IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant,

CATAWBA RIVER WATER SUPPLY PROJECT,
Defendant-Intervenor,

DUKE ENERGY CAROLINAS, LLC,
Defendant-Intervenor.

Before the Special Master
Hon. Kristin L. Myles

OPENING BRIEF OF THE STATE OF SOUTH CAROLINA ON THE PARTIES' PROPOSED CASE MANAGEMENT PLAN

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South Carolina respectfully submits its opening brief on disputed issues concerning amendments to the case management plan ("CMP"), pursuant to the schedule approved by the Special Master by e-mail dated October 5, 2010. Although the party States and intervenors amicably have resolved many disputes through the meet-and-confer process, several disputes remain unresolved, which primarily concern the length and scope of fact discovery.

First, North Carolina and intervenors seek to include within the initial discovery period two undisputedly complex issues — the alleged benefits of interbasin transfers on basins outside the Catawba and of electricity generation to each State — that all parties had previously agreed are irrelevant to the anticipated summary judgment motions on whether South Carolina has demonstrated the requisite threshold injury. South Carolina therefore proposes that discovery on those two issues be deferred until after a ruling on those motions, which is the same position North Carolina and intervenors themselves had long endorsed.

Second, in part as a result of their change of position on the need for immediate discovery into other basins and electricity generation, North Carolina and intervenors have proposed an excessive amount of discovery: a three-year period involving as many as 600 depositions, more than 1,000 interrogatories, and an unlimited number of requests for admissions, with North Carolina and intervenors entitled to the vast majority of those depositions. South Carolina, in contrast, proposes a far more reasonable 15-month discovery period, with 60 fact

witness depositions, 280 interrogatories, and 600 requests for admission, divided equally between each side.

In addition to these two major issues, the parties also have disputes about whether the amended CMP should address the existing meet-and-confer process regarding contention interrogatories that North Carolina and South Carolina have already served and when the parties should propose schedules for expert discovery.

As to each of the five areas of dispute, South Carolina has proposed a reasonable timeframe and set of limitations that would permit full discovery of all relevant issues without unnecessarily delaying an ultimate resolution of this matter. North Carolina and intervenors, by contrast, have offered a set of unreasonable proposals that would only complicate and delay discovery. South Carolina respectfully requests that the Special Master enter the proposed amended CMP with South Carolina's proposed language.

BACKGROUND

The party States and intervenors long have disagreed on whether this case should be conducted as a single proceeding or should be bifurcated for discovery or trial. Those disputes were grounded on widely divergent views of the legal standard for the threshold showing of injury that South Carolina must make before the Court will equitably apportion the Catawba River. Following extensive briefing, the Special Master declined to bifurcate the case between issues of threshold harm and equitable apportionment. *See* 8/20/10 Tr. at 6-12.

Instead, the Special Master concluded that, first, "we have a trial on the question of entitlement to a remedy, but we don't, in that trial, actually shape the remedy." *Id.* at 11. The Special Master also anticipated that summary judgment motions on threshold issues would be filed before the trial, "to narrow the scope of the trial in useful ways." *Id.* at 12. Subsequently, "that trial would include any and all issues that either party thinks are relevant, subject to obviously relevance objections and motions . . . on that subject." *Id.* The Special Master clarified that balancing of the equitable apportionment factors would occur at the trial on South Carolina's entitlement to a remedy, framing the question as whether "this situation, viewed as a whole, [is] one in which the court should inject itself by way of issuing an equitable decree enjoining the actions of one or both states." *Id.* at 10-11; *see also id.* at 13-16. If, in that trial, South Carolina shows entitlement to a remedy, then the case will proceed to the particulars of shaping an equitable apportionment decree. *See id.* at 12.

The Special Master stated that a written order memorializing those rulings will follow, but that, in the meantime, the "parties [should] get together now and revise . . . the case management plan." *Id.* at 35. On September 7, 2010, South Carolina submitted its proposed amendments to the CMP to North Carolina and intervenors, which responded on September 29, 2010. The party States and intervenors subsequently met and conferred extensively, were able to resolve disputes on many issues that will permit this case to move forward, and today have jointly submitted a proposed First Amended Case Management Plan containing

both the agreed-upon language and respective proposals for language on disputed issues. *See* First Amended Case Management Plan (Oct. 20, 2010) ("Proposed Amended CMP").

ARGUMENT

A. Two Issues Should Be Deferred Until Adjudication Of Summary Judgment Motions On South Carolina's Threshold Burden To Show Harm (§ 5.2)

Despite their disagreement on whether to bifurcate these proceedings, the party States and intervenors agreed that discovery on two discrete issues — the alleged benefits of interbasin transfers on basins outside the Catawba, and the alleged benefits of electricity generation to each State — should be deferred until after summary judgment motions on South Carolina's threshold burden to show harm are resolved.[1] All parties agreed that facts regarding other basins and electricity generation — and South Carolina reserves the right to dispute the relevance of those issues in this action — are irrelevant to South Carolina's showing of harm.

Consistent with that convergence of views, South Carolina proposed language (which North Carolina and intervenors now oppose) providing:

> Pending further order of the Special Master following summary judgment motions practice concerning whether South Carolina has met its threshold burden to show injury, the following two areas of discovery shall be deferred: (1) inquiry into any alleged benefits of North Carolina interbasin transfers on neighboring river basins in South Carolina, and (2) inquiry into any alleged benefits of electricity generation in either State. No party may raise these two issues in

[1] *See* SC Ltr. Reply 5-6 (Aug. 16, 2010); NC Ltr. Br. 4-5 (July 30, 2010) (issues 4 & 6); Intervenors' Ltr. Br. 5 (July 30, 2010) (issues c & d).

> connection with the merits of whether South Carolina has met its threshold burden to show injury, because all parties have agreed that they are irrelevant to that inquiry. The limits set out below on interrogatories, depositions requests to admit, and the like shall not be applicable to those two deferred issues; any such limits concerning those two deferred issues shall be determined in a future case management plan or order.
>
> Discovery into all other issues shall proceed in accordance with governing law and this Amended Case Management Plan.

Proposed Amended CMP § 5.2.

A trial on South Carolina's entitlement to a remedy will be preceded by summary judgment motions (filed by either party State) on whether South Carolina has met its threshold burden to show injury. Indeed, at the August 20, 2010 telephone conference, North Carolina stated that "North Carolina would want the opportunity to, *before all of the discovery on all of the remedy issues*, including balancing of harms and benefits, to have an opportunity to test the issue of whether or not South Carolina can meet that threshold burden [to show injury]." 8/20/10 Tr. at 22 (emphasis added). Because all parties have agreed that neither of the two discovery issues in dispute here will impact such motions, such discovery can be deferred and then proceed expeditiously as appropriate after a decision on their relevance in light of any ruling on summary judgment motions filed by either party concerning South Carolina's threshold showing of harm and in advance of the trial on South Carolina's entitlement to a remedy.

North Carolina and intervenors, however, now claim that discovery on these two topics must proceed immediately. But they do not claim that the issues are at all relevant to the threshold legal question whether South Carolina can show injury.

Nor do they claim that such discovery must begin immediately to ensure that it is completed before a trial on South Carolina's entitlement to a remedy. Therefore, deferral of discovery on those two issues until after a ruling on summary judgment motions remains a sensible procedural approach that will not prejudice either side. Moreover, proceeding in this manner will avoid at this time complicated discovery that North Carolina has asserted will involve "layers of discovery and expert analyses" and "scores of witnesses who will never have to testify unless South Carolina can meet threshold showings of substantial harm and causation." NC Bifurcation Br. 12 (Mar. 12, 2010); *see also id.* at 16.[2]

Accordingly, the Special Master should adopt South Carolina's proposed language deferring discovery on these two issues until after rulings on summary judgment motions on South Carolina's threshold showing of injury.

B. South Carolina's Reasonable Limits On Discovery Should Be Adopted

The parties disagree on several matters relating to the length of the discovery period and the number of discovery requests that each party may serve. South Carolina has proposed reasonable limits — subject to extension or expansion for good cause — that will permit full discovery on the issues that are relevant to this matter. North Carolina and intervenors, by contrast, have proposed an

[2] As South Carolina has argued previously, alleged benefits to other river basins in South Carolina from North Carolina's interbasin transfers are in any event irrelevant to this case. *See* SC Reply Br. 9-12 (Apr. 9, 2010). If discovery were allowed to proceed as North Carolina and intervenors now propose, that issue would have to be resolved at the outset.

unwarranted expansion of the discovery period and devices that would be burdensome and cause undue delay.

It should be noted that the parties' various proposals here are based in part on their view of whether discovery on the two issues discussed above, concerning alleged benefits from interbasin transfers and electricity generation, should be deferred until after a ruling on summary judgment motions on South Carolina's threshold showing of injury. Thus, in § 5.2, South Carolina proposes that "[t]he limits set out below on interrogatories, depositions, requests to admit, and the like shall not be applicable to those two deferred issues; any such limits concerning those two deferred issues shall be determined in a future case management plan or order." The Special Master should both defer discovery on those issues and adopt South Carolina's discovery limits discussed below.

But, even if the Special Master were to allow discovery to proceed on those two issues, the length of time for fact discovery and the number of depositions, interrogatories, and requests to admit sought by North Carolina and intervenors still should be scaled back considerably. As explained below, those proposals are unreasonably high regardless of the scope of issues to be explored in fact discovery.

1. The CMP Should Limit Fact Discovery to 15 Months (§ 5.4)

In § 5.4, South Carolina has proposed that "[f]act discovery shall be completed within 15 months, absent good cause shown, from the date the CMP is signed." North Carolina and intervenors have proposed that "[t]he parties

anticipate that fact discovery may be completed within three years from the date the CMP is signed."

South Carolina's proposal provides a reasonable amount of time for the parties to work diligently and efficiently to develop the factual record necessary to determine South Carolina's entitlement to a remedy. As an initial matter, much of the document discovery already has been completed. As set forth below, South Carolina's proposal envisions that, among them, the parties may conduct a total of 60 non-expert depositions and propound a total of 280 interrogatories (including those already served) and 600 requests for admission. There is no reason why this discovery plan cannot be completed within 15 months. Moreover, South Carolina's proposal would permit extension of this discovery period for good cause. At this stage in the proceedings, the best course is to set a schedule that will allow the parties to conduct discovery while also requiring them to do so in an expeditious manner, in order that summary judgment motions on South Carolina's threshold showing of injury can be adjudicated in advance of trial and potentially burdensome discovery into issues having nothing to do with that showing.

North Carolina's three-year proposal, by contrast, would create undue delay before summary judgment and trial. And North Carolina's proposal does not contemplate a deadline at all, but rather "*anticipate[s]* that fact discovery *may be completed* within three years from the date the CMP is signed." Proposed Amended CMP § 5.4 (emphases added). Under this language, it is unclear what recourse, if any, South Carolina would have if North Carolina and intervenors drag the

discovery process out beyond their proposed three-year timeframe. That lengthy and open-ended proposal should be rejected. At a minimum, any discovery period should have a firm end date, subject to extension only upon a showing of good cause. South Carolina's proposal for an additional 15 months of fact discovery is entirely reasonable and should be adopted; in all events, there is no basis at this time for proposing another 36 months of discovery.

2. The Amended CMP Should Impose Reasonable Limits on Interrogatories, Depositions, and Requests for Admissions, and Should Preclude Duplicative Discovery

a. *Number of Interrogatories* (§§ 6.2, 6.3). Consistent with its proposals to defer two discovery issues and otherwise to complete fact discovery within 15 months, South Carolina proposes that it be permitted to serve a total of 40 contention interrogatories and 100 fact interrogatories, and that North Carolina and intervenors be subject to the same limit, collectively, so as to equalize the discovery devices available to plaintiff and defendants. This proposal is a significant expansion of the limits set out in Federal Rule of Civil Procedure 33(a)(1), which limits the total number of interrogatories to 25, absent stipulation or order by the court. It provides a sufficient opportunity for both sides to conduct discovery by interrogatories while protecting against undue burdens in the context of the scope of this case.

North Carolina and intervenors have proposed a larger and more complicated set of limits. Under their proposal, each of the party States would be permitted to serve 75 contention interrogatories and 200 fact interrogatories on each other party,

while intervenors would be permitted to serve a combined total of 75 contention interrogatories and 100 fact interrogatories, collectively. North Carolina's and intervenors' proposals thus would allow all three defendants to serve 450 interrogatories on South Carolina. South Carolina's proposal, by contrast, gives all parties an opportunity to conduct sufficient discovery into all relevant issues, without enabling North Carolina and intervenors to conduct a fishing expedition at South Carolina's expense.[3]

b. *Number of Fact Witness Depositions* (§ 6.6.1). South Carolina proposes (in § 6.6.1) that South Carolina be entitled to "depose no more than 30 non-expert witnesses" and that North Carolina and intervenors may "depose a combined total of no more than 30 non-expert witnesses, collectively." In light of the parties' agreement that depositions may last 10 hours (*see* Appendix B, § 5.3), South Carolina's proposal allows each side to take 300 hours of depositions, which should be sufficient to allow for a full exploration of the factual issues relating to this case. Moreover, the parties have agreed (§ 6.6.1) that depositions noticed by both South Carolina and North Carolina or an intervenor are not included in the 30 deposition total, which could increase the number of deposition hours significantly. South Carolina's proposal is a significant expansion of the Federal Rules of Civil Procedure, which require stipulation or judicial approval before any party can take

[3] South Carolina submits that 50 contention interrogatories and 120 fact interrogatories per side should be sufficient, even if discovery concerning electricity generation and other basins is not deferred.

more than 10 depositions (limited to 7 hours) absent consent from all other parties. *See* Fed. R. Civ. P. 30(a)(2)(A), (d).

In contrast, North Carolina and intervenors have proposed (in § 6.6.1) that "[e]ach party may notice and take 150 depositions." Under that proposal, North Carolina and intervenors collectively could take a total of 450 depositions, and South Carolina could take a total of 150 depositions, not including cross-noticed depositions. Such a lopsided ratio cannot be approved, as it would permit defendants to burden South Carolina with *three times* the number of depositions that South Carolina is permitted to take. Even aside from that unfairness, this proposal envisions more than 6,000 hours of depositions — or more than two years of depositions on any reasonable schedule.[4]

North Carolina's and intervenors' proposal is well beyond the scope of reasonableness, even for exceedingly complex cases. For instance, the deposition time granted to each party under North Carolina's proposal exceeds, by more than 1,000 hours, that given to plaintiffs and defendants in the WorldCom securities litigation class actions. *See In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 DLC, 2004 WL 802414, at *2 (S.D.N.Y. Apr. 15, 2004) ("scheduling order . . . provided that the plaintiffs and defendants in the *Securities Litigation* [consisting of more than 100 consolidated class actions] are each limited to sixty eight-hour deposition days,

[4] Even if the parties could schedule two depositions per day, each weekday of the year, and could complete each 10-hour deposition in a single day, depositions would still take 60 weeks to complete. And, again, that does not include cross-noticed depositions.

excluding the time given to defendants for discovery of the plaintiffs in the Individual [non-class] Actions").

The lead parties in this case are, of course, state governments, with limited resources and an obligation to their citizens to use those resources efficiently. Given the current fiscal environment facing both States, it is not reasonable to authorize, as a baseline matter, 450 separate depositions for defendants and 150 for plaintiff, not counting the cross-noticed depositions. South Carolina has proposed a far more realistic and even-handed limitation — 30 per side, subject to expansion for good cause — that should be adopted.[5]

c. *Number of Requests to Admit* (§ 5.3.9). South Carolina proposes that South Carolina be limited to 300 requests to admit and that North Carolina and intervenors collectively be limited to 300 such requests. Such a reasonable limit is necessary to ensure against burdening another party by propounding an endless stream of requests for admission. At the same time, those limits will permit the parties to streamline the trial process with admissions as to certain facts and the authenticity of documents. North Carolina and intervenors, on the other hand, propose that there be no limit.

Although the Federal Rules of Civil Procedure do not impose an express limit on the total number of requests for admission that a party may serve under Rule 36, they do provide that, "[b]y order or local rule, the court may . . . limit the number of requests [for admission] under Rule 36." Fed. R. Civ. P. 26(b)(2). The 1993 advisory

[5] South Carolina submits that 40 fact depositions per side should be sufficient, even if discovery concerning electricity or interbasin transfer benefits is ordered to proceed.

committee notes to this language state that it was implemented in order to "dispe[l] any doubt as to the power of the court to impose limitations . . . on the number of requests for admission under Rule 36." Fed. R. Civ. P. 26(b)(2) advisory committee's note. The local rules of many district courts limit requests for admission to a tenth of the total of 300 proposed by South Carolina, absent good cause shown.[6]

If used effectively, requests for admission can narrow the issues in dispute and serve to streamline trial. But, if the parties are free to serve an unlimited number of such requests, they can bog down discovery proceedings and delay an ultimate resolution. For these reasons, South Carolina respectfully requests that the amended CMP impose a reasonable limit of 300 requests for admission per side.[7]

d. *Prohibition on Duplicative Discovery* (§ 5.7). Section 5.7 provides, in agreed-upon language, that "[t]he Parties shall endeavor not to serve duplicative discovery." Proposed Amended CMP § 5.7. South Carolina also proposes to include the following sentence: "Thus, for example, discovery served on the party States by Intervenors shall not be duplicative of discovery served on either Party State by the other." *Id.* This statement is, in substance, identical to

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[6] *See*, *e.g.*, Local Civil Rule 26.1(C) (D. Mass.) ("Unless the judicial officer orders otherwise, the number of discovery events shall be limited for each side (or group of parties with a common interest) to . . . twenty-five (25) requests for admissions . . ."); Local Civil Rule 36.1(a) (S.D. Cal.) ("No party will serve on any other party requests for admission which, including subparagraphs, number more than twenty-five requests for admission without leave of court."); Local Civil Rule 36 (W.D. Tex.) ("Requests for admission made pursuant to Rule 36, Fed. R. Civ. P., will be limited to thirty (30) requests, which shall in like manner include all separate paragraphs and sub-parts contained within a number request. The Court may permit further requests upon a showing of good cause.")

[7] South Carolina submits that 350 requests to admit per side should be sufficient, even if discovery concerning electricity or interbasin transfer benefits is ordered to proceed.

one in the existing CMP. *See* CMP § 5.9 ("Discovery served on South Carolina by Intervenors shall not be duplicative of discovery served on South Carolina by North Carolina.").[8] North Carolina and intervenors, however, object to the inclusion of this sentence.

It is difficult to understand the basis for the objection. Both Duke and the CRWSP intervened on the side of defendant North Carolina. It is therefore reasonable to assume that all of the discovery requests propounded by Duke and the CRWSP will be directed toward South Carolina, which has been the case to date. As a result, South Carolina has had to respond to discovery requests from three separate parties, while each of the other parties has had to respond only to discovery requests from South Carolina; that practice will certainly continue. It is only fair to make clear — as does the existing CMP — that such intervenor discovery must not duplicate discovery served by North Carolina.

3. The Parties Should Propose Expert Discovery Schedules Six Months Prior to the Close of Fact Discovery (§ 5.5)

The parties agree to provide joint and/or individual proposals for an expert discovery schedule, but they disagree on the deadline for doing so. *See* Proposed Amended CMP § 5.5. South Carolina proposes that this deadline be set at six months prior to close of fact discovery, whereas North Carolina and intervenors propose to do so earlier, six months following entry of the Amended CMP.

If South Carolina's proposed 15-month timetable for the completion of fact discovery is adopted, then the difference between the two sides on this question is

[8] Section 5.9 in the original CMP is renumbered § 5.7 in the Amended CMP.

only three months. Nevertheless, South Carolina's proposal is the more reasonable, as it gives the parties more time to assess the state of fact discovery, which will lead to more productive meet-and-confer discussions and proposals, and less likelihood that proposals or schedules would have to be adjusted.

Moreover, North Carolina's and intervenors' proposal is manifestly unreasonable in light of its own proposed timetable of three years for fact discovery, which would require development of expert schedules two-and-a-half years before the start of expert discovery. A great deal can happen in such a time period, and it seems inevitable that any agreed-upon schedule would require wholesale revisions at the conclusion of fact discovery.[9]

4. North Carolina's Additional Language Regarding Contention Interrogatory Responses Is Unwarranted (§§ 5.4, 6.1)

a. North Carolina has proposed extensive language in § 6.1, to which South Carolina objects in full, referring to the party States' ongoing meet-and-confer process concerning contention interrogatory responses. North Carolina proposes to require that the parties supplement those responses within 60 days of entry of the Amended CMP and proposes further that "[n]o party shall refuse to respond or to supplement a response to a contention interrogatory on the grounds that discovery is not yet complete or, where the party chooses to rely on its experts

[9] This is all the more true if, as North Carolina proposes, the Amended CMP does not set forth any deadline for the close of fact discovery, but merely states that the parties "anticipate that fact discovery may be completed within" a certain time frame. Proposed Amended CMP § 5.4.

to provide its response, that the service of expert reports has not yet been required." Proposed Amended CMP § 6.1.

None of this language is necessary or appropriate for the Amended CMP. Objections to responses to contention interrogatories should be resolved in the first instance through the meet-and-confer process. In fact, that process continues apace with respect to the contention interrogatories that both parties previously served. Both party States recently have written each other requesting further supplementation of certain contention interrogatory responses within 60 days.

If North Carolina remains dissatisfied with South Carolina's responses — or with South Carolina's reliance on forthcoming expert reports — North Carolina should file a motion to compel and carry its burden of demonstrating to the Special Master that South Carolina's responses to the specific contention interrogatories that North Carolina posed were inadequate.[10] North Carolina, however, is seeking to use the Amended CMP to obtain an abstract ruling on a pending dispute. The Amended CMP is not the proper forum to pre-judge that dispute. The Special Master should reject North Carolina's proposed § 6.1.

b. North Carolina also has proposed language (in § 5.4) based on its erroneous view that the Amended CMP should address the parties' pending dispute about South Carolina's responses to North Carolina's contention interrogatories. North Carolina thus proposes that "[t]he parties anticipate that fact discovery shall precede expert discovery; however, additional fact discovery may be required

[10] The same burden would apply to South Carolina should it file a motion to compel.

following receipt of expert reports provided after the close of fact discovery if South Carolina objects to and does not respond to Contention Interrogatories until such time as it provides expert reports." In contrast, South Carolina proposes (in § 5.4) that "[f]act discovery shall precede expert discovery absent good cause shown."

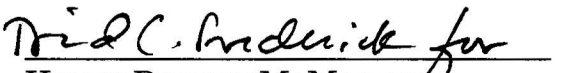
North Carolina's proviso concerning South Carolina's contention interrogatory responses should be rejected for the same reason as its additional language in § 6.1 — the Amended CMP is not the vehicle for the abstract resolution of a pending dispute about contention interrogatory responses. Instead, North Carolina should bring any bona fide dispute to the Special Master for resolution by filing a motion to compel.

In all events, South Carolina's language — which provides a clear rule for the sequence of fact and expert discovery, with a provision for alteration based on the well-known "good cause" standard — sufficiently protects both States from the possibility that expert reports will raise issues not addressed during fact discovery. South Carolina's language for § 5.4 should be adopted.

CONCLUSION

South Carolina respectfully requests that the Special Master enter an Amended CMP incorporating South Carolina's language on all disputed issues.

Respectfully submitted,



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