

No. 138, Original

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, ET AL.,

Defendants.

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On Bill of Complaint

**ANSWER OF THE CITY OF CHARLOTTE,
NORTH CAROLINA**

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The City of Charlotte, North Carolina ("Charlotte"), as Defendant-Intervenor, hereby answers the Complaint of the State of South Carolina, upon information and belief as follows:

1. Charlotte admits the allegations set forth in Paragraph 1.

2. The allegations set forth in the first sentence of Paragraph 2 constitute South Carolina's characterization of its case to which no response is required. Charlotte avers that the Catawba River is essential to the generation of hydroelectric power, economic development and commerce, and recreation in North Carolina. As to the allegations set forth in the second sentence of Paragraph 2, Charlotte admits that the Catawba River is subject to periodic fluctuations in water level, but denies that such fluctuations render its volume or flow inadequate for South Carolina. Charlotte admits the allegations set forth in the third sentence of Paragraph 2. Charlotte admits the allegations set forth in the fourth sentence of Paragraph 2 to the extent that "currently" refers to the date on which South Carolina filed its Complaint. Charlotte admits the allegations set forth in the fifth sentence of Paragraph 2.

3. Charlotte denies the allegations set forth in the first sentence of Paragraph 3, and avers that in 1991 North Carolina enacted a statute requiring the registration of water withdrawals and transfers of one million gallons or more per day, and in 1993 North Carolina enacted a statute prohibiting new transfers of two million gallons or more per day from one river basin to another without first securing a certificate from the North Carolina Environmental Management Commission. As to the allegations set

forth in the second sentence of Paragraph 3, Charlotte admits that North Carolina has authorized the transfer by Charlotte of up to 33 million gallons per day from the Catawba River Basin by certificate, including 16 million gallons per day as grandfathered, admits that the most recent interbasin transfer certificate was authorized in January 2007, but lacks sufficient information or knowledge to admit or deny the remaining allegations in the second sentence of Paragraph 3.

4. Charlotte denies the allegations set forth in the first sentence of Paragraph 4, and avers that Charlotte's interbasin transfers are lawful, do not exceed North Carolina's equitable share of the Catawba River, and do not cause serious or substantial injury to water users or other interests in South Carolina. The allegations set forth in the second sentence of Paragraph 4 constitute South Carolina's characterization of its case to which no response is required.

5. Charlotte admits the allegations set forth in Paragraph 5.

6. Charlotte admits the allegations set forth in Paragraph 6 that the North Carolina Environmental Management Commission ("EMC") has authorized an interbasin transfer for Charlotte in accordance with North Carolina law, and admits that any other interbasin transfers authorized by the North Carolina EMC were done in accordance with North Carolina law, but avers that the remaining allegations constitute legal conclusions to which no response is required.

7. The allegations set forth in Paragraph 7 constitute legal conclusions to which no response is required.

8. Charlotte admits the allegations set forth in Paragraph 8.

9. Charlotte admits the allegations set forth in the first sentence of Paragraph 9, but lacks sufficient information or knowledge to admit or deny the remaining allegations in Paragraph 9.

10. Charlotte admits the allegations set forth in the first and second sentences of Paragraph 10. As to the allegations set forth in the third sentence of Paragraph 10, Charlotte lacks sufficient information or knowledge to admit or deny such allegations, and avers that Charlotte's population, as well as its institutional, commercial, and industrial base are growing rapidly, and recent studies project that demand for treated water supplies will continue to increase at an annual rate of 1.5 percent, resulting in water supply needs of 215 million gallons per day and wastewater treatment needs of 159 million gallons per day by 2050. As to the allegations set forth in the fourth sentence of Paragraph 10, Charlotte admits that the Catawba River Basin includes portions of Chester, Kershaw, Lancaster, York, Fairfield, Sumter, Lee, and Richland Counties in South Carolina. Charlotte denies the remaining allegations set forth in the fourth sentence of Paragraph 10.

11. Charlotte admits the allegations set forth in Paragraph 11, and avers that the Catawba River also serves additional purposes in North Carolina not listed in Paragraph 11, including, but not limited to, recreation and wastewater assimilation uses.

12. The allegations set forth in Paragraph 12 constitute South Carolina's characterization of a 1995 Catawba River Basinwide Water Quality Management Plan prepared by the then North Carolina Division of Environmental Management Water Quality Section, which document speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required.

13. The allegations set forth in Paragraph 13 constitute South Carolina's characterization of a 1995 Catawba River Basinwide Water Quality Management Plan prepared by the then North Carolina Division of Environmental Management Water Quality Section, which document speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required.

14. Charlotte admits the allegations set forth in the first sentence of Paragraph 14, avers that Charlotte was one of the stakeholders in the negotiation process and also is a party to the Comprehensive Relicensing Agreement which resulted from the negotiation process, but denies that the Federal Energy Regulatory Commission ("FERC") was a "stakeholder" in the negotiation process when instead it was an "interested party." Charlotte denies the allegations set forth in the second sentence of Paragraph 14, and avers that South Carolina has not accurately described the significance and context of the 1,100 cubic feet per second figure. Charlotte further avers that the stakeholders agreed that the minimum continuous flow from Lake Wylie would be 1,100 cubic feet per second, except during low flow periods such as droughts; that flows from Lake Wylie should be reduced during low flow periods consistent with the severity of the low flow event; and that

water users in both North and South Carolina should take measures to reduce water demands during such low flow events.

15. Charlotte admits the allegations set forth in the first sentence of Paragraph 15 that the Catawba River is subject to periodic fluctuations in water level, but Charlotte denies the allegation that there are periods when the Catawba River does not have even minimally adequate flows. As to the allegations set forth in the second, third, and fourth sentences of Paragraph 15, Charlotte lacks sufficient information or knowledge to admit or deny such allegations, but avers that additional water flows from the North Carolina portion of the Catawba River, via discharges of treated effluents, into the South Carolina portion of the Catawba River at a point below the gauge described in Paragraph 15, and that such additional flows typically range from 60 to more than 120 million gallons per day.

16. As to the allegations set forth in Paragraph 16, Charlotte admits that Duke Energy developed a model to estimate the flow of the Catawba River, but denies all remaining allegations on the ground that South Carolina's characterizations of the model and what the model shows are incorrect.

17. Charlotte admits the allegations set forth in the first sentence of Paragraph 17, to the extent that the phrase "currently experiencing moderate drought conditions today" refers to the date on which South Carolina filed its Complaint. As to the allegations set forth in the second sentence of Paragraph 17, including items (a) through (e), Charlotte lacks sufficient information or knowledge to admit or deny such allegations pertaining to any alleged harm that

South Carolina and its citizens suffered as a result of the drought that ended in 2002.

18. Charlotte denies the allegations set forth in the first sentence of Paragraph 18, and denies that any harms South Carolina may have suffered from reduced flow in the Catawba River have been exacerbated by North Carolina's interbasin transfer statute. The allegations set forth in the second and third sentences of Paragraph 18 constitute legal conclusions and South Carolina's characterization of North Carolina General Statute § 143-215.22I, which statute speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required.

19. The allegations set forth in the first and second sentences of Paragraph 19 constitute legal conclusions and South Carolina's characterization of North Carolina General Statute § 143-215.22I, which statute speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required. To the extent that a response is required, Charlotte avers that while the statute referenced above may not expressly require reduction of interbasin transfers during drought conditions, it does require consideration of detrimental effects on the source basin, and one of the express conditions of Charlotte's interbasin transfer certificate is a drought management plan "to protect the source basin during drought conditions"

20. Charlotte admits the allegations set forth in the first sentence of Paragraph 20. As to the allegations set forth in the first sentence of subparagraph 20(a), Charlotte admits that in March 2002, the North Carolina EMC granted a certificate under

North Carolina General Statute § 143-215.22I allowing Charlotte to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin. As to the allegations set forth in the second sentence of subparagraph 20(a), Charlotte admits that the certificate was granted during the drought of 1998 through 2002, but denies all remaining allegations, and avers that the interbasin transfer certificate was not inequitable and did not exacerbate any harms the drought may have been imposing on South Carolina and its citizens. Charlotte further avers that the EMC analyzed the effect of Charlotte's 33 million gallon per day interbasin transfer on the entire Catawba Basin, including water flows and utilization in South Carolina, and specifically found that, even with the resulting reductions in flows from Lake Wylie into South Carolina, detrimental effects on the Catawba Basin would be insignificant. As to the allegations set forth in the first sentence of subparagraph 20(b), Charlotte admits that in January 2007, the North Carolina EMC granted a certificate under North Carolina General Statute § 143-215.22I allowing the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. As to the allegations set forth in the second and third sentences of subparagraph 20(b), Charlotte lacks sufficient information or knowledge to admit or deny such allegations.

21. The allegations set forth in the first sentence of Paragraph 21 are vague and ambiguous with respect to the particular statute being referenced, and constitute a legal conclusion to which no response is required. Charlotte lacks sufficient infor-

mation or knowledge to admit or deny the allegations set forth in the second sentence of Paragraph 21.

22. Charlotte lacks sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 22 involving what South Carolina does not know.

23. Charlotte lacks sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 23 involving what South Carolina does not know, and further avers that the allegations in Paragraph 23 constitute a legal conclusion to which no response is required.

24. Charlotte denies the allegations set forth in the first sentence of Paragraph 24, and avers that water that is transferred from the Catawba River Basin to other basins in North Carolina is available for return to South Carolina via other river systems, including transfers made by Charlotte that flow into South Carolina via the Yadkin-Pee Dee River. Charlotte denies the allegations set forth in the second and third sentences of Paragraph 24, and avers that Charlotte's interbasin transfers from the Catawba River are lawful, do not exceed North Carolina's equitable share of the Catawba River, and do not cause serious or substantial injury to water users or other interests in South Carolina.

25. The allegations set forth in Paragraph 25 constitute legal conclusions to which no response is required.

26. The allegations set forth in Paragraph 26 constitute South Carolina's characterization of an October 31, 2006 letter from the South Carolina Attorney General's Office to the North Carolina Department of

Environment and Natural Resources, which document speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required.

27. The allegations set forth in Paragraph 27 constitute South Carolina's characterization of a December 19, 2006 letter from the South Carolina Attorney General to the North Carolina Attorney General, which document speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required.

28. The allegations set forth in the first and second sentences of Paragraph 28 constitute South Carolina's characterization of a January 3, 2007 letter from the North Carolina Attorney General to the South Carolina Attorney General, which document speaks for itself and provides the best evidence of its content and meaning, and thus, no response is required. As to the allegations set forth in the third sentence of Paragraph 28, Charlotte admits that the Cities' application was granted in part on January 10, 2007.

29. The allegations set forth in Paragraph 29 constitute South Carolina's characterization of a resolution of the Catawba/Wateree River Basin Bi-State Advisory Commission, and a January 8, 2007 Memorandum transmitting the resolution, which documents speak for themselves and provide the best evidence of their content and meaning, and thus, no response is required.

The remainder of South Carolina's Complaint constitutes South Carolina's prayer for relief to which no response is required. To the extent that a response

is required, Charlotte denies that South Carolina is entitled to any relief whatsoever.

GENERAL DENIAL

Charlotte denies any and all allegations set forth in South Carolina's Complaint, including, to the extent they might be construed as allegations, the headings contained therein, that have not specifically been admitted, denied, or otherwise responded to.

FIRST DEFENSE

South Carolina's Complaint fails to state a claim for which relief may be granted.

SECOND DEFENSE

Charlotte's significant interest in protecting its rights under the Certificate issued in March 2002 by the North Carolina Environmental Management Commission pursuant to state law, which Certificate authorizes Charlotte to execute interbasin transfers of up to 33 million gallons per day from the Catawba River, must be given significant weight in any equitable apportionment of the waters of the Catawba River between North Carolina and South Carolina.

THIRD DEFENSE

Charlotte's significant interest in the negotiated Comprehensive Relicensing Agreement, to which Charlotte was a signatory and member of the Final Agreement Committee, must be given significant weight in any equitable apportionment of the waters of the Catawba River between North Carolina and South Carolina. Twenty-eight South Carolina cities, counties, departments, commissions, water and sewer districts, organizations, businesses, and resi-

dents were also signatories to the Comprehensive Relicensing Agreement.

FOURTH DEFENSE

Duke Energy's existing FERC license is subject to renewal in August 2008, and is expected to require a flow regime that differs significantly from the current FERC license. As the impacts to South Carolina, if any, cannot be determined until the new license is issued and a new flow regime is established, this matter is not yet ripe for review and should be dismissed or stayed pending the outcome of the FERC relicensing proceeding.

FIFTH DEFENSE

South Carolina's claims are barred, at least in part, by the doctrines of laches and estoppel. South Carolina was aware of Charlotte's interbasin transfer application, commented on Charlotte's application, and did not oppose Charlotte's application at the time it was granted, despite South Carolina's knowledge of and participation in the proceedings related to Charlotte's application. In reliance on North Carolina EMC's granting of Charlotte's interbasin transfer application in March 2002, Charlotte has invested in various infrastructure projects necessary to effectuate interbasin transfers from the Catawba River Basin.

SIXTH DEFENSE

The benefits to Charlotte of the interbasin transfers from the Catawba River, as well as Charlotte's intrabasin consumptive uses, including but not limited to benefits to existing economies, communities, and service areas, outweigh any actual or poten-

tial harms to South Carolina attributable to Charlotte's interbasin transfers and intrabasin consumptive uses, and South Carolina has not taken appropriate steps to use efficiently, conserve, and augment water in the Catawba River.

SEVENTH DEFENSE

South Carolina has authorized and continues to authorize interbasin transfers from the Catawba River Basin in South Carolina, and thus should not be heard to complain about interbasin transfers from the Catawba River Basin authorized by North Carolina.

EIGHTH DEFENSE

South Carolina suffers no cognizable injury due to interbasin transfers in North Carolina when water that is transferred from the Catawba River Basin to other basins in North Carolina is available for return to South Carolina via other river systems, including transfers made by Charlotte that flow into South Carolina via the Yadkin-Pee Dee River.

NINTH DEFENSE

South Carolina cannot carry its burden of proving that Charlotte's interbasin transfers and intrabasin consumptive uses cause real or substantial injury or damage to South Carolina.

TENTH DEFENSE

Charlotte reserves the right to assert such other defenses as may be developed during the course of this litigation.

WHEREFORE, Charlotte respectfully prays that the Court:

1. Deny any and all affirmative relief requested by South Carolina;
2. Dismiss South Carolina's Complaint with prejudice;
3. Protect Charlotte's interests in its interbasin transfers authorized pursuant to North Carolina law;
4. Protect Charlotte's interests in sufficient Catawba River withdrawals to fully satisfy Charlotte's present and future water supply needs;
5. Protect Charlotte's interests arising out of and related to Duke's current FERC License, the Comprehensive Relicensing Agreement, and any new FERC license to be issued; and
6. Award Charlotte such other and further relief as the Court deems proper.

Respectfully submitted,

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