sovereign.") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983)).

The States may, with Congress's consent, create Compact Clause entities. But those entities "occupy a significantly different position in our federal system than do the States themselves." *Hess*, 513 U.S. at 40. Compact Clause entities lack the normal sovereign attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction. Because Compact Clause entities have no separate sovereign identity, they have no inherent claim to sovereign immunity. *Id.* at 39-40. They similarly have no inherent right to invoke this Court's original jurisdiction in the way one of the States might do.[3]

Unlike the States, Compact Clause entities are "creations of * * * discrete sovereigns" that "address 'interests and problems that do not coincide nicely either with the national boundaries or with State lines.'" *Hess*, 513 U.S. at 40 (citation omitted). The States (and sometimes the federal government) exercise cooperative power over the Compact Clause entity's actions for narrowly defined purposes. As a result, the Compact Clause entity's "political accountability is diffuse," and it lacks close ties to an identifiable body of citizens. *Id.* at 42. Furthermore, a Compact Clause entity can be disbanded once it has served its purpose. It therefore has none of the historical, legal, or functional *sovereign* attributes of a State.

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[3] The Court's decisions make clear that the States are entitled to invoke this Court's original jurisdiction based on their identity as sovereign States, and not on the basis of particular powers that they may exercise. For example, the Court has made clear that even entities that "exercise a slice of state power" (*Lake Country Estates*, 440 U.S. at 401 (internal quotation marks omitted)), such as political subdivisions of a State, are not "States" within the meaning of 28 U.S.C. 1251(a). *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972).

Just as this Court has recognized that compact commissions are not entitled to Eleventh Amendment immunity, lower courts have declined to treat compact commissions as States for other judicial purposes. For example, in *Nebraska* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 974 F. Supp. 762 (D. Neb. 1997), a district court rejected a compact commission's claim that it should be treated like a State for Seventh Amendment purposes. The court concluded 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." *Id.* at 764. An interstate compact "does not create a separate sovereign state, and its powers are in no way equivalent to that of an independent sovereign." *Id.* at 765. The compact commission in that case, like its counterpart in the present case, "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." *Ibid.*[4] That reasoning applies with equal force here. The Commission is not a State and should not be considered the equivalent of a State for purposes of invoking this Court's original jurisdiction.

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[4] The State of Nebraska sued the Central Interstate Commission in federal district court on at least two previous occasions as well. *Nebraska ex rel. Nelson* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F. Supp. 1046 (D. Neb. 1995); *Nebraska ex rel. Nelson* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205 (D. Neb. 1993), aff'd, 26 F.3d 77 (8th Cir.), cert. denied, 513 U.S. 987 (1994). Most recently, the Eighth Circuit affirmed the district court's rejection of Nebraska's challenge to the Central Interstate Commission's authority to establish deadlines for the State to process a waste disposal facility license application. See *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 187 F.3d 982 (1999). Under the Commission's argument in the present case, none of these cases could have proceeded in federal district court because this Court would have had *exclusive* original jurisdiction over Nebraska's claims.

B. The Commission Cannot Invoke This Court's Exclusive Original Jurisdiction As The Representative Of States That Are Parties To The Compact

The Commission also contends that it "stands in the shoes" of the States that are parties to the Compact and is entitled to invoke this Court's original jurisdiction as a representative of those States for purposes of this action. Mot. 24 & n.5; Reply Br. 2-3. That contention is unsound.

1. The Commission asserts that Congress may authorize an entity created by interstate compact to invoke this Court's original jurisdiction on behalf of the States that are parties to the compact. Reply Br. 2-3. It is not clear, however, that Congress may do so. A Compact Clause entity is not a "State" within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be entitled to assert) the constitutional entitlements of a State in an Article III court as against a defendant that *is* one of the States of the Union. In addition, a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment. See U.S. Const. Amend. XI.[5]

There is no need to reach those constitutional issues here, however, because there is no sound reason to conclude that, when Congress approved the Compact, it intended to allow the Commission to invoke this Court's original jurisdiction as

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[5] This Court's decisions holding that "nonconsenting States are immune from suits brought by federal corporations, foreign nations, or Indian tribes" demonstrate that a State's sovereign immunity in federal court is not limited to "the strict language of the Eleventh Amendment." *Alden* v. *Maine*, 527 U.S. 706, 728 (1999) (citations omitted). Accordingly, although Congress has provided that this Court has original (but not exclusive) jurisdiction over "[a]ll actions or proceedings *by* a State against the citizens of another State" (28 U.S.C. 1251(b)(3) (emphasis added)), it has not provided for original jurisdiction over a suit brought *against* a State.

a representative of the States that are parties to the Compact. The Compact allows the Commission to act in a representational capacity for certain purposes, but the Compact does not expressly grant the Commission power to invoke this Court's original jurisdiction or to sue a State.

The Compact provides that the Commission may:

> act or appear on behalf of any party state or states * * * as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact's mere mention that the Commission may appear in various tribunals, including "any court of law," falls far short of providing the Commission authorization to invoke this Court's original jurisdiction to sue a member State and to precipitate the constitutional questions that would arise from such a novel action. Compare *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946)); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 75 (2000).

Congress has consistently confined this Court's original jurisdiction within a narrow compass. See 28 U.S.C. 1251. Furthermore, Congress is undoubtedly aware of what "has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972). This Court should not lightly assume that Congress intended to enlarge the category of parties that may invoke this Court's exclusive original jurisdiction on the basis of the faint implication that the Commission seeks to draw from the Compact. Cf. *Mississippi* v. *Louisiana*, 506 U.S. at 76 (noting that the "delicate and grave" character of original jurisdiction renders it "obligatory only in appropriate cases" (citation omitted)).

2. The result is the same if the question of the Commission's authority to invoke this Court's exclusive original jurisdiction is viewed as one of standing. This Court has held that, in appropriate circumstances, an association or organization has standing to sue to redress injuries to its members. The Court has articulated a three-prong test for such "representational" standing, under which an association or comparable entity has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Applying the third prong of that test here, both the nature of the claim asserted (a claim by a number of States that another State has violated an interstate compact) and the relief requested (monetary and other relief against a sister State) ordinarily would require the participation of the party States themselves as plaintiffs in a suit within this Court's exclusive original jurisdiction.

This Court has ruled, in a case against a private defendant, that the third prong of this associational or representational standing test is prudential, not constitutionally required under Article III, and that it therefore may be displaced by an Act of Congress. See *Food & Commercial Workers*, 517 U.S. at 555-558. There is no need here to decide whether the third prong should likewise be regarded as merely prudential where the plaintiff is an organization created by an interstate compact among sovereign States and the defendant is a sister State. As we have noted, the general terms of the Compact at issue in this case are insufficient to constitute the requisite statutory authorization for the Commission to bring such a suit under this Court's exclusive original jurisdiction and thereby displace an otherwise applicable prudential rule.

3. Even if the foregoing obstacles to suit as a representative of States that are parties to the Compact could be overcome in another case, the Commission would be incorrect in characterizing its role in this case as one of "stand[ing] in the shoes" of the party States. Reply Br. 3. The Commission, in its capacity as the Compact Clause entity responsible for administering the Compact, imposed a sanction on one of the States that is a party to the Compact. The Commission's sanction requires North Carolina to return nearly $80 million (plus interest) to the Commission. The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission—and not the States that are parties to the Compact—dispersed the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility. See Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a). Hence, in seeking to enforce the sanction, the Commission is not acting in a representative capacity, but is instead acting in its own right, as "a legal entity separate and distinct from the party states." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a).

C. The Commission Has An Alternative Forum For Pursuing Its Claim

The Commission contends that if this Court does not exercise its original jurisdiction, there is no alternative forum in which it can litigate its claims against North Carolina. See Mot. 27-29; Reply Br. 6-7. That argument is also unsound.

The Commission contends that the present case should not be heard in state court because "[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States," and "[a] State cannot be its own ultimate judge in a controversy with a sister State." Mot. 28 (quoting *West Va. ex*

rel. Dyer v. *Sims*, 341 U.S. 22, 28 (1951)); see Reply Br. 7. The Court's rejection of original jurisdiction over a suit by the Commission would not, however, preclude one or more States that are parties to the Compact from bringing an original action under 28 U.S.C. 1251(a) against another party State to enforce the Compact and seek an appropriate remedy. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987).

In any event, the Commission's reliance on *Sims* is misplaced even as to the Commission's own claims. The Court's decision in *Sims* arose from an interstate compact reflecting an agreement among eight States to curtail pollution discharges into the Ohio River. 341 U.S. at 24. A controversy arose because of "conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact." *Id.* at 25. The West Virginia Supreme Court resolved that intrastate dispute through a mandamus action, but this Court, on writ of certiorari, reversed that court's interpretation of the compact. *Id.* at 32.

This Court observed that "[a] State cannot be its own ultimate judge in a controversy with a sister State" in the context of this Court's *review* of the state court judgment on certiorari. See *Sims*, 341 U.S. at 28-29. The Court explained that, although the West Virginia Supreme Court of Appeals "is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution," this Court is "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States." *Id.* at 28. The Court specifically observed that "the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court." *Id.* at 30.

Contrary to the Commission's contention, *Sims* demonstrates that state courts *are* appropriate fora for resolving

interstate compact controversies that do not fall within this Court's exclusive original jurisdiction. This Court may review a state court's interpretation of a compact—which is a matter of federal law—through a writ of certiorari. The Eleventh Amendment would pose no bar to the Court's exercise of appellate jurisdiction in that context. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 28 (1990). This Court can accordingly ensure that a state court's initial exercise of jurisdiction over a compact dispute involving a non-State party would not result in a single State being the "ultimate judge" of the federal issues raised in the bill of complaint. See *Sims*, 341 U.S. at 26-30.[6]

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[6] The Commission contends that North Carolina "does not even concede that a State's sovereign immunity would not preclude a resolution of this dispute in the North Carolina courts." Reply Br. 8 n.3 (citing *Alden* v. *Maine*, *supra*). North Carolina's brief in opposition indicates, however, that North Carolina courts would be an available and appropriate forum for resolving the dispute. See Opp. 25 ("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"). Furthermore, if this suit is not barred by the Eleventh Amendment, as the Commission's filing of an action against North Carolina in this Court apparently assumes, the Eleventh Amendment likewise presumably would not bar a suit by the Commission against North Carolina in federal district court.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
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May 2001

APPENDIX B

SANCTIONS HEARING
SOUTHEAST COMPACT COMMISSION

Proceedings before Curtis Van Kann, Hearing Officer, reported by Michael R. Brentano, Certified Court Reporter and Notary Public, at Embassy Suites Hotel, 4700 Southport Road, College Park, Georgia, on the 8th day of December, 1999, commencing at the hour of 8:30 a.m.

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* * *

[page 13] The State of North Carolina has, by its actions, left the Compact with no recourse but to take sanctions against it to recover its funds. However, nothing can reclaim the time that has been lost. Once again, the Southeast Compact is faced with a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive materials due to the lack of disposal facility.

And that's the end of my statement.

MR. VAN KANN: All right, thank you, Commissioner Mobley. It occurs to me that the statement that you have just made is probably part opening statement and part testimony because there were certain factual matters there. And I think in order to be in accord with the procedures adopted by the Commission, I'd like to give you a retroactive oath that the testimony that you have just given, to the extent it is testimony, is—can be under oath for purposes of any review.

Would you raise your right hand. Do you solemnly swear that the testimony you've just given is true and correct to the best of your knowledge and belief so help you God?

MR. MOBLEY: Yes, sir.

* * *

[page 34] concerns over management and time frames of the project. We have worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for a completion of the facility. And once again, because of funding issues and work issues on their part, that plan was never executed to its full extent.

On December 19th, 1997, the Authority voted to shut down the project, pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. And I believe one of those letters may already be in as an attachment. If I've duplicated some attachment there already, I apologize. But that letter is December 19th, 1997.

And finally, I would like to acknowledge Exhibit 3, which is the letter previously mentioned in which North Carolina has stated that they have withdrawn from the Compact and will not be participating in any further actions. My point is that despite having no mandate to fund the project, this commission has done that to over $79 million, that North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and that when it came time [page 35] for them to do their part, as was voted in accordance with the Compact and to be the next host state, they were unable to meet those obligations in a timely manner and ultimately decided that they would not play.

And that's the end of my testimony.

MR. VAN KANN: All right. Thank you, Mr. Hunter. Let me ask if members of the Commission, commissioners, have any question for this witness. Again, we will start on the left and maybe just go right down the line starting with Commissioner Burks [sic] any questions?

Mr. Setser, any questions?

MR. SETSER: Yes, just briefly.

EXAMINATION

BY MR. SETSER:

Q. Coming from the perspective of various commission meetings that have been held an [sic] presentations and instructions we received from the executive director of the North Carolina Low Level Waste Management Authority, and at times from the Division of Radiation Protection in the State of North Carolina, have you—can you recall any specific instructions or guidance that had been given by either the general assembly or the governor to expedite of [sic] facilitate the development of a site?

* * *

[page 40] to demonstrate that the governor very clearly was apprised and knew what was required of the State.

Q. The Authority law speaks to the issue of paying back the expenses for siting the disposal site. What does the law say about that?

A. You'd have to refresh my memory. I believe after operation, they can collect those.

Q. And do you know how those funds were generated?

A. How they would be generated? By fees of people disposing of waste.

Q. The generators?

A. Right.

Q. That would be after—

A. You'd obviously have to have a site to do that.

Q. Correct. And those fees would go back to the host state, correct?

A. That's correct.

MR. JONES: No more questions.

MR. VAN KANN: Mr. Buckner, any questions?

MR. BUCKNER: I have none.

MR. VAN KANN: Miss Walters, any questions?

MS. WALTERS: No.

MR. VAN KANN: Any other members of the

* * *

[page 54] MR. MOBLEY: Not specifically. It just—it was within a very short time frame, but I don't remember.

Q. (By Mr. Jones) At the time you had filed the complaint, how far had North Carolina progressed at that site?

A. They had shut down work by that time. And their work had gotten to a point where they felt like if they had all the remaining money that the Compact had given to them plus some additional funding, that they might be able to come to a decision on whether the site was capable of being licensed.

Q. When Barnwell closed—you've cited in your complaint that in 1995, South Carolina withdrew from the compact. When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?

A. No. We had no other funding other than some interest on our accrued funds.

Q. You spoke at the beginning of your testimony about the trade-off and benefits to a state being a member of the compact. In terms of North Carolina, could you elaborate on that? Would that mean they had access to Barnwell?

* * *

[page 62] processed and disposed of.

Q. I think there was a question earlier about—go ahead.

MR. HAWKINS: Please finish, I'm sorry.

MS. SHULTS: Go ahead.

MR. HAWKINS: Judge, may I? Dealing with—

MR. VAN KANN: Just again—

MR. HAWKINS: Charles Hawkins, commissioner from Virginia.

RE-EXAMINATION

BY MR. HAWKINS:

Q. Dealing with the financial aspects of the process. I was not a member of the Commission when the original compact law was passed. But there was some reference made in some of the correspondence I believe I read from the State of North Carolina about they refused to accept the entire burden of financial responsibility of building the site. In the original compact law itself, was it not a fact that the host state had the total responsibility of building the site and was not the Commission prohibited from investing money into the development of that site? Was that a fact?

A. I think that it's certainly true that the intent was that the host state would develop—would [page 63] expend the funds to develop the site and the concept was that they then would be able to recoup those costs by charging appropriate fees for the disposal of the waste. And it's clear that the compact legislation indicates that the compact does not have to pay for the disposal—development of the disposal site. I don't think it prohibits the Commission or the Compact Commission from assisting the state, but it does indicate that there is no requirement that we assist the state.

Q. Follow-up question, please, sir. But weren't—in fact, didn't we change the state compact laws to allow us to put moneys into the State of North Carolina and development of the site and the original compact law that was passed by the legislatures of participating states clearly stated that the

responsibility was of the host state and that the general assembly of North Carolina passed that in full understanding of their financial responsibility?

A. It's certainly true in the original compact legislation that they passed it that way. The amended—the amended or —or activities to amend the compact, I think, only addressed the question of whether a state could withdraw from the compact. This was after the designation of North Carolina.

* * *

[page 82] through that represented the State of North Carolina and not either the Authority or an individual agency. And we were told that his existing commissioners were people to represent the State of North Carolina.

Q. And then right about the same time, in June, which was just before that, in this letter says, Commission believing it was not prudent to spend commission funds expressed strong doubt that the project would ever be completed. I was looking for evidence of this doubt because the only thing I can determine was that Hunt had said—Governor Hunt had replied in correspondence that he supported the project but he needed money to carry it forward. And I was curious about if there were other statements that were not in the record by the governor or other elected officials that would indicate this—the genesis for the strong doubt.

A. Well, there are two issues. Let me first comment on the latter one, the money. There has never been an indication where the Compact Commission has indicated its unwillingness to continue to use the funds it had at its disposal to fund the State of North Carolina as it went forward to develop the site. It was only when we got to the point where we—the projections for licensure of the site, both time and [page 83] cost, became more than the money that we had in the bank to cover, thus creating a potential shortfall of several million dollars, and I don't remember the exact number at this point in time.

And it was then that we created a task force which Commissioner Mobley chaired with a number of stakeholders to try to develop a funding mechanism to cover that shortfall. And one was developed and, of course, as we remember serving on it, the State of North Carolina did not accept that funding proposal, nor did they come back with one of their own that was an alternate or better or different from that that would allow the shortfall to be met so that it could go forward. It was only after that time when there was no hope of having moneys to reach the target date that the Commission decided it was not prudent to expend what reserve funds it did have in the bank to continue the process.

So from a funding standpoint, we've always been on record as indicating we were willing to fund with what moneys we had. But remember that when the State of South Carolina withdrew from the compact as a party state, it was, in effect, prior to that time the enabling mechanism for the collection of fees since they had control of the fees that the generators paid [page 84] in order to dispose of waste at the site. So that was the mechanism. So whenever they withdrew as a party state, that mechanism went away and, therefore, the only income and the only moneys that the Compact Commission had available to it was the interest earned on the existing principal that it already had in the bank and there was not going to be a continuing source of funds to either provide North Carolina or to even support the budget of the Compact Commission. So that's the discussion of funding as I recall it.

And refresh my memory on the other issue.

Q. The strong doubts, where—

A. The doubts arose out of the continued moving target as far as completion of tasks and timetables moving toward an overall goal of satisfying the licensing agency. It was definitely a moving target that didn't stay in one place. And this caused considerable doubt. And as a result, we expressed this strong reservation to North Carolina.

In fact, we enacted a resolution requiring them to develop a coordinated work plan that was agreed to by both the Authority and the licensing agency with milestones and projections of cost in order to allow this to go forward. At which time the State of North Carolina hired another contractor, Harding Lawson

* * *

[page 91] for environmental reasons, or for just the ability to do it in just a much easier manner, there has to be some understanding that commitments are made.

The process that I understand was one that went through a designation of points for the states and everyone agreed that that would be the end result of the host state first time around. And North Carolina had the points, it's my understanding, I was not here at the time. The legislation that went through the bodies of the general assemblies of all the states said, in fact, we were going to work together for the mutual benefit of all the people in our area.

If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart. And we all lose from that. This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens. And if, in fact, compacts cannot stand the test of troubled waters, the validity of those compacts are not going to last.

And I would think, too, Judge, at this juncture if, in fact, this does take the course that it seems to be taking, and if something is not in place to [page 92] bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts,

knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body. And that's no way to build agreements, sir. Thank you.

MR. VAN KANN: Any questions for Commissioner Hawkins? Yes, sir, Commission [sic] McNeer.

MR. McNEER: A.C. McNeer. I have no question, I just want to confirm my opinion one hundred percent of what he's just said. I think he's absolutely correct that if we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble.

And I commend you for your comments as always. Thank you.

MR. VAN KANN: Any other commissioners have any statements or questions with respect to Commissioner Hawkins? Any member of staff or counsel? Thank you, Commissioner.

Any other commissioners from Alabama, Georgia, Mississippi, or Virginia wish to offer [page 93] anything at this time? Okay. Seeing none, I'll assume that we can move on.

I did note earlier that the Commission received a letter from the Attorney General of North Carolina dated December 1, 1999. A copy of it is in the back of the room and I certainly won't undertake to read it in its entirety. It has been made an exhibit to this record, Exhibit 3. And among other things, the letter says that after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding.

And I'm advised that the Commission has not received any subsequent communication from North Carolina changing that position. Nevertheless, if there is anyone in the room representing the State of North Carolina who wishes at this

point to be heard by way of evidence or documentary submissions, he or she is certainly welcome to come forth and be heard.

Well, seeing no one rushing to the front, I think we can move on to the next phase of the proceeding. And that is for closing statements of the complainant parties, Florida and Tennessee. Any of the representatives of those states would like at this point to offer a closing statement, they may certainly do that. And after that, we will move to the stage of

* * *

APPENDIX C

RESOLUTION

Whereas, the Southeast Compact Commission (the "Commission") is charged by Article 4(E)6 of the Southeast Interstate Low-level Radioactive Waste Management Compact (the "Compact") with the duty of identifying a host state for the development of a second regional disposal facility and seeking to ensure that "such facility is licensed and ready to operate as soon as required but in no event later than 1991"; and

Whereas, the Commission is charged by Article 4(E)4 of the Compact with the duty of developing procedures for determining, "consistent with consideration for public health and safety, the type and number of regional facilities which are presently necessary to manage waste generated within the region"; and

Whereas, the Commission, although not obligated to do so under the Compact provisions, deems it appropriate and necessary to provide financial assistance to any state duly designated as the next host state for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility in accordance with Article 3 of the Compact; and

Whereas, the Commission has appropriated, in its annual budget for the fiscal year July 1, 1986-June 30, 1987 the sum of $200,000, designated as a "State Assistance Trust Fund," to be used for the aforesaid purposes; and

Whereas, the Commission intends to appropriate the same or similar amounts in future annual budgets for the same aforesaid purposes, * * *

* * *

* * * an independent certified public accountant, whose report shall be made available to the Finance Committee and to the Commission.

7. After approval by the Finance Committee, the Executive Director is authorized to make payments and disbursements from the Fund only for the purposes set forth in Paragraph 1 of this Resolution and in accordance with the By Laws of the Southeast Compact Commission. Payments and disbursements shall be made only on application by the duly designated agency of the next host state.

8. Each application by the duly designated agency of the next host state shall be on a form approved by the Executive Director. The application shall state in full the reasons and the need for the requested payment and the precise purposes for which the requested payments will be used.

9. No application will be received from, and no payments from the Fund will be made to, any private individual, organization or corporation.

10. In the event that the Finance Committee decides not to authorize payments as requested by the duly authorized agency of the next host state, that agency may request the full Commission to review and reconsider the decision. The Commission's decision shall be final.

Adopted February 9, 1988
Biloxi, Mississippi

APPENDIX D

MINUTES
SOUTHEAST COMPACT COMMISSION
October 24, 1989
Page Five

Report from Host State Identification Committee

Ms. Barbara Wrenn, Chairman, reported that the Host State Identification Committee last met on September 26, 1989 in Nashville, Tennessee, to become more acquainted with the generator survey report of the Technical Advisory Committee. She stated that Commissioner Mobley made a report indicating that waste reduction continues. The Host State Identification Committee continues to look at the criteria for selecting the next host state. The distinction between volume and curies may become more important in the next selection because while the volumes are reducing drastically, curies are not. This may be something to be weighed differently in the next selection process.

In the southeast region, it is not anticipated that the generators will have 32 million within the next 20 years. The threshold for closure for the North Carolina facility is either 20 years of operation or 32 million feet, whichever comes first. It [sic] not anticipated that we will need a third regional disposal facility in operation before the two decade period. The committee will continue to study the criteria within the parameters expected by the state of North Carolina.

Commissioner Godwin questioned whether the decrease in volume would affect the financing of future facilities. Ms. Wrenn indicated that this was a finding of the committee since the financing heretofore was based on volume. It may be necessary in the future to alter the financing of the facility.

Report of the Public Participation Committee

Commissioner Ben Smith reported that the Committee recommends having an annual event for legislators to inform them of the work of the Compact. He presented a proposed budget and agenda for the event. Upon a motion by Mr. Smith, the Commission voted unanimously to proceed with the conference plans and to expand the Commission budget to include $55,000 for the annual conference, targeting the summer of 1990 for the first conference.

Commissioner Bailey questioned whether more than two legislators could attend. Mr. Smith said it would certainly be welcome if paid for by that state.

It was suggested that, in addition to the planned conference for southeast legislators, the Southern Legislators' Conference would be a good avenue for exposure, such as a booth, exhibit or reception.

Report from the Finance Committee

Capt. Briner presented the following recommendation to the Commission in the form of a motion.

> The Finance Committee recommends that the Commission approve the development of a site development charge for the purpose of repayment of a Capacity Assurance Charge and direct the Finance Committee to proceed with the development of a methodology for its implementation.

[Page Six]

Mr. Smith discussed repayment of the charge in reference to generators who [sic] will not be operating in the future and the volumes for those currently disposing of waste will vary. He suggested that there be a payback of the Capacity Assurance Fee and to provide some incentives so that there will not be stockpiling of waste and excessive storage.

There was discussion from several Commissioners in reference to the Capacity Assurance charge and potential payback.

By unanimous vote, the motion was approved.

A proposal to implement a Capacity Assurance Charge was then presented by Captain Briner (see "Summary Description of Capacity Assurance Charge"). The meeting was briefly recessed so that everyone could look over the proposal before voting.

When the meeting was reconvened, a roll call vote was taken, and the proposal was adopted with no opposition.

Report from Commissioner Shealy

Commissioner Shealy reported on the judgment of compliance with the milestones in the Low-Level Waste Policy Amendments Act. In reference to the July 1, 1988 milestone where a host state had to be identified and siting plans submitted, Puerto Rico and three states were not in compliance. Rapidly approaching is the January 1, 1990 milestone which requires that a complete license application be submitted to the Nuclear Regulatory Commission or an agreement state, whichever applies. Mr. Shealy further discussed the option of Governor certification. Mr. Shealy submitted a Guidance Document for determining compliance with the third milestone, to be entered into the minutes of the meeting. This document contains four key elements that the three host states (Nevada, Washington, and South Carolina) feel should be in the governors' certifications. Currently only one draft Governor's certification has been received (from the Midwest Compact). He also pointed out that the Governor's certification is to be submitted to the U.S. Regulatory Commission.

Dr. Howell questioned whether the South Carolina site would definitely be closed, internally and externally. John McMillan answered that the site would be closed on the regional facility, but South Carolina has the option to use it for their own waste.

Commissioner Cynthia Bailey made the following motion, which was unanimously approved.

> That the Commission defer to South Carolina's judgement on the enforcement of other milestones as regards access to the regional facility but reserving any independent authority the Commission might have for the future accessment.

SUMMARY DESCRIPTION OF CAPACITY ASSURANCE CHARGE

Adopted October 24, 1989

1- Name

This special fee on all current southeastern users of the Barnwell, S.C. disposal facility shall be denominated as a "Capacity Assurance Charge".

2- Purpose

To assure the timely development of the second regional disposal facility in North Carolina by furnishing additional funds to the Southeast Compact Commission ("Compact") for utilization by the NC Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of North Carolina's site development. In this phase a site will be selected and a license to build and operate the facility will be obtained. This will assure the availability of a site for all southeast generators and thus this fee is a future disposal capacity assurance charge.

3- Who Pays the Charge

All southeast low-level radioactive waste generators using the Barnwell, South Carolina disposal facility.

4- Basis for Calculating the Charge

A cubic foot charge for volumes disposed at the Barnwell, S.C. disposal facility.

5- Duration

Beginning January 1, 1990 and continuing for so long as necessary to accumulate a total of $21.4 million, which funds shall be utilized to partially defray the cost of site selection and licensing of a new regional disposal facility in North Carolina, or a license is granted, whichever first occurs. In no event will the charge be collected later than December 31, 1992, due to the closure of the regional facility in Barnwell, South Carolina.

Projected charges would yield $9 million per year based upon 450,000 cubic feet at $20/cubic foot.

6- Exemptions

None

7- Specific Power of the Compact to Allocate Funds to NC

It is the duty of the Commission to "provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities." [Article 4(E)5.]

The Compact Commission shall seek to ensure that [the new regional facility in NC] is licensed and ready to operate as soon as required . . . [Article 4(E)6.]

"It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing . . . sufficient facilities for the proper management of low-level radioactive waste generated in

the region; . . . [and to] distribute the costs, benefits, and obligations of successful low-level radioactive waste management equitably among the party states . . ." [Article 1]

8- Specific Power of the Compact to Accept Funds from the State of South Carolina

"The Commission may accept for any of its purposes and functions any and all donations, grants of money . . . from any state . . . or from any institution, person, firm, or corporation, and may receive, utilize, and dispose of the same." [Article 4J.]

9- Specific Power of the SC Budget and Control Board to Impose, Collect, and Disburse Proceeds from Charges

"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. must be sufficient to cover the annual budget of the Commission . . ." [Article 4H.2.]

Sec. 13-7-30 of the SC Code specifically empowers Budget and Control Board to impose, collect and disburse special fees or surcharges.

10- Specific Power of the Authority to Accept Funds From the Compact

NCGS 104G-6a(13) expressly authorizes the Authority to apply for, accept and expend grants of money from a compact commission for any purpose authorized by the enabling statute creating the Authority.

11- Purposes for Which the Authority May Expend the Proceeds from these Charges

The Authority is granted broad powers to do anything necessary and proper to site, design, construct, and

operate a disposal facility either itself or through a private operator. [NCGS 104G-6 and 104G-10].

12- How Will the Charges Be Determined

The Authority shall submit to the Compact an annual budget projecting costs associated with paying the operating and maintenance expenses of the Authority, the costs of paying the Authority's contractors or consultants, and the costs of reimbursing NC agencies for their expenses incurred on behalf of or in support of the Authority.

The Compact shall transmit its own budget to the SC Budget and Control Board and shall include the amount requested by the Authority.

The SC Budget and Control Board shall determine the volume charge annually based upon estimated totals from southeastern generators.

13- Adjustments in annual volume charge

The charge shall be reviewed by the Southeast Compact Commission at least on an annual basis and may be adjusted due to changes in volumes.

14- How will charge be collected

The Barnwell site operator will collect the charge from all southeastern generators based upon disposed volumes.

The site operator will transmit the proceeds to the South Carolina State Treasurer who shall then transmit the funds to the Compact. For further detail, see "Attachment A: Procedure For Collection of Proposed Capacity Assurance Charge"

15- How will the funds be disbursed

The Authority will periodically submit an invoice to the Compact for payment from the accumulated funds derived from these charges. See "Attachment B:

Procedure For Expenditure of the Proposed Capacity Assurance Charge Funds"

16- What controls will be placed on the use of these funds by the Authority

No payments shall be made by the Authority absent express or implied statutory authority in its enabling legislation for the specified purpose.

Payments to Chem-Nuclear Systems, Inc. will be subject to the exact terms and condition contained in their written contract with the Authority.

Chem-Nuclear shall submit a work plan based upon milestones and schedules approved by the Authority. Invoices submitted by Chem-Nuclear shall be consistent with the approved work plan.

The Authority will implement a comprehensive monitoring and quality assurance program to support management and oversight of its contracts with Chem-Nuclear and others.

The Authority shall approve all service agreements and other obligations incurred on its behalf or in support of the Authority by other state agencies and contractors.

17- What mechanisms are available to the Compact to enforce compliance

The same generic sanctions to assure good faith compliance shall also be available to enforce these guidelines and policies.

Misuse, misapplication or misappropriation of funds provided by the Compact to the Authority shall also be subject to all the same legal remedies ordinarily available to parties.

18- Who will audit the receipt and expenditure of these funds

The Authority's books and records shall be subject to an annual audit by the North Carolina State Auditor in addition to those administrative policies and controls

imposed by its parent department, the North Carolina Department of Administration.

The results and written reports of audits for these governmental entities are public information and subject to inspection.

19- What priority will be used for applying the proceeds from these charges relative to state fund appropriations granted the Authority

As proceeds from these charges are collected from the Compact and deposited with the North Carolina State Treasurer, they will first be utilized to pay current or past obligations of the Authority. To the extent these charges are insufficient to pay the Authority's obligations, appropriated State funds shall be used. At the end of the licensing phase, any unexpended operating funds appropriated by the North Carolina General Assembly to the Authority shall revert to the State's General Fund.

Based upon current projections, available funds derived from the capacity assurance charges and state appropriations are expected to be adequate to pay all licensing expenses associated with the project.

Any and all costs that are not otherwise paid by the generators from these charges shall ultimately be repaid to the State of North Carolina with interest once the facility becomes operational. To maintain an accurate account of the total cost of developing and establishing the regional disposal facility, the Authority shall maintain a ledger showing the total amount of funds expended from the NC General Fund that are not otherwise recovered from these generator charges.

20- Documentation of Cost Projections

Attachment C indicates expenditure projections for the licensing phase from November 1, 1987 through

December 31, 1991 of $13,732,702 for the Authority and the State agencies associated with the regulatory and licensing aspects of the project. In addition, the Authority's prime developer/operator contractor, Chem-Nuclear Systems, Inc., began work under their contract on July 28, 1989 and their projected licensing expenditures are included in this exhibit totalling $20,879,692.

The General Fund Appropriation from the North Carolina General Assembly to the Low-Level Radioactive Waste Management Authority and the other State agencies directly involved in the project totals approximately $17,400,000 for the 1989-1991 biennium. *The money is designated to be used only when there are no other funds available for this project.* The total of all projected expenditures from the first anticipated date of receiving Capacity Assurance Funds in April 1990, through the receipt of the license on December 31, 1991 is approximately $21,000,000.

ATTACHMENT A

DRAFT PROCEDURE FOR COLLECTION OF PROPOSED CAPACITY ASSURANCE CHARGE

Step 1 The N.C. Low-Level Radioactive Waste Management Authority (Authority) submits a budget to the Southeast Compact Commission (Commission) for the current budget period (i.e. January 1, 1990 to June 30, 1990). In subsequent years, the Authority submits an annual budget to the Commission.

Step 2 After approval, the Commission submits this budget to the South Carolina Budget and Control Board as an amendment to its budget for the purposes of assisting North Carolina in the licensing phase of site development.

Step 3 The South Carolina Budget and Control Board sets the amount of the charge per cubic foot based on the budget of the Authority divided by the number of cubic feet which Chem-Nuclear Systems, Inc. (CNSI) expects to dispose for Southeast generators over the same time period.

Step 4 For each shipment of waste disposed at Barnwell by Southeast generators, CNSI calculates the amount of the charge owed by the generator and bills the generator for this amount on the routine invoice. The charge will be due to CNSI on payment of the invoice (45 days is an average period for payment). Note: the capacity assurance charge will not be built into the base charge since it does *not* apply to generators outside the Southeast.

Step 5 Once a month, CNSI submits to the S.C. Treasurer's office the amount of charges collected from generators over the past month.

Step 6 Once a month, the S.C. Treasurer's Office transmits funds to the Commission for the amount of charges submitted by CNSI that month. This check will be separate from the check for the Commission's operating budget.

Step 7 The capacity assurance charge funds are deposited into an account held separate from the Commission's operating funds.

Step 8 Upon approval of an invoice from the Authority (see "Draft Procedure for Expenditure of the Proposed Capacity Assurance Charge Funds"), the Commission transmits funds to the Authority.

Step 9 CNSI ceases billing generators for the capacity assurance charge at the point in time when they have collected a total of $21,400,000.

ATTACHMENT B

DRAFT PROCEDURE FOR EXPENDITURE OF THE PROPOSED CAPACITY ASSURANCE CHARGE FUNDS

1. Chem-Nuclear Systems, Inc. (CNSI), other contractors and other state agencies invoice the N.C. Low-Level Radioactive Waste Management Authority (Authority) for completed tasks, in accordance with the Work Plan.

2. The Authority invoices the Southeast Compact Commission (the Commission) with an itemized list of work performed by CNSI, other contractors, other state agencies, and the Authority staff.

   The Authority certifies to the Commission Executive Director that the work has been performed and that the work corresponds to the Authority's Work Plan or other legal obligations of the Authority.

4. As soon as possible, but in no event later than ten days after the receipt of the Authority's invoice, the Commission mails a check to the Authority. The check is co-signed by the Commission Executive Director and Secretary-Treasurer. If the amount of the invoice exceeds the amount of capacity assurance charges collected to that date and remaining in the account, the check will be made for no more than the amount remaining in the account.

5. Payments to the Authority shall be deposited in a special segregated fund maintained by the North Carolina State Treasurer. Checks drawn by the Authority shall be debited against the special account.

6. At each Commission meeting, the Authority provides a thorough report of the progress made toward its Work Plan.

APPENDIX E

MINUTES
SOUTHEAST COMPACT COMMISSION
November 15, 1990
Page Five

Commissioner Smith presented three factors that would produce a more successful and cost effective conference which are (1) greater commissioner involvement in working with legislators, (2) repeating the conference location, and (3) avoidance of unnecessary changes to the format and written materials.

The Committee also recommended that this conference not be joined with a commission meeting. The Committee felt that there would be to many conflicts.

In reference to hiring an outside consultant to facilitate the conference, the Committee asked Secretary-Treasurer Captain William Briner and Ben Smith to form a subcommittee to review the consultant's work plan prior to execution of a contract.

In regard to the scheduling of the conference, several dates were offered. September 15 and 16 were chosen for the conference.

Chairman Hodes emphasized early follow-up with legislators on registration for the conference.

New Commissioner W. Tayloe Murphy was appointed as a member of the Public Participation Committee.

Report of the Finance Committee

A. Financing of Regional Facitity Development

Captain William H. Briner, Chairman of the Finance Committee, called on Commissioner George Miller, who had chaired a special subcommittee appointed to review the proposal presented in an August 21, 1990 memorandum by

South Carolina commissioners, John McMillan and Heyward Shealy. Chairman Briner commended Rep. Miller and others involved for the hard work expended in in [sic] this effort.

Commissioner Miller made the following motion:

The Finance Committee recommends that the Commission establish an access free as outlined in the August 21, 1990 memorandum to the Commission from Commissioners McMillan and Shealy, as amended (see Attachment A.)

Notwithstanding, in the event a member state does not establish a mechanism which provides compensation for the access free within the time provided, the host state shall assess and collect the fee based on volume on an equitable basis for all waste from that state, to be paid by the generators.

The motion was seconded by John McMillan.

Commissioner Ben Smith stated that the original figures from the August 21, 1990 memorandum would have to be adjusted. Chairman Hodes indicated that these figures would be corrected.

Alternate Commissioner Palmer from Mississippi addressed the fact that this motion covers only the first two years, implying that the issue must be revisited for the balance of funds needed.

Captain Briner responded affirmatively to Commissioner Palmer's concern.

Commissioner Godwin requested that "equitable basis" be stated as volume per facility.

Commissioner Miller moved to amend his motion to indicate that they are not authorizing a financial commitment on behalf of the states themselves. Each state is to establish a

mechanism for collecting the access fee. If this is not done, the host state will assess the fee. The word "equitable" is to be substituted to read "equal".

Seconded by Captain Briner.

The amendment was approved unanimously.

Commission [sic] Setser, speaking to the motion, reiterated that this does not imply that the Commission is placing a financial liability on the state itself.

Commissioner stated that the process is to be put into place on January 1, 1991.

The motion as amended was voted on by roll call. The affirmative vote was unanimous.

Commissioner Miller thanked South Carolina for submittal of the proposal and expressed appreciation of the member states in regard to the financial burden of this project. Commissioner Briner thanked the commissioners for their efforts and Commissioner Hodes thanked Captain Briner for his work with the Finance Committee on this issue.

B. Prudence Evaluation

Captain Briner stated that the Finance Committee recommends that a professional services contract be made with Ernst & Young for a diagnostic evaluation of the North Carolina Low-Level Radioactive Waste Management Authority's costs. The cost for this evaluation will approach $50,000.

The commissioners discussed the motion. Alternate Commissioner Palmer asked for clarification on the need for the contract.

Commissioner Smith indicated that possibly this evaluation will give suggestions for stretching the funds over a longer period of time and ways to possibly cut costs.

Commissioner Godwin would like indication that these are reasonable expenses.

Attachment A

(text of 8/21/90 memorandum, amended 11/15/90)

As you know, the Southeast Compact Finance Committee has been discussing the concept of establishing an access fee in addition to the current capacity assurance charge for collecting revenues to develop the second regional disposal facility for the Southeast Compact.

The suggested alternative places too great a burden on generators who are trapped in a fixed price situation with little if any ability to adjust prices to absorb major increases in cost. As a result, these generators will either reduce shipping by utilizing expanded storage or, in extreme cases where storage is not a viable option, go out of business. We do believe an access fee alternative is an option, but only if implemented in an equitable manner. We also believe each member state of the Compact is best suited for determining the most equitable means for developing this system.

Article 3(B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for access fees: "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 state or states and approved by a two-thirds vote of the Commission."

South Carolina, as the host state to the regional facility is proposing all state in the Southeast Compact pay an annual access fee based upon proportional volumes from each state beginning with the last quarter of 1989 and the first three quarters of 1990, adjusted on a quarterly basis thereafter. Further, the state access fee is payable to the State of South

Carolina beginning January 1, 1991 through December 31, 1992. The amount to be raised during this time period is $12 million.

This proposal will allow individual sates to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in the North Carolina Low-Level Radioactive Waste Management Authority be returned in the form of a user credit after the opening of the next host state facility.

RESOLUTION

TO ESTABLISH AN ACCESS FEE ON SOUTHEAST GENERATORS FOR THE PERIOD JANUARY 1, 1993—DECEMBER 31, 1995

Adopted by the Southeast Compact Commission
November 13, 1992

In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.

The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move

forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.

The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993-December 31, 1995. Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993-December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

MECHANISM TO COLLECT REVENUES DURING THE PERIOD JANUARY 1, 1993 - DECEMBER 31, 1995 FOR CONTINUED DEVELOPMENT OF THE SECOND REGIONAL DISPOSAL FACILITY FOR THE SOUTHEAST COMPACT REGION

An access fee will he collected during the three year period January 1, 1993-December 31, 1995 for the purpose of funding the continued development of the second regional disposal facility in North Carolina.

Article 3 (B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for an access fee:

> "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 state or states and approved by a two-thirds vote of the Commission."

Generators in all Southeast Compact states will be assessed an access fee based upon each state's percentage of Southeast Compact waste disposed at the Barnwell site during the previous twelve months. Further, the state access fee is payable to the State of South Carolina for the twelve quarters beginning January, 1993 and ending December 31, 1995. The amount to be raised during this time period is $3 million each quarter, for a total of $36 million.

Each state may establish a mechanism for determining the amount of access fee assessed against individual generators within that state. In the event a member state does not establish a mechanism for assessment, the host state shall assess and collect the fee based on the method described herein.

This mechanism will allow individual states to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in the North Carolina Low Level Radioactive Waste Management Authority be returned to the generators in the form of a user credit after the opening of the next host state facility.

Generators within states of the Southeast Compact will be assessed quarterly. Fees will be billed on the fifteenth day of the month immediately preceding the first day of each quarter in the assessment period. Generators shall be expected to pay such fees by the fifteenth day of the first month of each quarter, regardless of whether they plan to use the existing regional disposal facility in Barnwell, South Carolina during the quarter in question.

Access fees shall be calculated and collected by Chem-Nuclear Systems Inc. (CNSI) on behalf of the State of South Carolina. Fees shall be calculated and assessed according to the following procedures.

PROCEDURES

Fee Calculation and Assessment

The initial assessment will be based on the volume of waste disposed during the fourth quarter of 1991 and the first three quarters of 1992. The second assessment will be based on volumes of waste disposed during the first quarter 1992 through the fourth quarter 1992, and adjusted on a quarterly basis throughout the assessment period.

The total amount of access fees to be collected each quarter shall be determined by dividing the total amount of revenues needed by twelve quarters. Access fees will be apportioned first to each state and then assessed to each generator within the state based upon the mechanism established by that state.

On December 15, 1992, the first quarterly statement will be distributed by South Carolina for the Commission. Such statement shall show the total amount of the quarterly access fees apportioned to the state. The statement shall also include a breakdown of the quarterly volumes and the access fees to be assessed against each individual generator in each member state.

The total amount of the access fees apportioned to each member state for the quarter shall be determined by using historical disposal data from the Barnwell, South Carolina facility. The member state's share of the total shall be determined in the following manner:

1) Calculate the state's percentage of waste disposed at the Barnwell facility: Divide the volume of waste disposed by the state's existing generators at the Barnwell facility during the previous twelve months by

the total volume of waste disposed at the Barnwell facility by all existing Southeast generators during the same period.

2) Multiply the state's disposal percentage by the total quarterly revenues to be assessed against all existing Southeast generators to determine the total access fees apportioned to that state.

Except in the case of a state which establishes a different mechanism, the quarterly access fees assessed against individual generators within the state shall be determined in the following manner:

1) Calculate the generator's percentage of the state's waste disposed at the Barnwell facility: Divide the volume of wastes disposed at the Barnwell facility by the individual generator during the previous twelve months by the total volume of waste disposed by all the state's generators during the same period.

2) Multiply the generator's percentage of state waste disposed by the total state access fee to determine the quarterly fee assessed to the generator.

Data Requirements

The most recent available twelve months (four quarters) of disposal data from the Barnwell, South Carolina regional facility shall be used in all calculations of access fees. During quarterly adjustments of access fees, disposal data will be updated, omitting the oldest quarter and incorporating the most recent quarter.

Fee Administration

Generators will remit access fee payments to CNSI. The regional access fees received by the Southeast Compact Commission will be administered in accordance with the procedures for expenditures now in effect for the access fee.

Regional Facility Access Fee Enforcement

Generators who fail to remit access fee payments by the fifteenth day of the first month of each quarter shall be considered in violation of Article 3(B) of the Southeast Compact as stated above and will be subject to any or all of three sanctions:

1) Unpaid access fees will accrue interest at the rate of one percent per month until paid.

2) After being provided thirty days notice, generators may be denied access by the host state to the Southeast regional disposal facility until access fees and accrued interest are paid in full.

3) Generators may be denied certification to export wastes outside the Southeast region until fees and interest are paid in full. This applies only to waste not accepted at the Southeast regional disposal facility due to license requirements.

Appeals

An appeals process will be available to existing generators or states who believe access fees have been determined based upon erroneous disposal data. Appeals must be filed in writing to the Southeast Compact Commission Office within thirty days of billing. Collection of disputed access fees and the imposition of sanctions shall be stayed until the appeal is reviewed by the Commission. If disposal data is in error, revised charges are due 30 days after the new bill is mailed. Charges which are found to be proper during the review will be due (with interest at the rate detailed above) within thirty days of mailing of the appeal review results.

Exemptions

Any generator who shipped to Barnwell during the base period and who demonstrates to a subcommittee of the Finance Committee that it will not utilize a regional facility

after 1992 will be excluded from the historical disposal data from the Barnwell facility that will be used for computing each state's share of the access fee. The subcommittee will consist of the Chairman of the Finance Committee, Commissioner Roberts and Commissioner Hodes.

Each state may provide for exemptions for other reasons through the mechanism it chooses for allocation of its share of the access fee to the generators within that state.

Contingencies

The collection of revenues for site development of the second regional disposal facility in North Carolina will be contingent upon the following:

All costs for site development incurred by the Authority are continually monitored and deemed reasonable and prudent by the Southeast Compact Commission;

The Southeast Compact Commission continually monitors and concurs that satisfactory progress is being made in the North Carolina site development process;

Any cost increases or schedule delays are immediately reported and justified to the Southeast Compact Commission by the Authority;

In the event that the revenue requirements from Southeast generators destined for site development by the North Carolina Low-Level Radioactive Waste Management Authority have either increased or decreased and these changes are deemed reasonable and prudent by the Southeast Compact Commission, the Commission may elect to alter the total revenues collected by the Regional Facility Access Fee.

SUMMARY OF THE MECHANISM:

1. The purpose is to meet the cash flow requirements of the NCLLRWMA without relying on revenue derived from importation from out-of-region.

2. Continues the existing access fee mechanism with some "fine tuning" to address the problems encountered and clarify the original motion adopted 11/15/90.

3. Covers three year period January 1, 1993-December 31, 1995.

4. Provides for assessment of $3 million per quarter, for a total of $36 million.

5. Does not include provision for the rollover of unpaid fees to the following quarters.

6. Provides for exemptions for those generators who are included in the base period data and who can demonstrate that they will not utilize the Barnwell facility after 1992 for purposes computing each states [sic] share of the access fee.

7. Includes clarification language on enforcement, appeals and contingencies which were not specifically included in the 11/15/90 motion.

8. Provides for faster more efficient transfer of fees from CNSI to South Carolina and on to the Commission.

APPENDIX F

COMMISSION MINUTES
September 28, 1992
Page Two

Approval of Minutes

The minutes of the August 14, 1992 meeting were approved as written.

Chairman Hodes asked for any comments related to agenda items. Ms. Janet Hoyle, Director of the Blue Ridge Environmental Defense Fund, a grassroots environmental organization in North Carolina, stated that people across North Carolina were becoming aware of political and economic pressures for fewer sites across the nation. Because North Carolina has been selected as the host state for the largest compact, they feel North Carolina is at great risk for becoming a national waste dump. She urged the Southeast Compact to ban the importation of waste from states or generators outside the region.

Mr. Lance Lloyd, representing GP Nuclear, stated that GP Nuclear has companies in two compacts. They are requesting that the import policy be changed to allow them to combine their wastes into one report. GP Nuclear is contributing approximately $7M towards this project.

Treasurer's Report

Captain William Briner, Chairman of the Finance Committee, reported that the Finance Committee had been requested to address two aspects of the Import Policy. They are the amount of the access charge and the mechanism for collection of that charge. As proposed by the Finance Committee, Captain Briner made a motion that an access fee in the amount of $220/cu. ft. be accepted by the Commission.

The motion was seconded by Commissioner Shropshire and the vote was unanimously in favor of the motion.

Captain Briner then proposed that Section V. of the Draft Import Policy be approved with the changes as adopted in the Finance Committee meeting (copy attached). The motion was seconded and approved unanimously.

Planning Committee

Chairman Jim Setser gave the background for the development of the Import Policy. At the July 15-16 meeting of the Planning Committee it was decided that an Import Policy Group needed to be established to develop an Import Policy. The group was appointed July 30, 1992, and is made up of the three members of the Planning Committee, Jim Setser, Mike Mobley, Carl Roberts, and Richard Hunter. The group collected information from August 1-12 to be used for pre-draft materials. At the Planning Committee meeting on August 13, 1992, a framework resolution was recommended and passed on August 14 by the Southeast Compact Commission. The public was then made aware of the passage of this resolution and requested to submit their response to this resolution. The Import Policy Group met again on August 31, 1992 to receive more information from generators and the public. The Group also met with attorneys to discuss the legal aspects of this Policy. The Group met this morning to further consider the policy.

[Page Three]

Commissioner Setser stated that the following criteria were used in development of the Policy:

Does it promote public health and safety?
Is it of benefit to the Southeast Compact?
Is it non-discrimatory?
Is it legally defensible?
Is it reasonable?

Is it fair?
Is it the right thing to do?

Two major areas arose for discussion. One is the extent to which the Southeast Compact will provide incentives for progress in the national compacting process. The other area is the requirement that access be contingent on a contract between the Southeast Compact and the Region/State. Commissioner Setser then recommended that the Commission adopt the Import Policy which includes a contract and that authority be given to the Executive Director to execute the contracts, not inclusive of negotiations.

After much discussion, Chairman Hodes asked for a second to the motion which was given by Ben Smith.

Tayloe Murphy, Virginia Commissioner, expressed concerns between provisions in Section III. Access Policy and the provision in the contract that allows the Commission to terminate an access agreement for any reason. He indicated that it was unclear who would determine whether or not the other region or unaligned state has actively pursued the spirit of the LLRWPA.

Commissioner Murphy moved that the following wording be added to paragraph three of Section III.

> . . . The Southeast Compact Commission shall make the determination whether or not a region or unaligned state has actively pursued the spirit of the Low-Level Radioactive Policy Act and such determination shall be final and binding on all parties and not subject to contest by the region or unaligned state or other persons.

The motion was seconded by Bernard Caton. The motion was defeated with only two affirmative votes.

Commissioner Murphy made a motion that in paragraph 12 of the contract that the phrase "the jurisdiction over its or his

person of all" be changed to "venue in the". Seconded and approved unanimously.

Commissioner Roberts made a motion to add language on page 6, Section III., of the Import Policy to read as follows:

[Page Four]

> A report shall be submitted by each region and unaffiliated state that contracts for access with the Southeast Compact within thirty days of execution of the contract and shall include the following items at a minimum:
>
> a. Legislation enacted to enable siting activity;
>
> b. Entities responsible for siting activities;
>
> c. Resources committed to site development;
>
> d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;
>
> e. A copy of the current siting plan for the state/region.

The motion was seconded and approved unanimously.

Commissioner Roberts made a motion that the contract be amended in item #3 to include the following:

> Within thirty days of the execution of this contract, the_____Region (State) shall submit the following information at a minimum:
>
> a. Legislation enacted to enable siting activity;
>
> b. Entities responsible for siting activities;
>
> c. Resources committed to site development;
>
> d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;
>
> e. A copy of the current siting plan for the state/region.

The motion was seconded and adopted.

Commissioner Setser brought up an issue previously discussed but not decided upon related to signing of the contract. Mr. Setser made a motion that the wording in Section IV., Part B, second sentence, read as follows:

> After the Commission authorizes a contract for access with an applicant state or compact, the Executive Director will mail a contract to the applicant state/compact for signature. Upon receipt of the signed contract from the applicant state or contract, the Executive Director is authorized to sign the contract.

The motion was seconded and approved with two negative votes from the South Carolina commissioners.

[Page Five]

Commissioner Mike Mobley made the following amendment to the motion approved above.

> . . . . Upon receipt of the signed contract, the Executive Director is authorized to execute the contract on behalf of the Southeast Compact Commission, assuming that no changes have been made to the contract by the applicant state or compact. In those cases where the contract is required by the applicant state or compact to be signed first by the Southeast Compact Commission, the Executive Director and Chairman are so authorized. A contract for access will be effective as soon as it is signed by both parties and received by the Southeast Compact Commission.

The motion was seconded and approved.

Dr. Hunter suggested that the Chairman be added as a signee in addition to the Executive Director.

Dr. Hunter's motion was seconded and approved.

Kathryn Visocki asked for direction in communicating that the contract is non-negotiable. It was suggested that this be explained to [sic] a cover letter.

A roll call vote was given on the Policy/Contract as amended. The vote was unanimous approving the Policy/Contract.

New Business

Dr. Hodes requested that the Commission consider that the Import Policy Group be formalized into the Import Policy Committee with the same members and Jim Setser as Chairman of the Committee. Captain Briner made the motion with a second by Ben Smith. This motion was approved unanimously.

Mike Mobley requested that the committee who studied the Aerojet request for exemption from fees (Palmer, Hunter and Mobley) give a report on the Aerojet situation. Dr. Hunter gave background as to Aerojet's request for an exemption. He stated that Aerojet would possibly have to close their facility with a loss of 170 jobs as a result of the inequity caused by the S.C. law requiring fees from generators outside of South Carolina. He called on Mr. Brad Squibb of Aerojet to give a status report on the current situation.

Mr. Squibb reported that an extension had been granted on the bid proposal. One hundred percent (100%) of the contract will be awarded to one contractor. They have retained $59/cu.ft. in escrow and plan on paying that. Because of this, they have laid off 56 people * * *

* * *

APPENDIX G

COMMISSION MINUTES
November 13, 1992
Page Three

Finance Committee Report

Captain Briner presented the following motion:

> In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.
>
> The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.
>
> The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993 - December 31, 1995.

> Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993–December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

The motion was seconded by Carl Roberts.

Mike Mobley requested that a subcommittee of the Finance Committee be established to look at the process and put into place standards for fee programs so that there is a set mechanism to deal with these fees.

Dr. Hodes said that this could be established as a staff function to put together a chart outlining the details of each of the fees.

Dr. Hodes called for a roll call vote which was unanimously in favor of the motion.

APPENDIX H

information, because we have both John Mac Millan and Dayne Brown here, has been presented. I think the real important part is that we have obtained the assurances and, of course, you heard in the Finance Committee Meeting which we will have a report soon, that we have acted, we've got a tentative recommendation on their funding request."

Commissioner George Miller reported that Governor Hunt continues to support the process. The Joint Select Committee on Low-Level Radioactive Waste continues to meet on a regular basis. At the April 15 meeting, the committee reaffirmed the work of the Compact Commission by issuing a Statement of Policy. (Attached)

Report of the Planning Committee

Chairman Setser reported that the Planning Committee met and determined that the Proposed Budget for 94-95 was in line with the goals of the Five-Year Strategic Plan. This report was made to the Finance Committee.

Report of the Finance Committee

Chairman Briner presented the Budget for Fiscal Year 94-95 which was approved unanimously with no discussion. Capt. Briner then presented two requests from the North Carolina Authority for funding.

The first motion was approved unanimously:

The Commission grants the request from the North Carolina Authority for advancement of funds from the Regional Access Fee when necessary on a documentated basis not to exceed a total of $3 Million. The advance will be paid out of

the accummulated [sic] funds of the Compact share of the Out-of-Region Access Fee and will be repaid to the Out-of-Region Access Fee fund from the Regional Access Fees collected in the future.

The second motion was approved unanimously:

The Commission shall approve the transfer of up to $7 million to North Carolina on an as-needed basis. The Chairman will appoint a group composed of the Chairman, the Treasurer, the Chairman of the Monitoring Group and any other Commissioners or Alternate Commissioners interested who will, by telephone and/or fax, evaluate the information provided to establish that the need for each payment has been documented. The written approval by a majority of the group will be required to authorize the actual expenditure of each requested payment.

APPENDIX I

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

January 5, 1996
The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Since 1983 we have been working together to provide a safe and economical low-level radioactive waste (LLRW) facility needed by southeast industries and institutions. I would like to apprise you of several developments which may affect how we fulfill our responsibilities to southeast waste generators and rate payers in the future. I am also corresponding with Lieutenant Governor Wicker, President Pro Tem Basnight, Speaker Brubaker, and Co-Chairmen Conder and Dickson of the Joint Select Committee on LLRW to relay the same information.

Allow me first to review for you the history of the Southeast Compact and the statutory responsibilities of its members. In 1983, the states of North Carolina, Alabama, Florida, Georgia, Mississippi, South Carolina, Tennessee, and Virginia entered into a cooperative agreement to form the Southeast Compact, which was ratified by Congress in 1985. The Compact allows the southeast states to exclude out-of-region wastes from disposal at in-region facilities. South Carolina was to serve as the Compact's first host state with the Regional Facility at Barnwell slated to close at the end of 1992.

In 1986, the Compact selected North Carolina as the second host state. The designation of North Carolina as the second host state obligates North Carolina to develop a facility for disposal of the Region's low-level radioactive waste for a period of twenty years. The Compact Law required that this facility be developed in no event later than 1991 and gave the host state the responsibility for financing, siting, and licensing the facility. North Carolina put a siting process in place and in late 1992 the North Carolina Authority submitted a license application for the Wake County site. The license application has been under review for three years by the North Carolina Division of Radiation Protection and there are no indications when the review will be complete.

A total of more than $85 million has now been expended on site development in North Carolina. Over the past five years, the Southeast Compact Commission has provided [page 2] $55 M toward those efforts. North Carolina is now five years beyond the 1991 statutory deadline for opening a regional disposal facility. Recently the Commission has received conflicting reports from state agencies in North Carolina regarding the likelihood of licensing the Wake site and the resources required to do so. We understand that the North Carolina Authority plans to decide in late January whether to proceed with efforts to obtain a license for the Wake County site.

The State of South Carolina withdrew from the Compact in July 1995. At that time, the Commission lost its traditional source of revenues from operation of the regional facility in Barnwell. The loss of these revenues severely diminishes the Commission's ability to assist North Carolina in meeting its responsibilities for funding and developing a LLRW disposal site.

In response to the concerns over project uncertainties, escalating costs and dwindling resources, the Commission

took several actions in recent months to conserve resources while it evaluates the existing situation.

In August 1995 the Commission passed a resolution expressing its sense that further funding to the project would be contingent upon the contractor's (Chem-Nuclear Systems) financial investment in the project. The resolution was transmitted to the North Carolina Authority that same month. At a subsequent meeting in November 1995, the Commission reaffirmed its position in a resolution which prohibited consideration of the release of any further funds until a response from the contractor is received and until a comprehensive site assessment report is provided by the North Carolina Low-Level Radioactive Waste Management Authority which includes the scope, cost and length of time required to pursue a licensing decision.

The Commission also adopted new requirements for the release of funds. In the future, contractual agreements must be established for funding releases. In addition, the expenditure of funds for site development must be conditioned upon the achievement of siting goals. Also passed was a requirement that North Carolina develop a business plan for site development, which includes the projected costs and timetable for developing a regional facility in North Carolina.

The development of a Regional Disposal Facility in North Carolina is critical to the success of the Southeast Compact. After the North Carolina facility becomes operational, the Compact Law prohibits member states from withdrawing from the Compact. This secures the Compact's membership and the member states' future obligations to host regional facilities for the Compact. In addition, the opening of a new regional facility ensures a source of revenues for future Compact operations and a potential source of revenues for site development in the third host state. If the [page 3] Commission depletes its reserve funds and site development

is not yet complete in North Carolina, the Compact's future livelihood will be jeopardized.

Many of the recent actions taken by the Commission are a direct result of increasing constituent concerns about the direction of the North Carolina project. At recent forums for southeast waste generators and other citizens, concern was expressed over increasing costs and delays, the open-endedness of the siting process, the lack of overall accountability for the project, and how North Carolina will fulfill its responsibilities when the Commission is no longer able to fund the process. In addition, we are told that if costs continue to escalate, prohibitive disposal rates may lead many generators to store at their individual sites rather than pursue safer centralized disposal.

The Southeast Compact has entrusted North Carolina with the task of providing a facility for safe and economical disposal for our industries, utilities, academic and medical institutions and ratepayers. To this end, the Commission has provided $55 M in financial support to North Carolina. Future Commission resources, however, will be far more limited and will be subject to competing needs. In addition, any funds released will be based upon contractual agreements and other requirements. At some point, Commission funds will no longer be available to North Carolina for site development, and North Carolina will need to make alternate plans for fulfilling its obligations to the Compact. Please be advised that it will be necessary to begin considering the alternatives available to you for meeting these obligations.

I would like to express the Commission's continuing support for the site development efforts in North Carolina. If there is anything further the Commission can do to assist you in your efforts, please contact me.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: George Miller
William H. Briner

APPENDIX J

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 25, 1996

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-5001

Dear Governor Hunt:

Thank you for your letter of April 8, 1996 in which you assure me that North Carolina remains committed to fulfilling its obligations under the Southeast Compact. I would like to ensure that there is no misunderstanding as to the nature of those obligations.

Both your letter and statements made by Mr. Steve Levitas while chairing the April 18 meeting of the Inter-Agency Committee suggest that you expect the Compact Commission to take an active role in site selection decisions in North Carolina or make a decision which would relieve North Carolina of its host state obligations. You state in your letter that if "the future of the project is in jeopardy . . . then I suggest the Compact Commission move immediately to determine how best to address this problem." Mr. Levitas asked, "At what juncture will the Authority and the Commission make a decision about whether this project will go forward?" In my view, both of these statements misrepresent the role of the Commission as defined by North Carolina statute.

It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a

facility. North Carolina statute makes it clear that the Commission should not dictate to the host state any specifics of the siting process such as location or technology. The Commission selected North Carolina as the host state and has monitored progress in North Carolina, being extremely careful not to dictate to the host state how to do its job. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding. While the Commission has provided funding voluntarily, it is under no statutory obligation to do so.

As I pointed out in my letter of January 5, North Carolina must consider the possibility that the remaining funds available from the Southeast Compact Commission may not be sufficient to complete the project and must plan accordingly to secure funds to complete the project and fulfill the State's obligation to the region. You state in your letter that you would not recommend to the General Assembly that it "assume a greater portion (of) the financial responsibility for the project than it has done to date."

[page 2] However, by enacting the compact into law the General Assembly already assumed responsibility to fund the project to completion. To suggest that the General Assembly not provide further funding is to suggest that the State disregard its agreement with six other states.

North Carolina entered the Southeast Compact voluntarily, knowing that it would be required to take its turn as a host state. As a part of the host state selection process and before North Carolina was selected as host state, all states were formally given a period of time in which to demonstrate to the Commission that no land suitable for a disposal site was available in the state. No state made such a demonstration.

I would like your help understanding two issues raised by your letter. You stated that North Carolina remains

committed to fulfilling its obligations, yet go on to say that North Carolina will not fund the work, and this lack of funding will place the project in jeopardy, a problem you suggest the Commission would have to address. I would be most interested in knowing how you reconcile this apparent contradiction.

If I am interpreting your statements correctly and you do expect the Compact Commission to take an active role in site selection decisions in North Carolina and/or make a decision which would relieve North Carolina of its host state obligations, the Commission would be interested in learning which specific section of the statute authorizes it to take such actions. If this is not your intended meaning, we would appreciate a clarification of your statements.

We look forward to receiving your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Southeast Compact Commission
Rep. George W. Miller, Jr.
Capt. William H. Briner
Rep. Dub Dickson
Sen. Richard Conder
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

APPENDIX K

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

May 10, 1996

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission will meet in June to consider continued funding for development of the regional low-level radioactive waste disposal facility in North Carolina. Commissioners have raised a number of different mechanisms for continued funding of the facility. At least one of those options would involve payment of funds to North Carolina after specific actions were completed. Such a mechanism would necessitate immediate action by the North Carolina General Assembly to appropriate funds to enable the project to move forward without interruption or delay.

While the Commission has provided funding voluntarily, it is under no statutory obligation to do so. It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a facility. By statute, the Commission is not responsible for any of the costs associated with the development or operation of the facility. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding.

Furthermore, there is the possibility that the remaining funds available from the Commission may not be sufficient to

complete the project. If that is the case, the General Assembly would also need to act to provide funds to complete the project in order to fulfill the State's obligation to the region.

If you wish to discuss this information further, members of the Commission or its staff are available to meet with you.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Identical originals sent to: Sen. Marc Basnight
Rep. Harold Brubaker
Sen. J. Richard Conder
Rep. Walter Dickson

cc: Southeast Compact Commissioners
Steve Levitas
John Mac Millan

APPENDIX L

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

June 14, 1996

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

Dear Dr. Hodes:

I am writing in response to your letters of April 25 and May 10, 1996. In those letters you state that it is North Carolina's responsibility, as the next host state selected by the Southeast Compact Commission, to site, license, build, and operate a regional low-level radioactive waste (LLRW) facility *and* to provide the necessary funding for that purpose.

Your assertion that North Carolina law somehow obligates the State of North Carolina to fund a regional LLRW facility is incorrect. North Carolina law states explicitly that all costs associated with this project should be borne by the waste generators who would be served by a regional facility. N.C. GEN. STAT. § 104G-15(a). To date, the Compact Commission has provided a means to carry out that State law, which I continue to believe is sound policy. Further, one overarching policy goal of the Compact, also codified as North Carolina law, is to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states." N.C. GEN. STAT. §104F-1 [COMPACT ART. I].

Although the Compact itself in no way obligates this or any other state to pay for a regional facility, as you note, the Commission has recently suggested that *future* funding might be premised on some sort of contractual commitment by North Carolina. This position recognizes that there is no existing enforceable obligation, under the Compact or otherwise, between this State and the Commission or other party states. In fact, the various noninterference and termination provisions of the Compact, to which you allude in your letter of April 25, clearly remove any funding or other enforceable obligations as a legal matter.

The Compact Commission has appropriately provided more than $70 million in project funding to date. In doing so, the Commission no doubt recognized that such funding was essential to the project, which I believe would be the case if any other Compact member were the next host state. North Carolina shares an interest with the Commission and the other party states [page 2] in seeing that a regional LLRW facility is licensed, that it is safe, and that it is funded by waste generators in an equitable manner. North Carolina has provided almost $30 million in support of the project and continues to fund the Authority and regulatory agencies at approximately $2 million per year. However, as stated in my April 8 letter, North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt
James B. Hunt Jr.

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

APPENDIX M

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

July 18, 1996

Richard S. Hodes, M.D.
Chairman
Southeast Compact Commission
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603

Dear Dr. Hodes:

In response to your letter of July 18, 1996, I would like to state that my office has repeatedly responded to your communications.

I want to re-affirm that North Carolina is ready to go forward with a licensing work plan agreed to by all parties and we have restated our position that funding must come from or through the Southeast Compact Commission.

North Carolina Commissioner Miller at the June 18, 1996, meeting requested $4 million necessary to go forward with the first phase of the work. I am advised that Mr. MacMillan, Executive Director of the Authority, made clear what would occur if the funding request was denied.

The Commission turned this down. If the project is delayed, it will be the result of the Commission turning down the funding request.

We have been represented on the Commission by Representative George Miller and Captain William Briner. They attend all meetings and are readily available to receive any messages from the Commission.

Sincerely,

/s/ James B. Hunt
James B. Hunt, Jr.

APPENDIX N

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Law-Level Radioactive Waste Management

July 9, 1996 HAND DELIVERED

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of July 3, 1996, in which you expressed interest in resolving the remaining issues between the Commission and the State of North Carolina so that we can go forward with the work of establishing a low-level waste disposal facility.

We acknowledge your recognition of State Representative George W. Miller and Captain William H. Briner as representatives of North Carolina on the Southeast Compact Commission. As charter members of the Commission, they have worked closely with us for thirteen years, are knowledgeable of the issues and valued participants in the Commission's deliberations. For this reason, and because of procedural issues and possible constitutional issues of incompatibility of office, it was the intent of our June 18 resolution that you appoint a separate individual or agency to negotiate on behalf of the State with the Commission as a whole.

We are concerned that the value of participation by Commissioners Miller and Briner as Commissioners will be lost if they are placed in the position of negotiating with a Commission on which they serve. At some point, Commissioners will need to evaluate the work of the

negotiators. This may create an uncomfortable situation for Commissioners Briner and Miller if they must judge their own work, and possibly a procedural problem in voting. In effect this would take away from the Commission the contributions of two valuable Commissioners.

We need the knowledge and expertise of Captain Briner and Representative Miller as members of the Commission and do not wish to sacrifice the benefit of their participation. Rather, we respectfully request that you appoint another individual or agency to negotiate with the Commission on behalf of the State of North Carolina.

The Commission recognizes the urgent need to provide funding to preserve the project team and we stand ready to make available up to one million dollars in interim funding to the North Carolina Low-Level Radioactive Waste Management Authority as soon as we receive notice of your appointment. Like you, we are eager to resolve the remaining issues so that we may move forward.

We look forward to your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX O

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

July 18, 1996 DELIVERED BY COURIER

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Commission is disappointed and dismayed by your lack of response to our correspondence to you dated July 8, 1996. Having heard no official response, the Commission could not make the necessary funds available to the North Carolina Low-Level Radioactive Waste Management Authority. North Carolina's inaction has placed the entire project in jeopardy.

Certainly you are aware that, as a consequence of the State's lack of response, the project has already begun to shut down. Our Executive Director and 1 have had recent conversations with your Chief of Staff, and I am told you have received a briefing from the Authority's Chairman and a letter from the Authority's Director describing the initiation of activities to suspend project operations and close the project site. Indeed, today is the last day of operations for the Raleigh office of the project applicant, Chem-Nuclear Systems, Inc.

If the project to develop a low-level radioactive waste disposal facility for the Southeast region is compromised by this inaction, it is clearly not the responsibility of the Southeast Compact Commission.

I have communicated to your Chief of Staff and your Scheduler that I am prepared to travel to North Carolina to

meet with you personally to discuss how to keep the project moving forward. I can assure you that the Commission remains committed to its previously communicated position to provide resources to the State for this purpose. I urge you to make the time available in the coming week for such a meeting.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX P

MINUTES OCTOBER 3, 1996

[page 2] * * * dramatic improvement in the working relationship between the Authority and the regulators. He expressed a need to recognize disposal opportunities throughout the nation and a need to pursue co-funding by the contractor and North Carolina. Mr. Pugh expressed concern that the motions pending action by the Commission today do not address the issue of co-funding by North Carolina. He stated that there was no urgency in giving additional funding to North Carolina without having the capability of completing the process.

Mrs. Mary MacDowell, Chatham County Preferred Site Local Advisory Committee, reminded the Commission that the two scientific endorsers of the Licensing Work Plan stand to gain financially if funds are provided by the Southeast Compact Commission. The geologists representing Wake County and Chatham County do not believe the site meets the requirements for licensure. Mrs. MacDowell informed the Commission that nine candidates for the North Carolina General Assembly had held a press conference indicating their desire to stop the process and withdraw from the Compact.

Mr. Ken McCracken, an employee of Southern Nuclear Operating Company and chairman of the Southeast Utilities Generators Group (SEGG), stated that the recommendations presented by the SEGG at the last Commission meeting still stand. He stated that despite changes in waste disposal, utilities have a need for disposal of decommissioned waste. He stated that the SEGG wants to move forward and expressed the need for continuity and affirmative action today with regard to funding.

Unfinished Business

Chairman Hodes recognized Commissioner Setser to speak to his amendment to the substitute motion. Mr. Setser acknowledged that he found his amendment did not contain some elements he desired and, instead, offered an amendment to Peter Schmidt's motion to strike the existing language and substitute the following language:

> The Commission authorizes the release of funds to the North Carolina Low-Level Waste Management Authority ("Authority") on a quarterly basis to cover amounts expended by the Authority in performing the work described in the Licensing Work Plan (LWP), dated May 31, 1996. Release of the funds necessary to reach decision point number 2 is subject to compliance with and ongoing adherence to the following terms and conditions as certified by the Monitoring Committee of the Commission:
>
> CONDITION No. 1—The establishment of a clear commitment by the Authority to maintain cost and schedule performance, consistent with the proposed Licensing Work Plan, unless fully justified by essential technical revisions to the LWP or other exceptional circumstances as concurred with by the Monitoring Committee of the Commission.
>
> CONDITION No. 2—The establishment of a clear commitment by the North Carolina Interagency Review Committee that the Division of Radiation Protection (DRP) and other state agencies will devote resources as necessary to support state performance consistent with the LWP schedule, including the resolution of state restrictions on and selection of appropriate tracers for proposed field activities.

[page 3] CONDITION No. 3—Agreement by the Authority to develop and maintain an expanded level of detail in the LWP project schedule at least one quarter in advance of the schedule.

CONDITION No. 4—Approval by the Monitoring Committee of the Commission of, and commitment from the Authority to adhere to, reasonable LWP periodic reporting requirements which include, but are not limited to, actual quarterly expenditures as measured against the original LWP; an explanation of all schedule slippage or cost overruns; quarterly cost projections and an update of the LWP schedule; the timely reporting of the results of topical meetings and decision point meetings; and, prompt notification to the Commission by the Authority upon discovery by the Authority, its contractors or sub-contractors of any condition that may disqualify the site for its intended use. The continuation of funding will be contingent an the absence of conditions disqualifying the Wake County site for its intended use.

CONDITION No. 5—Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as concurred in by the Commission's ~~Policy and Planning~~ Monitoring Committee *, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus endorsement of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

FURTHERMORE, Commission Officers and Staff are hereby directed to work cooperatively with the Authority to establish updated site capacity requirements and waste stream characterization so that the Authority will characterize the site and seek a license in accordance

* See approved change on page 5.

with established Compact capacity requirements for the probable period of North Carolina site operation. This task is to be completed as soon as possible, but in any event, no later than the completion of Decision Point No. 2 in the LWP.

AND FURTHERMORE, the Commission recognizes that there are inadequate unreserved funds currently in the Commission's Treasury to meet projected needs to obtain a license for the existing site, for any potential litigation costs, and for costs related to construction of the facility. Therefore, the Commission directs the Commission Policy and Planning Committee, Commission Officers, and staff to work with the Authority, generators, and other parties to develop realistic models of cost and schedules for placing a site into operation and to develop realistic strategic approaches and agreements for the necessary funding. All work associated with this task shall be successfully accomplished by the completion of Decision Point No. 2 of the LWP. Release of funds from the Commission to the Authority for work beyond Decision Point No. 2 in the LWP shall be in accordance with the above specified agreements for funding.

[page 4]

The motion was seconded.

Commissioner Michael Mobley queried John Mac Millan as to the amount of money needed to reactivate the team to work on the Licensing Work Plan. Mr. Mac Millan stated that an additional $500,000 would be necessary and a clear commitment from the Commission would be needed for future funding for the contractors to begin work.

Commissioner Hawkins asked Mr. Mac Millan if the $500,000 would cover expenses needed to address the five conditions laid out in Commissioner Setser's amendment to the motion. Mr. Mac Millan answered that it would.

A vote was taken on Mr. Setser's amendment to Peter Schmidt's main motion. The amendment passed.

A vote was then taken on Mr. Setser's amendment to the substitute motion offered by Commissioner Mobley at the 8/26/96 Commission meeting. The vote was defeated.

Commissioner Mobley then withdrew his substitute motion in favor of the amended main motion. The substitute motion was withdrawn by unanimous consent.

Commissioner Hawkins made a motion to amend the main motion by the addition of Condition 6 which would read:

> The Commission shall not dispense any monies for further development without approval from the North Carolina legislature.

After discussions relative to the effect of Commissioner Hawkins' amendment, the motion was defeated in a roll call vote of 10 to 4.

Commissioner Miller made the following amendment as a new paragraph to the main motion:

> In the meantime, the Compact Commission should conduct an in-depth examination of the present and anticipated need for a second low-level disposal site in the Southeast. This feasibility study would include an analysis of volume of waste from the seven Southeast states, technology changes and developments that have occurred to date and anticipated availability of other disposal options. Also to be considered would be siting cost, availability of generator funds for the licensing process, site construction, maintenance, closure and perpetual care.

The amendment was seconded. After a brief recess of the Commission, a vote was taken and the amendment was defeated.

The amended main motion as offered by Commissioner Setser was then voted on and passed in a roll call vote of 12 to 2.

[page 5] *New Business*

Commissioner Michael Mobley made the following motion:

> In order to implement the previous motion, the Commission instructs staff to:
>
> (1) notify the N.C. Low-Level Radioactive Waste Management Authority that funds in an amount up to $500,000 will be made available for the Authority to provide an expanded level of detail in the Licensing Work Plan (LWP) and to re-deploy a project team for implementation of the LWP, such funds to be paid out upon receipt of documentation of actual expenditures;
>
> (2) organize a Special Meeting of the Monitoring Committee, to be held no later than October 20, 1996, for the purpose of developing a process to certify whether the five conditions in the previous motion have been met by the appropriate entities in North Carolina; and
>
> (3) organize a meeting of the Policy and Planning Committee, representatives of the Authority, Southeast waste generators and other appropriate parties to begin development of approaches and agreements for funding the LWP, litigation and construction in North Carolina.

The motion by Commissioner Mobley was seconded.

Commissioner Miller queried whether the funds would be disbursed on a reimbursement basis or advanced before work was done. Mr. Mac Millan explained that contractors submit invoices for work previously authorized and then the Authority submits invoice documentation to the Commission Staff for reimbursement. Mr. Mobley stated that the intent of the motion was to reimburse for work done.

Executive Director Kathryn Haynes then questioned the reference to the Policy and Planning Committee in Condition 5 in Mr. Setser's motion. She inquired as to whether Mr. Setser instead wanted the Monitoring Committee to be referenced.

Commissioner Hawkins then made a motion that the vote on Mr. Mobley's motion be postponed until Mr. Setser's motion be reconsidered. The motion was seconded and passed.

Commissioner Setser made a motion to reconsider his amendment to the main motion previously passed. The motion was seconded and passed.

Commissioner Setser then moved that in Condition No. 5 of the main motion, the reference to the Policy and Planning Committee be replaced by Monitoring Committee and the Commission accept the roll call vote on the motion as previously taken. The motion was seconded and passed

A vote was then taken on the motion by Commissioner Mobley and it passed.

APPENDIX Q

MINUTES April 18, 1997

[page 4] * * * The Commission recognizes that there are insufficient funds currently in the Commission's treasury to meet projected needs to complete development of a low-level radioactive waste disposal facility in North Carolina through the construction phase. The Commission further recognizes that a Task Force for Facility Funding has been diligently working to develop an approach far obtaining the necessary funding but has not yet reached a conclusion. Therefore, we direct the Policy and Planning Committee, Commissioner officers and staff to continue to support the work of the Task Force for Facility Funding until a recommendation for funding is reached or the Task Force concludes that it cannot reach agreement on a recommendation.

The Commission requests that the Task Force for Facility Funding continue its work as expeditiously as possible and that it notify the Chairman immediately upon reaching a recommendation so that a meeting of the Commission can be called at his recommendation. In the event that an agreement on a recommendation cannot be reached, the Policy and Planning Committee shall make a recommendation to the Commission as to how to proceed. The motion passed.

Mr. Mobley commended all the members of the Task Force for their hard work and dedication.

Report of the Administrative Committee

Peter Schmidt presented the Operating Budget for FY 1997-98 and made a motion that it be adopted as presented. The motion passed.

Report of the Monitoring Committee

Ms. Debra Shults reported that the Monitoring Committee adopted a resolution affirming compliance on Decision Point 2. She made the following motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review by the Monitoring Committee if indicated. The Staff will report the Authority's recommendations to the Chairman of the Monitoring Committee, who will, if necessary, call a meeting of the Monitoring Committee to veto the further release of funds. At all times in the funding release process the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

Because of the large representation of the public at this meeting, Chairman Hodes asked for a motion for waiver of the rule to allow for public comment before Commission discussion of the motion.

Chairman Hodes explained the intent of the motion to be for the Commission to allocate funds in addition to the $6 M that has already been allocated. The purpose of the additional funds which is $2.9 M would be to allow the contractor to proceed with contracting procedures after the contractor and the Commission are satisfied that Decision Points 1 and 2 have been fully met and [page 5] agreed to. The Monitoring Committee would be authorized to refuse to release funds. If they do not, the staff will be authorized to release funds in accordance with statements presented for payment. Dr. Hunter will be the individual to be advised of all fund

releases. He may call a meeting of the Monitoring Committee at any time. The Commission is delegating its authority to withhold funds to Dr. Hunter.

Commissioner Mobley made a motion to waive the rule to allow for 2-minute comments from the public on the motion.

Dr. Hunter made a substitute motion that two people representing the opposing view represented be allowed to talk for five minutes each. The motion was defeated.

Mr. Mobley's motion passed with a 2/3 roll call vote.

Public comment was received. (Comments are recorded on tape in Commission office.)

The Commissioners then debated the pending motion. Commissioner Miller expressed concern over the release of additional funds and the oversight of the release of funds by the Monitoring Committee.

Commissioner Hunter stated that he thought the Decision Points were to balance risk versus cost. They were intended to be points at which the Commission would decide whether to go forward. He stated that he would like to forego concurrent work and just get to the Decision Point 2 even if it costs more.

Commissioner Mobley stated that the Commission has wrestled with many of the issues surrounding the funding of the Licensing Work Plan. He stated that disposal is the best route to protect the public from the hazards of radiation. Mr. Mobley feels that continued funding needs to be provided. Mr. Mobley then offered the following amendment to the motion with the motion to read as follows:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized. Monitoring of

expenditures will be done by the Monitoring Committee pursuant to the October 3 motion of the Commission.

After further discussion, the motion was defeated.

Commissioner Schmidt then offered the following substitute motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review and approval by the Monitoring Committee. The Staff will report the Authority's recommendations to the Chairman of the [page 6] Monitoring Committee who will call a meeting of the Monitoring Committee to review compliance with the conditions stated in the October 3, 1996 motion of the Commission and to approve the further release of funds. At all times in the funding release process, the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

The substitute motion passed in a roll call vote.

New Business

There was no new business.

Public Comment

Several attendees provided comments. (Recording on tape available in Commission office.)

The meeting was adjourned at 12:36 p.m.

Approved:

/s/ William H. Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurers Report

APPENDIX R

MINUTES

* * * regulator will assume the foundation of the LWP has eroded and will move back to a more traditional regulatory approach.

Commissioner Hunter asked Mr. Whisnant who the parties were that had concerns and if they considered it imprudent to continue with the project. Mr. Whisnant stated that Dr. Burt with the Division of Radiation Protection had expressed concern about the prudence of continuing with the project. Someone in the Attorney General's office had expressed concerns about the process and its implications and prudence. Another member on the IAC who is a representative of the Division of Radiation Protection also raised concerns about the prudence of proceeding with the Wake site.

Old Business

Report of the Task Force for Facility Funding

Commissioner Mike Mobley, chairman of the Task Force for Facility Funding, recognized those who had participated on the Task Force and expressed his appreciation for their work. He presented a written report from the Task Force (copies available in the Commission office).

Report of the Monitoring Committee

Commissioner Hunter, chairman of the Monitoring Committee, reported that the Monitoring Committee met on June 27, 1997 and accepted the decision by the North Carolina Authority that Decision Point #2 had been met. Dr. Hunter called the Commission's attention to the letter received on July 21, 1997 from Mr. Richard Whisnant, chairman of the Interagency Committee on Low-Level Radioactive Waste, and expressed a personal dilemma of

releasing further funding to North Carolina. It appears there is no consensus on the implementation of the Licensing Work Plan.

Mr. Hunter then made a motion that Condition #5 be deleted from the October 3, 1996 motion. The motion was seconded.

Debate on the motion and the Intent of Condition #5 followed. Commissioner Mobley offered a substitute motion that Condition #5 read as follows:

> CONDITION No. 5—Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as concurred in by the Commission's Monitoring Committee, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus support of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

The substitute motion was voted upon and passed.

Public Comment

Several attendees provided comments. (Recording on tape available in Commission office.)

Report of the Task Force for Facility Funding (cont.)

Commissioner Mobley, chairman of the Task Force, continued his report by submitting the following motion:

The Task Force for Facility Funding requests that the Commission formally adopt the Report of Task Force for Facility Funding. The Commission further directs the Executive Director to formally transmit the report to the North Carolina Authority with a request to implement recommendations #2, #4 and #5 of the report.

The motion passed unanimously.

New Business

Vice-Chairman Jim Setser made a motion that the Commission approve the Authority's request for additional funding for the months of August and September for a total of up to $1.4 million. Further funding beyond the $1.4 million being considered will be predicated upon Mr. Whisnant providing the Commission with a successful progress report.

The motion was seconded. After discussion, the motion passed in a roll call vote of 9-2.

The next meeting of the Commission will be held in Orange Beach, Alabama on August 20-21, 1997.

The meeting was adjourned at 12:54 p.m.

Approved:

/s/ William H. Briner
Capt. William H. Briner
Secretary-Treasurer

APPENDIX S

MINUTES August 21, 1997

[page 4] * * * Mr. Mobley also reported that the Memorandum of Understanding as presented by the Southeast Generators' Group was an outgrowth of the recommendations for funding made by the Task Force for Facility Funding. Mr. Mobley highlighted the presentation as made by Mr. Ken McCracken at the Policy and Planning Committee meeting. After much discussion, Mr. Mobley made the following motions:

Motion #1

Be it resolved that the Southeast Compact Commission:

- Agrees in principle with the Memorandum of Understanding (8/13/97 Draft) drafted by the Southeast Compact Electric Utilities Generators Group;
- Hereby authorizes the Chairman of the Commission to communicate the Southeast Compact Commission's support to Governor Hunt and the North Carolina Low-Level Radioactive Waste Management Authority (Authority) and to urge them to favorably consider the Memorandum of Understanding;
- Authorizes the use of funds currently being provided by the Commission to the Authority to include appropriate legal expenses and other costs that may be incurred in negotiating and developing a finalized Memorandum of Understanding; and
- Authorizes expenditure of current Southeast Compact Commission funds to support the negotiation and documentation of licensing loans and a construction funding letter of intent.

Public Comment

Public comment was entertained before vote on the motion offered by Mr. Mobley. Mr. Jim Warren, chairman of NC WARN, expressed his opinion that the site was still a gamble. He stated that the Memorandum of Understanding was burdensome for North Carolina. He feels that the utilities are dangling free money in an effort to trap North Carolina legally and financially. He also stated that he did not believe the Governor would approve of the MOU.

Ms. Mary MacDowell stated that the Win-Win-Win-Win statement expressed in the Memorandum of Understanding does not include Chatham County.

A vote was taken on Motion #1 and it passed 11-2 with both North Carolina Commissioners voting against it.

Motion #2

> The Southeast Compact Commission requests that the North Carolina Low-Level Radioactive Waste Management Authority (Authority) consider the proposed Memorandum of Understanding as a mechanism to address the license funding shortfalls and construction funding. It is the belief of the Southeast Compact Commission that the proposed Memorandum of Understanding addresses the previously identified significant issues in a balanced effective manner.
>
> Further, believing that time is of the essence, a response regarding the Authority's intent with regard to the proposal is requested by December 1, 1997. An expression of agreement in principle to the final [Page 5] Memorandum of Understanding or an alternative proposal with appropriate concurrences is the Southeast Compact Commission's expectation.
>
> The vote on Motion #2 passed 11-2 with both North Carolina Commissioners voting against it.

Motion #3

The Southeast Compact Commission authorizes the expenditure of up to $10,000.00 from the Commission's budget funds to obtain legal opinions regarding the Memorandum of Understanding and specifically regarding the export restriction issue.

The motion passed unanimously.

Report of the Monitoring Committee

Richard Hunter, Chairman of the Monitoring Committee, stated that there may be a need for stop gap funding for October and November for the Authority and made the following motion:

The Monitoring Committee recommends that the Southeast Compact Commission provide interim additional stop gap funding to the North Carolina Low-Level Radioactive Waste Management Authority through November 30, 1997 up to $1.2 million.

The motion passed unanimously.

The meeting was adjourned at 1:55 p.m.

Approved:

/s/ William H Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurer's Report

APPENDIX T

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

August 28, 1997 HAND DELIVERED

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

In a series of letters to one another last year, we discussed the fact that sufficient Commission funds were not available to complete development of a low-level radioactive waste disposal site and that a plan was needed to secure the necessary funding. While there was not complete agreement on funding responsibilities, it was agreed that additional funding was needed.

Lacking resolution of the funding issue, the Commission organized a Task Force for Facility Funding to study the problem and recommend mechanisms for future funding. The Task Force was formed as an independent body with volunteer representatives of the North Carolina Low-Level Radioactive Waste Management Authority (Authority), the Commission, waste generators and the public. Enclosed are the recommendations of the Task Force issued in May and approved by the Commission in July.

Stemming from the recommendations of the Task Force, staff of the Authority and a group of regional waste generators began discussion of an approach in which regional generators could provide financial assistance to North Carolina to complete site development and ensure long-term financial viability of the site. Enclosed is the latest draft Memorandum

of Understanding (MOU) drafted by the Southeast Compact Electric Utilities Generators Group (SEGG).

Key elements of the proposal are as follows:

> Participating generators will loan funds to the Authority to cover the anticipated shortfall for implementing the Licensing Work Plan (LWP), approximately $7 million, with provisions to cancel and forgive the debt if the Wake County site is not licensable due to a demonstrable site deficiency. If the site is licensable, the loans would be repaid when revenue bonds are issued to finance construction of the facility. The loan will not be indebtedness of the State or any of its political subdivisions and will require the Governor's approval after receiving the advice of the Advisory Budget Commission.
>
> To facilitate issuance of revenue bonds, participating generators will guarantee that funding will be provided to North Carolina annually for any shortfall of facility operating revenues to meet the annual revenues necessary for operation of the facility, retirement of its debts and funding of its long-term care and closure funds.
>
> To ensure that closure and long-term care funds are available in the event of an unanticipated and unavoidable premature closure of the facility, participating generators will agree to pay North Carolina their share (based on disposed volume) of any closure and long-term care fund shortfalls.
>
> Reasonable conditions, including participation by both Duke Energy and Carolina Power and Light, will have to exist prior to the participating generators assuming their obligations, [page 2] and certain conditions (such as excessive taxes or fees) will release them of those responsibilities. Voluntary participation in the MOU will

be open to all Southeast Compact generators on equitable terms.

The MOU proposes that the Southeast Compact Commission make available the funds that it has designated for site licensing prior to generator loans being used for LWP funding. It also requires the Commission to implement an export policy which would allow access to out-of-region disposal facilities at all times for generators voluntarily participating in the MOU and, following annual disposal of a predefined amount of waste at the North Carolina Facility, for all other generators.

The MOU contemplates that the Authority would contractually commit to four items: (i) repayment of LWP loans plus interest equal to the generators' weighted average cost of capital from the funds raised when construction revenue bonds are issued following licensing of the facility; (ii) implementation of defined facility rate structures (which differentiate between generators participating in the MOU and generators not participating); (iii) implementation of defined escrow fund accumulation and distribution plans to ensure full funding of the closure and long-term care funds by the end of facility operation, payment of North Carolina capitalized expense plus interest upon completion of the State's term as host state, and payment of construction bond principle and interest; and (iv) reasonable audit rights for Participating Generators.

The Commission is continuing to provide funds for site development to the Authority through November 30, 1997. However, as we have discussed, it will be imprudent to continue to deplete Commission resources for this purpose if a source of funds is not established soon for the ultimate

completion of the project. If North Carolina does not have a long-term funding mechanism under consideration by December 1, we will not be able to continue funding.

The Commission heard a presentation of the draft MOU on August 20. On August 21, the Commission agreed in principle with the MOU and asked me to urge you and the Authority to consider the MOU as a mechanism to address the license funding shortfalls and construction funding. In order that we may proceed, please notify me by October 1, 1997 whether you agree in principle with the proposal offered by the SEGG.

The Commission is encouraged by the collaborative effort of the Authority, generators, the public and others and is hopeful an agreement can be reached to benefit all patties. I look forward to your response.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
Walter Sturgeon
Richard Whisnant
Southeast Compact Electric Utilities Generators Group

Enclosures: Report of the Task Force for Facility Funding
Memorandum of Understanding
Overheads and Summary, SEGG Report to the Policy and Planning Committee

APPENDIX U

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

November 3, 1997

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

Dear Dr. Hodes:

As I promised in my letter of September 16, 1997, I have given further attention to the Compact Commission's efforts to develop additional funding for the proposed low level radioactive waste disposal facility in North Carolina during the few weeks since my return from the trade mission to Europe and Asia. To reiterate my earlier correspondence, I appreciate the Commission's efforts to develop a funding solution. I understand that the Compact Commission still endorses a proposal made by a group of several southeastern utilities (not including North Carolina utilities) to loan up to seven million dollars to a North Carolina State agency in exchange for, among other things, preferential rates and the ability to export waste out of the compact region.

At the outset, it must be recognized that this proposal involves authority vested by statute in multiple State agencies (not all of which are in my cabinet), local units of government, and the North Carolina legislature. Since the Compact Commission endorsed this proposal in August, it has been reviewed by several of these agencies in North Carolina that have direct involvement, including, among

others, the staff of the Local Government Commission in the office of our State Treasurer (essential due to the proposed bond issue to pay for construction of the facility); the Interagency Committee on Low-Level Waste (essential as a forum for concerns relating to facility regulation and operation); the Low-Level Radioactive Waste Authority (an independent State agency who is called on to sign the agreement); the Department of Environment and Natural Resources (responsible for licensing and regulating the facility) and the Attorney General's office. My staff has discussed the matter with representatives of each of these agencies, because the proposal calls for matters (such as issuing bonds, limiting the State's ability to assess taxes, and limiting the way a facility is operated) that are outside the jurisdiction of the Governor's office.

Based on my initial review, I find it doubtful that the practical, as well as legal, commitments envisioned would be approved by all the affected agencies and governmental [page 2] bodies. I do not believe they or I can square the Compact Commission's statutory goal of "distribut[ing] the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states," Compact Art. I, with a proposal that, among other things, requires:

- a North Carolina State agency to take on seven million dollars in debt with no budgeted or other means of repayment;
- North Carolina to bear the brunt of any shortfall in funding, given that this State has already paid over $30 million towards the facility, while every other Compact State has paid around $25,000; and
- North Carolina to limit the pricing and revenue stream from this future facility, at great risk to its ability to support bond financing, without the matter even being reviewed by the North Carolina legislature.

Furthermore, they will wonder, as I do, why the Compact Commission and generators have insisted that North Carolina commit to these steps in a timeframe that comes just before the entire schedule and budget for the facility is to be reevaluated. This timeframe is even less appropriate given the events that have recently come to light in the region and the nation that suggest the emergence of a fundamentally different market for low level radioactive waste.

At the conclusion of Decision Point 1, I understand the contractor for the authority is to reevaluate the schedule and budget for this facility. At that point, if there does, indeed, appear to be a shortfall in projected licensing revenue, the simplest, most equitable approach would be for each party state that has not already contributed beyond its pro-rata share to make a pro-rata payment to cover the shortfall. I am sure that the Compact Commission can come up with some such approach that provides the relatively few dollars needed to complete licensing without jeopardizing the future operation and financing of the facility.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt
James B. Hunt jr.

JBH:rbw

cc: Hon. George W. Miller
Capt. William Briner
Warren Corgan
Walter Sturgeon
Robert High
Andrew A. Yanore, Jr.

APPENDIX V

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

HAND DELIVERED

November 14, 1997

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of November 3, 1997 in which you state your thoughts, based upon your initial review, with regard to future funding of the proposed low-level radioactive waste facility. It is helpful to learn your thoughts at this stage in the process. There seem to be fundamental areas of misunderstanding leading to disagreement which need to be clarified and worked out.

You are correct in stating that the Commission continues to support the Memorandum of Understanding (MOU) as proposed. We believe it to be an equitable and thorough approach for providing the necessary funding mechanisms, providing necessary assurances, and balancing the risks among the parties involved. Under this proposal all parties would win—a facility would be opened to satisfy the needs of the compact and the generators, and the state would have a guaranteed revenue stream to recover its costs. The MOU acknowledges existing statutes and jurisdictions and does not ask the State to contractually commit to actions (such as limiting the State's ability to assess taxes) contrary to those statutes. The agreement does not place absolute constraints on the State. It specifies certain conditions under which the

participating generators would be released from their commitments but does not seek to contractually bind the State to preventing those conditions.

Based on the wording of your letter, you appear to have received interpretations of the MOU that are contrary to its intent in several key areas. For example, it is difficult for us to comprehend how a proposal with a guaranteed revenue stream can be seen as limiting " . . . the revenue stream from this future facility, at great risk to its ability to support bond financing." To the contrary, the proposal offers to reduce the financial risk to North Carolina and to enhance the State's ability to market revenue bonds for construction of the facility by guaranteeing an annual revenue stream sufficient for North Carolina to repay all bond debt, recover its investment, cover all facility operating costs, and fund reasonable fees. The guaranteed revenue stream is estimated to be $40 million per year for twenty years. We encourage you to study the proposal before drawing a final conclusion and will be pleased to discuss or negotiate the proposal or an alternative proposal.

Whether the response we receive from the North Carolina Low-Level Radioactive Waste Management Authority (Authority) embraces the MOU as proposed, a modification of the MOU, or an alternative plan such as the one you proposed in the letter, the response will need to encompass several elements not indicated in your letter.

First, the proposal must address funding for all future phases of site development. In addition to the funds needed for licensing, funding must be addressed for litigation and for construction. As North Carolina's representative on the Task Force for Facility Funding repeatedly pointed out, it will be difficult to obtain approval for revenue bonds for construction without a guaranteed revenue stream or customer disposal volume.

[page 2] Secondly, the proposal from the Authority must include evidence of concurrence from all parties to the proposal. If modifications to the MOU are proposed, then concurrence would be required from the Southeastern Compact Utility Generators Group (SEGG) and any other parties to the proposed agreement. If funding from other states is proposed, then agreement in principle from the other states will need to be presented. If the Commission will be expected to provide further funding for the project or otherwise be a party to the proposed funding plan, we need to be consulted in the negotiation of the proposal before it is presented by the Authority.

You have questioned the appropriateness of committing to a funding plan before the schedule and budget are once again reevaluated The Commission clearly has asked for no firm commitment at this time, but merely an agreement in principle to a *non-binding* MOU, intended to facilitate good faith development of a binding agreement before the existing Commission funds are exhausted. To delay agreement to a non-binding MOU in anticipation of a schedule and cost revision ignores the hard fact that Commission funds may be fully depleted in less than a year. Based on the fact that five months have already elapsed since the concepts in the MOU were first proposed to representatives of the Authority, seeking to assure that a year is available for completing a funding agreement does not seem excessive. By the time signatures to a binding agreement are required (on or before June 30, 1998), reevaluation of the budget and schedule will certainly be complete.

Further, you questioned the time frame, "given the events . . . that suggest the emergence of a fundamentally different market for low level radioactive waste." We have no knowledge of recent events which have changed the market for commercial low-level radioactive waste.

As for your concern with squaring the Commission's statutory goal of distributing the costs, etc. among the party states, I will restate the Commission's position that it is the intent of the compact law to accomplish this goal by obligating each party state, in turn, to develop and operate a facility. It has always been the intent of the law that each host state would be repaid for its expenses from facility revenues.

As stated in earlier correspondence, if agreement in principle cannot be reached among all appropriate parties by the December 1, 1997 deadline, the Commission will not provide funding for work done beyond November 30, 1997. The Commission remains hopeful that we may reach a meaningful agreement for future funding with the Authority by that date.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Warren G. Corgan
Commissioners and Alternate Commissioners
Southeastern Compact Utility Generators Group

APPENDIX W

[SEAL]

North Carolina
Low-Level Radioactive Waste
Management Authority

[Names Omitted in Printing]

James B. Hunt, Jr., Governor
Walter B. Sturgeon, Jr.,
Executive Director

December 19, 1997

VIA FACSIMILE & FIRST CLASS MAIL

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission for
Low-Level Radioactive Waste
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

I was disappointed to receive your letter of December 1 which responded to the Authority's November 25 motion and corresponding letter by stopping project funding. It is North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible.

As you know, the Authority successfully completed Decision Points 1 and 2 of the Work Plan and technical activity was moving along at a very good pace. The Authority's priority has been to focus its resources and attention on obtaining an operating license, but it is committed to attempt to resolve construction funding and other issues in the proposed Memorandum of Understanding. It is clear to us, however, that a mutually agreeable funding arrangement will

take a lot of time and more flexibility to resolve. The financial consultant which we have retained has reinforced that view. We are committed to attempting to resolve unsettled issues, including future funding, given sufficient time. Insisting that we resolve these issues by 12/1/97 was unreasonable, as I told the Compact Commission at its November meeting.

All of our current relationships and responsibilities are between the Authority, the Compact Commission, and its member states. While the Compact Commission has asked the Authority to agree in principle with the MOU or find an alternative (both Governor Hunt and I have already proposed alternatives which were rejected), we would expect the Compact Commission to be working [page 2] hard to develop alternatives as well.

The inability of the generators' group to provide additional funds in the form of a grant rather than the proposed loan was also very disappointing to us. These monies would not have been needed until 1999, when the project would have been much further along and would have been provided on the same basis that North Carolina now provides funds. Although I fully understand the generators' concern about the money which has been spent, their reluctance to rally to this need conveys a lack of commitment and sense of urgency toward the project. We would have expected the generators' group, the Compact Commission, and all other member states to be very strong allies of what we were trying to do on their behalf.

In summary, the Authority finds itself in the following position:

1. The Compact Commission has cut off project funds even though the Authority has met its project targets and is making good technical progress. Funding cessation was based upon the Authority's failure to

obtain alternative funding agreements or to agree on the MOU by 12/1/97, a date which was unrealistic as the Authority told the SECC on numerous occasions and specifically at its November 1997 meeting in Norfolk. The Compact has cut off funding despite the fact that it currently has enough unreserved money available to proceed with the Licensing Work Plan beyond what the Authority believes is the key decision point, where success or failure will be much more predictable.

2. The generators' group has refused to commit to provide additional project funding as a grant, even though that funding will not be needed until mid-1999, at which time development will be much further along and the generators would retain the right to decide not to fund at that time.

3. Present Compact law makes it virtually impossible to issue revenue bonds. For that reason the Authority agrees that a contract between it and the generators is required in order to get construction funding. The current MOU, however, contains requirements which would also make it impossible to issue revenue bonds. While the Authority feels that it might be possible to develop an agreement which permits North Carolina to issue bonds and satisfies the needs of the generators, developing such an agreement will take time and could [page 3] not have been done by 12/1197.

In view of all the above, the Authority voted at its December 19 meeting that it has no alternative but to commence the orderly shutdown of the project pending the compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature.

It is extremely unfortunate that the Compact's actions have caused the project to be stopped. We have worked hard and made very good strides toward resolving the technical issues which plagued us in prior years. The Authority has no real choice but to commence a project shutdown given the generators' lack of commitment and the Compact's unwillingness to spend its existing funds.

Sincerely,

/s/ Warren G. Corgan
Warren G. Corgan, Chairman

cc: Walter B. Sturgeon
Richard B. Whisnant
Andrew A. Vanore, Jr.
Representative W. W. "Dub" Dickson
Southeast Compact Member State Governors

AUTHORITY MEETING—DECEMBER 19, 1997

The following motion was made by Authority Member Nick Long, seconded by Douglas Story, and unanimously passed:

In response to the Southeast Compact Commission's letter of December 1, 1997, and

Because of the Compact's cut-off of project funding for purely non-technical reasons and despite the Authority's successful accomplishment of Decision Points 1 & 2, and

Because of the Compact's insistence that the Authority agree in principle to the terms of the proposed "Memorandum of U standing" (MOU) by the unreasonable deadline of December 1, 1997, despite the fact that the MOU seeks to impose unreasonable or unworkable requirements on the Authority or the State, and

Because of the Compact Commission and its member states' refusal to commit unconditionally to the North Carolina project, and

Because of the Compact's refusal to spend its unreserved funds on hand despite the fact that it would accomplish work on the Licensing Work Plan to or through Decision Point 5 and/or to seek alternative funding, including assessments by member states, and

Because of the fact that present compact law makes it virtually impossible to issue revenue bonds for the project because a party state may withdraw from the compact after construction financing is needed, and

Because of the fact that by its actions the Compact has failed to honor its obligations and duties to the Authority, the State of North Carolina, and other member states, and made further performance by the Authority nearly impossible,

I move that the Authority direct its contractors, consultants, and staff to begin the orderly shutdown of the project pending the Compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature,

and that the Authority authorize and direct its Chairman, in consultation with Staff and the Chairman of the Legal and Finance Committee, to so inform the Compact Commission.

FULL AUTHORITY MEETING—DECEMBER 19, 1997

The following motion was made by Authority Member Bob Heater, seconded by John Hairr, and unanimously passed;

Whereas, the Southeast Compact Commission (Compact) has cut off project funding for purely non-technical reasons and despite the North Carolina Low-Level Radioactive Waste Management Authority's (Authority) successful accomplishment of Decision Points 1 & 2, and

Whereas, the Authority has no other source of funding with which to continue the Licensing Work Plan activities, and;

Whereas, the State of North Carolina, including the Authority, cannot commit to the terms and conditions required by the Compact and the Southeast Generators' Group for the resumption of funding of Licensing Work Plan activities, and;

Whereas, the Authority has certain statutory obligations with respect to the work completed and in progress to date for the facility development, and;

Whereas, the Authority has limited funds with which to satisfy some or all of said obligations;

Be it hereby Resolved, that the Authority finds that it has no other alternative than to begin an orderly cessation of facility development activities, including commencing the restoration of the preferred site, so that the project work can be preserved until such time as the Authority can receive instruction from the North Carolina General Assembly with regard to continuing the Authority's statutory mission.

To accomplish the objective of this resolution, I move that the Authority direct its contractors and staff to do the following:

> Complete the work authorized at the November 25, 1997 Authority meeting, which includes maintaining a basic project team through the month of December 1997 and completing final revisions to the documentation and reports for Decision Point l;
>
> Commence and complete the orderly collection of all outstanding project records and the archiving of said records at the Morrisville office of Harding Lawson Associates so that the records may be easily retrievable in the event that the project is restarted;

Complete all of the above at a total cost for all contractors not to exceed $519,058, which includes the $189,058 already authorized;

Begin site restoration activities at a total cost for all contractors not to exceed $100,000, based upon a defined scope of work developed with the advice and consent of the Technical Committee; * * *

APPENDIX X

[Names Omitted In Printing]

(LOGO) Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 26, 1999

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission for Low-level Radioactive Waste Management held its meeting in Raleigh on April 20 and 21, as scheduled, to discuss efforts in North Carolina to fulfill the State's legal obligations to the region since the cessation of siting activities in December 1997. The Commission was disappointed that you were unable to attend.

At the meeting, the Commission heard a status report from the North Carolina Low-Level Radioactive Waste Management Authority, the agency charged by the North Carolina General Assembly with developing a disposal facility for the region's low-level radioactive waste. The North Carolina Low-level Radioactive Waste Management Authority reported no efforts to resume site development activities since December, 1997, when the Authority discontinued its efforts to site a disposal facility.

The Southeast Compact Commission has asked me to notify you that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region. The Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and

safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's radioactive waste.

Further, the Commission respectfully requests that you provide the Commission with a written plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region. The motion adopted by the Commission is enclosed.

I realize that the General Assembly is still in session; however, a prompt response to this request is imperative. Should you have any questions, please contact me at (813) 289-6200, extension 3150, or Kathryn Haynes, the Executive Director of the Commission, at (919) 821-0500.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Enclosure

cc: Southeast Compact Commission

Recommendation from a Joint Meeting of the Policy and Planning Committee and the Monitoring Committee 4/20/99

Adopted April 21, 1999

It is recommended that the Chairman of the Commission be directed to write a letter to the Governor of North Carolina and to the leadership of the North Carolina General Assembly, with copies to the North Carolina Low-Level Radioactive Waste Management Authority stating the following:

- that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region;
- that the Southeast Compact Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's low-level radioactive waste; and
- that the Southeast Compact Commission requests the leadership of the North Carolina General Assembly to respond in writing with a plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region.

APPENDIX Y

SANCTIONS COMPLAINT

Complaint

By its actions to cease all activities in pursuit of a license to build the second regional low-level radioactive waste (LLRW) disposal facility for the Southeast Interstate Low-Level Radioactive Waste Compact (Compact), the State of North Carolina has failed to fulfill its obligations as a party state of the Compact and as the second host state under the Southeast Interstate Low-Level Radioactive Waste Compact law (Compact Law) to provide a disposal facility for the Southeast region. North Carolina has not provided any promise or evidence of its intention to provide funding for the resumption of work on the project.

Furthermore, the North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 (Attachment 1) from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region. North Carolina received the funds from the Commission with the full knowledge that it was expected to develop a facility for the Compact.

Authority for Complaint

The authority for this complaint is Article 7(F) of the Compact which empowers the Commission to impose sanctions against party states. Article 7(F) provides that 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 the suspension of its rights under this compact and revocation of its status as a party state."

The process for implementing Article 7(F) is set out in the "Administrative Sanctions Procedure" adopted by the Commission on April 5, 1990.

Supporting Statements

- North Carolina accepted the terms and conditions of the Compact when the North Carolina General Assembly enacted the language of the Compact into North Carolina General Statute 104F in 1983.

- North Carolina was designated as host state for the second regional disposal facility on September 11, 1986 by a two-thirds majority vote of the Commission. This selection followed a lengthy screening and review process conducted by the Commission and outside consultants.

- The North Carolina General Assembly accepted the designation as the second host state in 1987 when it created the Authority by enacting North Carolina General Statute 104G. The Authority was given the responsibility for selecting and developing a site for a regional LLRW disposal facility and for providing for its operation, closure and post-closure control. The North Carolina General Assembly acknowledged its host state obligations when it repeatedly provided general state funds for the Authority, the Division of Radiation Protection and other state agencies involved in the license review process. The legislature also appropriated $16 million of general funds to the Authority for the initial site selection process.

- North Carolina has not provided any additional funding directly for the site selection process since October, 1989, when the Commission, acting on a recommendation from the Authority, voted to voluntarily provide funding for site development. Note that Article 4(K) of the Compact

Law states that "the Commission is not responsible for any costs associated with the creation . . . [or] the operation of any facility."

- The Commission collected fees from both regional and out-of-region generators using the first regional disposal facility in Barnwell, South Carolina to voluntarily provide funds to North Carolina for the site selection process. The attached financial reports and minutes (Attachment 2) show funds provided to the Authority to develop the facility and the mechanisms used to generate those funds.

- South Carolina withdrew from the Compact in 1995 in large part because of the lack of progress in the North Carolina siting process. Since then, the Commission has not had a source of funds from either the Barnwell, South Carolina facility or from the anticipated second disposal facility in North Carolina. The Commission has grown increasingly concerned over the shortfall of funds needed to develop the North Carolina facility and its ability to generate funds needed for the development of the next regional facility and future Commission operations. That concern was initially expressed in a letter to Governor Hunt dated January 5, 1996 (Attachment 3) informing him that the State will need to develop a plan for fulfilling its obligations to the Compact.

- The Commission has worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for completion of the facility. The Commission notified North Carolina on August 28, 1997 (Attachment 4) that funding would not be provided for work done by the Authority beyond November 30, 1997 until the funding issue is resolved and that the Commission expects North Carolina to continue its siting activities.

- On December 19, 1997 the Authority voted to shut down the project pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. The attached letter of December 19, 1997 from Mr. Warren Corgan, Chairman of the Authority, to Richard S. Hodes, Chairman of the Commission, includes the motions approved by the Authority (Attachment 5).

- The attached statement (Attachment 6) of Mr. Walter Sturgeon, Executive Director of the Authority, indicates the project was shut down in early 1998. Furthermore, as recently as April 21, 1999 the Authority has not resumed any activities to develop a disposal facility and has stated that it has no plans to do so unless the Commission provides funding.

Recommended Sanctions

It is recommended that the Commission impose the following sanctions against North Carolina for its failure to fulfill its obligations as a party state of the compact and as the second host state under the Compact Law to provide a disposal facility for the Southeast region:

- Require the return of the $79,930,337 plus interest for the funds voluntarily provided by the Commission to North Carolina and damages for loss of a source of funds for the Commission operating budget and development of future regional facilities.

- Recover $2500 per day from North Carolina for every day beyond August 1, 2001 that an acceptable disposal facility is not provided for use by Southeast regional generators.

Limit export for treatment, storage or disposal of waste from North Carolina generators at the Envirocare of Utah facility in Clive, Utah, the Chem-Nuclear Systems, Inc. facility in Barnwell, South Carolina, or any other facility which may accept LLRW from regional generators in the future until a regional facility in North Carolina is opened.

- Prohibit the use by North Carolina generators of processing facilities located in the Southeast Compact states until North Carolina opens a facility.

- Require North Carolina to store all waste from the region until a new regional facility is provided.

- Direct the Chairman and the Executive Director, working with outside counsel, to go directly to court for a declaratory judgment to require North Carolina to provide a facility or a court order for recovery of funds, interest, and damages.

Filed by the State of Florida this 21st day of June, 1999.

/s/ Richard G. Hunter
Richard G. Hunter, Ph.D.
Commissioner,
State of Florida

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Commissioner,
State of Florida

Filed by the State of Tennessee this 21st day of June, 1999.

/s/ Michael Mobley
Michael Mobley
Commissioner,
State of Tennessee

/s/ Debra Shults
Debra Shults
Alt. Commissioner,
State of Tennessee

APPENDIX Z

(LOGO)

State of North Carolina
Department of Justice
P.O. Box 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

Phone: (919) 716-6400
Fax: (919) 716-6750

December 1, 1999

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

Dear Dr. Hodes:

This letter shall serve as North Carolina's response to letters from the Compact Commission to Governor James B. Hunt, Jr., Lieutenant Governor Dennis A. Wicker, President Pro Tempore of the Senate Marc Basnight, and Speaker of the House of Representatives James B. Black, providing formal notice of a sanctions hearing to be held on December 8, 1999, in Atlanta, Georgia. At that hearing we are told that the Compact Commission intends to hear evidence and consider proposed sanctions against North Carolina for an alleged failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region."

North Carolina joined the Compact in 1983 as a result of the ratification of the Compact agreement by the North Carolina General Assembly. This legislation was enacted with the intent and understanding that the agreement required a cooperative effort by the party states to develop safe

facilities for the storage and disposal of low-level radioactive waste generated in the southeast region. This cooperative effort included the distribution of development costs on an equitable basis. As the designated second host state for a facility, North Carolina has incurred costs in excess of 50 million dollars in carrying out its responsibilities. From 1988 through 1997 the Compact Commission consistently provided supplemental funding for the development process as required by the Compact agreement.

In December, 1997, however, the Compact Commission terminated supplemental funding of the project, thereby shifting the total economic burden to the taxpayers of North Carolina. As a result of this breach of the Compact agreement, the North Carolina General Assembly concluded that North Carolina had no option but to exercise its right under Article VII(g) of the Compact law to withdraw from the Compact. Senate Bill 247 was enacted by the General Assembly on July 26, 1999, formalizing North Carolina's withdrawal from the Compact. The Compact Commission was informed of this action on that same date by Representative George W. Miller, Jr.

[page 2] In response to North Carolina's refusal to accept the entire economic burden of licensing and constructing a disposal facility the Compact Commission has now initiated a sanctions proceeding against North Carolina. Having withdrawn from the Compact, however, North Carolina is no longer legally subject to the terms of the Compact agreement or the jurisdiction of the Compact Commission. Furthermore, it is North Carolina's position that the Compact Commission has no authority under the Compact agreement to conduct a sanctions proceeding against a state that has voluntarily withdrawn from the Compact. For those reasons, and after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding and will vigorously oppose any effort by the

Commission to impose sanctions or retain further jurisdiction over this state.

Prior to termination of supplemental funding by the Compact, North Carolina, at great cost, consistently progressed toward a licensing decision as required by the Compact agreement, acting at all times in good faith, but without compromising the level of scientific and regulatory scrutiny required to protect the safety, health and welfare of the people of this state. North Carolina will continue to take all appropriate measures to provide for the storage and disposal of radioactive waste generated in North Carolina in accordance with federal and state laws and regulations.

Sincerely,

/s/ Michael F. Easley
Michael F. Easley

APPENDIX AA

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

BY CERTIFIED MAIL

November 8, 1999

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27611

Dear Governor Hunt:

On June 21, 1999, the states of Florida and Tennessee filed a formal sanctions complaint with the Southeast Compact Commission in accordance with Article 7(F) of the Southeast Compact law. The complaint claims that the State of North Carolina is in violation of the compact law for failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region." It further claims that the "North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region." The Commission reviewed the complaint and decided to hold a sanctions hearing in accordance with its Administrative Sanctions Procedure.

This letter serves as formal notice that a formal, quasi-judicial sanctions hearing will be held by the Commission at 8:30 a.m. on December 8 in Atlanta, Georgia to address the complaint against North Carolina. A meeting notice is enclosed.

The Commission will meet on December 9 to decide, based on the evidence presented at the hearing, whether North Carolina violated the compact law. If the Commission finds a violation, it will also vote on a sanction appropriate to the violation.

As a party to the sanctions hearing, North Carolina has the right to fully participate in the proceedings. The Commission's sanctions procedure and the hearing guidelines that describe the parties' rights and responsibilities during the hearing are enclosed. Please notify the Commission offices as to who will represent North Carolina in the proceedings.

It is the policy of the Commission to try to resolve all grievances before the initiation of formal proceedings. Settlement is encouraged during any stage of the sanctions procedure.

I would be pleased to answer any questions you may have with regard to the sanctions process.

Sincerely,

/s/ Kathryn V. Haynes
Kathryn V. Haynes
Executive Director

Enclosures

APPENDIX BB

RESOLUTION

Adopted 12/9/99

WHEREAS, the Southeast Compact Commission for Low-Level Radioactive Waste Management ("Commission") has determined that the State of North Carolina failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to this Compact; and

WHEREAS, according to Article VII(f) of the Compact law, North Carolina is subject to sanctions by the Commission.

NOW THEREFORE, pursuant to Article VII(f), the Commission resolves as follows:

The State of North Carolina shall pay to the Commission the sum of $79,930,337, the amount of funds provided by the Commission to North Carolina for the development of a regional low-level radioactive waste disposal facility, plus interest at the applicable legal rate from the date by which the North Carolina Low-Level Radioactive Waste Management Authority ceased activities to develop a regional disposal facility, January 1, 1998;

The State of North Carolina shall pay to the Commission the sum of $10 Million resulting from the loss of a source of funds for the Commission operating budget for a period of twenty years, the term of operation for a regional disposal facility;

The State of North Carolina shall pay to the Commission its attorney's fees incurred since the date of the sanctions complaint filed by the States of Florida and Tennessee, June 21, 1999, in connection with the

sanctions proceeding and any further enforcement actions resulting from North Carolina's violation of the Compact;

The sums provided above shall be paid in full by July 10, 2000; and

In the event of default, the Executive Director of the Commission is directed to work with outside counsel to take such enforcement actions, including litigation, as necessary to collect all unpaid sums.

For the purposes of and in accordance with Article VII(f) of the Southeast Compact, the rights and obligations incurred by the State of North Carolina as a party state to the Compact, including those incurred as a host state, shall remain in full force and effect until the terms of the sanction are complied with and satisfied in full, as determined by the Southeast Compact Commission in its sole discretion.

APPENDIX CC

ATTORNEY GENERAL MIKE EASLEY'S RESPONSE TO THE DECISION BY SOUTHEAST LOW-LEVEL RADIOACTIVE WASTE COMPACT COMMISSION TO IMPOSE SANCTIONS AGAINST NORTH CAROLINA

FOR IMMEDIATE RELEASE

CONTACT: Carl Hepp (919) 716-6413 or Amanda Crumley (919) 716-6412
December 9, 1999

Today, the Compact Commission voted unanimously to impose sanctions against North Carolina for withdrawing from the Compact. The sanctions include repayment of $80 million plus interest in funds advanced to North Carolina for the Compact project. In addition, they are seeking the recovery of $10 million in lost future revenue for the project and payment of all attorneys fees for the Compact to enforce the sanction. The deadline for payment of this money is July 10, 2000. North Carolina did not participate in the sanctions hearing.

"We clearly stated North Carolina's position regarding the sanctions hearing to the Compact Commission last week. The Compact has neither the means nor the authority to enforce these sanctions."

"We do not need to wait until next July to give the Compact Commission North Carolina's answer. The Answer is 'NO'."

"When the Compact breached its agreement with North Carolina and it became clear that the Compact did not share North Carolina's concerns for the safety of citizens or the environment, the legislature legally withdrew from

participation. Since North Carolina is no longer a member of the Compact, the Compact has no authority to impose sanctions on the State."

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