NO. 132, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2008

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 MOTIONS FOR SUMMARY JUDGMENT

SECOND REPORT OF THE SPECIAL MASTER

BRADFORD R. CLARK
Special Master
Washington, D.C.

April 2009

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This Report was initially distributed to the parties in January 2009 and is now being filed with the Supreme Court simultaneously with the Preliminary Report of the Special Master. After the parties received the Preliminary Report in June 2006, they commenced discovery. After partial discovery, the parties suspended discovery in order to file cross-motions for summary judgment. The Plaintiffs filed a motion for summary judgment on Count II of their bill of complaint, and North Carolina filed a motion for summary judgment on all of the Plaintiffs' claims. The Special Master held a hearing on the motions. After the hearing, at the request of the Special Master, the parties filed supplemental briefs addressing several issues that arose in the hearing. For the reasons set forth below, the Special Master recommends that the Plaintiffs' motion be denied and that North Carolina's motion be granted in part and denied in part.

I. Background

In 1986, with the consent of Congress, the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia entered into the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Southeast Compact" or "Compact"), Pub. L. No. 99-240, Tit. II, 99 Stat. 1871, as amended by the Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, 103 Stat. 1289. The purpose of the Compact was to provide facilities for the disposal of the region's low-level radioactive waste. The Com-

pact created the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission"), consisting of two voting members from each State, to administer the Compact.[1]

Under the Compact, a preexisting disposal facility in Barnwell, South Carolina, owned by that State, served as the initial disposal facility for the region until a new facility could be built. In September 1986, the Commission selected North Carolina to be the second host State to construct and operate a new regional facility. Under the terms of the Compact, the Commission is not "responsible for any costs associated with . . . the creation of any facility." Compact, Art. 4(K). Nonetheless, the Commission decided in 1988 that it was "necessary and appropriate" to provide financial assistance to the second host State for pre-operational costs associated with the construction of a new facility. The member States did not provide any of these funds directly. Rather, the Commission raised substantial revenue by imposing various surcharges and fees on waste brought to the Barnwell facility in South Carolina and used these funds to defray the costs associated with North Carolina's efforts to site and develop a new facility. From 1988 through 1997, the Commission provided North Carolina with approximately $80 million in assistance. During the same period,

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[1] The following description is based on the submissions of the parties and does not consist of findings by the Special Master. This description is intended solely to provide background and context for this Report and does not preclude future proceedings to adjudicate material facts should such adjudication prove necessary.

North Carolina expended approximately $34 million of its own funds, but the State did not succeed in obtaining a license to construct a new facility.

In 1995, South Carolina withdrew from the Compact, thereby depriving the Commission of additional revenue from the Barnwell facility and creating potential competition for any new regional facility. In 1996, the Commission initially informed North Carolina that it could not provide further funds. After North Carolina informed the Commission that it could not continue the project without financial assistance, however, the Commission agreed to continue its assistance from funds on hand. Finally, in late 1997, the Commission ceased providing North Carolina with additional financial assistance. North Carolina commenced an "orderly shutdown of the project" and withdrew from the Compact in July 1999.

In December 1999, the Commission held a Sanctions Hearing, found that North Carolina had breached the Compact, and ordered it to repay close to $80 million that it had received from the Commission along with an additional $10 million in sanctions and attorney's fees. North Carolina did not participate in this hearing and did not comply with the Commission's order. The Commission itself subsequently attempted to sue North Carolina in the original jurisdiction of the Supreme Court, but the Court denied the Commission leave to file its complaint. *See Southeast Interstate Low-Level Radioactive Waste Management Comm'n v. North Carolina*, 533 U.S. 926 (2001).

The Commission, joined by Alabama, Florida, Tennessee, and Virginia, subsequently filed a similar complaint, and the Court granted leave to file in 2003. The case was assigned to the Special Master on November 17, 2003.

After initial proceedings, the Special Master distributed a Preliminary Report to the parties on June 19, 2006, recommending that North Carolina's motion to dismiss the Commission's claims be denied; that the Plaintiffs' motion for summary judgment on Count I of the bill of complaint be denied; and that North Carolina's motion to dismiss the bill of complaint be granted in part and denied in part.

North Carolina's motion to dismiss the Commission's claims asserted that those claims are barred by the Eleventh Amendment and principles of state sovereign immunity. The Report noted that the logic of the Court's opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), "suggests that if Compact Clause entities should not be treated as States when they are sued as defendants, then they should not be treated as States when they sue as plaintiffs." The Report, however, recommended that the motion be denied—and that the Eleventh Amendment question not be resolved at that point in the proceedings—because "careful review of the Court's precedents suggests that a non-State party may join a State or the United States in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs."

The Report noted that the Plaintiffs "have filed a joint Bill of Complaint and are currently asserting the same claims and seeking the same relief against North Carolina," and that North Carolina's contention that the Plaintiff States may not be entitled to assert some of the claims that the Commission is entitled to assert could not be resolved without further factual and legal development. The Report also stated that "North Carolina is free to renew its motion to dismiss if and when the Commission attempts to pursue a claim legally foreclosed to the States."

The Report recommended that the Plaintiffs' motion for summary judgment on Count I of the bill of complaint—which essentially sought summary enforcement of the Commission's sanctions order against North Carolina—be denied because the Compact "does not authorize the Commission to impose monetary sanctions against member States, and because North Carolina withdrew from the Compact prior to the imposition of sanctions." The Report further concluded that "North Carolina did not waive its right to contest enforcement of the Commission's order by failing to appear in that proceeding." Although the Report accordingly recommended that the Commission's sanctions order not be summarily enforced, it stressed that this recommendation "does not mean that North Carolina faces no potential liability as a matter of law" with respect to the Plaintiffs' other claims in the bill of complaint.

Finally, the Report recommended that North Carolina's motion to dismiss the Complaint be granted to the extent that it urged that the Commis-

sion's sanctions order could not be enforced and that the Compact does not authorize the Commission to impose monetary sanctions. The Report recommended that the motion be denied, however, to the extent that it contended that the Plaintiffs were barred as a matter of law from seeking a judicial remedy beyond the remedies prescribed by the Compact. The Report concluded that further proceedings were necessary to determine whether North Carolina in fact breached its obligations under the Compact, whether North Carolina had any implied obligation under the Compact not to withdraw after being selected as a host State, and if so, when if ever such an obligation attached. The Report also concluded that further proceedings were necessary to evaluate the merits of the other claims that the Plaintiffs asserted in the bill of complaint. The Report stressed that "to the extent that the parties allege that North Carolina and the Commission entered into some kind of supplemental agreement outside the Compact, they may face a variety of legal and practical hurdles in seeking relief based on any such agreement." But the Report noted that, at that early stage of the proceedings, "no reason appears why such claims must be dismissed as a matter of law."

After the Special Master issued the Preliminary Report with respect to the parties' threshold motions, the parties agreed on a discovery schedule to be conducted over the next eighteen months. Before the parties had completed discovery pursuant to that schedule, however, they jointly requested that the Special Master establish a schedule for the filing

of dispositive motions for summary judgment based on their partial discovery to that point. The Special Master agreed, and the parties then filed cross-motions for summary judgment.

The Plaintiffs filed a motion for summary judgment on Count II of their bill of complaint. North Carolina filed a motion for summary judgment on all of the Plaintiffs' claims. The parties appeared before the Special Master to argue those motions. Following the argument, the Special Master requested supplemental briefing on several legal and factual questions that arose in connection with the pending motions. The parties filed supplemental briefs, responses, and replies to address these matters.

Although the Federal Rules of Civil Procedure are not strictly applicable in this original action, the Rules and the Court's precedents construing them are "useful guides" to the resolution of the parties' motions. *See Nebraska v. Wyoming*, 507 U.S. 584 (1993); Supreme Court Rule 17.2. Under Rule 56(c), summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.C.R.P. 56(c). When the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-moving party fails to "make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a material factual dispute exists, the Court views the evidence

through the prism of the controlling legal standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Special Master concludes that these principles should guide his recommendations concerning the parties' motions for summary judgment.

For the reasons set forth below, the Special Master recommends that the Plaintiffs' motion be denied and that North Carolina's motion be granted in part and denied in part.

II. The Plaintiffs' Motion for Summary Judgment on Count II of the Bill of Complaint

The Plaintiffs seek summary judgment against North Carolina on Count II of the bill of complaint, which alleges that North Carolina breached the Compact. In their motion, the Plaintiffs argue that North Carolina breached the Compact in two ways. First, the Plaintiffs argue that North Carolina breached the Compact in December 1997 by ceasing all activities in pursuit of a license to build the second regional low-level radioactive waste disposal facility. They stress that North Carolina remained a party to the Compact for nineteen more months and therefore remained subject to its obligations under the Compact. Second, the Plaintiffs argue that North Carolina breached the implied covenant of good faith and fair dealing by withdrawing from the Compact in July 1999 "on the eve of the sanctions hearing the Commission had convened to address North Carolina's failure to fulfill its own obligations under the Compact." Pl. Mem. in Support of S.J. at 22-23.

North Carolina, in opposing the Plaintiffs' motion and by filing its own motion for summary judgment on Count II, *see* Part III, *infra*, argues that it fulfilled its obligation under the Compact to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C). In addition, North Carolina maintains that there is no dispute that it would have pursued the licensing process if the Commission had provided further funding. With respect to the Plaintiffs' second theory of breach, North Carolina argues that the express provision in the Compact permitting withdrawal precludes any claim that withdrawal could violate the implied covenant of good faith and fair dealing. In addition, North Carolina argues that, even if withdrawal could, under some circumstances, violate the implied covenant of good faith and fair dealing, the record does not reveal any evidence of bad faith in this case.

The Special Master recommends that the Plaintiffs' motion be denied because North Carolina did not breach the Compact by ceasing licensing activities for nineteen months before its withdrawal from the Compact and because North Carolina's withdrawal did not violate the implied covenant of good faith and fair dealing. Denial of the Plaintiffs' motion for summary judgment (and, as is explained below, grant of North Carolina's motion for summary judgment) on Count II does not necessarily mean that North Carolina faces no potential liability as a matter of law with respect to the Plaintiffs' other claims. *See* Part IV, *infra*.

A. Alleged Breach of Contract By Cessation of Licensing Activities

The Plaintiffs argue that North Carolina breached the Compact by ceasing all licensing activities on December 19, 1997, nineteen months before North Carolina formally withdrew from the Compact on July 26, 1999. The parties do not dispute that North Carolina did not take additional steps to pursue a license for a waste facility during that period. *See* Pl. Statement of Undisputed Material Facts ¶ 55 ("After Dec. 19, 1997, North Carolina took no further steps to license, site, or construct a facility."); Def. Statement of Material Facts Not in Dispute ¶¶ 67-70 (stating that as of December 19, 1997, North Carolina "was shutting down the project of siting and licensing a low-level radioactive disposal facility"). The parties do, however, dispute what specific actions North Carolina did take during those nineteen months, and the legal significance of those actions or omissions.

The Commission selected North Carolina to be the second host State for the region in September 1986. (South Carolina, which had a facility when it joined the Compact, was the first host State.) The North Carolina General Assembly responded by enacting legislation creating the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). The purpose of the Authority was to fulfill North Carolina's responsibilities under the Compact, while protecting the State's public health, safety, and environment. N.C. Gen. Stat. § 104G

(repealed effective July 1, 2000). Several provisions of the Compact are relevant to the present dispute.

First, Article 4(K) of the Compact provides in pertinent part that the "Commission shall not be responsible for any costs associated with . . . the creation of any facility." Compact, Art. 4(K). Second, Article 5(C) of the Compact provides that "[e]ach party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." *Id.*, Art. 5(C). Third, Article 7(G) of the Compact provides that "[s]ubject to the provisions of Article VII section (h), any party state may withdraw from this compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years." *Id.*, Art. 7(G). Article 7(H), added at the behest of North Carolina after it was chosen as the second host State, provides: "The right of a party state to withdraw pursuant to Article VII section (g) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress." *Id.*, Art. 7(H).

Notwithstanding these terms, it appears that the Southeast Compact was the weakest, in terms of the provisions for sanctions for recalcitrant states and for withdrawal, of all interstate compacts on radioactive waste created at this time. As noted in the

Preliminary Report, the only sanction that the Compact expressly authorizes the Commission to impose is the revocation of the membership in the Compact of a State that fails to fulfill its obligations under the Compact. Other compacts approved simultaneously by Congress, by contrast, empowered the compact entities to impose more draconian forms of sanctions. *See, e.g.*, Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. IV(I)(14), 99 Stat. 1915 (authorizing the compact commission to "impose sanctions, including but not limited to, fines, suspension of privileges and revocation of the membership of a party state"); Central Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(f), 99 Stat. 1891 (authorizing the compact commission to impose on a host State that withdraws before fulfilling its obligations "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal"); Central Interstate Low-Level Radioactive Waste Management Compact, Art. VII(e)(14), 99 Stat. 1870 (authorizing compact commission to require specific monetary payments as a sanction for non-compliance or failure to fulfill compact obligations).

The Southeast Compact also imposes fewer limits than do other contemporaneously approved compacts on the right of participating States to withdraw. As noted above, the Compact (at the urging of North Carolina after it was chosen as the second host state) expressly limits the right of States to withdraw only after the second host facility becomes operational. Other compacts, by contrast, im-

pose more stringent limits on the right of withdrawal.[2] *See, e.g.*, Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901 (providing for financial penalties for host States that withdraw before fulfilling their obligations); Central Interstate Low-Level Radioactive Waste Compact, Art. VII(d), 99 Stat. 1870 (delaying the effect of withdrawals for five years); Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1900 (same); Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VII(h), 99 Stat. 1922 (same).

Given the Southeast Compact's relatively lax provisions governing the Commission's sanctioning authority and the participating States' right to withdraw, it is difficult to resist the conclusion that each of the participating States hoped to receive the benefit of being able to dispose of waste at a facility outside its borders, while avoiding the burdens of being the State selected to host the waste disposal facility.

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[2] The Southeast Compact was approved by Congress simultaneously with other regional compacts. The Plaintiffs stress that the drafters of the Southeast Compact did not closely consult the other compacts when they negotiated its terms. This Report compares and contrasts these compacts not to establish the specific intent of their respective drafters, but to ascertain how Congress would have understood the compacts when it enacted them into law. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'"). Accordingly, the Supreme Court has previously interpreted an interstate compact by comparing it to other "compacts, approved by Congress contemporaneously." *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

This is not to suggest that the Compact does not embody an enforceable bargain among the participating States; but the Compact seems clearly to have been designed to maximize the participating States' ability to extricate themselves from the arrangement if they had the misfortune of being chosen as the host State. Under such a regime, it would be surprising indeed if a facility were actually constructed without significant assistance from the States not selected as hosts or from the Commission, drawing on other sources of revenue.

To be sure, it is not clear that more stringent restrictions on withdrawal or more robust sanctioning power would have produced a different outcome; even the regional compacts with stronger terms ostensibly designed to ensure State participation did not ultimately produce new disposal facilities. Indeed, although Congress simultaneously approved seven regional interstate compacts in 1986 to deal with the disposal of low-level radioactive waste, *see* Omnibus Law-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859, none of these compacts has yet produced an operational low-level radioactive waste disposal facility. This appears to be in part because of the strong political and environmental obstacles to siting and licensing such facilities, and in part because of changes in the market and technology for the disposal of low-level radioactive waste.

This is the context in which the events giving rise to the present dispute took place. As noted above, although the Compact establishes that the Commission has no legal obligation to bear any of

the costs associated with the creation of a new facility, soon after being selected as the second host State North Carolina requested financial assistance from the Commission and indicated that it was unable or unwilling to bear the full cost of building a new facility. The Commission responded by adopting a resolution on Feb. 9, 1988, deeming "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." App. 63.

Beginning in Fiscal Year 1988 (July 1, 1987 – June 30, 1988) and continuing through Fiscal Year 1998 (July 1, 1997 – June 30, 1998), the Commission provided North Carolina with approximately $80 million in assistance. During the same period, North Carolina spent approximately $34 million of its own funds. The Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina. The parties jointly provided the following year-by-year breakdown of the funds provided by the Commission and North Carolina. *See* Parties' Joint Supp. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 1.

FISCAL YEAR	COMMISSION FUNDS	NORTH CAROLINA FUNDS
1988	$200,000	$473,688
1989	$200,000	$2,467,160
1990	$1,015,914	$8,561,524
1991	$8,700,103	$7,281,097
1992	$11,199,561	$1,132,272
1993	$17,575,695	$2,215,442
1994	$12,069,397	$2,300,941
1995	$16,729,754	$2,264,566
1996	$3,166,000	$2,196,326
1997	$2,800,769	$2,145,691
1998	$6,260,347	$2,028,978
1999	$0	$531,923
2000	$0	$346,097
TOTAL	$79,917,540	$33,945,705

According to the parties, these funds were spent as follows: $94 million on site development,

$11 million on siting and licensing review efforts, $3 million on outside counsel to defend litigation, and $6 million by the Authority for salaries, benefits, and the cost of operations. *Id.* at 2.

Several key events help to put these expenditures in context. Early in the process, North Carolina defended and settled litigation over the location of the new facility. The State subsequently filed a license application for a proposed facility in Wake County in December 1993. On the basis of numerous concerns relating to health and safety, the State licensing authority declined to rule on the application at that time. North Carolina, with continuing financial assistance from the Commission, proceeded to hire consultants and experts in an attempt to address these concerns and obtain approval.

Apparently frustrated with the pace of the project, South Carolina exercised its right to withdraw from the Compact in July 1995, thereby depriving the Commission (and North Carolina) of further funding from fees assessed by the Barnwell facility. On January 5, 1996, the Commission informed North Carolina that it could no longer provide funds to assist with the development of the second facility. Pet. App. at 70a-74a. North Carolina responded that it was unwilling to assume a greater portion of the financial responsibility for the project than it had assumed to date. The Commission reversed its position and released additional funds to North Carolina during 1996 and 1997.

On December 1, 1997, the Commission again informed North Carolina that it would no longer provide funding for the project. North Carolina re-

sponded that without further financial assistance, it would be forced to commence an orderly shutdown of the project. The Authority's Business Plan, forwarded to the Commission on December 13, 1996, stated that "the total funds estimated to be required to reach the point at which a license can be issued (assuming a favorable decision) is $34 million." Parties' Joint Suppl. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 7. Furthermore, the best estimate at that time of the cost of constructing a facility, assuming the issuance of a license, was an additional $75 million. *Id.*

Because the Commission had only approximately $20 million on hand and North Carolina was not willing to assume a greater proportion of the costs, efforts to complete the licensing process essentially ceased at the end of 1997. North Carolina did, however, continue to fund the Authority for several years, maintain the project's records, and preserve the work done to date in the unlikely event that further funds became available. Finally, in July 1999, the North Carolina legislature voted to withdraw from the Compact. The Commission held a sanctions hearing in December 1999. The Commission unanimously found that North Carolina had failed to fulfill its obligations under the Compact, and it ordered North Carolina to repay all of the funds it had received from the Commission. North Carolina did not recognize the authority of the Commission, and this lawsuit followed.

At the outset, the Plaintiffs contend that the Court need not independently decide whether North Carolina took appropriate steps to ensure the licens-

ing of the facility, because the Commission resolved that question in its sanctions decision. According to the Plaintiffs, the Commission's determination is "conclusive" for purposes of this litigation. The Special Master finds this contention unpersuasive for the reasons previously set forth in the Preliminary Report. The best reading of the Compact is that the Commission lacks the power to impose monetary sanctions on member States. *See* Prelim. Report at 16-27. In addition, North Carolina withdrew from the Compact before the Commission purported to impose sanctions. *Id.* at 27-32. Thus, both the Plaintiffs and the Defendant remain free to press their interpretations of the Compact before the Special Master and, ultimately, before the Supreme Court.

In the alternative, the Plaintiffs argue that the Commission's decision finding that North Carolina breached the Compact is entitled to substantial deference. The Special Master finds this argument unpersuasive because the Constitution vests the Supreme Court with the authority to resolve disputes between States. The Court is composed of Justices with life tenure and salary protection, and the Constitution presupposes that judicial officers with these protections are in the best position to resolve disputes between States impartially. The Commission does not share these characteristics and cannot claim impartiality in this dispute. Indeed, it initiated this litigation and is currently a party to these proceedings. Under these circumstances, the Commission cannot be considered an independent and impartial decisionmaker. *Cf. Young v. U.S. ex*

rel. Vuitton et Fils, 481 U.S. 787 (1987). In addition, the Court has often observed that the Founders vested the Court with original jurisdiction in cases involving States in order to "match the dignity of the parties to the status of the court." *California v. Arizona*, 440 U.S. 59, 65-66 (1979); *accord Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *Ames v. Kansas*, 111 U.S. 449, 464 (1884); *see also* The Federalist No. 81 (Hamilton) ("[I]n cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.") Accordingly, the question whether North Carolina fulfilled its obligation under the Compact to take "appropriate steps" towards licensing of a disposal facility is for the Court to resolve in the first instance without according deference to the Commission's interpretation.

Turning to this question, the Special Master concludes that North Carolina did not breach its obligation to take "appropriate steps" under the Compact. The Plaintiffs do not contend for purposes of the current motion that North Carolina failed to take appropriate steps to license a facility prior to December 1997. Rather, their contention is that by refusing after that time to assume the entire financial burden associated with licensing and building a facility, North Carolina failed to take appropriate steps and breached its obligations under the Compact.

At the outset, it is necessary to identify precisely the obligation at issue. Contrary to the Plaintiffs' occasional suggestions, the Compact does not impose an absolute obligation on the host State to

build a facility. Rather, it obligates the host State only to "take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C). In this case, the appropriate authority was the Division of Radiation Protection in the North Carolina Department of Environment, Health, and Natural Resources. A central issue, therefore, is whether North Carolina breached its obligation to take "appropriate steps" to secure a license from that agency. In the Special Master's view, the obligation in question is properly construed to be more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost.

In the Preliminary Report, the Special Master raised the question whether there was any supplemental agreement between North Carolina and the Commission that would have limited North Carolina's right to withdraw in exchange for financial assistance from the Commission. Both in their briefs and at the oral argument on the pending motions, the parties have now made clear that there was no such agreement. Rather, the Commission provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance. This fact is somewhat surprising given the amount of money the Commission provided over a decade. At any point, it could have made clear to North Carolina that further financial assistance was contingent upon amending the Compact to limit North Carolina's rights or augment its obligations.

Indeed, after being chosen as the second host State, North Carolina successfully sought an amendment to the Compact that it considered necessary to protect its interests as the second host State. The amendment provides that the "right of a party state to withdraw . . . shall terminate thirty days following the commencement of operation of the second host state disposal facility." Compact, Art. 7(H). The negative implication of this amendment is that party States (including North Carolina) remained free to withdraw prior to the opening of a second facility. South Carolina exercised this right in 1995, and North Carolina exercised it in 1999.

The question under the Compact, therefore, is whether North Carolina took appropriate steps to apply for and obtain a license while still a member of the Compact. The Special Master believes that the phrase "appropriate steps," as used in the Compact, is ambiguous. At a minimum, the adjective "appropriate" suggests that not all steps are required by the Compact. For example, a host State presumably would not violate the obligation to take appropriate steps by declining to locate the waste facility in the center of an urban area, rather than in an unpopulated area. Similarly, a host State likely would not violate the obligation to take appropriate steps by declining to seek a license for a facility that would operate in violation of State health and safety requirements. Cost is undoubtedly also relevant in assessing the obligation to take "appropriate steps." While the Compact might be construed to require the expenditure of $34 million to apply for a license, it is doubtful that it required the expenditure of $1

billion for this purpose. The Compact underscores the non-absolute nature of the obligations it imposes on party States by providing that "nothing in this compact shall be construed to infringe upon, limit or abridge" the rights enjoyed by sovereign States. Compact, Art. 3.

Given the inherent ambiguity in the phrase "appropriate steps" and the Compact's express reservation of the party States' sovereign rights, the Special Master believes that the meaning of the phrase may be informed by the parties' course of performance under the Compact. The course of performance suggests that North Carolina satisfied its obligation to take "appropriate steps." Soon after being selected as the second host State, North Carolina indicated that it could not bear the full financial burden of siting, licensing, and building a new facility. Accordingly, it repeatedly requested that the Commission provide substantial financial assistance. The Commission responded to these requests by providing such assistance through the end of 1997. The Commission's willingness to share the financial burden (even though it had no obligation to do so under the Compact) may be explained in part by the existence of the provision of the Compact giving North Carolina (and every other State) the right to withdraw from the Compact. This provision created the real possibility that North Carolina might withdraw from the Compact if the financial burden of being a host State proved too onerous.

Thus, in the first four years after North Carolina was selected, the Commission bore a smaller proportion of the costs (approximately $10 million)

than did North Carolina (approximately $18 million). As the magnitude of the project became clearer, however, the Commission assumed a greater proportion of the costs. Accordingly, during the next four years, the Commission contributed approximately $57 million, while North Carolina contributed approximately $8 million. At no point, however, did the Commission condition its assistance on a promise by North Carolina either to assume a greater share of the costs of the project in the future or to refrain from exercising its right to withdraw from the Compact.

This left the Commission in a difficult position when South Carolina withdrew from the Compact in 1995. To that point, fees assessed at the Barnwell facility had provided virtually all of the funds used by the Commission to finance the development of a second facility. In January 1996, the Commission informed North Carolina that it could no longer provide financial assistance, but reversed course when North Carolina refused to assume full responsibility for the project. In December 1997, the Commission informed North Carolina that it would not provide further funding. At this juncture, North Carolina declined to assume the entire financial burden of licensing a facility going forward, and considered proposals for alternative funding.

It is in light of this background that the Plaintiffs present their claim that North Carolina either repudiated or breached its Compact obligation to take "appropriate steps" by taking no steps to license a facility after December 1997. North Carolina counters that it fulfilled its obligation under the

Compact to take appropriate steps because the Compact did not require it to assume the full financial burden of licensing a facility and because it continued to fund the Authority and preserve the project for several years while seeking to resolve the funding impasse with the Commission. In North Carolina's view, it would have been futile (and therefore not "appropriate") to expend additional funds without a substitute for the Commission's contributions. Accordingly, North Carolina reduced its expenditures from an annual average of $2 million during the preceding six fiscal years to approximately $440,000 during the last two fiscal years of the project.

The Special Master believes that the Plaintiffs are not entitled to summary judgment on the basis of these events. Soon after being named a host state, North Carolina took the position that it could not bear the entire cost of siting and licensing a facility. Accordingly, the State provided substantial—but non-exclusive—funding for the project from 1987 through 1999. The Commission agreed early on that it was "appropriate and necessary to provide financial assistance" to the host state for initial planning and administrative costs. In addition, the Commission continued to provide financial assistance beyond the initial stages of the project—in much more substantial amounts than at the beginning of the process—until it ceased funding at the end of 1997. Even today, the Plaintiffs do not contend that North Carolina breached the Compact prior to December 1997 by refusing to assume the entire cost of obtaining a license for a new facility. If North Carolina's limited financial contributions satisfied its obligation

to take "appropriate steps" prior to 1998, then it is difficult to conclude that its refusal to assume an unlimited financial commitment going forward breached this obligation. To the contrary, the parties' course of performance suggests that North Carolina's continuing (albeit limited) financial contributions satisfied its obligation to take "appropriate steps" under the Compact.

This conclusion is strengthened by the fact that North Carolina could have exercised its right to withdraw from the Compact at an earlier time. As noted above (and discussed further in Part II.B, *infra*), the Compact's only express limitation on the party States' right to withdraw—in Article 7(h), which was added at North Carolina's request after it was chosen as the second host State—provides only that a party State cannot withdraw more than thirty days after the second host State's disposal facility commences operation, without unanimous consent of the other party States. Compact, Art. 7(H). There is, of course, no dispute that the disposal facility of the second host State (North Carolina) had not yet commenced operation at the time of North Carolina's withdrawal. If withdrawal by North Carolina in December 1997 (when the Commission ceased providing funding) or earlier would not have constituted a repudiation of the Compact or a breach of North Carolina's obligation to take "appropriate steps" to secure a license for a disposal facility, then it is difficult to see how its subsequent withdrawal, after continuing to provide funding sufficient to keep resumption of the licensing process a viable option, can constitute a repudiation or a breach of that obligation.

The Plaintiffs' claim—which essentially amounts to the narrow contention that North Carolina's failure to withdraw immediately upon deciding that it could not provide all of the requisite funds constituted a repudiation or a breach—cannot withstand scrutiny.

It is true that, after the Commission withdrew its assistance in 1997, North Carolina took the position that it could not complete the licensing process on its own and decreased its expenditures from approximately $2 million a year to approximately $440,000 a year. The Plaintiffs argue that, by taking these steps, North Carolina repudiated its obligations under the Compact. But these actions do not constitute repudiation. Repudiation occurs when an obligor either makes a statement to an obligee "indicating that the obligor will commit a breach that would itself give the obligee a claim for damages for total breach," Restatement (Second) of Contracts § 250(a) (1980), or performs "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Id.* § 250(b). North Carolina did not state that it intended to breach the Compact. To the contrary, North Carolina took the position that it was not obligated under the Compact to bear all of the costs associated with licensing a facility. Nor did North Carolina act in a way that rendered it unable to perform under the Compact. To the contrary, it continued to fund the Authority for almost two more years in the hope that alternative funding could be secured.

It might be argued that North Carolina at least should have maintained rather than reduced

its expenditure level until it withdrew from the Compact. This argument is not persuasive. The parties agree that, at the time the Commission withdrew its assistance, it would have taken at least $34 million to complete the steps necessary to obtain a license. Of course, there was no guarantee that these efforts would have been successful, and even more expenditures might have been needed to secure a license. And even if the license had been secured, construction of the facility would have required an additional, and substantial, expenditure of funds. Thus, even if North Carolina had continued to spend money at its previous rate prior to withdrawing from the Compact, it would have spent only a small fraction of the amount needed to reapply for a license.

Since North Carolina's obligation to take "appropriate steps" did not require it to expend $34 million, it did not require North Carolina to waste several million dollars while seeking alternative funding. Rather, under the circumstances, North Carolina's decision to fund the Authority and preserve the project until it withdrew constituted "appropriate steps" under the Compact. A contrary conclusion—that North Carolina was required to continue its expenditures at pre-1998 levels—would have created a perverse incentive for North Carolina to withdraw immediately in December 1997 to avoid breaching the Compact rather than to maintain the status quo and seek alternative funding. Under these circumstances, the Special Master believes that North Carolina's actions satisfied its obligation under the Compact to take "appropriate steps."

B. Alleged Breach of the Implied Covenant of Good Faith and Fair Dealing

The Plaintiffs also argue that North Carolina breached an implied covenant of good faith and fair dealing by withdrawing from the Compact "after inducing the other Party Sates to invest more than eleven years and $80 million in its effort to develop a regional waste disposal facility." Pl. Mem. in Support of S.J. at 22. The Plaintiffs thus argue both that the Court should hold that the duty of good faith and fair dealing applies to interstate compacts and that North Carolina's withdrawal "was the epitome of bad faith and unfair dealing." *Id.* at 23. Even assuming that the duty of good faith applies to interstate compacts, the record contains no evidence that North Carolina acted in bad faith.

First, it is not clear that the duty of good faith and fair dealing applies to compacts between sovereign States. Moreover, even if it applies, it is not clear that it applies in the same way as it does to private contracts. In ordinary contract cases, courts generally recognize that contracts impose a duty of good faith and fair dealing. *See* Restatement (Second) of Contracts § 205 (1980). The Supreme Court has not yet decided whether this Restatement provision applies to the enforcement of interstate compacts approved by Congress. Ordinarily, courts are reluctant to impose obligations on States or the federal government if they have not expressly agreed to be bound. This applies with special force in the context of interstate compacts. States employ such

compacts in their sovereign capacity to resolve conflicts or to enter into voluntary, cooperative arrangements. Reading implied obligations into interstate compacts might deter States from entering into such arrangements.

In addition, judicial imposition of compact terms beyond those for which the States have expressly bargained poses risks similar to those inherent in interpreting ambiguous federal statutes to impose obligations on States in areas, such as land use, in which the States have exercised "traditional and primary power." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). A similar clear statement requirement may be appropriate when interpreting interstate compacts. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003)) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'" (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). Although there may be some circumstances under which construing interstate compacts to include implied duties is warranted, considerations of federalism counsel caution in this regard.

Reading the standard duty of good faith into the Southeast Compact raises an additional concern in this case because several of the other regional compacts approved by Congress at the same time included express provisions to this effect. For example, the Central Compact provides that "[e]ach party state has the right to rely on the good faith perfor-

mance of each other party state."[3] Central Interstate Low-Level Radioactive Waste Compact, Art. III(f), 99 Stat. 1865. Similarly, both the Central Midwest Compact and the Midwest Compact provide that "[e]ach party state shall act in good faith in the performance of acts and courses of conduct which are intended to ensure the provision of facilities for regional availability and usage in a manner consistent with this compact." Central Midwest Interstate Low-Level Radioactive Waste Compact, Art. V(a), 99 Stat. 1886; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. V(a), 99 Stat. 1897. The Supreme Court has explained that when a compact lacks features found in other compacts approved contemporaneously by Congress, courts "are not free to rewrite" the compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). Because Congress approved the Southeast Compact simultaneously with regional compacts containing express good faith requirements, courts should hesitate before reading a duty of good faith into the Southeast Compact.

Caution is especially appropriate in this case because the Plaintiffs would use an implied duty of good faith to limit North Carolina's express right to withdraw from the Compact. The Compact provides that "[a]ny party state may withdraw from the compact by enacting a law repealing the compact."

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[3] The Plaintiffs rely on *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004), to support a duty of good faith under the Southeast Compact. *Entergy*, however, arose under the Central Interstate Low-Level Radioactive Waste Compact, which (unlike the Southeast Compact) contains an express provision obligating States to act in good faith.

Southeast Compact, Art. 7(G), 99 Stat. 1879. Unlike the Southeast Compact, other regional compacts approved by Congress specifically limit a party State's right to withdraw after being selected as a host State to build a disposal facility. For example, several compacts permit parties to withdraw but delay the effect of such withdrawals for five years. *See* Central Interstate Low-Level Radioactive Waste Compact, Art. VII(d), 99 Stat. 1870; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(e), 99 Stat. 1900; Northeast Interstate Low-Level Radioactive Waste Management Compact, Art. VII(h), 99 Stat. 1922. The Southeast Compact places no such limitation on the right to withdraw.

In addition, the Midwest Compact provides a strong financial disincentive for host States to withdraw from the compact. A host State that withdraws "after 90 days and prior to fulfilling its obligations shall be assessed a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901. The Southeast Compact contains no similar restrictions on withdrawal. Courts should not lightly read such constraints into a compact approved by Congress on the very same day that it approved others containing express restrictions. *See Texas v. New Mexico*, 462 U.S. at 565.

There is another reason to question the Plaintiffs' assertion that the Southeast Compact contains implied restrictions on withdrawal. The Compact was subsequently amended (at North Carolina's re-

quest) to restrict withdrawal by member States, but this restriction was drafted to take effect only *after* a second disposal facility became operational. The negative implication of this amendment is that party States remain free to withdraw prior to that time. If the Commission or other party States had been concerned about the possibility that a host State (such as North Carolina or South Carolina) might withdraw, they could have proposed further amendments to restrict withdrawal. As the Compact stands, however, North Carolina (like South Carolina before it) was free to withdraw when it chose to do so.

Second, even assuming that a duty of good faith and fair dealing applies to the Southeast Compact, there is no evidence in the record that North Carolina breached any such duty. The current motion does not involve an allegation that North Carolina accepted millions of dollars from the Commission with no intent to seek or obtain a license, or that it denied a license for pretextual reasons. Nor does this case involve an allegation that North Carolina accepted Commission funds, secured a license, built a facility, and then immediately withdrew from the Compact before the other party States could make use of the disposal facility. Either course of conduct could very well constitute bad faith. *Cf. Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004) (finding that Nebraska never intended to license a facility and used false reasons as a pretext to deny a site license). Although the Plaintiffs may prove otherwise after further discovery, the current record suggests that North Carolina worked diligently to obtain a license and did not withdraw until it

became clear that it would not have the requisite funds to seek and secure a license for the facility.

The Plaintiffs do not dispute that North Carolina spent approximately $34 million of its own funds in its efforts to site and license a new facility. Nor do they allege for purposes of this motion that North Carolina acted in bad faith by either misappropriating or misspending the $80 million in assistance it received from the Commission. To the contrary, the parties assume for purposes of this motion that the $114 million North Carolina expended on this project went toward legitimate and necessary business expenses such as site development, siting and licensing review efforts, outside counsel, and the cost of running the Authority. *See* Parties' Joint Supp. Fact Br. in Support of Mot. for S. J. (April 18, 2008), at 2. The Plaintiffs' allegation of bad faith at this point in the proceedings essentially rests on the undisputed facts that North Carolina received approximately $80 million from the Commission and withdrew from the Compact without obtaining a license to build a new facility. As discussed, however, the Compact did not impose an absolute obligation on North Carolina to license a facility. Rather, it obligated North Carolina to take appropriate steps to that end. The Special Master believes that North Carolina fulfilled this obligation and that the Plaintiffs have failed to produce any meaningful evidence that North Carolina violated the implied covenant of good faith and fair dealing.

Because the undisputed facts fail to demonstrate that North Carolina acted in bad faith or repudiated the Compact, the Plaintiffs are not entitled

to judgment as a matter of law on their claims that North Carolina breached the Compact. Accordingly, the Special Master recommends that their motion for summary judgment on Count II of the bill of complaint be denied.

III. North Carolina's Motion for Summary Judgment on Count II of the Bill of Complaint

For substantially the same reasons described above, the Special Master also recommends that North Carolina's motion for summary judgment on Count II of the Complaint be granted. As discussed, Count II alleges that North Carolina breached the Compact by failing to site, license, construct, and operate a regional low-level radioactive waste disposal facility. Based on the undisputed facts, the Special Master concludes that North Carolina satisfied its obligation while a member of the Compact to take "appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority." Compact, Art. 5(C).

From the time that it was designated a host State until December 1997, North Carolina worked consistently to site and license a facility. North Carolina established and funded the North Carolina Low-Level Radioactive Waste Management Authority. It defended and settled litigation challenging potential sites for the facility. After choosing a site, North Carolina applied for a license, but its application was deferred because of unresolved health and safety concerns. North Carolina continued to work

with outside consultants and experts to resolve these concerns until December 1997, when the Commission informed the State that it would no longer provide financial assistance.

Based on the parties' course of performance, North Carolina concluded that the Compact did not require it to assume the full remaining financial burden (at least an additional $34 million) of reapplying for a site license. Accordingly, North Carolina continued to fund the Authority and maintain the project records while attempting to find alternative sources of funding. By July 1999, it was clear not only that no additional funding was forthcoming from the Commission and the party States, but also that the Commission might seek to sanction North Carolina. Rather than face a sanctions hearing it considered to be unwarranted, North Carolina withdrew from the Compact. The Special Master believes that North Carolina satisfied its obligation under the Compact to take "appropriate steps" while it was a member of the Compact.

The Special Master also concludes that North Carolina's decision to withdraw from the Compact did not constitute a breach of contract. The Compact gives party States the unrestricted right to withdraw before a second disposal facility begins operations. As discussed, other regional compacts approved by Congress simultaneously with the Southeast Compact placed additional restrictions on withdrawal, particularly by host States. The Southeast Compact contains no such restrictions, and it would be problematic to read them into the Compact. *See Texas v. New Mexico*, 462 U.S. at 565.

The Plaintiffs argue that it would be unfair to permit North Carolina to withdraw from the Compact without successfully licensing or building a facility, especially in light of the fact that the State received approximately $80 million in financial assistance from the Commission toward these ends. The test of fairness, however, must be the Compact itself. The party States drafted and agreed to the Compact without knowing which State would be chosen as the second host State. The Southeast Compact, unlike other regional compacts, placed relatively few constraints on member States, including host States. Instead, the Compact relied primarily on the benefits of membership and possible future revenue to induce its members (including host States) to remain in the Compact and produce new facilities. Based on the more restrictive language found in other compacts, one might have predicted that these incentives would prove to be inadequate. Certainly in hindsight, these incentives failed to keep either South Carolina or North Carolina from withdrawing (even after the latter spent approximately $34 million of its own funds to develop a new site). The remedy for this deficiency, however, is not a judicial reformation of the Compact, but rather voluntary amendment by the party States with the approval of Congress.

Given the terms of the Southeast Compact, it is not surprising that North Carolina withdrew in 1999 before successfully licensing and building a new facility. Once South Carolina withdrew in 1995, the Commission lacked a ready source of new resources to assist North Carolina with the substantial

expense of licensing and building a new facility. In addition, the financial incentives changed after 1995. If North Carolina had chosen to finance the facility itself, it would have been much more difficult to recoup its costs within a reasonable period. To avoid these events, the Southeast Compact could have placed greater restrictions on the ability of host States to withdraw. Had it done so, South Carolina and North Carolina might have remained in the Compact, the Commission would have maintained a reliable source of revenue to assist host States with the development of new facilities, and the region would have had a smoother transition from one facility to the next.

Indeed, some compacts took steps to deter withdrawal. As noted, both the Central Midwest Compact and the Midwest Compact restrict the ability of a designated host State to withdraw after 90 days by permitting the Commission to assess "a sum the Commission determines to be necessary to cover the costs borne by the Commission and remaining party states as a result of that withdrawal." Central Midwest Interstate Low-Level Radioactive Waste Compact, Art. VII(f), 99 Stat. 1891; Midwest Interstate Low-Level Radioactive Waste Management Compact, Art. VIII(i), 99 Stat. 1901. Even these provisions, however, were not enough to produce a new facility. Indeed, not a single new disposal facility has opened since Congress approved the regional compacts in 1986.

The events relating to the Midwest Compact are instructive. In 1987, the Midwest Commission selected Michigan as a host State because it was the

greatest producer of low-level radioactive waste. *See* Wayne E. Kiefer, *Low-Level Radioactive Waste Issues in Michigan: 1980-2000*, 33 Michigan Academician 343 (2002). Michigan faced great opposition at home to developing a facility. After rejecting several sites, the State adopted restrictive criteria that the Commission believed would make it impossible to find an appropriate site. *Id.* The Commission thereafter refused to advance any additional financial assistance to Michigan, and in July 1991 the Midwest Compact voted to revoke Michigan's membership in the compact. *Id.* The need to develop a regional disposal facility abated in July 1995 when South Carolina withdrew from the Southeast Compact and immediately reopened the Barnwell facility to all States other than North Carolina. *Id.*

In light of these events, some members of the Midwest Compact sought to strengthen the compact by proposing amendments to govern host States and funding. For example, Minnesota has sought to modify the compact by adopting, in its own statutory law, a revised version of the compact that obligates the Commission to "[p]rovide a host state with funds necessary to pay reasonable development expenses incurred by the host state after it is designated to host a compact facility." Minn. Stat. § 116C.831 (2008). The amendments also authorize alternative mechanisms to raise such funds. "When no compact facility is operating, the Commission may assess fees to be collected from generators of waste in the region." *Id.* "When a compact facility is operating, funding for the Commission shall be provided through a surcharge collected by the host state . . . ."

Id. A host State's obligation to develop and operate a facility is expressly made contingent upon the discharge by the Commission of its obligation to provide funding. *Id.* The amended compact further specifies that a host State relieved of its responsibilities "shall repay the Commission any funds provided to that state by the Commission for the development of a compact facility." *Id.* In addition, a host State relieved of its responsibilities "shall pay to the Commission the amount the Commission determines is necessary to ensure that the Commission and the other party states do not incur financial loss as a result of the state being relieved of its host state responsibility." *Id.* Although Congress does not yet appear to have approved amendments to the Midwest Compact, Minnesota's actions both reveal the difficulties of interstate efforts to create facilities for the disposal of low-level radioactive waste and suggest that the States are capable of drafting compact language to provide incentives for States to remain fully invested in those efforts.

Had the Southeast Compact contained provisions of this kind, the Plaintiffs' claims would have more merit. As written, however, the Compact merely imposed an obligation on host States to take "appropriate steps" to license a facility, placed no restrictions on the ability of a host State to withdraw, and did not obligate a host State to repay financial assistance from the Commission if it was ejected or withdrew from the Compact. Under these circumstances, the Special Master recommends that North Carolina's motion for summary judgment with respect to Count II of the bill of complaint be granted.

IV. North Carolina's Motion for Summary Judgment on Counts III-V of the Bill of Complaint

North Carolina has moved for summary judgment with respect to Counts III, IV, and V of the bill of complaint, which seek relief based on claims of unjust enrichment, promissory estoppel, and money had and received. The Plaintiffs have not moved for summary judgment on these claims because they believe that they are fact intensive and require additional discovery. The Special Master believes that resolution of North Carolina's motion on these claims requires further briefing and argument, and possibly further discovery. Because Counts III, IV, and V seek relief as an alternative to recovery for breach of contract under Count II, however, the Special Master does not think it is advisable to delay the filing of his Report. If the Court accepts the Special Master's recommendations with respect to Count II, then the parties can revisit Counts III, IV, and V in future proceedings. If the Court rejects the Special Master's recommendations regarding Count II, then there may be no need to consider Counts III, IV, and V.

Counts III-V cannot be resolved now. A threshold question is whether the claims at issue in Counts III–V belong to the Commission, the Plaintiff States, or both. If the claims belong exclusively to the Commission, then sovereign immunity may shield North Carolina from these claims. *See* Prelim. Rpt. at 4-14. The Compact provides 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. Liabilities of the Commission shall not be deemed liabilities of the party states." Compact, Art. 4(M), 99 Stat. 1877. It is undisputed that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance. But for sovereign immunity, the Commission itself could sue North Carolina to recover these funds.

In this case, the Commission has joined with the party States to sue North Carolina. To the extent that the Plaintiff States themselves are entitled to bring these claims, the Eleventh Amendment poses no barrier in this original action between States. See *Texas v. New Mexico*, 482 U.S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."); *Arizona v. California*, 460 U.S. 605 (1983). Thus, the question here is whether the Plaintiff States are entitled to pursue the claims asserted in Counts III-V on behalf of the Commission. There is no doubt that the Plaintiff States can sue North Carolina for breach of the Compact, as they are parties to the Compact. The claims asserted in Counts III-V, however, appear to belong exclusively to the Commission, since it provided the funds at issue. It is possible that the Plaintiff States may sue *parens patriae* to restore the funds to the Commission, but the parties have not adequately

briefed this issue, and its resolution in this case is unclear. *Cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) (stating that "where one State brings a suit *parens patriae* against another *State*, a more circumspect inquiry may be required in order to ensure that the provisions of the Eleventh Amendment are not being too easily circumvented by the device of the State's bringing suit on behalf of some private party"); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (stating that in order to maintain original jurisdiction, "it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (holding that "one State cannot create a controversy with another State . . . by assuming the prosecution of debts owing by the other State to its citizens").

In the course of briefing North Carolina's summary judgment motion, the parties raised several subsidiary questions. One is whether North Carolina law or federal common law governs the claims asserted in Counts III-V. North Carolina argues that its law should govern because these claims arise outside the Compact. While the Compact partakes of federal law, it argues, the claims asserted in Counts III-V necessarily arise under state law. The Plaintiffs counter that all disputes between States are governed by federal common law because States are entitled to equality of right under the Constitution, a principle that precludes the application here

of one State's law in preference to another's. Resolution of this question may turn on whether the claims are properly viewed as a dispute between States, as the Plaintiffs maintain, or instead as a dispute between the Commission and North Carolina, as North Carolina maintains. In disputes between States, the Court ordinarily applies federal common law designed to respect the equality of States. The rationale for applying federal common law is less compelling if the claims arise solely between the *Commission* and North Carolina.

Apart from the problems of sovereign immunity and choice of law, summary judgment on Counts III, IV, and V appears to be premature because several factual and legal questions remain to be decided. While the existence of the Compact does not appear to preclude an independent claim of promissory estoppel, the parties dispute whether North Carolina made an enforceable promise and what the precise content of any such promise might have been. The parties also dispute whether the Commission and/or the party States reasonably relied on any such promise. More fundamentally, there is a question whether promissory estoppel is an appropriate basis for recovery against a State. Any promise North Carolina made arose in the context of an interstate compact approved by Congress. It is unclear whether and to what extent the Constitution permits States to make and enforce promises outside the formalities of the Compact Clause.

Questions also remain regarding the Plaintiffs' claims for unjust enrichment and restitution. North Carolina denies that it received a benefit or

was enriched, because it spent all of the funds that it received on appropriate efforts to license a facility. Similarly, North Carolina claims that, in any event, there was no "unjust" enrichment, because the funds it received did not take the place of, but merely augmented, the state funds that it spent on the project. Unjust enrichment is more typically used to recover money paid by mistake.

In light of these legal and factual questions, the Special Master will defer consideration of North Carolina's motion for summary judgment with respect to Counts III, IV, and V. At a minimum, resolution of this motion would require further briefing and argument, and perhaps further discovery. Because further proceedings would delay the Court's consideration of this case and because the Plaintiffs assert the claims in Counts III-V only as an alternative to their claims for breach of contract, the Special Master recommends that North Carolina's motion for summary judgment on Counts III-V be denied at this time.

V. Restitution as a Measure of Damages

As a remedy for breach of contract, the Plaintiffs seek restitution of the approximately $80 million that the Commission provided to North Carolina from 1987 to 1997. As explained above, the Special Master recommends that the Court find that North Carolina has not breached the Compact. Accordingly, it is not necessary to resolve whether the Plaintiffs would be entitled to restitution of $80 million if North Carolina were found to have breached the Compact.

The Special Master notes, however, that the Plaintiffs' demand for restitution raises several complex issues. At the outset, one must distinguish between the equitable claim of restitution as a theory of *recovery* (as alleged in Counts III and V of the Complaint) and restitution as a *measure of damages* for a breach of contract (as alleged in Count II of the Complaint). *Compare* Restatement of the Law of Restitution § 1 (1937) (concerning the equitable claim of restitution for unjust enrichment), *with* Restatement (Second) of Contracts § 373 (1980) (concerning restitution as a measure of damages for breach of contract). The following discussion addresses issues relating to restitution as a measure of damages.

A threshold issue is whether the Plaintiffs may elect restitution as a remedy without first showing that expectation damages are either unavailable or inadequate. The Plaintiffs maintain that they may elect restitution as a remedy, while North Carolina argues that restitution is appropriate only when damages are inadequate.

Another issue is whether the Plaintiff States or instead only the Commission may seek restitution. Resolution of this question may affect whether North Carolina may assert Eleventh Amendment immunity to bar recovery. The Plaintiff States concede that the Commission rather than the States themselves provided the funds in question, but they argue that the States may seek restitution, for two principal reasons. First, they argue that the funds raised by the Commission through fees and surcharges should be considered contributions by the

States within the meaning of the Compact. Second, they argue that the Commission was acting as the States' agent when it provided the funds in question to North Carolina. North Carolina disputes both of these propositions and argues that only the Commission may seek restitution because it provided the funds at issue. In the course of these proceedings, the Special Master has also asked whether the Plaintiff States may seek to have restitution paid to the Commission rather than to the States themselves. If available, this approach might avoid some of the difficulties posed by the alternatives.

Finally, even if restitution is available as a measure of damages for the alleged breach of contract in this case, several complex questions will arise relating to the appropriate measure of restitution. First, if the basis for a finding that North Carolina breached the Compact is that it failed to take appropriate steps for the 19 months prior to its withdrawal—a claim that the Special Master recommended above be rejected—then are the Plaintiffs entitled to full restitution of all funds provided by the Commission from 1988 through 1997, or merely an amount to compensate them for North Carolina's inaction in the final nineteen months?

Second, if the Plaintiff States are entitled to seek restitution, should any recovery be reduced because fewer than all of the member States have chosen to sue? The Southeast Compact originally consisted of eight States: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Only four of these States are plaintiffs in this case. Georgia and Mississippi chose

not to join as plaintiffs. North Carolina is the Defendant and withdrew from the Compact in 1999. South Carolina is neither a plaintiff nor a defendant and withdrew from the Compact in 1995. Should restitution be adjusted on any of these bases?

As noted above, these questions need not be resolved at present in light of the Special Master's recommendation that North Carolina's motion for summary judgment be granted with respect to Count II of the bill of complaint.

VI. Conclusion

The Special Master recommends that the Plaintiffs' motion for summary judgment be denied, and that North Carolina's motion for summary judgment be granted with respect to Count II of the bill of complaint and denied with respect to Counts III-V of the bill of complaint.

This case is currently in an interlocutory position. For the reasons given above, the Special Master has determined that the case must proceed with further discovery and possibly a trial before Counts III-V can be completely resolved. The Special Master, however, has decided to file both his Preliminary Report and his Second Report now because he believes that an immediate decision by the Supreme Court may materially advance the ultimate termination of the litigation by narrowing the scope of any future discovery and trial. *Cf.* 28 U.S.C. § 1292(b) (permitting interlocutory appeals from district courts to courts of appeal under somewhat analogous circumstances).

It may assist the Supreme Court for the Special Master briefly to explain the procedural consequences of actions that the Court might take at this juncture. If the Court accepts the Special Master's recommendations, proceedings before the Special Master would continue with respect to Counts III, IV, and V. Alternatively, if the Supreme Court rejects one or more of the Special Master's recommendations, the Court might direct the Special Master to take further actions in the case, such as determining what remedy to award the Plaintiffs on Count II or how to address the remaining Counts of the complaint. Finally, the Court may decide to take no action on either the Preliminary Report or the Second Report at this juncture, much as a court of appeals might deny a discretionary interlocutory appeal. In that case, proceedings before the Special Master would continue, and the Supreme Court would have the opportunity to review the issues in the reports when the Special Master files a final report.

Respectfully submitted,

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