



State of North Carolina

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July 30, 2010

By e-mail and first class mail

Special Master Kristin L. Myles
Munger, Tolles & Olson, LLP
560 Mission Street, 27th Floor
San Francisco, CA 94015

**RE: *South Carolina v. North Carolina*, No. 138, Original;
Letter Brief Advocating Bifurcated Discovery**

Dear Special Master Myles:

North Carolina submits this letter brief in preparation for our upcoming August 20, 2010 telephone conference as requested during the June 25, 2010 telephone conference and confirmed in your July 22, 2010 email. This letter brief focuses on North Carolina's suggestions for **phased discovery** with a break between the two phases of discovery for a clearly delineated summary judgment phase. North Carolina respectfully submits that any decision regarding whether the trial itself should be calendared in discrete phrases could be deferred until we are further along in the process.

A. First Phase of Discovery.

Under the Case Management Plan entered January 7, 2009, the parties have made substantial progress on discovery including an exchange of requests for production of documents, ongoing production of a significant number of documents from numerous custodians within each party State, from the Defendant Intervenors and Charlotte, as well as documents produced pursuant to both South Carolina and North Carolina's third party subpoenas. In addition, South Carolina has continued the process of articulating its claims through its response to North Carolina's Contention Interrogatories. North Carolina has also responded to Contention Interrogatories requesting information on the positions taken by North Carolina in the litigation.

North Carolina anticipates that the parties will require additional time to complete discovery on the following issues:

1. Hydrological information regarding the Catawba River. In order for South Carolina to meet its threshold burden, South Carolina will be required to provide discovery regarding the hydrological conditions of the Catawba River. This will include factual discovery as well as reports from the parties' hydrologists and/or other experts regarding the average dependable flow, the existing flow, and the natural flow of the Catawba River. This may include historic data, geographic differences in flow, seasonal flow variations, and other hydrologic information about the Catawba River.

2. Substantial actual harms claimed by South Carolina. Discovery on this issue may include any evidence provided by South Carolina demonstrating, quantifying, or otherwise identifying substantial and actual harm and may include the following categories.

- a. Actual existing consumptive water usage in South Carolina. Further discovery may be required regarding the quantity of water presently used in South Carolina and/or types of existing water uses which South Carolina claims have been harmed by identified actions or inactions of North Carolina.
- b. Actual consumptive water uses in North Carolina. Discovery on this issue may include but is not limited to discovery regarding present existing diversions such as interbasin transfers (IBTs), any non-speculative future planned diversions of the Catawba River, or any other water uses in North Carolina which South Carolina claims cause it harm.
- c. Identification of time frame when alleged harm occurred. Discovery on this issue may include, but is not limited to, information regarding dates, years, or seasons when South Carolina's alleged harms occurred. Discovery is needed to establish whether South Carolina only experiences harms during certain months of the year, or alternatively, during certain periods of time when water levels are low and impact South Carolina's use of the Catawba River, including recreational use such as the use of boat ramps and marinas.
- d. Substantiality of claimed harm. Discovery on this issue may include, but is not limited to, information regarding the serious magnitude, the serious detriment to substantial interests of South Carolina, and/or the real and/or substantial injury claimed by South Carolina. Discovery on the issue of South Carolina's quantifiable harm may include volumetric, qualitative, economic, or some other measure of Plaintiff's alleged harm.

3. Causes of South Carolina's claimed harm. Discovery on this issue would focus on South Carolina's proof that actual consumptive uses of the river by North Carolina negatively and substantially impact present uses in South Carolina. This will include discovery regarding **when** South Carolina experienced harm. South Carolina will be required to provide evidence that there is a temporal relationship between North Carolina's uses and South Carolina's claimed harms.

In addition, discovery on this issue may include evidence of other possible causes of South Carolina's harm such as drought, self-inflicted harm caused by South Carolina's actions or inactions, or harm caused by other third-parties over whom North Carolina has no control. For example, to the extent that South Carolina's claimed harms include taste and odor problems, discovery may include information regarding the deficiencies of water treatment systems in South Carolina which contribute to or cause the alleged harm.

B. Motions for Summary Judgment.

North Carolina suggests that after the parties complete discovery on the issues set forth above, time be set aside for briefing and argument on motions for summary judgment. North Carolina expects the parties will file motions on the threshold question of injury, including the legal standard by which South Carolina must prove its injury caused by North Carolina. In addition, if the evidence supports such a motion, North Carolina may request the Special Master limit South Carolina's claim to periods of low flow, or drought, or to certain stretches of the river. Early resolution of certain issues, including the scope of South Carolina's harm described by reference to actual water quality, water quantity, flow rates, location of the alleged harm, and the time frame during which harm occurred, would help speed adjudication on the equitable apportionment issues and by defining actual harms would save the parties unnecessary expense in discovery. Moreover, the discovery remaining following adjudication of motions would not be duplicative of the Phase I discovery already accomplished. Instead, guided by the Special Master's rulings the parties would be able to focus the remaining discovery.

C. Second Phase of Discovery.

If the Special Master's decisions on motions for summary judgment allow some portion of South Carolina's case to continue, the parties would have reduced the discovery to be done on the remaining issues relating to an equitable apportionment. North Carolina believes that substantial cost savings and efficiencies would be achieved in this litigation if discovery relating to the balancing of the equities is delayed until Phase II. If South Carolina can meet its threshold showing of substantial injury, then Phase II of discovery would address whether the benefits to North Carolina from existing water uses in North Carolina outweigh that injury. This articulation of phased discovery is consistent with the position taken by South Carolina in the Letter of David

Frederick to the Special Master (Feb. 3, 2009). Phase II would also address the remedy, if any, to be implemented.

North Carolina recognizes that the Special Master remains concerned about the potential for overlap between Phase I and Phase II discovery. North Carolina believes that the overlap between Phase I discovery and Phase II discovery would be minimal, and has every confidence that the parties would work cooperatively to reduce it as much as possible. Following are specific and discrete issues that North Carolina proposes be deferred until Phase II:

1. Valuation of water usage occurring in North Carolina. To meet its threshold showing, South Carolina must come forward with evidence of injury that South Carolina residents have incurred at the hands of North Carolina. But, any harm that North Carolina would incur as a result of eliminating existing water usages in North Carolina is not relevant to the threshold showing. Accordingly, the benefits that North Carolina obtains from existing water usage need not be addressed until Phase II. The Court should therefore defer expert discovery with respect to the valuation of existing water usage in North Carolina. During Phase I, the parties need not conduct discovery or tender expert analysis with respect to how water is used within North Carolina after it is withdrawn from the Catawba River – only the quantity of water withdrawn in North Carolina.

2. Population Data. To the extent that equitable apportionment factors may include consideration of future uses, including but not limited to future population needs and the balancing of benefits to the populations served by the public water supply in both States, evidence showing the data with respect to the population residing in the Catawba River Basin and the number of people in each State dependent on the Catawba River should be deferred until Phase II. Expert discovery with respect to census data need not be conducted during Phase I.

3. Analysis of Alternative Water Supplies and Better Use of Existing Supplies. Any analysis of the availability of alternative water supplies (in both South Carolina and North Carolina) is not relevant to whether South Carolina can meet its threshold showing. Such an analysis, however, must be considered in balancing the equities. The Case Management Order should defer discovery with respect to the feasibility of increasing water storage capacity along the Catawba River, increasing water supplies through additional interbasin transfers, and the feasibility of improving the efficacy of water treatment facilities along the Catawba River.

4. Analysis of benefits of electrical power generated from the Catawba River. A significant portion of the consumption of water from the Catawba River relates to electrical power generation. That electricity is used in both North Carolina and South Carolina. The analysis of the benefits that flow to these two States as a result of this consumption should be deferred until Phase II. During Phase I, the parties should not be required to submit expert and

factual evidence with respect to the benefits of electrical power generated from the Catawba River.

5. Water consumed in North Carolina by South Carolina commuters. As a result of the numerous South Carolina residents that commute to Charlotte each day, a portion of the Catawba River that is consumed in North Carolina benefits South Carolina. During Phase I, the parties should not be required to submit expert and factual evidence with respect to the benefits to South Carolina commuters of water that they consume in North Carolina.

6. Analysis of other river basins (including the Yadkin River Basin). Given the fact that the water withdrawn from the Catawba River Basin in North Carolina through interbasin transfers ultimately ends up flowing into South Carolina through the Yadkin/Pee Dee River, the benefits that South Carolina receives as a result of this IBT in the Yadkin/Pee Dee must be considered during a balancing of the equities. The tremendous costs of analyzing the Yadkin/Pee Dee should not be incurred unless South Carolina can meet its threshold showing of substantial injury. During Phase I, the parties should not be required to submit expert and factual evidence with respect to any river basin other than the Catawba River Basin. We can also postpone arguing the legal issue of relevance.

7. Costs to North Carolina of storing water. The costs to North Carolina and its residents of maintaining various dams on the Catawba River to supplement the flow of water in times of drought are substantial. Although those costs must appropriately be considered during any balancing of the equities, they have no bearing on whether South Carolina can meet its threshold showing. During Phase I, the parties should not be required to submit expert and factual evidence with respect to the costs of maintaining the various dams on the Catawba River.

D. Phased Discovery Will Facilitate The Ultimate Resolution Of This Complex Case.

The discrete topics set forth above can be held open until Phase II without bogging down the progress of this litigation. Moreover, delaying this time-consuming and expensive discovery will facilitate the ultimate resolution of this action and will likely result in substantially reduced litigation costs. As described herein, the issues for discovery in each phase are not duplicative. Nor would this phased discovery require the parties to revisit witnesses with questions regarding issues on which discovery had already taken place. In short, North Carolina respectfully suggests that parsing the discovery into phases followed by motions practice on preliminary issues would help focus the litigation with a resulting savings of time and money.

Should the Court rule in favor of North Carolina on summary judgment, years of extensive discovery could be averted, thereby saving the party States millions of dollars. Moreover, even if issues remain for trial following summary judgment motions, the narrowing of issues that would result from the Court's rulings on summary judgment would streamline Phase

II discovery. For example, discovery relating to census data would likely be more efficient and more focused if postponed until Phase II. One potential outcome of summary judgment motions would be to narrow the case to certain segments of the Catawba/Wateree River. Expert testimony relating to population data would be much less extensive if the focus of that testimony is specific segments of the Catawba/Wateree, as opposed to the area as a whole. The same is true with respect to the analysis of alternative water supplies. If the Court's rulings on summary judgment were to limit the portions of the River at issue in this case, the analysis of alternative water supplies would also be greatly simplified – thereby resulting in cost savings to both party States and potentially shortening the time necessary to resolve this action. Another potential outcome of summary judgment motions would be to narrow the case to certain times of the year or certain periods when the flow of water in the River is below a specified flow rate. Depending on South Carolina's claim, low flow periods could be based on the low flow protocols which are part of the FERC Comprehensive Relicensing Agreement or some other low flow measurement. If Plaintiff's claims are limited to times of a particular level of low flow, the equitable apportionment analysis required would be significantly reduced resulting in a time and cost benefit to the Court, the Special Master, and the Parties.

Summary judgment motions will also force South Carolina to identify with specificity how North Carolina has caused it harm. To survive summary judgment, South Carolina must identify actual usages in North Carolina that have caused it harm (or, according to South Carolina's theory of the case, the aggregate quantity of water being withdrawn by North Carolina that has produced harm to South Carolina). The summary judgment motions will therefore result in North Carolina finally knowing the actual withdrawals at issue in this case (or, at a minimum, the volumetric amounts of aggregate water withdrawals that have caused South Carolina's purported harms). In essence, summary judgment motions will put everyone on notice as to the volume of water that is claimed by South Carolina to be an inequitable withdrawal by North Carolina. Once that task has been performed, it makes sense to then proceed to the costly economic analysis of the harm that North Carolina would incur if it must reduce its water usage by that volume. Until the volume has been defined, however, any expert analysis of the harm to North Carolina would, by necessity, be so vague as to be virtually useless. North Carolina's hands are tied in coming forward with the evidence it needs to address the equities until such time as the volume of water withdrawals has been sufficiently defined. Phased discovery would eliminate that unfairness.

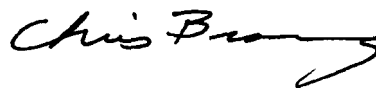
Finally, this case is much more likely to settle if discovery is phased. Forcing the parties to focus on threshold issues (while deferring some of the most costly and time consuming discovery) will provide the party States with sufficient information at the conclusion of Phase I discovery to make meaningful decisions as to the value of settlement. Moreover, the time, cost and expense of Phase II discovery would provide a sufficient incentive for the parties to settle in order to avoid those costs. In essence, phased discovery will provide the parties with the

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information that they need in order to engage in meaningful settlement discussions and will provide a natural point in the litigation to encourage the parties to do so.

Phased discovery stands as a proper case management device that will reduce the overall costs of this litigation and will move this case more swiftly towards an ultimate resolution.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Browning". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher G. Browning, Jr.
North Carolina Solicitor General

CGB/MLL/dm

cc: All Counsel of Record (via e-mail and hard copies as requested)