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December 8, 2008

William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *South Carolina v. North Carolina*, No. 138, Original

Dear General Suter:

The First Interim Report of the Special Master in this case was filed on November 28, 2008 and is presently scheduled for the January 9, 2009 Conference. Understanding that a short letter brief is permissible, the Catawba River Water Supply Project respectfully submits this letter addressing whether the Court should consider exceptions at this time to the First Interim Report or wait to consider any exceptions to the First Interim Report until the time when the Court reviews the Final Report of the Special Master.

The Court's Rules are silent as to the circumstances in which the Court will request parties to file exceptions to a Special Master's interim report, which is tantamount to an interlocutory appeal. Thus, the applicable criteria for allowing exceptions are unclear. In this case, the Special Master's lengthy and detailed ruling on intervention is consistent with this Court's precedent and warrants no review. If, however, the Court does consider allowing exceptions to the First Interim Report, certain practical considerations should inform the Court on this matter: (1) whether South Carolina has a demonstrable, immediate need for the Court to review the First Interim Report; (2) whether the Intervenors will be prejudiced by review of the First Interim Report at this time; and (3) whether the ends of efficient administration of justice will be best served by the further delay in the factual development and resolution of this litigation. These considerations should lead the Court to decline to entertain exceptions to the First Interim Report and instead consider any exceptions on intervention when the Court reviews the Final Report of the Special Master and all of the exceptions thereto, if any.

Because the Intervenors are not injecting into this original jurisdiction action any claim or issue not already before the Court, their participation does not expand the scope of the Court's original jurisdiction or otherwise alter the equitable-apportionment claim. In addition, South Carolina cannot assert any material prejudice to its interests if the Court does not consider exceptions to the First Interim Report. So far South Carolina has not been burdened by having to answer any discovery from the Intervenors; rather, South Carolina is engaging in discovery via

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interrogatories and document requests on the Intervenor. South Carolina's discovery efforts are extensive, ongoing, and mirror in scope or content the specific averments in the Complaint against the Intervenor that led to the motions to intervene. Any contention on the part of South Carolina that the intervention decision set forth in the First Interim Report mandates immediate review by this Court is directly contrary to the well-established rule applied in this Court and the lower federal courts that orders granting intervention are not subject to immediate appeal because they can be effectively reviewed on appeal from a final judgment or, as applicable in this case, Final Report. *See, e.g., J.B. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (*per curiam*); *see generally* 15B Wright & Miller, Federal Practice and Procedure § 3914.8. Likewise, should South Carolina contend that immediate review of the intervention decision is necessary in order to minimize the costs it may incur, that concern is implicated by every interlocutory order. And this Court and the lower federal courts, after considering the cost concern, have uniformly held that immediate review of an interlocutory order granting intervention is not warranted. Further diminishing the need for immediate review is the recognition that the remedy the Court can provide at the time it reviews the Final Report is just as effective as the relief it could grant now. For example, if, after review of the Final Report, the Court determines that the Intervenor was not entitled to participate in this action, it can vacate any relief granted to the Intervenor and limit the scope of the Special Master's decision.

Furthermore, the participation of the Intervenor in this action does not deprive South Carolina of access to any information that it would otherwise be entitled to receive. Instead, the Intervenor's participation in this case as parties benefits South Carolina in that it will be able to avoid the expense, delay, and limits of third-party discovery, and expand the discovery devices available to South Carolina (e.g., interrogatories) so long as the Intervenor remains in the case. Nor does the presence of the Intervenor in this case as additional parties increase, in any material respect, the burdens South Carolina must bear in litigating the case. The Intervenor does not assert any claim that is not already before the Court. So, South Carolina will not be burdened by new or different discovery from that which is presently framed by the pleadings. Moreover, whether the Intervenor participates in this case as parties or as amici, their legal arguments would be the same and South Carolina will be required to address them. Even if the Intervenor just participates as recipients of third party discovery, South Carolina will still face the same counsel negotiating through mostly the same factual and legal issues. Thus, there is no need, from a jurisdictional, procedural, or practical perspective, to permit South Carolina to file exceptions to the First Interim Report.

As briefly suggested above, this case is in the midst of discovery, and has been now for more than 4 months. South Carolina has propounded interrogatories and requests for documents upon North Carolina, Catawba River Water Supply Project, the City of Charlotte, and Duke

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Energy Carolinas, LLC, as well as third-party subpoenas upon Great Wolf Resorts, Inc., and the cities of Concord, Kannapolis, and Mooresville, North Carolina. All of these recipients have served answers, responses or documents, and are in the midst of internal document retrieval, document inspection, document numbering, formatting (if native format is illegible or not commonly retrievable), production, and ongoing dialogue with South Carolina in an effort to minimize any discovery disputes. South Carolina, North Carolina, Catawba River Water Supply Project, the City of Charlotte, and Duke Energy Carolinas, LLC have worked diligently together to submit a Proposed Joint Case Management Plan to the Special Master for efficient handling of this case. Because of the entry of the First Interim Report, the Special Master has issued a Case Management Order limiting discovery to just document production for the Intervenor and written discovery coupled with third party subpoena power only for the two States until the question of interlocutory exceptions to her decision granting intervention is resolved. So the normal discovery devices which parties typically utilize to better define the claims and issues in the case (e.g., admissions, interrogatories, depositions and document subpoenas) are not fully available right now in this case. Further, progress on expert investigation, expert data gathering and expert reporting is impaired due to the procedural posture of this case. Should interlocutory exceptions be allowed, this case (especially discovery) may be further complicated in that there could be participation at various times by Intervenor as both parties and third parties, which is wholly avoidable if just one set of exceptions to a Final Report is heard at the end of the case.

Additionally, the consideration of exceptions at this time will delay the Special Master's factual development of this case significantly. As noted above, the Intervenor's participation in this case as parties provides the party States with direct access to information critical to the resolution of the equitable-apportionment claim and eliminates the expense, delay, and limits otherwise implicated by third-party discovery. Until the intervention issue is resolved, however, there is a Case Management Order imposing restrictions on the Intervenor's ability to participate in discovery. *See* Case Management Order No. 7 Regarding Issuance of Third Party Subpoenas and Discovery Pending Proceedings on Interim Report Granting Intervention, ¶2. If the Court considers exceptions to the First Interim Report, those restrictions will remain in place until the Court issues its decision thereby delaying, rather than expediting, the factual development and disposition of this case. Should the Court, however, decide not to consider exceptions to the First Interim Report, then the discovery restrictions will be lifted and factual development will proceed typically.

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For these reasons, the Catawba River Water Supply Project respectfully submits that the Court should decline to consider interlocutory exceptions to the First Interim Report.

Sincerely,



Thomas C. Goldstein
*Counsel for the Catawba River
Water Supply Project*

cc: Enclosed Service List

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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 December 8, 2008, I caused copies of the Catawba River Water Supply Project's letter brief to be served by overnight delivery, postage prepaid, and by electronic mail (as designated) to those on the attached service list.



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*Counsel for the Catawba River
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