In the
United States Court of Appeals
for the Eighth Circuit

CASE NO. 02-3747

ENTERGY ARKANSAS, INC., et al.

Plaintiffs - Appellees,

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION,

Plaintiff - Appellee,

US ECOLOGY, INC.,

Intervenor Plaintiff-Appellee,

v.

STATE OF NEBRASKA, et al.,

Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Central Interstate Low-Level Radioactive Waste Commission sued the State of Nebraska seeking damages and injunctive relief for a breach of the provision of an interstate Compact requiring Nebraska to process a license application for a low-level radioactive waste disposal facility in good faith.

There has never been a final decision by the State on the application because the district court enjoined the licensing process before it concluded. The district court also struck the State's jury trial demand, and, following a trial, found that various State officials acted in bad faith. The court refused to remand the matter to the State for further administrative proceedings, asserting that the State could never be fair. The district court then awarded the Commission over $151 million in damages and prejudgment interest even though the Commission and the other Compact States spent no money on the licensing process.

This case raises important issues involving the Seventh Amendment, the administration of a State administrative process, sovereign immunity, availability of contract damages to an interstate compact commission, and a court's determination of "bad faith" by a State. The State believes oral argument is appropriate and respectfully requests thirty (30) minutes for argument.

CORPORATE DISCLOSURE STATEMENT

Appellants the State of Nebraska, the Governor of the State of Nebraska, the Nebraska Department of Environmental Quality, the Director of the Nebraska Department of Environmental Quality, the Nebraska Department of Health and Human Services Regulation & Licensure, and the Director of the Nebraska Department of Health and Human Services Regulation & Licensure, pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1, hereby state that none of them is a "nongovernmental corporate party," and thus is not required to make a corporate disclosure statement.

JURISDICTIONAL STATEMENT

I. Basis of District Court Jurisdiction

The Plaintiff alleges violation of a multi-state Compact approved by Congress. The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

II. Basis of Court of Appeals Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 from a final order of a district court.

III. Notice of Appeal Timely Filed

The district court entered its Final Judgment and Memorandum and Order on September 30, 2002. Appellants timely filed their Notice of Appeal on October 30, 2002, pursuant to Fed. R. App. P. 4 (a).

STATEMENT OF THE ISSUES

1. Whether a state has the right to a jury trial in an action by an interstate compact commission seeking monetary damages for an alleged breach of an interstate compact.

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002).
Chauffers, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990).
Tull v. United States, 481 U.S. 412 (1987).
Brownlee v. Yellow Freight System, Inc., 921 F.2d 745 (8th Cir. 1990).

2. Whether the district court erred in finding that the State of Nebraska violated its duty to review a license application in good faith because Nebraska's

Governor questioned whether a license should be granted on public policy grounds, but never directed the State reviewing agencies to deny the license, and where the evidence does not support a finding that the agencies were biased against the application, acted arbitrarily, capriciously or in a manner unsupported by the administrative record, or denied the license on any basis other than the application's lack of merit.

Coalition for the Fair and Equitable Regulation of Docks v. FERC, 297 F.3d 771 (8th Cir. 2002).
United States v. Basin Elec. Power Co-Op, 248 F.3d 781, 797 (8th Cir. 2001), cert. denied, Norbeck v. Basin Elec. Power Co-op, 534 U.S. 1115 (2002);
Taylor Equip., Inc., v. John Deere Co., 98 F.3d 1028 (8th Cir. 1996), cert. denied, 520 U.S. 1197 (1997).
Ikpeazu v. Univ. of Nebraska, 775 F.2d 250 (8th Cir. 1985).

3. Whether the district court erred in ordering the State of Nebraska to pay money damages, rather than ordering it in the first instance to complete the ongoing administrative process and correct whatever bad faith conduct may previously have been found against State officials and employees.

Schwartz v. Dolan, 86 F.3d 315 (2nd Cir. 1996).
Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995).
Hesselbein v. Clinton, 999 F.2d 320 (8th Cir. 1993).

4. Whether the district court erred in awarding damages to the interstate compact commission, suing on behalf of certain compact states, when neither the commission nor any compact state suffered any monetary loss from the alleged breach of the compact.

Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374 (Fed. Cir. 2001).
Union Ins. Co. v. Land and Sky, Inc., 253 Neb. 184, 568 N.W.2d 908 (Neb. 1997).
Recold, S.A. de C.V. v. Monfort of Colorado, Inc., 893 F.2d 195 (8th Cir. 1990).
W.K.T. Distrib. Co. v. Sharp Electronics Corp., 746 F.2d 1333 (8th Cir. 1984).

5. Whether the district court erred in awarding prejudgment and postjudgment interest against the State of Nebraska when such an award is barred by the Eleventh Amendment, not authorized by the Compact or any other federal or state statute, and when prejudgment interest was held to begin accruing more than a decade before the underlying cause of action even arose?

Library of Cong. v. Shaw, 478 U.S. 310 (1986).
Monessen Southwestern R.R. Co. v. Morgan, 486 U.S. 330 (1988).
West Virginia v. United States, 479 U.S. 305 (1987).
Knight v. Alabama, 962 F. Supp. 1442 (N.D. Ala 1996).

STATEMENT OF THE CASE

The Central Interstate Low-Level Radioactive Waste Commission (the "Commission"), US Ecology, Inc. ("USE") and certain generators of low-level radioactive waste (the "Generators") separately sued the State of Nebraska for damages and an injunction claiming that Nebraska's bad faith conduct in reviewing USE's license application to build and operate a disposal facility in Nebraska violated an interstate Compact. The suit was filed in December 1998, several days after the reviewing agencies denied the license, but before the State had made a final decision on the application. At the plaintiffs' joint request, the district court preliminarily enjoined all further administrative proceedings in April 1999. Entergy Ark., Inc. v. Nebraska, 210 F.3d 887 (8th Cir. 2000). To date, the administrative review of USE's license application is pending, and there is no final decision for this or any other court to review.

This Court has ruled that the Commission could maintain an action against Nebraska on behalf of the other States, but the suits by USE and the Generators were barred by sovereign immunity. Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 990 (8th Cir.), cert. denied, 534 U.S. 889 (2001). The only remaining action against the State was the Commission's breach of Compact claim, under which it sought both damages and injunctive relief. Before trial, the district court denied the State's demand for a jury trial on that claim, rejecting the argument that the

case was analogous to a breach of contract action for money damages for which trial by jury is guaranteed under the Seventh Amendment.

After a two month trial, the district court held that the conduct of various State officials during the licensing process violated the "good faith" requirement of the Compact. The district court did not find, however, that Nebraska's license review process was unlawful, nor did it conclude that the Agencies' decision to deny the license was wrong, arbitrary or capricious. Nevertheless, instead of directing the State to correct its errors and finish the licensing process in good faith, the district court barred any further administrative proceedings, asserting that Nebraska could never act in good faith, and ordered the State to pay $151,408,240 in damages and prejudgment interest to the Commission. In making this award, which was based almost entirely upon the licensing costs paid by USE and the Generators -- whose claims were previously dismissed -- the district court stated that the case was, in fact, analogous to a breach of contract action between private parties, thereby contradicting the rationale for its prior order striking the State's jury demand. This appeal followed.

STATEMENT OF THE FACTS

A. The Commission

In 1986, Nebraska, Arkansas, Kansas, Louisiana and Oklahoma (the "Member States") entered into the Central Interstate Low-Level Radioactive Waste

Compact (the "Compact") to select a site, construct, and operate a low-level radioactive waste ("LLRW") disposal facility (the "Facility") in the Compact region. The Compact created the Commission as a legal entity separate from the Member States to administer the Compact's terms. SA[1] 22 (Ex. 6018.0004). The Compact directs the Commission to select an applicant for a Facility license, but otherwise specifies no role for the Commission in the licensing process.

B. Funding for the Licensing Process

The Commission contracted with USE, a wholly owned subsidiary of American Ecology Corporation ("AEC"), in January, 1988, to be the license applicant and to provide all of the goods and services necessary to pursue the license. SA 36 (Ex. 6058.0020) (the "USE/CIC Contract"), SA 36 (Ex. 6058). USE was not the Commission's agent for licensing purposes. SA 36 (Ex. 6058.0068).

USE was unwilling to pay all of the tens of millions of dollars in anticipated license application expenses. The Commission had no money to fund the licensing process, and no Compact obligation to pay any of USE's license application expenses. SA 139 (Tr. 3096-3098). To facilitate the process, the USE/CIC Contract required USE to make a "sweat equity" contribution of $6.25 million by

[1] "SA" refers to the State's Appendix filed in this appeal. SA Tabs 1 to 11 are the relevant docket entries. SA Tabs 12 to 129 contain trial exhibits. SA Tabs 130 to 155 are relevant portions of trial testimony.

discounting its invoices. SA 36 (Ex. 6058.0027). As to the remaining licensing costs, the Commission entered into contracts with six generators of low level radioactive waste (the "Generators") to reimburse USE for its costs (the "Generator/CIC Contract"). SA 35 (Ex. 3391). This Contract specified that the Generators' funds were treated as prepayments against future waste disposal fees. SA 35 (Ex. 3391.0004), SA 139 (Tr. 3036-3037).

The Generators did not provide these funds directly to USE. Instead, the Commission acted as an administrator for a collection and payment system that worked as follows:

1. USE sent monthly invoices to the Commission.

2. The Commission reviewed each invoice and approved payment, computed the amounts owed by each Generator, and invoiced each Generator for its proportionate share.

3. Each Generator paid its invoice by depositing funds into a trust account. The Commission was neither the trustee nor the beneficiary of this trust.

4. When all of the Generators had deposited their shares into the trust account, the money was transferred from the trust account to a restricted Project Fund maintained by the Commission.

5. The Commission then promptly forwarded the funds to USE.

SA 35 (Ex. 3391.0005-08), SA 133 (Tr. 1038-42), SA 139 (Tr. 3046).

The Generators' funds and USE's equity were never a Commission asset or liability. The Commission, its outside auditors and outside counsel agreed that the

Commission was a mere "intermediary" or "conduit" for the Generators' funds during each payment cycle. SA 113 (Ex. 1160), SA 104 (Ex. 5404), SA 111 (Ex. 5650), SA 133 (Tr. 1049, 1077), SA 139 (Tr. 3098-3103, 3107-3112). The Commission's attorneys confirmed that the Commission had no obligation to repay any of the Generators' funds. SA 111 (Ex. 5650). The Commission's financial records did not record the prepayments as a Commission liability, and the Commission acquired no items with the Generators' funds that were recorded as Commission assets. SA 113 (Ex. 1160), SA 133 (Tr. 1049-50).

Through the entire licensing process that followed, neither the Member States nor the Commission provided any funds for the licensing effort. SA 128 (Ex. 8154.0006), SA 129 (Ex. 8155.0006), SA 133 (Tr. 1071-72). It was paid for exclusively by USE and the Generators.

C. The Licensing Process

Nebraska was selected as the Host State for the Facility in 1987. USE, with the Commission's approval, proposed a Facility site in Boyd County, Nebraska at the end of 1989. SA 29 (Ex. 3309), SA 30 (Ex. 3312), SA 32 (Ex. 3315), SA 33 (Ex. 3332). The Compact expressly provides that the Host State, here Nebraska, "shall regulate and license any regional facility within its borders." SA 22 (Ex. 6018.0002). Therefore, Nebraska promptly enacted additional statutes and regulations governing the impending licensing process, including provisions

requiring USE to pay all expenses incurred by the State to review the license application. SA 17 (Ex. 4593), SA 23 (Ex. 5826).

The responsibility for reviewing USE's application was assigned to the Nebraska Department of Environmental Quality ("DEQ") and the Nebraska Department of Health ("DOH") (collectively, the "Agencies"). Randy Wood was the Director of DEQ and Dr. David Schor was DOH's decisionmaker for LLRW licensing purposes (hereafter referred to as "Directors") when the 1998 licensing decision was made. The Directors assigned the day-to-day licensing work to their respective Agency's staff, which were jointly referred to as the LLRW Program. The LLRW Program established eight technical review teams to evaluate different subject areas of the application.

The license review process began in July 1990 when USE filed a written application consisting of a Safety Analysis Report and an Environmental Report. During the first two phases of the review, the Completeness Review and the Technical Review, the State determined whether USE's application contained all of the necessary information, examined the merits of the application in detail, and provided comments to USE identifying potential problems, requesting additional information, or seeking clarification of issues. SA 144 (Tr. 4587-88, 4610-11). The State's technical review comments and USE's responses were organized into comment "rounds." There were four such rounds between February 1991 and June

1995. In June 1995, USE filed Revision 8 ("Rev. 8") to its application, which it represented was the final revision. SA 16 (Ex. 3388.0211-2).

Thereafter, the LLRW Program analyzed Rev. 8 in detail and incorporated its preliminary findings into two documents, the Draft Safety Evaluation Report ("DSER") and Draft Environmental Impact Analysis ("DEIA"). SA 108 (Ex. 3084), SA 109 (Ex. 3085). These draft documents, issued in late October 1997, notified USE and the public of the LLRW Program's initial technical analysis of the application, and enabled them to comment, as required by Nebraska law. SA 108 (Ex. 3084.0003), SA 109 (Ex. 3085.0003-6), SA 110 (Ex. 3126.0008-11). The Agencies explicitly stated that these drafts were not intended to and did not reflect any decision by the Directors as to whether a license should be issued. SA 99 (Ex. 5852), SA 110 (Ex. 3126.0005), SA 150 (Tr. 6299), SA 154 (Tr. 6780).

After a 90-day comment period and a public hearing held in February 1998, the Agencies prepared a Safety Evaluation Report, an Environmental Impact Analysis, and a Proposed License Decision, containing the Directors' proposed decision to deny the license and the reasoning behind that decision. SA 116 (Ex. 3132), SA 117 (Ex. 3133), SA 118 (Ex. 5752), SA 144 (Tr. 4903-04). The SER, EIA and Proposed License Decision were provided to the public and USE in August 1998, followed by a 90-day comment period, and then a second public hearing in November 1998. SA 145 (Tr. 4931). On December 18, 1998, the

Agencies issued the Final Safety Evaluation Report, Final Environmental Impact Assessment and Final License Decision denying USE's application based upon USE's failure to satisfy several environmental and financial assurance requirements of Nebraska law. SA 123 (Ex. 3143), SA 124 (Ex. 3144), SA 125, (Ex. 5828), SA 144 (Tr. 4800), SA 154 (Ex. 6891-93). For instance, the State determined that groundwater rose to the surface of the ground under the proposed Facility, and would therefore come into contact with radioactive waste and contaminate the site and the shallow groundwater system beneath it. SA 17 (Ex. 4593.0032-33), SA 125 (Ex. 5828.0003-11). The State also determined that USE was unable to demonstrate through a written instrument -- before a license issued -- that it had the financial resources to construct the Facility. SA 17 (Ex. 4593.0047), SA 125 (Ex. 5828.0012), SA 144 (Tr. 4730-31), SA 154 (Tr. 6828-30).

D. The Contested Case Proceeding

As provided by Nebraska law, USE was entitled to an administrative review of the Agencies' decision through a "contested case" proceeding, where a hearing officer conducts a de novo evidentiary hearing and prepares an official record containing any evidence presented by the parties to the proceeding. The contested case is not an appeal of the December 1998 Decision, and the Decision is given no deference by the hearing officer. After the hearing, the hearing officer prepares findings and makes a recommendation to the Directors, and they then make a

"final" decision on the application. State Addendum[2] 9 (Title 115, Ch. 7; Title 180, Ch. 1). Thereafter, any interested party, but not the State, has the right to appeal the Agencies' final decision to the Lancaster County District Court of Nebraska. SA 17 (Ex. 4593.0068); Add. 8 (Neb. Rev. Stat. § 84-917 (2002)).

USE filed a contested case proceeding in February 1999, and the Agencies jointly appointed former Nebraska Supreme Court Justice C. Thomas White as the hearing officer. SA 126 (Ex. 27). The State also designated two individuals with no prior involvement in the licensing proceeding to act as the Directors in the final review -- Patrick Rice and Richard Raymond. Entergy Ark., Inc. v. State of Nebraska, 46 F. Supp.2d 977, 989 (D. Neb. 1999). Shortly after USE's filing, the district court issued a preliminary injunction halting the contested case and preventing any subsequent State court review of the "final" decision.

E. USE's Flawed License Application

USE's application was plagued by substantive deficiencies, delay and massive cost overruns from the beginning. USE's main subcontractor, Bechtel National, Inc. ("Bechtel"), identified numerous sections in the initial application that were deficient, or where data was wholly lacking, and as early as 1989, warned USE that licensing the Boyd County site would be complex and more costly due to the presence of wetlands on the site. SA 28 (Ex. 3304), SA 29 (Ex.

[2] Reference is to the State Addendum ("Add.") filed with this brief.

3309), SA 30 (Ex. 3312), SA 61 (Ex. 4145), SA 140 (Tr. 3506-07). USE charged the Generators over $18.8 million just to file the initial application, which far exceeded its initial estimate for the entire process. SA 13 (Ex. 1083), SA 14 (Ex. 1083A (Demonstrative)), SA 133 (Tr. 1092-93).

USE disregarded the significance of the 42 acres of wetlands on the Boyd County site apparently because, during its site characterization activities in the late 1980's, the site was largely dry due to then existing drought conditions. SA 38 (Ex. 1209), SA 40 (Ex. 3637), SA 148 (Tr. 5607-08), SA 149 (Tr. 6047-48). The drought cycle ended in 1992, and by late 1992, the site contained numerous ponded wetlands, some as large as 20 acres. SA 56 (Ex. 1288). By 1993, the wetlands were so inundated with water that USE personnel had to row a small boat for about 10 minutes to reach one of its monitoring wells. SA 140 (Tr. 3402). The State's regulations require the disposal site to be "free of areas of flooding or frequent ponding." SA 17 (Ex. 4593.0032). These regulations and the existence of ponded wetlands at the site caused the State to issue a Notice of Intent to Deny the license application in January 1993. SA 50 (Ex. 494).

It was only after the State issued its Intent to Deny that USE acknowledged the full extent of the wetlands and ponding problem. SA 64 (Ex. 4201). The State indicated in mid-1993, after inquiry from USE, that it would permit USE to file an amended application and essentially start over by reconfiguring its proposed site to

exclude the problem wetland areas. SA 154 (Tr. 6728-29). In August 1993, USE revised its application to reduce the size of the site from 320 acres to 110 acres. SA 64 (Ex. 4201), SA 140 (Tr. 3567), SA 144 (Tr. 4708-09), SA 154 (Tr. 6699-701). USE did not complete the amended application and submit it to the State until June 1995, almost two years later. SA 16 (Ex. 3388.0211), SA 79 (Tr. 4870). This "final application" included over 2,000 pages of new or revised information, and was essentially a new application. SA 16 (Ex. 3388.0063-69). By that time, USE had charged the Generators approximately $70 million, over $55 million of which were payments to USE and Bechtel. SA 13 (Ex. 1083), SA 14 (Ex. 1083A (Demonstrative)).

After receiving USE's final application, the Agencies estimated that they could finish their final review activities and issue the DSER and DEIA within one year. Upon reviewing Rev. 8 in more detail -- which had grown to more than 30,000 pages -- they revised their estimate and concluded that October 1997 was a more realistic date. SA 80 (Ex. 21), SA 144 (Tr. 4742-46), SA 154 (Tr. 6736-38).

Despite its bulk, USE's final application did not include all environmental data requested by the Agencies. For example, it only included groundwater level measurement data through December 1994. In December 1996, the State made a written demand for updated groundwater level measurement data. SA 96 (Ex. 5321). But, USE had not provided these data by October 1997, when the State

issued the DSER. SA 101 (Ex. 5339). Therefore, the DSER reiterated the State's demand, and warned that no license decision would be made until USE provided updated information. Id. Still, it was not until June 1998, one and one-half years after the 1996 demand letter, that USE finally turned over data showing groundwater elevations for January 1995 through December 1997. SA 115 (Ex. 5729), SA 89 (Ex. 1297). These data showed that the high groundwater levels on the newly reconfigured site reached elevations that violated many regulatory siting requirements. SA 154 (Tr. 6854-55).

USE also withheld critical financial data from the Agencies until early 1997. USE's financial fortunes were inextricably linked to those of AEC's; the two companies operated under a consolidated financial statement, and USE had guaranteed and pledged its assets (including the Nebraska LLRW disposal license) to secure AEC's debts. SA 90 (Ex. 6292), SA 98 (Ex. 6438), SA 133 (Tr. 1129). Even with the large fees from the Nebraska project, USE and AEC were essentially bankrupt by 1995 due to poor investments, mismanagement and a declining waste disposal market. SA 137 (Tr. 2503-58). The application that USE filed in 1990 contained no information about its financial condition. Despite repeated demands from the State, USE continued to withhold these data for more than six years. SA 71 (Ex. 4461). In 1994, the Commission harshly criticized USE for its repeated failure to provide accurate financial information. SA 70 (Ex. 4419).

In addition to concealing critical environmental and financial data, USE continuously changed its application, which further delayed the licensing review process. Between June 1990 and July 1995, USE submitted 10 versions of the application. SA 16 (Ex. 3388). Its last formal revision enclosing the financial information -- Rev. 8A -- was filed in March, 1997. SA 16 (Ex. 3388.0070-73), SA 140 (Tr. 3312-13). But, at the November, 1998 public hearings, USE told Nebraska that it could solve the identified site suitability defects and respond to changing economic conditions by radically reducing the size of the Facility from the 20 disposal cells proposed in its original application to four disposal cells. SA 120 (Ex. 1190.0112-19), SA 140 (Tr. 3315-16), SA 142 (Tr. 4110-11), SA 154 (Tr. 6888-89). However, USE never filed a revised application for the four cell design, as required by the regulations. SA 154 (Tr. 6888-89).

F. Governor Nelson and His Role

E. Benjamin Nelson challenged incumbent Kay Orr for the Nebraska governorship in 1990. Nelson spoke out during the 1990 campaign on LLRW issues because there were many serious LLRW policy matters, unrelated to the merits of USE's application, that would need to be addressed by the next Governor. SA 132 (Tr. 854). His position on LLRW matters was consistent during his campaign and future tenure as Governor: the proposed disposal facility must comply with the law, including all health and safety requirements. SA 132 (Tr.

858-59, 883-84, 931). Never was his position simply: "I oppose the dump." SA 132 (Tr. 866). An ardent believer in local control, candidate and Governor Nelson also pursued vigorously the requirement established by his predecessor (SA 21 (Ex. 5966), SA 132 (Tr. 916)), and made a part of Nebraska law (Neb. Rev. Stat. § 81-1579(3)) and the Commission's own rules, that the community where the Facility was to be located must consent to it. SA 132 (Tr. 863-64).

After Nelson became Governor in 1991, Nebraska statutes required that he and his staff, primarily at the Policy Research Office ("PRO"), become familiar with issues confronting the Agencies. Add. 5 (Neb. Rev. Stat. § 84-135 (2002)); Add. 7 (Neb. Rev. Stat. § 84-139 (2002)). Nelson's administration appointed an analyst at the PRO to monitor all LLRW matters affecting the general public, including whether the conditions for granting a LLRW license had been satisfied. SA 131 (Tr. 661-62); Add. 6 (Neb. Rev. Stat. § 84-137(2) (2002)). But, because USE's license application was a matter of public controversy, the Governor and his staff drew a "bright line" that permitted conversations with the Agencies about policy, legislative and regulatory activities, on the one hand, but prohibited conversations about the Agencies' technical analysis of the application, on the other hand. SA 43 (Ex. 366), SA 130 (Tr. 447), SA 131 (Tr. 474-75), SA 135 (Tr. 1707), SA 146 (Tr. 5054), SA 151 (Tr. 6463). Similarly, the Governor instructed the Agencies to conduct the license review "by the book," and to decide

the application on its merits, based solely on "sound science." SA 132 (Tr. 905-06), SA 143 (Tr. 4339), SA 150 (Tr. 6234-35). The Governor's staff, without exception, affirmed under oath at trial that a "bright line" rule existed and was honored. The Governor's office did not give any orders, instructions, or even suggestions to the Agencies about how they should conduct the license review process or make the final decision. SA 131 (Tr. 495), SA 132 (Tr. 884), SA 135 (Tr. 1680-81), SA 143 (Tr. 4344), SA 144 (Tr. 4704), SA 146 (Tr. 5096-97), SA 147 (Tr. 5204-05), SA 150 (Tr. 6392), SA 151 (Tr. 6436), SA 154 (Tr. 6679).

SUMMARY OF ARGUMENT

The district court's judgment should be reversed for several reasons.

First, the State of Nebraska had a Constitutional right under the Seventh Amendment to a trial by jury on the Commission's breach of Compact claim. A State has the right to a jury trial when sued by a non-sovereign entity, and the action raises legal issues and asks for legal relief. The district court acknowledged in its final order that the Commission's claim is most closely analogous to a breach of contract action between private parties in which the requested relief includes damages. Given that ruling, and that federal courts have long recognized the right to jury trial in such cases, the district court's order striking Nebraska's jury demand is reversible error. (pp. 22-32).

Second, under the terms of the Compact, the district court was permitted to find bad faith only the Agencies' conduct was arbitrary and capricious and unsupported by substantial evidence. There was also an evidentiary presumption that Agency officials acted with honesty and integrity, and that bad faith can only be shown by actual Agency bias. The finding of bad faith by former Governor Nelson and his PRO staff, even if credited, was not action by the Agencies, nor was it shown that Nelson caused Agency bias in the license review process or the decision. No finding was or could have been made that the denial of the license application was arbitrary, capricious, or contrary to the weight of the evidence. Moreover, the district court relied on evidence that it should have excluded in concluding that the licensing process was conducted in bad faith. (pp. 33-51).

Third, the district court erroneously enjoined the State's review process, thereby preventing the Agencies from correcting the errors identified by the district court and completing the review process as demanded by USE under State law. The appropriate remedy in cases like this one, where there is no suggestion that the underlying process itself is legally infirm, is to order the State to correct any errors and complete the administrative process fairly and in accordance with the law. It is only when a State fails to comply with such an order that a federal court may enjoin the process altogether and fashion its own relief. Here, there is no such evidence, only the district court's unwarranted and impermissible assumption that

the State would not comply. Once Nebraska is allowed to complete the licensing process in good faith, the Member States, the Commission, USE, and the Generators will have received everything they are entitled to under the Compact. (pp. 51-56).

Fourth, the trial court's damage award violates some of the most fundamental principles of contract damages. The district court awarded breach of contract damages to the Commission even though the parties to the contract on whose behalf this action was purportedly brought -- the Member States -- suffered no losses. It is undisputed that the Member States and the Commission spent exactly "$0" of their own money on the licensing process. All of the out-of-pocket licensing expenses on which the damage award is based came from USE and the Generators. Those alleged losses cannot be recovered in this action because, as this Court held, they are barred by the Eleventh Amendment. Moreover, the damage award cannot be reconciled with either the "expectation" or "reliance" theories of contract damages. None of the Member States had an "expectation" of a profit under the Compact, or that, at the end of the licensing process, USE would have a license decision (and perhaps a license), the Commission would have $151 million, and the State of Nebraska would have paid all licensing costs. Similarly, the Member States had no "reliance" damages because they had no Compact obligation to spend any money on the licensing process, and they never did so. By

awarding $151 million to the Commission, the district court has not given the Member States what they are entitled to under the Compact, but rather has awarded the Commission a gigantic and illegal windfall. (pp. 56-64).

Fifth, the district court's award of prejudgment and postjudgment interest is barred by Nebraska's sovereign immunity. The Supreme Court has stated clearly that, even if it consented to suit, Nebraska is immune from an award of prejudgment and postjudgment interest because it never expressly waived its sovereign immunity to such an award, and there is no basis for such interest in either the Compact or the common law. In addition, the district court erred by computing prejudgment interest since 1987, more than a decade before the Commission's cause of action even arose. (pp. 64-70).

STANDARD OF REVIEW

The district court's conclusions of law, including its ruling on Nebraska's right to a jury trial, contractual interpretation, damages analysis, and award of prejudgment and postjudgment interest, are reviewed de novo. Salve Regina Coll. v. Russell, 499 U.S. 225, 230-34 (1991); Thomas v. FAG Bearings Corp., 50 F.3d 502, 504 (8th Cir. 1995). The district court's findings of fact are reviewed under a clearly erroneous standard. Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 563 (8th Cir. 1992).

I. THE STATE WAS ENTITLED TO A JURY TRIAL ON THE COMMISSION CLAIM OF COMPACT BREACH

The right to jury trial in civil cases is a crucial freedom secured by the Seventh Amendment, which requires that "[i]n Suits at common law . . . the right of trial by jury shall be preserved." U.S. Const., Amend. VII. Long ago, the Court admonished that "every encroachment upon" the right to trial by jury must be "watched with great jealousy," Parsons v. Bedford, 28 U.S. 433, 446 (1830), and "any seeming curtailment of [that] right . . . should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935). See also Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 501 (1959); Halladay v. Verschoor, 381 F.2d 100, 109 (8th Cir. 1967). The district court's refusal to permit a jury trial was both an "encroachment upon" and a "curtailment of" an essential constitutional right, and reversal is constitutionally compelled under the Seventh Amendment.

A. Because the Commission Asserted a Legal Claim and Sought a Legal Remedy, the State Was Entitled to a Jury Trial

The Seventh Amendment entitles a party to have the claims against it tried to a jury if the cause of action is one "in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 564 (1990); see also Feltner v.

Columbia Pictures Television, Inc., 523 U.S. 340, 347-48 (1998); Tull v. United States, 481 U.S. 412, 417-18 (1987).

This required analysis is no different simply because the jury demand came from the State, not a private party. The Seventh Amendment is equally applicable to legal claims for money damages against sovereign states. Standard Oil v. Arizona, 738 F.2d 1021, 1028-29 (9th Cir. 1984), cert. denied, Chevron Corp. v. Arizona, 469 U.S. 1132 (1985); United States v. New Mexico, 642 F.2d 397, 402 (10th Cir. 1981). As the Ninth Circuit explained in Standard Oil, "the position of the states is analogous to the English crown, . . . [and] the crown was entitled to jury trial on demand under the common law that existed in 1791 in England." 738 F.2d at 1027. In fact, "trial by jury was originally a royal, as opposed to a popular right." Id. It has been well documented that, "[a]t common law, the jury was developed not merely as a protection for the individual, but also by the monarchs for their use." Id. See also 1 F. Pollack & F. Maitland, The History of English Law, 140 (2d ed. 1898, reprinted 1952). The State of Nebraska was, therefore, well within its rights in demanding that the claims against it be tried to a jury.

The right to a jury trial applies to common law causes of action and to statutory actions that did not exist at common law. See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708-09 (1999); Terry, 494 U.S. at 564; Tull, 481 U.S. at 417. The constitutional analysis is the same in both

instances, Tull, 481 U.S. at 417; Curtis v. Loether, 415 U.S. 189, 193 (1974), namely: whether the cause of action pled is more analogous to a law action, or to one that would at common law have been tried at equity. Markman v. Westview Instr., Inc., 517 U.S. 370, 376 (1996); Brownlee v. Yellow Freight System, Inc., 921 F.2d 745, 747 (8th Cir. 1990).

This determination requires examination of both the nature of the issues presented and the character of the remedy sought. Terry, 494 U.S. at 564. As to the first inquiry – the nature of the issues presented – courts look to whether the issues raised were historically triable to a jury at common law, or, if the action was unknown to 18th century common law, whether the issues to be tried are analogous to common law issues. Markman, 517 U.S. at 376; Del Monte Dunes, 526 U.S. at 708; see also Brownlee, 921 F.2d at 747. Fundamentally, this initial Seventh Amendment inquiry "depends on the nature of the issue to be tried rather than the character of the overall action." Terry, 494 U.S. at 569.

Second, the court examines the remedy sought to determine whether it is legal or equitable in nature. Id. at 565; Tull, 481 U.S. at 417-18; Brownlee, 921 F.2d at 747. This second inquiry is unquestionably the most important in the overall analysis, as made clear by the Supreme Court in Teamsters, 494 U.S. at 565, and Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989), and by this Court in Brownlee, 921 F.2d at 747.

With specific reference to the "issues raised," a congressionally approved interstate compact is a contract -- as has been repeatedly recognized by the Supreme Court, Texas v. New Mexico, 482 U.S. 124, 128-30 (1987); Oklahoma v. New Mexico, 501 U.S. 221, 236, n.5 (1991), and as both this Court and the district court explicitly found with respect to this very Compact. Entergy Ark., Inc. v. Nebraska, 68 F. Supp. 2d 1093, 1099 (D. Neb. 1999), aff'd in part and rev'd in part on other grounds, 241 F.3d 979 (8th Cir.), cert. denied, 534 U.S. 889 (2001). The Commission itself expressly and frequently characterized its core claim against the State of Nebraska as one for "breach of [the State's] contractual . . . duties," grounded exclusively on the allegation that the State violated the provision in the Compact requiring its "good faith performance." See SA 22 (Ex. 6018.0002), SA 4 (Dkt. #255).

Significantly, the district court treated this as a breach of contract case and based its liability and damages analysis exclusively on the State's failure to perform its Compact obligations in good faith, in breach of a specific Compact covenant. Op. 159-162, 171-72. And, in the context of determining the most analogous State statute of limitations, the district court emphasized that "this action is most similar to a contract action between private parties" and "the most appropriate analogy in a suit alleging breach of an interstate Compact is to a contract action between private parties." Op. 166, 167 n.49.

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It is well settled that a breach of contract action seeking compensatory damages was historically regarded as a legal claim at common law, and was triable by jury. See Terry, 494 U.S. at 569-70; Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962); Simler v. Connor, 372 U.S. 221, 223 (1963).[3] In all of such cases, 18th century jurisprudence required that contract issues be tried to a jury. See also J. Wm. Moore, Moore's Federal Practice § 22.01[2] (3d ed. 2001).

Second, and more importantly, the Commission sought and was awarded quintessentially legal relief for the State's alleged breach. See SA 4 (Dkt. #255); see also Op. 171. An analysis of the remedy sought confirms that the Commission's suit is one that would have been tried to a jury in a court of law at the turn of the century. As the United States Supreme Court recently explained in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002), "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." Id. (quoting Bowen v. Massachusetts, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)). The Supreme Court further stated, "money damages are, of

[3] See also Borgh v. Gentry, 953 F.2d 1309, 1311 (11th Cir. 1992); Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1064 (5th Cir. 1990); Bugher v. Feightner, 722 F.2d 1356, 1360 (7th Cir. 1983); Bradshaw v. Thompson, 454 F.2d 75, 79 (6th Cir. 1972).

course, the classic form of legal relief." Id. (quoting Mertens v. Hewett Assoc., 508 U.S. 248, 255 (1993)). See also Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 401 (7th Cir. 2000) ("A claim for money due and owing under a contract is 'quintessentially an action at law.").

The fact that the Commission included with its claim for money damages a prayer for equitable relief (see SA 4 (Dkt. #255)), does not take the legal issues from a jury. It has long been recognized that a jury trial on legal issues cannot be denied because those issues are coupled with equitable issues and characterized as incidental or less significant by comparison.[4] Tull, 481 U.S. at 425; Curtis, 415 U.S. at 196. If a case involves legal issues, even if equitable claims are also involved, the litigants have a right to a jury trial on the legal issues.

Here, the legal issues as to whether the State's conduct in processing the LLRW license application amounted to a breach of the "good faith performance" provision of the Compact and caused the Commission to suffer damages were central to every aspect of the Commission's amended complaint. Even as to the equitable relief sought, Commission recovery was dependent on resolution of its claim of Compact breach. Moreover, the district court's award of equitable relief

[4] See also Beacon Theaters, 359 U.S. at 510-11; Dairy Queen, Inc., 369 U.S. at 473; Gipson v. KAS Snacktime Co., 83 F.3d 225, 230 (8th Cir. 1996); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 491 (5th Cir. 1961).

in this case (injunction until money paid) was incidental to the millions of dollars of legal relief.

B. The District Court Erred in Analogizing the Present Suit to Colonial Disputes at the Time of the Founding

In striking the State's jury demand, the district court held that this breach of Compact case was analogous to a dispute between two American colonies, and relied on "the alternative methods of resolving disputes between the States set forth in the Constitution at the time of the Founding" (SA 6 (Dkt. #376)), which, the court asserted, "finds its historical roots in the method used by the Crown to resolve disputes between colonies." Id. The district court concluded that such disputes between the American colonies were not tried to a jury at common law, but were presented for resolution to the King's Privy Counsel. Id.

This analysis is twice flawed. First, as the district court itself points out, "the colonial method of settlement of [colonial] disputes was not even judicial, let alone one tried at law." Id. Thus, that analogy does not favor either the "court of law" or "court of equity" alternative. Second, unlike the colonial disputes model that served as the district court's benchmark, the litigants here are not two sovereigns, but consist of a non-sovereign entity (the Commission) and the State of Nebraska. Given these unmistakable differences, "colonial disputes at the time of the Founding" have little relevance to the State's jury demand here.

The district court's contrary reasoning appears to rest on its understanding that the Constitution's Compact Clause "find[s] its historical roots" in the colonial "disputes' resolution" model. Id. While that may be true, it does not mean, as this case shows, that all Compact cases are between sovereign States. The Commission brought this suit, not the Member States. The Commission has decidedly different "historical roots" than a sovereign state. It was created long after adoption of the Compact Clause. The Commission is a "creature created by the compact," (SA 6 (Dkt. #376)), and is a non-sovereign "legal entity separate and distinct from the party states." Compact, Art. IV(k)(2).

Here, in contrast to the district court's historical analogy where colonies were unable to agree, and thus submitted their disputes to the Crown, the Member States agreed to a method for resolving disputes that authorized the Commission to initiate proceedings against a party state in "any court . . . that has jurisdiction." SA 22 (Ex. 6018.0003). The district court's analogy applies to suits between States for which the Supreme Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1251(a), but does not apply here because the Commission is unable to invoke the Supreme Court's original jurisdiction. Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina, 533 U.S. 926 (2001) (Supreme Court refused Commission permission to invoke its original jurisdiction because it was not a State).

The Supreme Court has held that compact commissions are typically separate legal entities having none of the sovereign or even quasi-sovereign powers or attributes of a State. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 (1994); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 314-15 (1990) (Brennan, J., concurring). The district court below, in an earlier action, explicitly held that the Commission "simply is not a sovereign," but is, instead, "a legal entity separate and distinct from the Member States." Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n, 974 F. Supp. 762, 763-65 (D. Neb. 1997) (citing Compact Art. IV (k)(2)). Specifically authorizing this distinctly separate entity to act as an agent for the Member States' Compact disputes and taking them to federal court (where legal issues are tried to a jury), is not even remotely analogous to the practice of submitting colonial disputes to the Crown at the time of the Founding.

The district court's analogy is also erroneous because the determinative factor for Seventh Amendment purposes is not, as the district court held, the identity of the parties, but rather the nature of the issues and remedies sought. An inquiry that properly concerns itself with "issues" and "remedies" would more logically look to eighteenth century suits for compensatory damages between the King and individual claimants that were regularly tried to a jury on demand by the Crown. Standard Oil, 738 F.2d at 1027-28; see also Rex v. Peto, 148 Eng. Rep.

577 (1826); The King v. Humphrey, 145 Eng. Rep. 71 (1824); The King v. Cotton, 145 Eng. Rep. 729 (1751); The King v. Marsh, 145 Eng. Rep. 842 (1751). Here, too, the Commission's suit seeks money damages from the State. In such circumstances, as the Supreme Court has noted, a jury trial is compelled even if "an 'abstruse historical' search for the nearest 18th-century analog" arguably uncovers some other model. See Tull, 481 U.S. at 421. Thus, because the Commission's action raises legal issues and seeks money damages, a jury trial is compelled. The Supreme Court held in Tull, that even where there might be two 18th century analogies arguably pointing in different directions, the Seventh Amendment demands that the defendant be granted its request for a jury trial where the issues are legal and the relief requested is monetary. Tull, 481 U.S. at 421.

Nor can the district court's reference to original actions brought by one State against another in the U.S. Supreme Court justify denying Nebraska a jury trial. This Court previously held that the Member States agreed to an alternative method for resolution of their disputes, i.e., a suit by the Commission in federal court, and Congress gave its approval to that agreement without imposing any additional terms. Entergy Ark., Inc. v. Nebraska, 210 F.3d at 896-98. According to this Court (241 F.3d at 979), that agreement opened the door to a trial in federal court of a Commission suit against Nebraska based on a breach of Compact claim. But,

with respect to such a federal district court action, brought by the Commission for money damages, it is not anywhere stated (or even implied) in the Compact, in the Congress' approval of the Compact, or in the Compact Clause itself, that the Member States gave up their right to a jury trial.

It was the intent of the Framers of the Constitution that the "jury trial" issue, as with most other Compact issues, were for the signatory States to decide, as reflected in their Compact agreement, subject to the consent of Congress. See Cuyler v. Adams, 449 U.S. 433, 441 (1981). Here, the Member States, in agreeing to be sued by the Commission in "any court . . . that has jurisdiction" placed no constraints on trying the legal issues in such suits to a jury. To the contrary, the federal statute authorizing the Compact explicitly states that none of the Compact provisions is to be construed in a manner inconsistent with existing federal law. 42 U.S.C. § 2021d(4). Existing federal law includes, of course, the Seventh Amendment, which, as the Supreme Court and this and other Circuit Courts have stated, requires that legal issues in federal suits seeking legal relief (in the form of money damages) be tried to a jury.

Because the Compact specifically says that it is not to be read in a manner inconsistent with existing federal law, and contains no language taking away the Member States' right to a jury trial, the district court erred in striking the State's jury demand.

II. THE DISTRICT COURT ERRED IN FINDING THAT NEBRASKA CONDUCTED THE LICENSING PROCESS IN BAD FAITH

The Compact delegates to the Host State the determination of whether a license should be issued. Compact, Art. III(b); Art. V. Article V(g) provides that the Host State shall not "arbitrarily or capriciously deny or delay the issuance of a license." SA 22 (Ex. 6018.0006). This "arbitrary and capricious" standard has been construed innumerable times by federal courts in the context of challenges to administrative agency conduct. As held in those cases, agency action must be upheld so long as there is a rational basis for the agency's actions and substantial evidence to support it, even though a reviewing court might otherwise disagree. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984); Coalition for the Fair and Equitable Resolution of Docks v. FERC, 297 F.3d 771, 777, reh'g denied, 2002 U.S. App. LEXIS 21769 (8th Cir. 2002); Mausolf v. Babbitt, 125 F.3d 661, 669 (8th Cir. 1997). The district court was required to apply the Compact's arbitrary and capricious standard in determining whether the State acted in "good faith." United States v. Basin Elec. Power Co-Op, 248 F.3d 781, 797 (8th Cir. 2001), cert. denied, Norbeck v. Basin Elec. Power Co-op, 534 U.S. 1115 (2002); Taylor Equip., Inc. v. John Deere Co., 98 F.3d 1028, 1031-33 (8th Cir. 1996), cert. denied, 520 U.S. 1197 (1997). Moreover, the district court was required to accord substantial deference to the Agencies' interpretation of their own regulations. Coalition, 297 F.3d at 778.

With respect to the Commission's allegations of agency bias, this Court has ruled that administrative agencies and decision makers are entitled to the presumption that they are honest and impartial, and that this presumption can only be overcome by a showing of actual bias, such as personal animosity, illegal prejudice or a financial stake in the outcome. Withrow v. Larkin, 421 U.S. 35, 47 (1975); Gordon v. Hansen, 168 F.3d 1109, 1114 (8th Cir. 1998); Ikpeazu v. Univ. of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (per curiam).

In this case, the district court refused to decide whether the Agencies' process or decision was arbitrary and capricious, and improperly substituted its own judgment about how the Agencies should have acted "reasonably." The district court also presumed agency bias where none was proven, and admitted evidence at trial that should have been excluded. This combination of these errors requires reversal of its bad faith finding.

A. The District Court Erred by Finding that Governor Nelson's Conduct Caused Actual Agency Bias

The Directors of DEQ and DOH, not Governor Nelson, the PRO or Kate Allen, were responsible for the licensing process and decision; Nelson had no role in the decision-making process. SA 143 (Tr. 4343-44, 4415-16). For that reason, the central issue in this case was not whether Nelson or his staff was biased, but rather whether their conduct caused the Agencies to be incapable of following the law or conducting the licensing process on the merits. On this issue, the evidence

did not show such personal, financial, or other illegal prejudice by Agency personnel that is required to overcome the presumption of honesty and integrity. Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453, 1457 (8th Cir. 1996). Instead, the evidence showed insignificant interaction between the Governor and the Agencies during the beginning of the licensing process, none of which was sufficient to prove actual bias.

The district court focused primarily on former Governor Nelson and the PRO, and their alleged political opposition to the selection of the Boyd County site during Nelson's gubernatorial campaign, and thereafter in legislative initiatives involving the community consent issue. Op. 85. This political conduct, according to the district court, caused the entire license review process to be "sullied beyond redemption." Op. 85-87.

But external politics cannot, as a matter of law, overcome the presumption of agency honesty and integrity, nor justify finding that a state reviewing agency or its politically appointed Directors are improperly biased. Campaign rhetoric about matters subject to agency review -- such as, for example, the "hot button" issue of licensing a LLRW disposal facility and the Governor's insistence on community consent -- did not render the administrative review process suspect, or permit an inference that those charged with reviewing the application were so biased that

they were incapable of rendering an impartial decision. Withrow, 421 U.S. at 47; Ikpeazu, 775 F.2d at 254.

There is no other evidence sufficient to support a finding that the Governor or his staff caused actual bias at the Agencies. In fact, Governor Nelson, his Chief of Staff and General Counsel, Kim Robak, and members of his PRO staff testified that a "bright line" rule did not permit them to discuss the license decision or technical review of the license application with the Agencies. SA 131 (Tr. 474-6), SA 146 (Ex. 5054). They affirmed, under oath, that this "bright line" was never crossed. Id. Similarly, the Agencies' Directors and LLRW Program Staff testified that the former Governor and his staff were not involved in the technical review and analysis of the application or the decision to deny.

The district court criticizes Robak's involvement in 1992 in resolving differences between DOH and DEQ over their respective roles in the administrative process, including her role in the withdrawal of a request for legal opinion from the Attorney General on a licensing issue involving the 1993 Intent to Deny. Op. at 100-110. But, both Robak and the Agency Directors testified that her conversations about these matters did not concern the Agencies' review of the application, or its technical merits. SA 131 (Tr. 474-7, 645-8). The only reason that Robak, Nelson's Chief of Staff, asked that the draft Attorney General opinion be put on hold is because DEQ did not go through the Governor's Office to request

such an opinion, as required by Administration policy for all Agencies. SA 131 (Tr. 647-8). DEQ did not renew the opinion request because DEQ and DOH subsequently resolved their differences and regulatory interpretation. SA 135 (Tr. 1703). There is, therefore, no evidence that Robak ever instructed the Agencies how to analyze or decide the application.

The same can be said with respect to the actions of Kate Allen. No evidence suggests that Allen's actions interfered with, or had any substantive impact on, the Agencies' licensing activities. She did attend one LLRW Program meeting in May 1992, where technical issues were discussed. No evidence exists that she said anything at this meeting, or at any other time, to the Agencies about how they should decide or even analyze any license review issue. SA 42 (Ex. 553.0015), SA 144 (Tr. 4633-41, 4822), SA 154 (Tr. 6685). By October 1992, when her personal opposition to the project caused her to lose her objectivity, she was fired from the PRO, and never again acted on Nelson's behalf. SA 130 (Tr. 409-11), SA 146 (Tr. 5063). All of the Agencies' employees and Directors unanimously testified that Allen had no affect whatsoever on the review, nor even attempted to direct their review activities. SA 143 (Tr. 4385-86), SA 146 (Tr. 5076), SA 147 (Tr. 5538), SA 154 (Tr. 6685-86).

Nor do the circumstances of Wood's selection as DEQ's new Director in 1991 prove that he was actually biased. Op. 88-90. Remarkably, the district court

faulted Nelson for hiring Wood because he was a "tough guy," a regulator with "an attitude" and a rigid "regulatory philosophy." Op. 88-89. Nelson instructed Wood to conduct the license review "by the book," and decide the application only on its merits, based solely on "sound science." SA 132 (Tr. 905-06), SA 143 (Tr. 4386-87), SA 150 (Tr. 6234-35). Whatever the district court's subjective judgments on Wood's personality as a "tough guy" regulator, his adherence to instructions from Nelson to follow the law cannot show an impermissible, actual bias against the license application.

Moreover, none of this early evidence of Nelson and the PRO's involvement should have been admitted at trial because it related to a separate bad faith claim that was based upon pre-1993 conduct and therefore barred by the statute of limitations. The admission of this evidence cannot be excused on the grounds that this was a bench trial, where the court could later disregard irrelevant evidence, because the evidence that should have been barred featured prominently in its opinion. USE, with the Commission's knowledge and approval, first raised its bad faith claims based upon Nelson's alleged improper political influence in February 1993, when it filed a contested case proceeding attacking the Agencies' 1993 Notice of Intent to Deny. SA 54 (Ex. 1211). USE's petition included an 11-page chronology of actions by Nelson, Allen, and other State officials that USE claimed amounted to bias, political influence and bad faith. SA 54 (Ex. 1211.0016). This

petition specifically included a reference to Governor Nelson's campaign statement that the district court found so offensive. Id. at 1211.0016-17. Over the next six months, the Commission, USE and the Generators shared the documents produced by the State, including correspondence from 1991 and 1992 that the Commission relied upon in this case to prove bad faith, and began planning a bad faith action for damages based upon Nebraska's breach of "its contractual duty of good faith." SA 24 (Ex. 5968), SA 51 (Ex. 4004), SA 52 (Ex. 4005), SA 55 (Ex. 4075), SA 57 (Ex. 4084), SA 58 (Ex. 4093). The district court impermissibly allowed USE, the Generators and the Commission, to hold their bad faith claims in reserve and file them six years later, when the Agencies denied the license.

In addition, the district court erroneously applied Nebraska's five-year statute of limitations for breach of contract actions (Op. 166), rather than the two-year period required by Nebraska law (SA 11 (Dkt. #482, denying Dkt. #465); SA 9 (Dkt. #450); SA 8 (Dkt. #392), Op. 166-167)), and held that the Commission's claim was timely because it did not accrue until the State denied the license on December 18, 1998. Given that ruling, the Commission's separate bad faith claim that arose in January 1993 with issuance of the 1993 Notice of Intent to Deny was time barred after January 1998, at the latest. Nonetheless, over the State's objections, the district court improperly allowed all evidence of alleged bad

faith conduct by Nelson, his staff and the Agencies prior to February 5, 1994, and awarded damages outside any limitations period. Id.

B. The Licensing Process Was Not Conducted Arbitrarily and Capriciously

The Agencies did not act arbitrarily or capriciously in conducting the licensing process. In every example of "unreasonable" conduct cited by the trial court, the Agencies had a rational basis for their decision, and substantial evidence to support their views.

For instance, the district court faulted the Agencies for not setting a reasonable license review schedule, and for failing to meet the Commission's 1997 deadline. Op. 110-129. The State explained to the Commission, repeatedly, the Agencies' scheduling concerns as well as the need for complete information from USE. SA 39 (Ex. 3626), SA 53 (Ex. 4006), SA 59 (Ex. 4127), SA 71 (Ex. 4461), SA 84 (Ex. 6263), SA 86 (Ex. 5117), SA 87 (Ex. 5133). The January 14, 1997, deadline adopted by the Commission in late 1996 assumed -- incorrectly -- that USE's June 1995 filing was indeed the "final" revision. SA 94 (Ex. 5274.0040-41). In March 1997 -- after the Commission's mandated completion date -- USE filed another written revision, Rev. 8A, and in November, 1998, stated its intent to revise its application and alter the design of the Facility yet again -- thereby rendering the Commission's prior deadlines irrelevant. SA 120 (Ex. 1190.0112-19), SA 16 (Ex. 3388.0070-73).

The district court also should never have even considered any delay in the State's consideration of the application because this issue was previously litigated and is now barred by the doctrine of res judicata. In 1995, the Commission filed claims alleging that the State had violated its good faith obligation under the Compact by slowing down the review process, and by misusing and failing to account for certain federal funds it used in the licensing process. Nebraska ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low Level Radioactive Waste Compact Comm'n, Case No. 4:95CV3052. On July 17, 1996, the trial court dismissed, with prejudice, all bad faith claims and counterclaims that were or could have been asserted in that litigation. SA 25 (Ex. 7050). Nevertheless, the Commission reasserted its bad faith claims based on alleged Agency delay in the present litigation, and the district court rejected the State's pretrial attempts to exclude all such evidence, and the claims that had been dismissed. SA 7 (Dkt. #390), SA 9 (Dkt. #450), SA 10 (Dkt. #470 and Dkt. #481, denying Dkt. #468.).

The district court criticized the Agencies for not providing enough "assistance" to USE during the review process. Op. 88. Once again, the district court did not -- and could not -- cite any legal or regulatory requirement that a reviewing Agency must or even may assist a license applicant, or that prohibited the arm's length relationship that the Agencies preferred. But the Agencies met with USE on hundreds of occasions to discuss the application, and gave USE

thousands of written comments indicating what information USE needed to provide to satisfy the regulations. SA 140 (Tr. 3234-36, 3457). USE's own project manager published articles through 1992 lauding the State's cooperation in these meetings. SA 15 (Ex. 3131), SA 154 (Tr. 6702-03). The Agencies certainly did not act arbitrarily or capriciously here.

The district court also cited "flimsy" litigation by the State. Op. 114-128. The State's legal counsel reviewed each case before it was filed, and concluded that each presented a legitimate dispute which needed to be resolved in a court of law; none were filed to impede the licensing process. SA 155 (Tr. 7135-73, 7178-81). No licensing activity was ever delayed by the litigations cited by the lower court. The Agencies' reliance on counsel was not improper, let alone arbitrary and capricious.

Moreover, it was error for the district court to consider these filings as evidence of "bad faith" since they are constitutionally protected conduct under the Noerr-Pennington doctrine. The Supreme Court has repeatedly held that lawsuits are governmental petitioning activities protected by the First Amendment, and thus cannot serve as any basis for liability against the State. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 137, 136 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 671 (1965); Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484, 486-88 (8th Cir. 1985).

Nebraska's petitioning activities are no less protected by Noerr-Pennington than those of any other litigant. First Am. Title Co. v. South Dakota Land Title Assoc., 714 F.2d 1439, 1445-47 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984).

The Supreme Court has recognized a narrow exception to Noerr-Pennington's protection, which pertains only to activities undertaken as a "sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of [another]," Noerr, 365 U.S. at 144; California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510-16 (1972); City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380-84 (1991); Razorback Ready Mix Concrete, 761 F.2d at 487. The Commission, however, presented no evidence that the lawsuits in question were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993).

Similarly, there was no evidence that the State's "subjective motivation" in bringing these cases was "to interfere directly with the business relationships of a competitor through the use of the government process -- as opposed to the outcome of that process . . . ." Id. at 60-61. The State's attorney testified unequivocally that it was never the State's intent to have the litigations interfere with the Commission's or USE's activities, all of which were declaratory judgment actions.

SA 155 (Tr. 7135-73, 7178-81). This testimony was unrebutted, and there is no other evidence about the State's "subjective motivation" that can support the district court's finding of sham litigation.

Nor was DOH's involvement in the 1993 proposed decision (and thereafter) arbitrary and capricious. Op. 120. DOH had been involved in the review process since 1987, when Nebraska was selected as the Host State, long before Nelson ran for governor. Indeed, DOH had always been the Agency responsible for the State's compliance with a 1966 agreement with the Federal Nuclear Regulatory Commission that conferred "Agreement State" status on Nebraska for radiological matters. SA 143 (Tr. 4403), SA 146 (Tr. 5140). The Directors of the two Agencies concluded in 1989 -- before the Nelson administration -- that DOH had a lawful role in the process and entered into agreements defining each Agencies' role. SA 27 (Ex. 3260), SA 34 (Ex. 3380), SA 136 (Tr. 2041), SA 147 (Tr. 5147), SA 150 (Tr. 6259-62), SA 154 (Tr. 6662). When USE questioned DOH's participation in its 1993 contested case petition, the Agencies sought and, in good faith, relied upon legal opinions from their outside attorney affirming that DOH's role as a decision making agency was lawful. SA 65 (Ex. 8069), SA 73 (Ex. 8087), SA 155 (Tr. 7100-05), SA 150 (Tr. 6265). This conduct was not arbitrary and capricious. See McAninch v. Trader's Nat'l Bank, 779 F.2d 446, 470-71 (8th

Cir. 1985); United States v. Poludniak, 657 F.2d 948, 958-59 (8th Cir. 1981), cert. denied, Weigland v. United States, 455 U.S. 940 (1982).

C. The Licensing Decision Was Not Arbitrary or Capricious

While the district court asserted that it was not judging the merits of USE's application (Op. 2), this is precisely what it did when it ignored Nebraska's financial assurance and environmental regulations, substituted its views for those of the Agencies, and criticized the license decision as evidence of bad faith. Despite this criticism, the district court could not find that the denial was arbitrary and capricious because it was supported by overwhelming evidence on all grounds.

1. USE Was Unable to Satisfy the Written Financial Assurance Regulations

Nebraska's regulations required USE to provide written financial assurance that it could finance the Facility's construction before the Agency could grant a license. SA 17 (Ex. 4593.0047). The Agencies could not grant a license conditioned upon USE providing this financial assurance in the future. SA 144 (Tr. 4735-37), SA 154 (Tr. 6798-803).

Following the original license application and continuing through the Final License Decision, the financial condition of USE and AEC deteriorated rapidly. By 1994, AEC accumulated over $30 million in debt through a series of disastrous acquisitions. From 1994 on, AEC suffered under the weight of its enormous debt, declining waste volumes, mismanagement, faulty revenue projections, falling

prices and adverse regulatory decisions affecting its non-Nebraska operations. SA 137 (Tr. 2479 et seq.), SA 81 (Ex. 6249), SA 97 (Ex. 5326), SA 102 (Ex. 5381), SA 105 (Ex. 5422), SA 18 (Ex. 5556A (Demonstrative)), SA 112 (Ex. 5653), SA 119 (Ex. 5782). AEC struggled to stave off bankruptcy, and its own auditors were compelled to issue "going concern" opinions in 1995-1997. SA 91 (Ex. 5216), SA 97 (Ex. 5326), SA 112 (Ex. 5653), SA 81 (Ex. 6249), SA 100 (Ex. 6329). One of AEC's Directors warned that AEC's financial crisis could "create one of the largest environmental disasters this country has ever seen." SA 88 (Ex. 5176) (emphasis in original). As of November 1998, even with its reduced debt load, AEC still was unprofitable, had a critical working capital deficit and substantial unpaid bills. SA 137 (Tr. 2528-30). The unrebutted testimony and written reports of the State's financial expert, Conley Smith, confirmed that no financial institution would provide USE construction financing without third-party assistance. SA 107 (Ex. 5556), SA 114 (Ex. 5710), SA 122 (Ex. 5820), SA 137 (Tr. 2528-30). The Commission's own outside consultant, KPMG, conducted a similar evaluation and reported a devastating assessment of AEC's financial condition, consistent with Conley Smith's findings. SA 83 (Ex. 5057), SA 100 (Ex. 6329.0023-30), SA 141 (Tr. 3795-96).

Because of its financial problems, USE never provided the written financial assurance required by Nebraska law. SA 154 (Tr. 6823-24). No one, including the

Member States, the Commission, or even the Generators, ever provided a written document assuring the State they would assist USE in securing construction financing. SA 139 (Tr. 3169-3175), SA 141 (Tr. 3878-80), SA 144 (Tr. 4800), SA 154 (Tr. 6829-30). It was not arbitrary and capricious for the Agencies to require strict adherence to the regulations, and to decline issuing a license conditioned on future financing. Chevron, 467 U.S. at 843-44.

The district court never discusses the actual requirement in the Nebraska regulations. Op. 131-138. Instead, the district court stated that the regulations should have been satisfied by a conditional license, a guarantee from AEC, or the CIC/USE contract. Op. 82, 137. But, Nebraska's regulations do not permit a conditional license, and specifically prohibit an applicant from relying upon a parent companies' guarantee. SA 17 (Ex. 4593.0049), SA 154 (Tr. 6823-24). Moreover, the CIC/USE Contract did not obligate the Commission to provide any construction funding to USE, and the Commission never testified that it did. SA 36 (Ex. 6058). While the district court assumed that the Facility's revenue stream would be sufficient (Op. 134) and that AEC's problems "had largely evaporated" by December 1998 (Op. 138), its subjective views of the Facility's income generating capacity and USE's finances cannot properly be substituted for Nebraska's regulatory requirements.

The Agencies did not act arbitrarily and capriciously by rejecting a purported "financial assurance" letter dated February 9, 1995 from RRZ Public Markets, Inc. ("RRZ"), a dealer in tax-exempt industrial revenue bonds. Op. 82. SA 75 (Ex. 4698). By 1997, this letter was totally inadequate given AEC's post-1995 financial deterioration. SA 154 (Tr. 6824). Moreover, as disclosed at trial, RRZ had never examined USE or AEC's financial condition, did not intend its letter to convey any financial assurance, and could not assist USE with the construction financing since no tax exempt bonds were being issued. SA 127 (Ex. 11015.0004-10).

Finally, the district court's finding of bad faith in the hiring of Conley Smith, a respected financial firm in Omaha, is unsustainable. Op. 132-137, SA 134 (Tr. 1424), SA 144 (Tr. 4761-63), SA 154 (Tr. 6761-63). Neither the Commission nor Judge Kopf challenged Conley Smith's factual findings or analysis, probably because KPMG, the Commission's hand-picked consultant, reached the same conclusion about USE's desperate financial condition. Instead, the district court suggested impropriety because Conley Smith was initially recommended to the Agencies by a "political confidant" of Governor Nelson, Mr. W. Don Nelson (no relationship). Op. 138. But, as shown at trial, neither Governor Nelson nor Mr. W. Don Nelson were responsible for selecting Conley Smith. SA 154 (Tr. 6765-

66). The district court's conclusion that an administrative agency acts in bad faith by hiring an outside consultant in these circumstances is simply wrong.

2. USE Was Unable to Satisfy Environmental Regulations

The district court's criticism of the Agencies' 1998 Decision on environmental grounds centered on the State's allegedly improper use of USE's hydrographs and water contour maps demonstrating that groundwater was discharging at the surface of the disposal site in violation of Nebraska's regulations. Op. 151. Amazingly, the district court suggests that the Agencies should not have considered the hydrographs in making their decision. The district court also believed that the Agencies' interpretation and application of its own regulation was "unreasonable." But, the Agencies were required to consider the data provided, and to interpret and follow the regulations as written, not as they -- or the district court -- thought they should have been written. The district court completely ignored the requirement that on matters of regulatory interpretation, the standard is not the district court's own view of reasonableness. Coalition, 297 F.3d at 778.

The district court's finding that the Agencies' consideration of USE's hydrographs was bad faith is clear error. Op. 151. These hydrographs were wrongfully withheld from the State during the license review process. SA 103 (Ex. 1275), SA 89 (Ex. 1297), SA 67 (Ex. 4248), SA 68 (Ex. 4349), SA 72 (Ex. 4506),

SA 76 (Ex. 4706), SA 74 (Ex. 4634), SA 96 (Tr. 5321), SA 101 (Ex. 5339), SA 138 (Tr. 2839-40), SA 150 (Tr. 6341-42). Once USE provided them, the Agencies were not at liberty to disregard them, and the district court was not entitled to prohibit this consideration or call it "bad faith." If the State had decided the license without considering all of the environmental data submitted to it, the decision would most certainly have been subject to challenge as arbitrary and capricious.

Nor was it bad faith not to show the late filed hydrographs to all of the unspecified "experts previously hired by Nebraska" referred to by the district court. Op. 151. By June, 1998, the State's technical reviewers had already expressed serious concerns about groundwater discharge based on earlier information provided by USE. SA 31 (Ex. 3308), SA 29 (Ex. 3309), SA 62 (Ex. 3176), SA 45 (Ex. 7025), SA 138 (Tr. 2907-17). The new hydrographs were reviewed by Dr. Carlson, the Review Manager for hydrogeologic issues. He immediately recognized their significance, and his analysis which supported the Agency decision to deny the license was confirmed at trial by expert hydrogeologists, Dr. Osnes (SA 148 (Tr. 5764-72, 5687-90)), Dr. Davis (SA 152 (Tr. 6480-86, 6528-32)) and Mr. Lappala. SA 149 (Tr. 6041-6052). The district court's conclusion that the "real decision" was pre-ordained and not based upon these hydrographs is unsupported speculation.

Finally, the district court faulted the issuance of the 1993 Notice of Intent to Deny as evidence of bad faith. Op. 100. But, the Agencies did not deny the license at that point and agreed to let USE revise its application to overcome the Agencies' objections. The wisdom of the State's decision was confirmed months later -- after the wetlands were removed from the application -- when USE admitted that virtually all groundwater beneath the site discharged to these wetlands. SA 63 (Ex. 4177.0004), SA 64 (Ex. 4201), SA 66 (Ex. 4244), SA 48 (Ex. 7045A (Demonstrative)). The legal opinion prepared by Collier Shannon and the draft Attorney General's opinion (Op. 100-109) were fully consistent with the 1993 Notice of Intent to Deny, and with DEQ's prior regulatory interpretations. SA 50 (Ex. 494), SA 41 (Ex. 593), SA 47 (Ex. 3932). Moreover, there was no evidence that the Notice of Intent was politically motivated. The Governor's office did not participate in the decision-making process leading up to the Notice of Intent (SA 132 (Tr. 884-86), SA 143 (Tr. 4417-18, 4491)), and the Governor was properly informed of the decision only after it was made. SA 132 (Tr. 885), SA 143 (Tr. 4417-18), SA 154 (Tr. 6723-25), SA 131 (Tr. 652-53).

III. THE DISTRICT COURT ERRED IN AWARDING DAMAGES

A. The District Court Erred in Refusing to Remand the Matter to the State to Complete the License Review Process

Both USE and the Commission requested an injunction ordering the completion of the licensing process in a fair and unbiased manner. Federal courts

have consistently held that, where there has been a flawed state administrative review -- whether because the agency decision was arbitrary and capricious, failed procedural requirements, or a finding of bias or bad faith -- the remedy is to remand the matter to the state administrative agency with instructions to correct the flaw. Schwartz v. Dolan, 86 F.3d 315, 319 (2nd Cir. 1996); Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 112-115 (3rd Cir. 1979); see also, Schuldt v. Mankato Indep. Sch., Dist. No. 77, 937 F.2d 1357, 1360 (8th Cir.), cert. denied, 502 U.S. 1058 (1992); Melendez v. U.S. Dep't of Justice, 926 F.2d 211, 218-20 (2nd Cir. 1991); Clarke v. Coye, 60 F.3d 600, 604 (9th Cir. 1995), Jen Hung Ng v. INS, 804 F.2d 534, 539-40 (9th Cir. 1986); League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357, 361 (D. Neb. 1965), Tobin Quarries Inc. v. Central Neb. Pub. Power & Irrigation Dist., 64 F. Supp. 200, 206 (D. Neb. 1946). This Court has admonished that State "government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." Hesselbein v. Clinton, 999 F.2d 320, 326 (8th Cir. 1993).

The district court, in disregard of this precedent, refused to afford the State any opportunity to correct its errors in a "contested case" or other licensing proceeding. Instead, it halted the process and ordered the State to pay over $151 million to the Commission. Such federal interference with administrative functions assigned by law to the States is allowable only in rare circumstances that

are not present in this case. See Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995); Evans v. Buchanan, 447 F. Supp. 982, 989-90 (D. Del. 1978), aff'd, 582 F.2d 750 (3d Cir. 1978), cert. denied, 446 U.S. 923 (1980); Marsh, 242 F. Supp. at 361. For instance, there was no finding below, nor even any Commission allegation, that the "contested case" or other aspect of the State's licensing process was itself unconstitutional or otherwise in violation of federal law. Compare Yamaha Motor Corp., U.S.A. v. Stroud, 179 F.3d 598, 602-03 (8th Cir. 1999); White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677-78 (9th Cir. 1988); Urwhiller v. Neth, 265 Neb. 429, 434-36, 640 N.W.2d 417, 423-25 (2002). Liability was premised only on the way in which certain Agency officials carried out that process.

There is also no basis here to conclude that new State officials *would not* obey a court order to act in good faith. Nelson and all of the allegedly biased Directors are no longer in the State's employment, and the State has assigned the responsibility of deciding the application to new officials who had no previous involvement in the license review process. Federal law required the district court to presume that these different State officials will act in good faith, and will perform as a federal court directs. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc., 426 U.S. 482, 497 (1976); First Nat'l Bank of Albuquerque v. Albright, 208 U.S. 548, 553 (1908); Alaska Airlines, Inc. v. Johnson, 8 F.3d 791,

795 (Fed. Cir. 1993) ("[T]his presumption stands unless there is 'irrefutable proof to the contrary.'"), Cuesnongle v. Ramos, 835 F.2d 1486, 1500 n.12 (1st Cir. 1987); Rogers v. Okin, 738 F.2d 1, 4 (1st Cir. 1984). Even if there were grounds to doubt these officials' impartiality, the trial court could have easily directed that they be replaced by other state officials having no bias or previous involvement.

In such circumstances, the appropriate judicial remedy is to order the new and unbiased State officials to conduct the de novo "contested case" proceeding, and otherwise finish the review process, in good faith. Yamaha, 179 F.3d at 601; Hodel, 840 F.2d at 678. This gives USE all that it is entitled to under the law. See Rogers, 738 F.3d at 9. USE maintained below that its application satisfied all licensing requirements, and that consideration of the completed application in an impartial review process would, in all likelihood, result in the issuance of a license. SA 140, (Tr. 3362-64).[5] Allowing that process to occur is the required remedy in the first instance, and other remedial measures may be used only if the State fails to abide by the initial court-ordered relief. Edgar, 56 F.3d at 798 (federal interference with functions assigned by law to state and local governments "are to be reserved for extreme cases of demonstrated non-compliance with milder measures. They are the last resort, not the first."); Hesselbein, 999 F.2d at 326.

[5] While the district court faulted the conduct of certain State reviewers, it nowhere suggested that the State prevented USE from submitting any information to support its application, or that the information provided was in some respect incomplete.

See also Rhodes v. Chapman, 452 U.S. 337, 351 (1981); Dolan, 86 F.3d at 319; Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995), cert. denied, 481 U.S. 1069 (1987); Knox v. Salinas, 193 F.3d 123, 129-130 (2d Cir. 1999); Southwest v. Grebe, 151 F.3d 717, 734 (7th Cir. 1998).

The State's review process cannot be bypassed out of concern that it might have little lasting effect, either because Nebraska will eventually withdraw from the Compact, or the license ultimately will be denied in good faith. This case challenges the State's license review process, and the district court's remedy must confine itself to fixing any identified flaws in that process. See Missouri v. Jenkins, 515 U.S. 70, 102 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989); Heckler v. Day, 467 U.S. 104 (1984). The purpose cannot be to ensure the issuance of a LLRW Facility license because an impartial review of the application may confirm that the Boyd County site is unlicensable.

Nebraska's wholly independent and entirely lawful decision to withdraw from the Compact[6] does not in any respect undercut the effectiveness of the mandated injunctive remedy. Nebraska would be bound by a license decision at

[6] In August 1999, Nebraska enacted a statute to withdraw from the Compact and formally communicated notice of such action to the other Member States. By the terms of the Compact, withdrawal takes effect five years after that notice, making the effective withdrawal date August 2004. Compact, Art. VII(c); Op. 59-60; Neb. Rev. Stat. § 71-3522 (2002).

the conclusion of the process, regardless of when its withdrawal from the Compact becomes effective. The State and the Commission have never argued otherwise.

B. The District Court Erred in Awarding the Commission Damages in the Amount of $151 Million

The district court's award of $151 million to the Commission cannot withstand scrutiny on a number of grounds.[7]

1. The Member States Suffered No Monetary Loss

It is uncontested that the Commission -- or more particularly the Member States on whose behalf this suit was purportedly brought -- suffered no monetary

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[7] We previously argued in this Court, to no avail, on an appeal of the denial of the State's motion to dismiss the Commission's claim on sovereign immunity grounds, that the Commission has no authority to pursue the instant action for money damages against Nebraska, either on its own behalf or on behalf of other sovereign States, because Nebraska's consent to Commission suits in "any court . . . that has jurisdiction" (Compact, Art. IV(e)) does not include an Eleventh Amendment waiver to the present damages claims. See Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2002); but see Faibisch v. Univ. of Minnesota, 304 F.3d 797, 800, reh'g denied, 2002 U.S. App. LEXIS 23596 (8th Cir. 2002) (language permitting "a civil action against the state in any court of competent jurisdiction" does not indicate that a State has waived its sovereign immunity). As in this Court's recent Faibisch opinion, which was decided after this Court's dismissal opinion, the Compact does not specifically authorize the Commission to sue Nebraska in federal district court for money damages on behalf of the other Member States. Indeed, any Member State seeking money damages from a sister State would be required to proceed with an original action in the U.S. Supreme Court. See Kansas v. Colorado, 533 U.S. 1 (2001); Texas v. New Mexico, 482 U.S. 124 (1987); 28 U.S.C. § 1251(a). For that initial reason, the damage award should be vacated.

loss in connection with the LLRW license review process.[8] Indeed, all of the money expended in the license review on which the district court's award is based came from USE and the Generators, who voluntarily assumed full responsibility for funding the process. The Commission was merely a conduit for these funds, incurring no liability to repay them and acquiring no assets from them. A party must suffer actual loss before it is entitled to anything other than nominal damages. Restatement (Second) of Contracts, § 347 cmt. e (1981) (hereafter, "Restatement"); Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1382 (Fed. Cir. 2001). Moreover, a contracting party can recover only the monetary losses that it suffered from the breach, and cannot recover on behalf of third parties. Restatement § 302 (1); ITT Hartford Life & Annuity Ins. Co. v. Amerishares Investors, Inc., 133 F.3d 664, 669, reh'g denied, 1998 U.S. App. LEXIS 3224 (8th Cir. 1998).

Here, only the other Member States are entitled to recover on a breach of the Compact, see Recold, S.A. de C.V. v. Monfort of Colorado, Inc., 893 F.2d 195, 197-98 (8th Cir. 1990) (citing Gallagher v. Cont'l Ins. Co., 502 F.2d 827, 833 (9th Cir. 1974)), and it is undisputed that they neither claimed nor proved any monetary

[8] The Commission is not a party to the Compact, and consequently it has no right of action on its own to bring suit against the State of Nebraska for breach of the "good faith performance" obligation. Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n, 974 F. Supp. 762, 767-68 (1997).

loss.[9] The Commission did not dispute that all costs for the license review were borne solely by USE and the Generators -- non-Compact parties whom this Court has held are constitutionally barred from asserting, or recovering upon, any monetary claim against the State of Nebraska. Entergy Ark., Inc. v. Nebraska, 241 F.3d at 988-90. It was, therefore, legal error for the court below to award any damages in favor of the several Member States (or the Commission on their behalf).

The district court nonetheless entered a money judgment in the amount of $151 million in favor of the Commission -- representing the full $98 million spent on the license review, plus $53 million in prejudgment interest accrued since 1987 -- by relying on the theories of "expectation interest" and "reliance interest" damages. The fundamental flaw in the court's damages analysis is that, before either theory can apply, the plaintiff still must show it suffered monetary loss as a

[9] The district court gratuitously included in its award an additional $3 million representing Community Improvement Funds that, by separate State statute (Add. 3 (Neb. Rev. Stat. § 81-15, 13.01 (2002)) were to be contributed by the other Member States to Nebraska communities located near the Facility. No claim was made at trial that the Member States made these contributions (SA 133 (Tr. 1249-50)), and the Commission's own Rules, provide that Community Improvement Funds are assessed against Generators. Thus, this $3 million was not a Compact obligation, nor an amount the Commission should, under any circumstances, be able to recover on behalf of the other Member States in this action. No suggestion has ever been made that Nebraska's Community Improvement Fund legislation is unconstitutional, or that the funding thereunder is legally suspect. Plainly, had any such claim been available to the other Member States, it neither would nor could have properly been included in this action to enforce the Compact.

result of the breach (Restatement § 346). Neither the Member States, nor the Commission on their behalf, made any such showing.

In addition, under the "expectation interest" theory, the plaintiff's losses must be either a "loss in value," and/or "any other loss caused by the breach, such as incidental or consequential losses." Id. at § 347. Recognizing that the Member States and Commission had no legitimate claim of a "loss in value," i.e., lost profit, the district court characterized all of USE's and the Generators' licensing expenditures as "other losses" of the Member States. Op. 176. Quite apart from the fact that "other losses" referred to in Restatement § 347(b), are principally "incidental" or "consequential" losses -- meaning costs that are incidental or consequential to the breach, rather than the expected costs of the plaintiff's own contract performance[10] -- it is undeniably the case here that the expenditure of some $98 million by USE and the Generators caused no loss to the Member States

[10] See Restatement § 347(b), which defines "incidental losses" as "costs incurred in a reasonable effort (whether successful or not) to avoid a loss, such as costs to arrange a substitute transaction" (id., cmt. e), and "consequential losses" as "items such as injuries resulting from defective performance, as when a defective machine causes personal injury" (id.). These definitions and the cases applying them make it clear that the recovery of "other losses" as "expectation" damages are not for costs incurred by plaintiff during defendant's contract performance (as imperfect as it may be), but for costs expended thereafter in mitigation of, or consequential to, the breach. See e.g., Birkel v. Hassebrook Farm Serv., Inc., 219 Neb. 286, 288-90, 863 N.W.2d 148, 151-52 (1985); Servants of the Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1578 (D.N.M. 1994); Mr. Eddie, Inc. v. Ginsberg, 430 S.W.2d 5, 8-9 (Tex. Ct. App. 1968); Mitsui O.S.K. Lines, Ltd. v. Consol. Rail Corp., 327 N.J. Super. 343, 346-47, 743 A.2d 362, 364 (2000).

(or, for that matter, to the Commission). Indeed, the payments by USE and the Generators fully insulated the Member States from suffering any actual or potential monetary loss.

The "reliance" theory of contract damages also provides no basis for a damage award. By definition, "reliance" damages permit a contract party to recover the out-of-pocket expenses that it incurs in performing its own contractual obligations. Restatement § 349; see also Glendale Fed. Bank, 239 F.3d at 1382. Properly measured, "reliance" damages put the contracting party in the same position that it would have been in had the contract never been made. Id. at 1383, citing Restatement § 344(b) and 3 Dan B. Dobbs, Law of Remedies § 12.3(1) (2d ed. 1993).

Here, the Member States made no out-of-pocket expenditures of any sort. Not one dollar was taken from the public fisc of any Member State to fund the license review process, and thus no monetary award -- whether couched in terms of "reliance" damages, or otherwise -- would compensate the Member States for their out-of-pocket expenses. To the contrary, the award of $151 million here is an extravagant windfall to the Member States and Commission, who never spent a dime on the licensing process. The Commission never had an obligation to fund the licensing process, and has no obligation to do so in the future. What the Member States bargained for in the Compact was Nebraska's "good faith

performance." To the extent it can be said that Nebraska failed to deliver on that promise -- notwithstanding that the Agencies' denial was not arbitrary, capricious, or unsupported by the evidence -- the relief that will make the plaintiff whole is not a windfall damages award, but a review of the license application in an impartial State review process, as USE and the Commission have requested and the State has argued.

2. A Failure of Proof Further Defeats the Damage Award

There is yet another reason why the $151 million award cannot stand. The law requires that a damage award must include appropriate adjustments to account for mitigation (Restatement, § 347), and, where reliance damages are under consideration, the value of what the plaintiff received. Id., § 349; see also 3 Dan B. Dobbs, Law of Remedies, § 12.3(1); Carley Capital Group v. City of Newport News, 709 F. Supp. 1387, 1399-1400 (E.D. Va. 1989). Where, as here, the claim is grounded on "bad faith performance," damages are recoverable, if at all, only in an amount that can be shown to be "excess" costs due to the bad faith. W.K.T. Distrib. Co. v. Sharp Elec. Corp., 746 F.2d 1333, 1336 (8th Cir. 1984). The plaintiff must make this showing with particularity, and only the excess costs proximately caused by the breach are recoverable. Calkins v. F. W. Woolworth Co., 27 F.2d 314, 319 (8th Cir. 1928); Union Ins. Co. v. Land and Sky, Inc., 253 Neb. 184, 187-89, 568 N.W.2d 908, 910-11 (Neb. 1997).

The Commission made no effort below to particularize its "excess" damages at trial, arguing simplistically that all costs incurred over the life of the licensing process are recoverable because they are all now "worthless." The district court credited that "all or nothing" approach by finding that there was a "complete lack of performance" on the part of Nebraska, such that USE, or the Commission, received nothing of value from the process. Op. 157.

The record stands uncontradicted, however, that USE's license application was not finalized until March, 1997, after several years of extensive review, collaboration and meaningful input by the State's technical reviewers. SA 140 (Tr. 3457, 3612-18, 3637-38). USE's expenditures of over $95 million during the license process were certainly not wasted: USE viewed its application as satisfying all licensing requirements. SA 140 (Tr. 3362-64). In addition, the State's DSER and DEIA, both issued for public comment in October 1997, were regarded by the Commission, USE and the Generators as reflecting a fair analysis of the application. The district court also said so. Op. 77-83. Similarly, the State completed an independent assessment of the site's performance, which was regarded by all parties as a good faith analysis. The completion of these review activities conferred valuable benefits on USE, the Commission and the Member States. Where the record shows so clearly that the plaintiff received value from funds expended on the license review, the Commission's failure to make any

showing as to the actual "excess" costs attributed to the bad faith conduct defeats a specious claim for "all money expended." See, e.g., Johnson v. Pac. Lighting Co., 817 F.2d 601, 608 (9th Cir. 1987); Young v. Tate, 232 Neb. 915, 919, 442 N.W.2d 865, 868 (Neb. 1989).

Nor is there a basis on this record for the district court's assertion that the entire $98 million expenditure has been rendered "worthless" due to a failure of the State to complete the review process in good faith. Op. 171-179. The Agencies have decided that the Boyd County site is unlicensable, and that determination has not been held to be arbitrary, capricious, or unsupported by the evidence. Nevertheless, the State stands ready to proceed with the de novo "contested case" review, handled by a new administration, new State officials and decisionmakers, and former Supreme Court Justice Thomas White as the impartial hearing officer, none of whom were previously involved in the license process.

USE requested the opportunity to submit its current application for an impartial review, and has specifically demanded a "contested case" hearing. The State's failure to complete that process to date is due solely to the district court's continuing injunction. Add. 11. Until that injunction is lifted, the court's findings of bad faith are corrected, and the independent review is allowed to move forward, it plainly cannot be determined how "worthless" or "worthwhile" the review process has been. Certainly, the gratuitous assumption of "worthlessness" offered

by the district court -- based essentially on baseless predictions about what might happen in the future and distortions of the law -- is insufficient to sustain the $151 million award.

IV. THE DISTRICT COURT ERRED IN AWARDING PREJUDGMENT OR POSTJUDGMENT INTEREST

A. Nebraska Enjoys Sovereign Immunity Against An Award Of Prejudgment Interest

The U.S. Supreme Court has held that the Eleventh Amendment prohibits an award of prejudgment interest against a sovereign entity, such as the State of Nebraska, without its express consent, and that a sovereign's waiver to suit is not sufficient to allow an award of interest. Library of Cong. v. Shaw, 478 U.S. 310, 314-15 (1986). The instant Compact, including the provision in Article IV(e) on which jurisdiction is premised, says nothing about a waiver of sovereign immunity to prejudgment interest. Accordingly, the award of prejudgment interest below is in direct conflict with the Eleventh Amendment and must be reversed.

None of the numerous cases cited by the district court supports its prejudgment interest award; not one even involves a suit in which a sovereign State was held to have surrendered its Eleventh Amendment immunity from such awards.[11] Kansas v. Colorado, 533 U.S. 1 (2001), for example, was an original

[11] The district court cited twenty-seven cases to support its prejudgment interest award against Nebraska. Only six of those cases involved a sovereign defendant. In three of those six, the Eleventh Amendment did not apply because the cases

action between two States in the United States Supreme Court. The Eleventh Amendment has no application in such circumstances, and thus offers no protection against prejudgment interest in that forum. See Texas v. New Mexico, 482 U.S. 124, 130 (1987) ("In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."). Similarly, the Eleventh Amendment bar was not implicated in West Virginia v. United States, 479 U.S. 305, 311-12 (1987), because the sovereign immunity defense is not available in suits brought by the Federal Government. These cases thus provide no authority for defeating Nebraska's sovereign immunity to any award of prejudgment interest. Nor are we aware of any authority, in this Circuit or elsewhere, holding that an award of prejudgment interest can be returned against a sovereign State, where, as here, there has been no explicit waiver of immunity or Congressional abrogation as to such awards.[12]

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were either original actions between States or actions brought by the Federal Government. Kansas v. Colorado, 533 U.S. 1 (2001); Texas v. New Mexico, 482 U.S. 124, 130 (1987); West Virginia v. United States, 479 U.S. 305, 311-312 (1987). In two of the remaining three, the district court did not award prejudgment interest, and this Court affirmed, consistent with the Eleventh Amendment bar to such awards. See Manko v. United States, 830 F.2d 831, 838 (8th Cir. 1987); Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 582 (8th Cir. 1998). In the remaining case, the Supreme Court actually reversed a prejudgment interest award against a sovereign. Board of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 350 (1939).

[12] The district court's prejudgement interest award is not supported by this Court's decision in Winbush v. Iowa, 66 F.3d 1471 (8th Cir. 1995), which upheld a prejudgment interest award against a State under Title VII, because here the

The district court's award of postjudgment interest pursuant to 28 U.S.C. § 1961 is barred by the Eleventh Amendment for the same reasons. There is no explicit waiver of sovereign immunity against postjudgment interest in the Compact. Moreover, the federal interest statute cannot abrogate the State's Eleventh Amendment immunity since it does not unequivocally express an intention on the part of Congress to abrogate, and, in any event, was not enacted pursuant to Section 5 of the Fourteenth Amendment. See Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363-66 (2001); Seminole Tribe, 517 U.S. at 59-60; see Knight v. Alabama, 962 F. Supp. 1442, 1443-46 (N.D. Ala. 1996).

B. Prejudgment Interest Is Without Legal Basis Here

The district court's prejudgment interest award cannot survive as well because there is no statutory basis for it. In all cases, regardless of who is the defendant, prejudgment interest may be awarded by a federal district court only when the federal statute under which the cause of action is brought expressly authorizes it, or, in the absence of express authorization, when the court can discern sufficient legislative intent from the statute to permit such an award. Monessen Southwestern R.R. Co. v. Morgan, 486 U.S. 330, 336-339 (1988).

Compact did not abrogate the State's Eleventh Amendment immunity from interest. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 78-91 (2000); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59-60 (1996). It is also not supported by Missouri v. Jenkins, 491 U.S. 274 (1989), which involved an enhanced award of attorney's fees against a State that does not implicate the Eleventh Amendment.

Here, the federal statute is the Compact itself, and it nowhere says nor suggests that the Member States are liable for prejudgment interest. The Compact, approved by Congress in 1986, was enacted at a time when prejudgment interest was not permitted against a sovereign without its express consent. Shaw, 478 U.S. at 314-15. The Compact's silence is thus a clear indication of an intent by both the Member States and Congress not to allow such an award. Monessen, 486 U.S. at 337-38.

The district court's reference to prejudgment interest awards in cases involving other federal statutes (Op. 180-183) is no substitute for the lack of statutory authority in the Compact. The Commission's claim was brought solely under the Compact, and it is that Member States' agreement -- which became the controlling federal statute -- that is alone determinative, regardless of whatever authorization for prejudgment interest may be found in other federal statutes referred to by the district court.

Nor is there any basis for an award of prejudgment interest under federal common law or State law. The federal common law rule is embodied in Shaw, 478 U.S. at 314-15, where the Supreme Court stated unequivocally that a sovereign government is immune from prejudgment interest. Nebraska law, which the district improperly ignored, is equally clear. See Jackson Cty., 308 U.S. at 350 (Kansas law determined whether to allow prejudgment interest in a tax refund suit

against a state political subdivision). It specifically prohibits by statute an award of prejudgment interest against the State prior to the date of entry of judgment. Add. 2 (Neb. Rev. Stat. § 45-103.04).

C. There Can Be No Award Of Prejudgment Interest Prior To December 18, 1998, The Date On Which The Commission's Claim Accrued

Even assuming statutory authorization and no Eleventh Amendment bar to prejudgment interest, the district court erred in awarding prejudgment interest for any period before December 18, 1998, when the Commission's cause of action first accrued. West Virginia v. United States, 479 U.S. at 311 n. 2; City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 195-96 (1995). A prejudgment interest award recognizes that a party was injured when the cause of action accrued, and puts a plaintiff in the position he would have been in had he recovered his judgment immediately. Reyes-Mata v. IBP, Inc., 299 F.3d 504, 507 (5th Cir. 2002).

Here, the district court found that the Commission's claim did not accrue until December 18, 1998, when the State denied the license application: "[I]n this case, all of the facts essential to the Commission's claim of breach did not exist until the 1998 [license] decision was rendered. The Commission's suit was on file only months later." (Op. at 167; 57). Nonetheless, the court then awarded almost

15 years of prejudgment interest, running from December 26, 1987, through entry of judgment on September 30, 2002. (Op. Appendix at 8-15.)

This award of prejudgment interest from more than a decade before the Commission's cause of action even accrued is without precedent. Indeed, we have found no case permitting an award of prejudgment interest before a cause of action had come into existence. The Supreme Court decisions relied on by the district court certainly do not do so; instead, they look to when the underlying cause of action accrued for statute of limitations purposes to mark the earliest possible commencement of prejudgment interest. See e.g., Kansas v. Colorado, 533 U.S. at 15-16; National Gypsum Co., 515 U.S. at 195-196; West Virginia v. United States, 479 U.S. at 311 n. 2.[13]

The district court cannot have it both ways. It cannot insist the Commission's cause of action accrued on December 18, 1998, for statute of limitations purposes, but then establish an accrual date of December 23, 1987, for

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[13] Notably, the legal commentators cited by the Supreme Court agree that prejudgment interest begins to accrue when the underlying cause of action accrues. See C. McCormick, Law of Damages § 50 (1935) (prejudgment interest is "compensation allowed by law ... as additional damages for loss of use of the money due as damages, during the lapse of time since the accrual of the claim."); D. Dobbs, Law of Remedies § 3.6(4) ("Prejudgment interest accrues when the underlying obligation accrues.") (citing Restatement (Second) of Contracts § 354, Cmt. b (1981); Restatement of Restitution § 156, Cmt. b (1937)); A. E. Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 218-222 (1982) (prejudgment interest should begin to accrue at the time the cause of action arises).

prejudgment interest. See Castrignano v. E.R. Squibb & Sons, Inc., 900 F.2d 455, 463-464 (1st Cir. 1990) (prejudgment interest allowed only from the date the cause of action accrued for statute of limitations purposes). Given the district court's finding as to when the instant cause of action accrued, the award of prejudgment interest for any period prior to December 18, 1998, must be vacated.

CONCLUSION

For the foregoing reasons, the order and judgment of the district court should be reversed.

Dated: December 30, 2002 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Rule 28A(c) of the Rules of Appellate Procedure for the Eight Circuit, I hereby certify that the foregoing text of this brief is proportionally spaced using the Times New Roman font, has a typeface of 14 points, and contain 17,229 words according to the word count feature of the Microsoft Word XP word-processing system that was used to prepare this brief.

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Thomas W. Mitchell

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Appellants, and a 3.5 inch virus-free computer diskette, were served by regular United States mail, postage prepaid, this 30th day of December, 2002, upon each of the parties listed below.

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