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July 30, 2008

By E-Mail and First Class Mail

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

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

Dear Special Master Myles,

During the July 17, 2008 telephonic hearing, South Carolina requested the issuance of an Interim Report setting forth the Special Master's conclusions on the motions to intervene filed by Duke Energy Carolinas, LLC ("Duke"), the Catawba River Water Supply Project ("CRWSP"), and the City of Charlotte ("Charlotte"), which were separately referred by the Court for recommendations. South Carolina also requested that the report include the Special Master's recommendations with respect to South Carolina's motion for clarification or, in the alternative, for reconsideration. As set forth below, it has been the consistent practice of Special Masters, upon referral of a motion to intervene, to issue an Interim Report recommending a disposition of the motion, and for the Court to resolve the interim intervention issue. Accordingly, the Court's *Guide For Special Masters*, see Ex. 1 hereto, cites specific recent examples in which Special Master recommendations on motions for intervention have been submitted in an Interim Report for the Court's resolution (in contrast, for example, with evidentiary rulings that may be included in a Final Report). As the *Guide For Special Masters* is intended to reflect the "best practices" in original actions, we respectfully submit that issuance of an Interim Report is appropriate. Such an action reflects both the Court's careful attention to the limits of its original jurisdiction and the practical reality that the issue of intervention (both for a would-be intervenor and a party opposing intervention) will effectively be irremediable by the time a Final Report is issued.

During the July 17 call, and without having had an opportunity to reflect more fully on the matter, counsel for Charlotte and CRWSP suggested that South Carolina's request that the Special Master issue an Interim Report is somehow untimely. There are no specific rules regarding the issuance of an Interim Report by the Special Master, nor does any rule require that a party request that the Special Master issue an Interim Report at any particular time. Rather, the Court's general order of appointment directs the Special Master "to submit Reports as she may deem appropriate." Order of Jan. 15, 2008. Although the motions to intervene do not fall within

the scope of the Special Master's general appointment — rather, the Court separately referred the motions of CRWSP and Duke for leave to intervene to the Special Master in its initial order of January 15, 2008, and issued a subsequent order referring Charlotte's motion to intervene, which was filed with the Court after the Special Master was appointed, *see* Order of Mar. 17, 2008 — the same principle should apply to the timing of reports. The question, therefore, is not whether South Carolina's "request" is timely, but whether it would now be "appropriate" for the Special Master to issue an Interim Report on the separately referred motions to intervene. The Special Master having come to a final decision as to her recommendations regarding the motions to intervene and South Carolina's motion for clarification or, in the alternative, for reconsideration, South Carolina respectfully submits that now is the appropriate time to submit those recommendations to the Court.

The consistent practice of previous Special Masters in original cases, approved of in the Court's *Guide For Special Masters*, supports South Carolina's request. For example, in *Alaska v. United States*, No. 128, a motion to intervene was filed with the Court after a Special Master had already been appointed. The Court separately referred the motion to the Special Master on April 30, 2001, *see* 532 U.S. 1006, and, after directing further briefing and hearing argument, the Special Master issued an Interim Report on November 27, 2001, recommending that the motion be denied, *see* Ex. 2. Likewise, in *New Jersey v. New York*, No. 120, the City of New York moved to intervene, and the Court referred the motion to the Special Master on March 20, 1995. *See* 514 U.S. 1013. The Special Master promptly submitted a Report, and on May 22, 1995, the Court ordered that the motion to intervene be denied. *See* 514 U.S. 1125. Those actions were taken in the preliminary phases of the litigation, as Special Master Verkuil issued his Final Report on March 31, 1997, and the Court decided the case on exceptions to the Special Master's report on May 26, 1998. *See* 523 U.S. 767. The practice has been the same regardless of whether the Special Master recommended granting or denying leave to intervene. *See Connecticut v. New Hampshire*, 504 U.S. 983 (1992) (No. 119) (upon referral of two motions to intervene, adopting recommendations in the First Interim Report of the Special Master that one motion be denied and the other granted).*

The Court's *Guide For Special Masters*, issued in 2004, confirms that practice. The *Guide* specifically identifies motions to intervene as falling into a special category of motions as to which the Court specifically "want[s] the Master to file an Interim Report with a recommendation for disposition of the motion before going further." Ex. 1, at 7-8 (citing *Alaska v. United States*, No. 128; *New Jersey v. New York*, No. 120). In contrast, "the Court prefers that the Master resolve all issues and file a Final Report" on issues such as evidentiary rulings, participation as an *amicus curiae*, and referrals to mediation. *Id.*

Tradition alone would be reason enough to follow this practice, but it is notably rooted in two important judicial considerations:

* The cases upon which Duke, Charlotte, and CRWSP relied in support of their motions to intervene were typically decided by the Court upon exceptions to an Interim Report issued by a Special Master. *See, e.g., Arizona v. California*, 460 U.S. 605, 612-13 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). In *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), the Court appears to have denied the City of Philadelphia's motion to intervene without first referring the motion to a Special Master.

First, submission of an Interim Report upon reaching a recommended disposition of a motion to intervene referred to the Special Master shows appropriate respect for the close attention the Court pays to the limits of its original jurisdiction. *See, e.g., New Jersey v. New York*, 345 U.S. at 373 (“Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.”); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (“[w]e seek to exercise our original jurisdiction sparingly,” and “individual users of water . . . ordinarily would have no right to intervene in an original action in this Court”).

Second, this traditional practice shows due regard for the limits of a Special Master’s authority. Unlike with certain case management issues as to which the Special Master arguably has plenary authority (*e.g.*, fixing the time and conditions for the filing of additional pleadings, summoning witnesses, or issuing subpoenas), a Special Master has authority only to make a recommendation on the motions to intervene. *See, e.g., Robert L. Stern et al., Supreme Court Practice* 577 (8th ed. 2002) (noting that, when “petitions for intervention” are referred to a Special Master, “the Master’s reports and recommendations are advisory only and are subject to exceptions and objections by the parties”); *see also Alaska v. United States*, No. 128, *New Jersey v. New York*, No. 120, and *Nebraska v. Wyoming*, 507 U.S. 584 (1993) (No. 108) (all involving recommendations of a Special Master on motions to intervene); *Guide For Special Masters*, Ex. 1, at 2 (noting that “the Master’s ‘decision’ on both facts and law takes the form of a recommendation to the Court rather than a reviewable judgment”). It is therefore appropriate for the Special Master to issue a recommendation on the intervention issue at an early stage in the case, to afford the Court a meaningful opportunity to act on that recommendation. Intervention is largely a dead issue at the end of a case, as there is no effective cure at that time for an erroneous decision. Therefore, if a Special Master were to provide the Court with an opportunity to review a recommended decision on motions to intervene only as part of its review of a Final Report, that recommendation would effectively presume the authority *to resolve* those motions.

South Carolina respectfully believes that the Special Master erred in concluding that the motions to intervene should be granted and in denying South Carolina’s motion for clarification or, in the alternative, for reconsideration. The Attorney General has directed us to represent that South Carolina intends to file exceptions to the Special Master’s recommended dispositions of those motions. For the reasons set forth above, we respectfully request that the Special Master promptly submit an Interim Report setting forth recommendations to the Court on the intervenors’ motions to intervene and on South Carolina’s motion for clarification or, in the alternative, for reconsideration.

Respectfully submitted,



David C. Frederick
*Special Counsel to the
State of South Carolina*

cc: Enclosed Service List

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

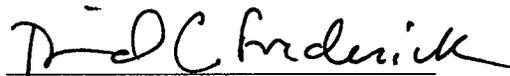
STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

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 July 30, 2008, I caused copies of the Letter Brief to Special Master Regarding Issuance of an Interim Report in Connection with Motions To Intervene 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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