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August 16, 2010

By E-Mail and First-Class Mail
Special Master Kristin L. Myles
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, California 94105

Re: Reply Letter Brief of the State of South Carolina
***South Carolina v. North Carolina*, No. 138, Original**

Dear Special Master Myles:

South Carolina respectfully submits this reply letter brief in accordance with the schedule set by the Special Master.

Discovery should be ordered to proceed on a unitary basis (save for two discrete issues, concerning effects on other river basins and benefits of electricity generation, which both States and intervenors agree are irrelevant to adjudication of South Carolina's harm showing). Any phasing of discovery and summary judgment motion practice on South Carolina's threshold showing of injury are integrally related. To the extent an issue is arguably relevant to South Carolina's threshold showing, North Carolina's and intervenors' rebuttals, or South Carolina's response, discovery must be permitted before such summary judgment motions are filed concerning South Carolina's threshold injury.[1] Yet there is a clear — and thus far unresolved — dispute about the legal standard that applies. As South Carolina has shown — and North Carolina and intervenors still do not dispute — nearly all of the issues claimed by North Carolina and intervenors concern balancing of the equities. Under their expansive and continually shifting view of the threshold legal standard, those factual matters likely will be called into play in any summary judgment motions on South Carolina's threshold injury and, therefore, must be the subject of pre-summary judgment discovery. Bifurcation of discovery is further

[1] Any summary judgment motion or other motions that might be dispositive of South Carolina's claims concerning the unconstitutionality or invalidity of North Carolina's interbasin transfer statute are not encompassed herein. The South Carolina Attorney General anticipates making such motion or motions attacking the validity of North Carolina's statute prior to the end of discovery.

unworkable because it would result in significant witness overlap and would not be conducive to settlement.

Accordingly — and contrary to the requests from North Carolina and intervenors to defer a decision on bifurcation — the Special Master should formalize the initial decision not to bifurcate this proceeding and should hold that, save for two discrete issues, discovery shall proceed on a unitary basis.

1. Material and Irreconcilable Differences Over South Carolina's Threshold Showing Preclude Nearly All Phasing of Discovery

a. North Carolina and intervenors repeat their claims that discovery on a number of issues can be deferred until any Phase Two of this case, because they concern only equitable balancing and not South Carolina's threshold showing of harm. *See* NC Ltr. Br. 4-5 (setting out seven issues); Intervenors Ltr. Br. 5 (nine issues); *cf.* NC Br. 6-17 (Mar. 12, 2010) (eight issues). North Carolina and intervenors, however, offer *no* rebuttal to South Carolina's showing in its previous two briefs that their view of the threshold legal standard South Carolina must meet to show harm requires consideration of nearly all of those issues. *See* SC Br. 11-19 (Mar. 12, 2010); SC Reply 8-9 (Apr. 9, 2010). In particular, once North Carolina and intervenors contend that South Carolina must show — among other things — that South Carolina could not ameliorate its harm by less consumption, more conservation, or use of alternative water supplies *in South Carolina*, it must be open for South Carolina to assert that equity requires such changes *in North Carolina*.

Thus, the expansive theory of Phase One that North Carolina and intervenors advocate overlaps so significantly with any reasonable conception of Phase Two that no meaningful or efficient distinction can be made between the two phases (with two exceptions, discussed below). Indeed, the Special Master has recognized that, insofar as any Phase One requires assessing "particular uses by North Carolina" as well as "particular uses by South Carolina," there will be "some[] overlap with the [Phase Two] concept of whether the uses are or are not beneficial." 1/27/10 Tel. Conf. Tr. at 30:14-25.

Accordingly, in the Phase One that North Carolina and intervenors envision under their erroneous legal standard, a weighing of all the facts and equities of each State's respective water uses would be required. The following issues identified by North Carolina (using its letter brief numbering) would therefore become relevant to any Phase One discovery and as to facts in *both* States: (1) valuation of water

usage, (2) population data,[2] (3) analysis of alternative water uses and better use of existing supplies, (5) water consumed in North Carolina by South Carolina commuters,[3] and (7) costs to North Carolina of storing water. *See* NC Ltr. Br. 4-5; *cf.* NC Br. 7-14, 16-17 (analogous issues 1-5, 7-8); Intervenors Ltr. Br. 5 (analogous issues a-b, e-i). Bifurcation of discovery on these issues would be extremely prejudicial to South Carolina insofar as South Carolina is denied access to information necessary to refute the factual and legal arguments that North Carolina and intervenors have indicated they will make.

In addition, to the extent any bifurcated discovery order does not preclude North Carolina and intervenors from asserting their erroneous harm standard, the result will be numerous motions to compel or to quash discovery grounded in each party State's view of the threshold legal standard, which would be presented to the Special Master piecemeal and without a full factual record on which to adjudicate key issues of mixed law and fact. Thus, "two discrete discovery periods would ***not*** serve judicial economy," because "the parties are likely to come to the Court with ***repeated*** disputes over how requested material is related to [the various] issues, which will burden the Court time-wise, and unduly increase the costs of litigation for both parties." *THK Am., Inc. v. NSK Co.*, 151 F.R.D. 625, 633 (N.D. Ill. 1993) (internal quotation marks and footnote omitted); *see also* SC Ltr. Br. 2 & n.2.[4]

b. Inconsistencies and/or ambiguities in the positions taken by North Carolina and intervenors further highlight the difficulty of bifurcating discovery on these issues. North Carolina has long advocated that South Carolina, to meet its threshold burden of showing harm, must show that acquisition of "alternative water supplies or storage opportunities" could not ameliorate its harms. NC 2008 Br. 7 (June 16, 2008). North Carolina expressly adopts those arguments here. *See* NC Br. 1 n.1; *see also* Intervenors Br. 6 (Mar. 12, 2010). In its letter brief, however, North Carolina states (at 4) that "[a]ny analysis of the availability of alternative

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[2] Population data, particularly the 2010 census data scheduled to be available in Spring 2011, also are relevant to South Carolina's threshold showing of harm as an indicator of the increasing demand in North Carolina that will threaten to take more and more water away from South Carolina uses in the foreseeable future. *See* SC Reply 9; SC Ltr. Br. 8-9 (discussing evidence of future harms).

[3] This issue (like intervenors' analogous issues e and f) should not be independently relevant in any event, because any such consumption is taking place as an adjunct to the operations of a North Carolina business. Thus, the equitable apportionment analysis properly would consider only the harm or cost to a business from having less water.

[4] Intervenors (at 4) point to the fact that no such disputes have yet been brought, but they would certainly ripen if bifurcated discovery of the sort requested by North Carolina and intervenors were required.

water supplies (in both South Carolina and North Carolina) is not relevant to whether South Carolina can meet its threshold showing." Those two positions are irreconcilable. North Carolina never has expressly withdrawn its previous position that it can point to alternative supplies and storage in South Carolina to rebut South Carolina's harm showing; and in any event intervenors continue to assert that "South Carolina must show . . . that its harm is not being caused by its own failure to take reasonable measures to conserve and/or store water." Intervenors Ltr. Br. 4.

Intervenors likewise contradict themselves in asserting (at 3) that "South Carolina bears the burden of proving that *specific* injuries it has suffered are traceable to *particular* uses of water in North Carolina," yet, at the same time (at 5), that the "cataloguing of the specific uses of the Catawba's waters in North Carolina" can be deferred until after a ruling on whether South Carolina has satisfied its threshold burden to show harm. Both cannot be true, which further highlights the folly of bifurcating discovery on these issues. North Carolina, for its part, asserts (at 2) that "[a]ctual consumptive water uses in North Carolina" are relevant to the harm inquiry.

Those inconsistencies also illustrate that the threshold harm standard advocated by North Carolina and intervenors continues to be a moving target, which undermines its claim to be grounded in this Court's cases. Because the parties need to have discovery on whatever issues might turn out to be relevant to resolution of the threshold harm question, the shifting nature of defendant's and defendant-intervenors' view of the legal standard makes it all the more important that pre-summary judgment discovery be as full as possible.

2. South Carolina's Contention Interrogatory Responses Indicate that It Will Meet Its Threshold Burden To Show Harm

South Carolina's responses to North Carolina's contention interrogatories contain a detailed and lengthy statement of the harms on which South Carolina intends to rely. *See* SC Ltr. Br. 7-9 & Ex. B. Those harms, in times of low flows, to industries, recreation, and other interests will satisfy the Court's injury standard, in much the same way that the Court found analogous harms to recreation and oyster cultivation in times of low flows entitled New Jersey to an equitable apportionment of the Delaware River. *See id.* at 5, 9-10 (discussing, *inter alia*, *New Jersey v. New York*, 283 U.S. 336, 345-46 (1931)).

Intervenors (at 5-6) assert — with no legal or factual analysis — that phased discovery should be ordered because "South Carolina is likely to have difficulty reaching Phase Two," in light of the fact that South Carolina's "burden in Phase One is clear and convincing evidence." But South Carolina has set out the primary

harms on which she will rely and explained how they meet the governing legal standard. And South Carolina would meet even North Carolina's and intervenors' erroneous legal standard, because, for example, the specific uses from recent and foreseeable growth in North Carolina take water away from pre-existing South Carolina uses in times of low flows, particularly through interbasin transfers in North Carolina that are not returned to the source basin and have the most drastic effect during times of drought. *See* SC Ltr. Br. 9-10.[5]

3. Two Discrete Discovery Issues May Be Deferred, As All Agree that the Issues Are Not Relevant to Litigation Over South Carolina's Threshold Showing of Injury

South Carolina previously explained that all agree that the issue of whether North Carolina's interbasin transfers provide benefits to an adjacent river basin in South Carolina — which South Carolina contends is irrelevant to the case in any event — may be deferred because it is not relevant under any party's position on South Carolina's threshold burden to show harm. *See* SC Ltr. Br. 3-4; NC Ltr. Br. 5 (issue 6); Intervenors Ltr. Br. 5 (issue c).[6]

North Carolina and intervenors also have asserted that analysis of the benefits of electrical power generated from the Catawba River "should be deferred

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[5] The Special Master has stated that contention interrogatories are a useful vehicle to discover the factual and legal contentions to be made by each side, and they have been employed effectively here. As North Carolina reports (at 1), "South Carolina has continued the process of articulating its claims through its response to North Carolina's Contention Interrogatories," thus acknowledging that it has notice of the primary harms on which South Carolina intends to rely. North Carolina (along with intervenors) apparently has accepted South Carolina's responses as sufficient at this stage of the case. Although North Carolina served a lengthy letter on May 7, 2010, claiming that each and every one of South Carolina's contention interrogatory responses was deficient in numerous ways, it has not sought to meet and confer on any issue since receiving South Carolina's lengthy and detailed response served on June 7, 2010.

[6] Intervenors' letter brief (at 2-3) appears to assume that this issue would be a part of any Phase One, by stating that, "prior to Phase Two," "North Carolina and/or Intervenors may abandon prior to or lose [that issue] at summary judgment." South Carolina, however, had understood from the telephone conference held on June 25, 2010 (which was not transcribed), that both intervenors and North Carolina agreed that this issue would not be relevant to the Phase One they envision. South Carolina does not believe that intervenors meant to reverse their position on the relevance of other river basins to South Carolina's harm showing and expects that they will clarify their position on this issue either before or at the upcoming August 20, 2010 telephone conference.

until Phase II." NC Ltr. Br. 4 (issue 4); *see* Intervenors Ltr. Br. 5 (issue d).[7] South Carolina agrees that discovery on this issue also may be deferred until after dispositive motions are adjudicated concerning South Carolina's threshold showing of harm.

Those two issues safely can be deferred because all parties agree that those facts are irrelevant to the threshold harm issue. It bears noting that, having so agreed, North Carolina and intervenors will be estopped from contending later that South Carolina cannot meet its threshold burden without some evidence as to other river basins or electrical power generation. That same principle would apply in the event that the Special Master, over South Carolina's objection, were to exclude additional subject areas from pre-summary judgment motion discovery. Having proposed to defer fact discovery on such topics until after a ruling on the harm question, North Carolina and intervenors may not be permitted to claim that South Carolina cannot make its threshold harm showing without proof of some factual issue on which South Carolina has been denied discovery.

4. North Carolina's and Intervenors' Conception of South Carolina's Threshold Showing of Injury Is Erroneous

Under this Court's equitable apportionment precedents, South Carolina can satisfy its threshold burden by showing that water demand within the Catawba River Basin exceeds supply in particular low-flow conditions and that South Carolina is injured as a result of the insufficient supply. *See* SC Ltr. Br. 4-5; *see also* SC Br. 14-17; SC Reply 13-15; SC 2008 Br. 4-12 (June 16, 2008); SC 2008 Reply 5-15 (June 23, 2008). As South Carolina further has explained, North Carolina's assertions concerning the applicable legal standard — that South Carolina must meet a proximate cause tort standard; must show that it could not ameliorate its harms by adjustments to consumption in South Carolina; and must bear the full brunt of any drought while North Carolina's uses continue apace — are without merit. *See* SC Ltr. Br. 5-7.[8]

North Carolina and intervenors repeat those assertions here, *see* NC Ltr. Br. 2-3; Intervenors Ltr. Br. 3-4, yet they continue to provide no legal support for them, and there is none. The proximate cause tort standard that North Carolina and

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[7] In its previous brief, North Carolina had included this issue as one of several sub-issues concerning "analysis of water usage in North Carolina that benefits South Carolina." NC Br. 11 (initial capitalization omitted); *see id.* at 11-15.

[8] Intervenors are thus wrong to assert (at 3) that "there is only a single material point of divergence: whether South Carolina bears the burden of proving *specific* injuries it has suffered are traceable to *particular* uses of water in North Carolina."

intervenors advocate — without citation to any authority from this Court or elsewhere — necessarily assumes that the upstream State has a superior right to or property interest in the waters of a shared resource, which subverts the fundamental principle that all States are on an equal footing and have equality of right to shared natural water resources. *See* SC Ltr. Br. 4-6.

Nor is South Carolina's harm "self-inflicted" if South Carolina arguably could ameliorate it by more effective "conservation, storage and other measures in times of low flow." Intervenors Ltr. Br. 4; *see also* NC Ltr. Br. 3 ("self-inflicted harm caused by South Carolina's actions or inactions"); NC 2008 Br. 7 (defining "[s]elf-inflicted" "harms" as those "attributable to activities in South Carolina, including interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for or utilize alternative water supplies or storage opportunities"). No precedent from this Court has held that such issues are relevant to the threshold harm standard, and the Court in *Colorado v. New Mexico*, 459 U.S. 176 (1982), expressly applied such factors only *after* it had held that the downstream State had met its threshold burden to show injury. *See id.* at 187 n.13, 189-90 (holding threshold burden was met and remanding for equitable balancing of factors including "water storage and conservation").[9]

North Carolina and intervenors are likewise wrong — and again they cite no authority — in asserting that the effects of drought are to be excluded from the analysis, apparently on the theory that drought is not caused by North Carolina. As this Court's cases make clear — and consistent with the paramount principle that each State has equality of right to a shared resource — the effects of drought are to be borne by both States, not foisted solely on the downstream State as would result from North Carolina's and intervenors' inequitable approach. *See* SC Ltr. Br. 6. That is why the Court unwaveringly has first taken account of the effects of drought on the total water supply available to both States, and then compared both States' water demands to that *drought-impaired* available supply. In making that comparison, the Court has made very clear that, "where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination," meaning that the downstream State has demonstrated threshold injury and the Court proceeds to weigh the equitable apportionment factors. *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945); *see also Wyoming v. Colorado*, 259 U.S. 419, 471-85 (1922) (apportioning interstate river where water demand exceeded water

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[9] North Carolina (at 3) points to water "taste and odor problems" that it claims could have been caused by insufficient water treatment in South Carolina. Although such discrete issues may be relevant to South Carolina's threshold showing of injury, it bears noting that South Carolina's primary claims pertain to insufficient quantities of water to sustain lake levels and downstream river flows, and which could be redressed by less consumption in North Carolina in times of low flows.

supply); *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (threshold harm shown where "*any* diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users"); SC Ltr. Br. 4, 6.

5. A Unitary Discovery Period (With Two Limited Exceptions) Will Prevent Witness Overlap and Facilitate Settlement

As South Carolina has shown, the same reasons that counsel for a single trial counsel for a single discovery period here as well, as courts have regularly concluded in analogous contexts. *See* SC Ltr. Br. 2-3 & nn.2-3 (citing cases). Many of the witnesses to be called will testify as to facts concerning both the harm to South Carolina and the relative equities of water uses in both States, and thus would be inconvenienced by having to appear at two depositions (just as they would be further inconvenienced by having to appear at two trials). *See id.* at 2 & n.2.

A single discovery period also will facilitate early settlement efforts, as evidenced by the successful settlement of South Carolina's claims against Duke Energy in the state-court litigation concerning Duke's Clean Water Act § 401 certification. *See id.* at 2-3 & n.3. The prevailing judicial view is that fulsome discovery will "facilitate settlement discussions," because it "assists each party in evaluating essential elements of the matters in issue and in assessing the risks associated with an adverse decision in the action." *Johns Hopkins Univ. v. CellPro*, 160 F.R.D. 30, 35 (D. Del. 1995); *see* SC Ltr. Br. 2-3 & n.3. North Carolina (at 6-7) and intervenors (at 4-5) have cited no authority to the contrary, and their assertions that bifurcated discovery would better facilitate settlement — despite leaving key facts undeveloped — is plainly wrong.

What will encourage settlement here is full discovery, which will enable (a) North Carolina to gain a more accurate understanding of whether (as South Carolina contends) North Carolina faces a serious risk that an order from this Court will put an end to its current policy and practice of consuming as much water as it wants without regard to South Carolina's needs[10]; and (b) South Carolina to gain a sense of whether (as North Carolina contends) this litigation is unlikely to result in a significant change in the balance of water flows between the two States. Permitting the party States to have full information concerning both South

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[10] *See* Jim Nesbitt, *Water Wars*, The News & Observer, Raleigh, NC, Sept. 30, 2007, at A25 (quoting David Moreau, chairman of North Carolina's Environmental Management Commission, as saying that North Carolina traditionally has followed "the Big Straw theory," meaning that "you pump out all the water you can from streams and from underground").

Carolina's harms and the relative balance of the equities will assist each side in developing settlement positions and negotiating.

* * * * *

For the reasons set out here and in the prior briefing and oral argument, South Carolina respectfully submits that the Special Master should order this case conducted as a single proceeding for purposes of discovery as well as trial, save for two discrete issues, so long as North Carolina and intervenors stipulate that they will not raise such issues in response to South Carolina's threshold harm showing.

Respectfully submitted,

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cc: Current Service List

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On August 16, 2010, I caused copies of the Reply Letter Brief of the State of South Carolina to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on the Special Master, defendant State of North Carolina, intervenors Catawba River Water Supply Project and Duke Energy Carolinas, LLC, and *amicus curiae* City of Charlotte, North Carolina.

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