State of West Virginia
Office of the Attorney General

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August 8, 2014

The Honorable James W. Courrier, Jr.
Prosecuting Attorney
Office of the Prosecuting Attorney of Mineral County, West Virginia
P. O. Drawer 458
Keyser, WV 26726

Dear Prosecutor Courrier,

Your office has asked for an Opinion of the Attorney General regarding whether the meetings laws of West Virginia or Maryland should apply to meetings of the Potomac Highlands Airport Authority (the "Authority"). This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it relies solely on the factual assertions set forth in your letter to the Office of Attorney General and relevant follow-on correspondence.

According to your letter, the Authority was created by the Potomac Highlands Airport Authority Compact (the "Compact"). *See* Pub. L. No. 105-348, 112 Stat. 3212 (1998). Approved by the United States Congress in 1998, the Compact was intended to create an airport to serve the areas surrounding Mineral County, West Virginia and Allegany County, Maryland. You state that the Compact is silent on the question of which state's law is to be followed in conducting Authority meetings. Nonetheless, the Authority has conducted its business under the auspices of the Maryland meetings laws, not the West Virginia Open Meetings Law, and the Authority has even recently stated that it believes Maryland law has governed and should continue to govern the conduct of these meetings.

Your letter raises the following legal question:

Under the Compact, do the meetings laws of West Virginia or Maryland govern meetings of the Authority?

Interstate compacts are contracts and are to be interpreted as such. "[A] Compact is, after all, a contract." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations omitted). They are "legal document[s] that must be construed and applied in accordance with [their] terms." *Id.* Interstate compacts are thus "construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013).

At the same time, however, interstate compacts are governed by the Compact Clause of the U.S. Constitution and are considered to be federal law. As the Supreme Court has said, "a congressionally approved compact is both a contract and a statute." *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991). Under the Compact Clause, "two States may not conclude an [interstate compact] without the consent of the United States Congress." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *see also* U.S. Const. Art 1, §10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State."). Once such consent is given, the compact "becomes a law of the United States." *Texas*, 482 U.S. at 128; *see also Cuyler v. Adams*, 449 U.S. 433, 438 (1981) ("congressional consent transforms an interstate compact within this Clause into a law of the United States").

Accordingly, interstate compacts are generally interpreted under *federal* principles of contract law. In *Petty v. Tennessee-Missouri Bridge Commission,* the Supreme Court rejected a lower court's reliance on state-law contract principles in interpreting a "sue-and-be-sued provision" in an interstate compact, 359 U.S. 275, 279 (1979). The Court noted that the "Court of Appeals laid emphasis on the law of Missouri" and "likewise cited Tennessee decisions strictly construing statutes permitting suits against the State." *Id.* The Supreme Court explained that courts interpreting an interstate compact should "turn to *federal* not state law," unless Congress through the compact has adopted a state's law as controlling. *Id.* at 280 (emphasis added). Put another way, state law cannot govern because the Supreme Court must have "final power to pass upon the meaning and validity of compacts." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Federal principles of contract interpretation include "the standard principles of contract law"—that is, "the core principles of the common law of contract that are in force in most states"—augmented by "any special characteristics" of the contract being interpreted. *United States v. Nat'l Steel Corp.*, 75 F.3d 1146, 1150 (7th Cir. 1996). The interpretation of any interstate compact begins, therefore, with the text. *See Tarrant Regional Water District*, 133 S. Ct. at 2130 ("as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties"). Where the text is silent or "ambiguous," the Supreme Court has turned to "other interpretive tools to shed light on the intent of [a] [c]ompact's drafters." *Id.* at 2132; *see also Montana v. Wyoming*, 131 S. Ct. 1765, 1772 n.4 (2011) ("As with all contracts, we interpret the Compact according to the intent of the parties, here the signatory States."). Those tools have included "the well-established principle that States do not easily cede their sovereign powers" and "the parties' course of dealing," *Tarrant Reg'l*

Water Dist., 133 S. Ct. at 2132, as well as principles of statutory interpretation, *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991). The Supreme Court has been "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010).

Applying these principles, we find that the text of the Compact does not *expressly* address the question of which state's meetings law governs. There is no provision in the Compact that specifically identifies the state law applicable to meetings of the Authority. Nor does the Compact explicitly entrust that decision to the Authority itself. The Compact grants the Authority the power to "make and adopt all necessary bylaws, rules, and regulations for its organizations and operations," but only to the extent "*not inconsistent with law*." Compact § 6 (emphasis added). That caveat appears quite plainly to contemplate that the Authority does not have the power to contravene state open-meetings laws—*i.e.*, laws relating to "organizations" and operations"—though it does not specify whether West Virginia or Maryland law governs.

The text does *imply*, however, that West Virginia's meetings law should control. The only two sections of the Compact that refer to a specific state law both reference West Virginia law. Section 8 of the Compact calls for the examination of financial records of the Authority by the State Tax Commissioner of West Virginia "in the manner required by Article nine, Chapter six of the Code of West Virginia." Section 11 of the Compact specifies that "[a]ll eligible employees of the Authority are considered to be within the Workmen's Compensation Act of West Virginia." These provisions—together with the fact that there are no references in the Compact to Maryland state law—strongly suggest that the Authority was intended to be governed by West Virginia law.

But recognizing the Supreme Court's "reluctan[ce] to read absent terms into an interstate compact," *Alabama*, 560 U.S. at 352, we have also looked to other interpretive tools, which we believe on balance support the conclusion that West Virginia's meetings law applies. On the one hand, "[t]he parties' conduct under the Compact" is indeterminate. *Tarrant Regional Water Dist.*, 133 S. Ct. at 2132. The facts we have been given suggest that the Authority meets in West Virginia, though it has long operated under Maryland's meetings law.

On the other hand, the doctrine of *contra proferentem*—which "requires ambiguities in a document to be resolved against the drafter"—favors the application of West Virginia law. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2012). The Compact is written in such a way as to suggest it was drafted by agents of Maryland. Section 1 of the Compact refers to Mineral County, West Virginia, being permitted to enter into the agreement with "this state," implying Maryland without stating its name. Section 2 similarly refers to Mineral County, West Virginia, contracting with "this state" to create the Authority. Section 7 is titled "Participation by West Virginia" and sets forth West Virginia's ability to act under the terms of this Compact; there is no similar section regarding Maryland's authority to act or participate.

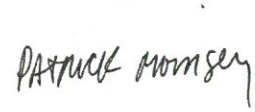
Finally, a conflict of laws analysis also supports the application of West Virginia law. A conflict of laws analysis is appropriate to determine the law that "governs the rights and duties of the parties with respect to an issue in contract in the absence of an effective choice by the parties." *Brewer v. Nat'l Indemnity Co.*, 363 F.3d 333, 338 (4th Cir. 2004). To that end, federal

courts applying federal contract principles have followed the Restatement (Second) of Conflict of Laws. *See Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007) ("[W]hen conducting a federal common law choice-of-law analysis, absent guidance from Congress, we may consult the Restatement (Second) of Conflict of Laws."); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) ("Federal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws."); *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) ("Federal common law follows the approach of the Restatement (Second) of Conflicts of Laws."). To decide which state's law should apply, the Restatement considers a number of factors to determine which state has the most significant relationship with the issue. *See* Restatement (Second) of Conflict of Laws § 188 (1971). Those factors are the place of contracting, the place of negotiating the contract, the place of performance, the location of the subject matter of the contract, and the location of the parties. *Id.* These factors are to be evaluated according to their relative importance with respect to the particular issue. *Id.*

Applying the factors, we believe that West Virginia has the most significant relationship with the issue. The last three factors—the place of performance, location of the subject matter of the contract, and the location of the parties—favor West Virginia. The airport is physically located in West Virginia and the Federal Aviation Administration has always classified the airport as a West Virginia airport. In addition, the state tax commissioner of West Virginia is tasked with examining the Authority's records in accordance with West Virginia law, and the Authority's tax-exempt status is under West Virginia law. Perhaps most important, it is the meetings law that is at issue, and the meetings of the Authority take place in West Virginia at the airport. The remaining factors—the place of contracting and the place of negotiating—we believe are neutral. Because this is an interstate compact, it had to be ratified by both state legislatures and consented to by Congress before becoming effective. The place of contracting and the place of negotiating arguably include all three of those locations, and thus favor neither West Virginia nor Maryland.

For all these reasons, we conclude, based on the facts you have provided us, that West Virginia's meetings law governs meetings of the Potomac Highlands Airport Authority.

Sincerely,



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