IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA CONCERNING PHASE ONE AND PHASE TWO ISSUES AND TIMING

Pursuant to the Special Master's Order in the May 23, 2008 status conference, South Carolina respectfully submits this reply brief concerning (1) the issues to be resolved in Phases One and Two of this case, and (2) the duration of Phase One fact and expert discovery, including the time for the exchange of expert reports.

The party States are in basic agreement that Phase One should be limited to South Carolina's threshold showing of injury and that Phase Two should afford North Carolina an opportunity to satisfy its burden of showing that its upstream uses substantially outweigh South Carolina's downstream uses in the fashioning of any appropriate equitable apportionment decree. The party States' respective proposals should be adopted to that extent.

With respect to the specifics of South Carolina's Phase One injury showing, however, North Carolina asserts numerous propositions that are demonstrably contrary to law. For example, North Carolina claims that South Carolina's injury must be limited to harms caused by consumptive uses in North Carolina; in fact, as a matter of law, South Carolina also can show harm from non-consumptive uses such as pollution and sewage spills. North Carolina also asserts that the effects of drought and low water flows must be excluded. This Court's cases, however, have rejected precisely that argument, holding that the supply of water in establishing threshold injury in Phase One (as well as for evaluating equitable apportionment in Phase Two) *must* take into account low flows due to drought or other naturally occurring dry condition factors. Were it otherwise, South Carolina would have to bear the full burden of a drought, while North Carolina could continue consuming water through its "big straw" without regard to South Carolina's equal rights in the Catawba River. These and other erroneous propositions discussed below should be rejected as contrary to this Court's cases establishing what a downstream State may show as a threshold injury.

Finally, with respect to the length and schedule for Phase One discovery, the parties disagree in numerous respects. As to each, the Court should adopt South Carolina's proposal. First, North Carolina proposes that fact and expert discovery last approximately 33 months, which is a full year longer than South Carolina's proposal of 21 months. South Carolina's schedule should be adopted and North Carolina's rejected as unduly lengthy. Second, North Carolina's proposal that

South Carolina submit a fact report detailing the harms on which it will rely nine months *before* service of its expert reports should be rejected as unnecessary, unfair, and because it will cause undue delay. Third, North Carolina's proposal that it be permitted to serve sur-rebuttal expert reports is contrary to the party States' agreement in the Joint Proposed CMP and unnecessarily provides for four rounds of expert reports stretching out for more than one year. Fourth, North Carolina claims that it needs nine months from service of South Carolina's initial expert reports to produce its own expert reports, but fails to explain why its experts could not begin their modeling work as fact discovery proceeds, and then respond to South Carolina's initial expert reports in a more timely manner after they are served.

A. Phase One and Phase Two

1. The States Agree That Phase One Should Concern South Carolina's Injury and Phase Two Should Concern Equitable Apportionment

At a general level, the party States agree about the issues to be decided in Phases One and Two. Consistent with the Court's typical practice of requiring the downstream State first to show injury and then proceeding to balance the respective States' interests in deciding whether and what type of equitable apportionment decree is warranted, both States have proposed that Phase One should concern South Carolina's threshold showing of injury and that Phase Two should concern application of the Court's equitable apportionment factors. *See* SC Br. 2; NC Br. 2.

As South Carolina further maintains, once the downstream State has met its "initial burden of showing that a diversion by [the upstream State] will cause

substantial injury to the interests of [the downstream State]," then the burden may be "shifted to [the upstream State] to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment." *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *see also Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (same); SC Br. 5. North Carolina likewise agrees that, if South Carolina's initial "burden is carried, then defendant [North Carolina] is permitted to show that the benefits of upstream water uses substantially outweigh the demonstrated downstream injury." NC Br. 2 (citing *Colorado v. New Mexico*, 459 U.S. at 186-88). North Carolina thus proposes to "organiz[e] the proceedings according to Phases that correspond to each State's respective evidentiary burdens." *Id.* at 3.

Accordingly, the Special Master should order that Phase One will concern South Carolina's showing of injury and that, after South Carolina has satisfied its initial burden, Phase Two will commence, in which the burden will shift to North Carolina to show that its upstream uses substantially outweigh South Carolina's downstream uses in determining each State's respective allocation of water from the Catawba River.[1]

[1] To the extent North Carolina's brief could be read to suggest that there should be a *third* phase in which the specific form of decree would be considered, that position should be rejected. Such a position would be contrary to North Carolina's prior agreement in the Joint Proposed CMP to "bifurcate[]" — not trifurcate — the proceedings in this case. *Compare* Joint Proposed CMP § 4.1 (agreeing that "this matter will be bifurcated as set out in a separate order" into "Phase One" and "Phase Two") *with* NC Br. 2 ("[a] proceeding to consider equitable apportionment of the Catawba River is called for only if South Carolina meets her initial burden and North Carolina falls short as to its subsequent burden"). Moreover, such further splitting of these proceedings will be inefficient and only cause unnecessary delay in resolving South Carolina's claims. The proper remedy for a Phase

2. North Carolina's Specific Proposals Concerning South Carolina's Showing of Injury Are Incorrect as a Matter of Law

North Carolina incorrectly sets out a series of specific constraints regarding South Carolina's threshold showing of harm. Those constraints should be rejected as contrary to law.

First, North Carolina asserts (at 3) that Phase One should be focused solely on "*consumptive water uses* in North Carolina." That formulation is far too narrow. As North Carolina itself acknowledges, this case is also about "water quality problems," not just water consumption. Br. 7 (distinguishing between "South Carolina's wastewater permitting practices, which may unreasonably increase the waste load in the River, [and] . . . South Carolina's own consumptive uses"). North Carolina's unduly narrow formulation would insulate it from having to account for the harms caused by the substantial sewage spills into the Catawba River Basin near the state boundary by the City of Charlotte.[2] Instead, South Carolina should be permitted to rely on *all* harms to the Catawba caused by acts in North Carolina, as set out in this Court's equitable apportionment precedents. *See* SC Br. 8-12 (discussing cases detailing multiple types of harm not limited to upstream consumptive uses, including to water quality, recreation, fishing, and the like); *cf.*

Two ruling establishing the States' respective equitable shares of the Catawba River and that North Carolina has taken more than its share of the River will be to limit its use accordingly; further phases of the case will be unnecessary to make that determination.

[2] *See*, *e.g.*, Adam O'Daniel, *What you don't see in the Catawba River is what's doing the most harm*, The Herald (Rock Hill, S.C.), July 29, 2007, at 1A ("Charlotte-Mecklenburg Utilities had 370 raw sewage spills in 2005-2006, and 330,000 gallons of sewage reached surface water, said utilities spokesman Vic Simpson, an 83 percent decrease from 2004. But Simpson said data for 2006-2007 is being compiled, and he expects the numbers to worsen.").

Nebraska v. Wyoming, 515 U.S. 1, 12-13 (1995) ("[i]f Nebraska is to have a fair opportunity to present its case for [enjoining upstream projects in Wyoming], we do not understand how we can preclude it from setting forth . . . evidence of environmental injury").

Second, North Carolina asserts that "[p]erceptible, but localized, injuries are insufficient to carry South Carolina's burden if the consumptive uses occurring in North Carolina are not shown to have caused widespread harm to the Catawba River Basin in South Carolina." NC Br. 5 (citing *Kansas v. Colorado*, 206 U.S. 46, 117 (1907)). But the Court has never applied such a limitation on the threshold showing of harm. North Carolina relies on *Kansas v. Colorado*, the Court's first equitable apportionment case, but there the Court did *not* hold that the downstream state (Kansas) had failed to prove injury. Rather, the Court considered all the evidence at the end of the case, found that the irrigation benefits to Colorado outweighed the diminution of water flow into Kansas, and declined to issue a decree. *See* 206 U.S. at 117; *id.* at 114 ("[W]hen we compare the amount of this detriment [to the southwestern part of Kansas] with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation."); *Colorado v. New Mexico*, 459 U.S. at 186 ("In *Kansas v. Colorado*, . . . where we first announced the doctrine of equitable apportionment, we found that users in Kansas were injured by Colorado's upstream diversions from the Arkansas River. 206 U.S., at 113-114, 117.

Yet we declined to grant any relief to Kansas on the ground that the great benefit to Colorado outweighed the detriment to Kansas.") (parallel citation omitted). Instead, as South Carolina has explained, the injury threshold may be met by a number of factors either alone or in combination, and there is no requirement that any one, or all, of them be "widespread" (though the nature and extent of the harm will be weighed in Phase Two).

Third, North Carolina (at 5-6) claims that South Carolina's showing of harm should be offset by any benefits it might arguably receive by having waters taken from the Catawba River Basin transferred to a different river basin that also flows into South Carolina. To the extent that could conceivably happen, it is not properly a part of South Carolina's injury showing concerning the Catawba River Basin, which is the subject of its complaint. Any purported benefits to other river basins would not obviate the harm *to the Catawba* and its users. Accordingly, to the extent that issue might arguably factor into the case, it would be arguably relevant (if at all) in Phase Two, with North Carolina having the burden to prove both that its withdrawals from the Catawba River Basin enter another river basin and flow downstream to South Carolina's benefit, and that those benefits outweigh the harms to the Catwaba River Basin. *See Colorado v. New Mexico*, 459 U.S. at 189; *Colorado v. New Mexico*, 467 U.S. at 314 (evaluating availability of "substitute

sources of water" only in Phase Two, following establishment of the downstream State's injury).[3]

Fourth, North Carolina claims (at 7) that causes of harm to South Carolina "by reason of dry regional conditions or elevated water temperatures," including drought and water flows below some measure of historical norms, cannot be considered. North Carolina thus contends (*id.*) that South Carolina must "prove the degree to which her alleged harms were caused by consumption in North Carolina rather than by these 'conditions.'" In effect, North Carolina contends that South Carolina *alone* should bear the burden of drought or other low-flow conditions, and North Carolina should not bear any such burden but rather can continue using water — under its "big straw" theory — on the counterfactual assumption that drought or low flows simply do not exist. North Carolina cites no support for that one-sided proposition, and this Court's *equitable* apportionment cases have repeatedly rejected the same argument as *in*equitable. *See* SC Br. 8-10.

Upstream States have previously — and unsuccessfully — advocated calculating the apportionable water flow based on historical averages and ignoring more recent periods of drought and low flows. In *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court rejected that argument and refused to regard the apportionable supply as the average annual flow because actual annual flows varied

[3] The only case North Carolina cites, *Kansas v. Colorado*, likewise makes clear that such a concern is only part of the Phase Two balancing and does not diminish the downstream State's threshold showing of injury. *See* 206 U.S. at 101 (noting that such benefits in other watersheds would be considered as possibly "justifying" the upstream State's actions).

greatly from the average, while successful irrigation requires substantial stability of supply. *See id.* at 471-84 (setting out data). The Court concluded that, "[t]o be available in a practical sense, the supply must be fairly continuous and dependable." *Id.* at 471-72. "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond." *Id.* at 476. Accordingly, in determining the dependable flow, the Court *excluded* years that were unusually wet because the annual flows had varied a great deal over time. *See id.* at 485-86 (calculating average annual dependable flow of 170,000 acre-feet when average annual flow was more than 208,000 acre-feet).

In *Nebraska v. Wyoming*, the Court again rejected the upstream State's claim that the apportionable water supply should be based on average annual flows that did not take into account periods of low flows or drought. The Court viewed the apportionable supply of the North Platte River as the *dependable* flow. *See Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945). In doing so, the Court did not consider all years for which water flow data were presented, 1904-1940, but only the years from 1931 to 1940 because a drought had persisted since 1931. *See id.* at 626. Lacking conclusive evidence of whether the drought was a cycle about to end or a new norm, the Court found that "the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions." *Id.* at 620; *cf. Kansas v. Colorado*, 514 U.S.

673 (1995) (interpreting interstate compact referring to "usable" flow). Indeed, the Court denied the upstream State's motion to dismiss, which had asserted lack of threshold injury based on the historic average flows, explaining that the "dry cycle which has continued over a decade has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war." 325 U.S. at 608. North Carolina's suggestion that drought should be disregarded when calculating the harm to the downstream State is thus contrary to the Court's cases and must be rejected.[4]

These precedents make plain that the apportionable water supply for purposes of calculating harm to the downstream State (and, ultimately, for crafting an equitable apportionment decree) must take into account recent periods of

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[4] North Carolina cites two cases as standing for the proposition that South Carolina's proof of harm is limited to "'consumption occurring in North Carolina'" and must ignore "climatic and other factors that contribute to flow reduction in the Catawba River." NC Br. 6 (purporting to quote *North Dakota v. Minnesota*, 263 U.S. 365, 388 (1923), and *New York v. New Jersey*, 256 U.S. 296, 302-03 (1921)). Neither case supports North Carolina's position (and neither case contains the purported quote, or even a similar variant). In *North Dakota v. Minnesota*, the downstream state complained of harm to farmlands from flooding caused by the upstream State; after reviewing an extensive factual record, the Court held that the flooding both had been short-lived and was not necessarily caused by the upstream State. *See* 263 U.S. at 386 ("To attribute to such a minor, but constant, artificial incident a phenomenal effect for two whole summer seasons, without a recurrence since, is to fly in the face of all reasonable probability."). In *New York v. New Jersey*, the Court declined to issue a decree based on pollution harms because the defendant State had, subsequent to the filing of the suit, agreed and contracted with the United States as intervenor to upgrade its sewage treatment facilities substantially and in a way the Court found satisfactory. *See* 256 U.S. at 304-05, 313. Thus, *New York v. New Jersey* stands for the proposition that the upstream State may obviate the harm to the downstream State by agreeing reasonably to modify its behavior. *See id.* at 313 (stating that the interstate problem "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted"). Thus far, however, North Carolina has refused to discuss such reasonable measures. *See* SC Compl. ¶¶ 26-29 (filed June 7, 2007).

drought or low flows. North Carolina's claim that its citizens can continue using the waters of the Catawba River Basin without regard to the very real effects of low flows and drought on South Carolina is both inequitable and contrary to this Court's cases.[5]

Fifth, in a variant of the preceding flawed argument, North Carolina asserts (at 8) that South Carolina would be harmed only if it can show that, "during drought or other low inflow periods, Duke's standard operating practices would have resulted in flows that are sufficient to avoid those injuries but for the consumptive uses in North Carolina." It would be inappropriate and certainly premature to limit South Carolina's proof in such a manner. If Duke's standard operating practices were not followed, for example, their mere existence would not obviate the harm to South Carolina. *Cf.* NC App. 71a (filed Aug. 7, 2007) (CRA provision stating that "Licensee may, at its sole discretion, modify or suspend its use of selected operating procedures that are designed for periods of normal or above normal inflow to optimize the water storage capabilities of the Project"). Or, if Duke's practices were merely voluntary or precatory (or urged other entities or municipalities in North Carolina to cut back on their water use during low flows

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[5] After North Carolina approved the permit for the Concord and Kannapolis interbasin transfer, it was announced that a major resort and water park using 70,000 to 80,000 gallons per day would be built in Concord. The $140 million resort is scheduled to open in Spring 2009 with the help of $4.2 million in incentives and capital improvements authorized by the City of Concord and Cabarrus County, and is now under construction. *See* Adam Bell, *$140 Million Project: Concord Lands Upscale Resort with Spas, Indoor Water Park*, Charlotte Observer (N.C.), Sept. 27, 2007, at 4U; http://www.greatwolflodge.com/locations/concord/construction/. Under North Carolina's theory, it may build and operate such facilities irrespective of any drought conditions. *But see* NC Br. 7 (appearing to acknowledge that North Carolina's must prove that its uses are "*reasonable* consumptive uses") (emphasis added).

only on a *voluntary* basis, as portions of the Comprehensive Relicensing Agreement ("CRA") would do), they would not have compensated for upstream withdrawals by other North Carolina users. *Cf. id.* at 72a-74a (CRA provision providing for municipal water systems to "[r]equest that their water customers and employees implement voluntary water use restrictions"). Moreover, whether Duke's standard operating practices themselves result in injury to South Carolina would logically be determined only after North Carolina's consumptive uses are assessed — as a matter of logic Duke's reservoirs would be that much higher if the substantial amounts of water removed from the Catawba River upstream of the state boundary were not diverted. Finally, other North Carolina users may not have experienced comparable diminutions of flow as were suffered in South Carolina as a result of Duke's practices, so it cannot be assumed that those practices had the same effects in North and South Carolina, as North Carolina appears to suggest. Accordingly, South Carolina's proof of injury should not be artificially limited in the way North Carolina advocates, but instead should be based on the facts revealed in discovery and the hydrology modeling to be done by the experts based on those facts.[6]

[6] The interests of private entities such as the City of Charlotte or Duke, or collateral proceedings such as Duke's relicensing before the Federal Energy Regulatory Commission, will not guide the inquiry. Rather, the interests of the States themselves as *parens patriae*, taking into account *all* relevant water uses, will set the appropriate standard. *See* Reply Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint at 4-8 (filed Aug. 22, 2007); *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992) (noting the suggestion of alternative proceedings provided no assurance "that a State's interests under the Constitution will find a forum for appropriate hearing and relief"). Indeed, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens," and therefore cannot be invoked to adjudicate or advance private interests. *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (per curiam).

Sixth, North Carolina next asserts (at 7) that South Carolina must show that its harms "were not caused or exacerbated by actions in South Carolina." South Carolina does not dispute the general proposition that North Carolina may submit evidence of other causes to the harms claimed by South Carolina, but North Carolina cites no case (and South Carolina is aware of none) requiring the downstream State affirmatively to *negate* all other causes as part of its threshold showing. Rather, South Carolina need only show that the harms it identifies are fairly traceable to North Carolina, in line with longstanding judicial standards for showing but-for causation. *See New Jersey v. New York*, 283 U.S. 336, 345 (1931) (cataloguing harms without requiring any special standard of causation); NC Br. 8 (claiming South Carolina must show it would not have been harmed "but for . . . uses in North Carolina").

North Carolina further errs in claiming (at 7) that South Carolina's showing of harm must subtract South Carolina's own "interbasin transfers, upstream consumption within South Carolina, inadequate conservation measures, or failure to plan for and utilize alternative water supplies or storage opportunities." Perhaps that statement simply identifies in advance one of the means by which North Carolina will seek to disprove South Carolina's showing of causation, and North Carolina will have that opportunity. But the argument (particularly with respect to conservation or planning measures) appears to be less about causation than about whether South Carolina's uses are equitable. The downstream State may prove injury based on its *existing* uses. The question whether those existing uses are

equitable, as compared with the upstream State's uses, is part of the balancing of equities that occurs only in Phase Two, with the burden on the upstream State to show that they offset the harm to the downstream State.

In *Colorado v. New Mexico*, for example, this Court found that New Mexico had proved serious injury by clear and convincing evidence because "*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." 459 U.S. at 187 n.13. In finding injury, the Court did not assess the equities of New Mexico's existing users. Instead, the Court remanded to the special master for factfinding on Phase Two issues, including the "existing uses of water," the "availability of substitute sources of water," and "reasonable conservation measures in both states." *Id.* at 189-90. If those concerns were part of the Phase One injury inquiry, as North Carolina argues here, the Court could not have found that New Mexico had satisfied its initial burden of showing injury. *See also Colorado v. New Mexico*, 467 U.S. at 317-24 (noting first that "New Mexico has met its initial burden of showing 'real or substantial injury,'" and proceeding to evaluate the evidence found on remand concerning existing New Mexico uses of the river, substitute supplies of water, and conservation measures in both States).

Despite relying on the two opinions in *Colorado v. New Mexico* for the proposition that Phase One should consist only of South Carolina's showing of harm (*see* NC Br. 3-4), North Carolina would import issues that those same cases addressed only in Phase Two. That approach, moreover, would isolate

consideration of South Carolina's water uses and consider them in Phase One without comparison to North Carolina's uses, contrary to this Court's holdings that Phase Two should involve the evaluation of, *inter alia*, "existing uses, supplies of water, and reasonable conservation measures available to *the two States*." *Colorado v. New Mexico*, 467 U.S. at 317 (emphasis added). Accordingly, in Phase Two of this case, "with respect to whether reasonable conservation measures by [South Carolina] will offset the loss of water due to [North Carolina's] diversion, or whether the benefit to [North Carolina] from the diversion will substantially outweigh the possible harm to [South Carolina], [North Carolina] will bear the burden of proof." 459 U.S. at 187 n.13.

North Carolina's assertions concerning South Carolina's Phase One showing of injury, therefore, should be rejected.

B. Phase One Fact and Expert Discovery

South Carolina has proposed that Phase One fact discovery close on August 31, 2009, approximately 14 months from now; that expert discovery close on March 31, 2010, approximately 21 months from now; and that a trial on Phase One issues be scheduled for May 2010. *See* SC Br. 16-17. North Carolina, on the other hand, proposes that fact discovery close 18 months from the date of an order setting the discovery schedule; and that expert discovery conclude approximately 15 months after that, for a total of 33 months (with no mention of a trial date). *See* NC Br. 12-13. Thus, the difference between the parties' discovery-period proposals, measured from July 1, 2008, for comparison purposes, is 12 months.

The difference is largely explained by North Carolina's proposal that South Carolina submit, after nine months of fact discovery, a "report identifying the specific alleged 'harms' and the consumptive uses by North Carolina allegedly related to those 'harms,'" followed by a period of nine months for North Carolina to engage in fact discovery "to probe South Carolina's allegations." *Id.* at 9. That approach is deeply flawed. As North Carolina asserts, South Carolina's harms will need to be "model[ed]" (*id.*) and that modeling work will have to be done by South Carolina's experts. It would be unfair and infeasible to require South Carolina to identify the harms before all of the evidence has been produced in discovery and before South Carolina's experts have had a chance to model the relevant data. South Carolina's proposal, on the other hand, provides less time for fact discovery, more time for expert reports and discovery, and less time overall, and it does not require South Carolina to identify all harms on which it will rely nine months before it files initial expert reports, as North Carolina's proposal would do. North Carolina's proposal is simply a rehashed argument that it does not understand South Carolina's claims.

North Carolina also requests the opportunity for an additional sur-rebuttal expert report responding to South Carolina's reply, which accounts for two months of North Carolina's extended schedule. *See* NC Br. 10. But North Carolina already agreed in the Joint Proposed CMP that there would be opening, opposition, and reply expert reports, and offers no explanation for its sudden change of position and request for a fourth round of reports. *See* Joint CMP § 5.7; SC Br. 16. In addition,

because South Carolina has the burden of proof, it should get the last word with its reply expert reports. Just as sur-rebuttal briefs are disfavored following three rounds of briefing, so should sur-rebuttal expert reports.

Instead, the Special Master should adopt South Carolina's proposed schedule, which calls for its expert reports to be submitted 60 days after fact discovery closes, North Carolina's expert reports to be submitted 60 days after receipt of South Carolina's expert reports, and South Carolina's reply expert reports to be submitted 60 days thereafter. North Carolina claims (at 9) that its experts need nine months to complete their modeling work following South Carolina's identification of its harms. But North Carolina's experts need only respond to South Carolina's expert reports and may criticize their methodology or propose different methodologies as they see fit. Moreover, there is no apparent reason why North Carolina's experts cannot begin their own modeling work in advance of South Carolina's service of its expert report at the end of fact discovery.[7] North Carolina offers no justification (at 10) for taking an additional 14 months after the close of fact discovery on Phase One to conduct expert discovery.

Conclusion

For the foregoing reasons, and those in its opening brief, South Carolina respectfully requests that the Special Master adopt its proposals for the scope of issues to be addressed in Phase One and Phase Two, and for the timing of Phase One discovery and trial.

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[7] North Carolina's proposal (at 10) would unfairly limit South Carolina to only 30 days for preparation of expert rebuttal reports.

Respectfully submitted,

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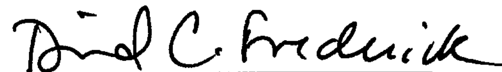
CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On June 23, 2008, I caused copies of the Reply Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.



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