

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

---

TELEPHONIC CONFERENCE

BEFORE SPECIAL MASTER KRISTIN LINSLEY MYLES

Friday, December 5, 2008

Reported by:  
DANA M. FREED  
CSR No. 10602  
  
JOB No. 97422

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

---

Telephonic Conference before Special  
Master Kristin Linsley Myles, beginning at 11:03 a.m.  
and ending at 11:52 p.m. on Friday, December 5, 2008,  
before DANA M. FREED, Certified Shorthand Reporter  
No. 10602.

1 APPEARANCES:

2

3

MUNGER, TOLLES & OLSON LLP  
KRISTIN LINSLEY MYLES, SPECIAL MASTER  
AMY C. TOVAR  
560 Mission Street, Twenty-Seventh Floor  
San Francisco, California 94105-2907  
415.512.4000  
tovarac@mto.com

4

5

6

7

For SOUTH CAROLINA:

8

ASSISTANT DEPUTY ATTORNEY GENERAL  
BY: ROBERT D. COOK  
L. CHILDS CANTEY

9

10

Post Office Box 11549  
1000 Assembly Street, Room 519  
Columbia, South Carolina 29211-1549  
803.734.3736

11

12

agrcook@ag.state.sc.us

13

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.  
BY: DAVID C. FREDERICK

14

SCOTT ATTAWAY

15

Attorneys at Law  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
202.326.7900  
dfrederick@khhte.com

16

17

18

For NORTH CAROLINA:

19

NORTH CAROLINA DEPARTMENT OF JUSTICE  
BY: JAMES C. GULICK

20

Attorney at Law

21

114 West Edenton Street  
Raleigh, North Carolina 27603  
919.716.6900

22

cbrowning@ncdoj.gov

23

24

25

1 APPEARANCES: (Continued)

2

3 For PROPOSED INTERVENOR DUKE ENERGY CAROLINAS, LLC:

4

SIDLEY AUSTIN LLP  
BY: ROGER MARTELLA  
Attorney at Law  
1501 K Street, N.W.  
Washington, D.C. 20005  
202.736.8270  
cphillips@sidley.com

5

6

7

8

9 For PROPOSED INTERVENOR CATAWBA RIVER WATER SUPPLY  
PROJECT:

10

DRISCOLL SHEEDY, P.A.  
BY: JIM SHEEDY  
SUSAN DRISCOLL  
Attorneys at Law  
11520 North Community House Road  
Building 2, Suite 200  
Charlotte, North Carolina 28277  
jimsheedy@driscollsheedy.com

11

12

13

14

AKIN GUMP STRAUSS HAUER & FELD LLP  
BY: THOMAS C. GOLDSTEIN  
TROY CAHILL  
Attorneys at Law  
Robert S. Strauss Building  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036  
tgoldstein@akingump.com

15

16

17

18

19

20

21

22

23

24

25

1 APPEARANCES (Continued):

2

3 For the CITY OF CHARLOTTE:

4 HOGAN & HARTSON LLP  
5 BY: JAMES T. BANKS  
6 Attorney at Law  
7 555 Thirteenth Street, N.W.  
8 Washington, D.C. 20004  
9 202.637.5600

7

8 HOGAN & HARTSON LLP  
9 BY: PARKER D. THOMSON  
10 Attorney at Law  
11 1111 Brickell Avenue, Suite 1900  
12 Miami, Florida 33131  
13 305.459.6613

10

11 CHARLOTTE-MECKLENBURG UTILITIES  
12 BY: H. MICHAEL BOYD  
13 Attorney at Law  
14 5100 Brookshire Boulevard  
15 Charlotte, NC 28216  
16 704.391.5110

14

15

16

17

18

19

20

21

22

23

24

25

1 Friday, December 5, 2008

2 11:06 a.m. - 11:52 a.m.

3 SPECIAL MASTER MYLES: Why don't we move  
4 straight into -- I think this will be a short call  
5 unless people have issues not raised in the letters.

6 Why don't we start with the case management  
7 order which I'll do quickly. I will try to enter that  
8 next week. I gather that it's pretty much ready to  
9 go. Is there any -- there is nothing new that needs  
10 to be added, right? Since November.

11 MR. FREDERICK: That's correct. This is  
12 David Frederick. That's correct.

13 SPECIAL MASTER MYLES: I had two clarifying  
14 questions about it. One is that I gather that  
15 everything has been deferred in terms of deadlines to  
16 a subsequent or a later case management order that has  
17 not yet been drafted; is that right?

18 In other words, there's two deadlines, the  
19 fact discovery and expert discovery as well as the  
20 general case deadlines that we had talked about some  
21 time ago. And those, as far as I could tell, are not  
22 in the order because they've been deferred to a  
23 separate order; is that right?

24 MR. FREDERICK: This is David Frederick.  
25 That's correct.

1 SPECIAL MASTER MYLES: Okay.

2 MR. GULICK: That's correct, Special Master.  
3 This is Jim Gulick.

4 SPECIAL MASTER MYLES: Okay. That separate  
5 order -- is it also correct that that separate order  
6 has not yet been conceived, if you will? In other  
7 words, it doesn't exist in any draft form?

8 MR. GULICK: That's correct.

9 SPECIAL MASTER MYLES: Okay. So is the  
10 reason that is that we have this certainty over the  
11 intervention that's delaying the parties' ability to  
12 agree on a trial schedule or discovery and trial  
13 schedule?

14 MR. FREDERICK: This is David Frederick.  
15 I think that's one aspect of it. And because that  
16 effected the proposed intervenors discovery, that was  
17 also effected.

18 MR. GULICK: Special Master, this is  
19 Jim Gulick. I agree with what Mr. Frederick just  
20 said. In addition, of course, there are differences  
21 about the -- obviously, about the scope of the case.  
22 And the full extent of discovery that may be required.  
23 And there are a couple of other sort of related issues  
24 that I don't think we need to go into today that make  
25 it difficult for the parties to -- to project well

1 what time it's going to take at this stage, and settle  
2 and also agree with each other about how much time  
3 it's going to take. That may become clearer as time  
4 goes on, however. I would expect it would.

5 SPECIAL MASTER MYLES: Okay. That sort of  
6 leads to my second question, which was I see that also  
7 the bifurcation -- bifurcation is provided for in 4.1  
8 of the order, but it is not defined. And that  
9 definition also seems to be deferred to a subsequent  
10 case management order. Is that also correct?

11 MR. GULICK: That's correct.

12 SPECIAL MASTER MYLES: And that also hasn't  
13 yet been drafted. And also, that order is also -- is  
14 that the subject of -- also the subject of the  
15 uncertainty or the disputes over the scope? And  
16 that's why that's not provided for.

17 MR. GULICK: I think -- Special Master, this  
18 is Jim Gulick. I think part of it has to do with  
19 dispute over scope, part of it I think also has to do  
20 with the differences of view about the nature of that.

21 SPECIAL MASTER MYLES: Nature of what?

22 MR. GULICK: Exactly what the bifur- -- what  
23 the first issue should be.

24 SPECIAL MASTER MYLES: Okay.

25 MR. FREDERICK: Yeah. Sorry, Jim, I didn't

1 mean to interrupt you.

2 MR. GULICK: And -- and I think the other  
3 point is, of course, we -- all the parties wanted to  
4 have as much as the case management order as we could  
5 agree upon --

6 SPECIAL MASTER MYLES: Okay.

7 MR. GULICK: -- so....

8 SPECIAL MASTER MYLES: That's all fine. And  
9 I think nothing in any of that would prevent me from  
10 signing the case management order as it is, because  
11 I'll read it more closely and will probably sign it  
12 next week. But from reading it, it seems to me to be  
13 all -- all that's in there is good. And I don't  
14 anticipate any questions or problems. If I do have  
15 any minor issues or questions, I will email you with  
16 them so we don't have to delay entry of that order  
17 until the next conference. But I don't anticipate any  
18 such question, having looked at it again. I looked at  
19 it previously as well.

20 I do think, though, that we need to move to  
21 resolution of the timing issues and the nature and  
22 scope of the bifurcation in terms of what defines each  
23 phase. I'm not surprised to hear that there's dispute  
24 over that and that that's holding things up. Because  
25 I have the sense that there's been dispute over that

1 for some time. And even in my mind, there's a great  
2 deal of uncertainty as to what the phases would or  
3 should be. So I think that we -- what I'd like to do,  
4 because I think it really is -- correct me if I'm  
5 wrong about this, but I do think that it's important  
6 for governing discovery, I think it's important for  
7 governing what the scheduling is going to be of the  
8 trial. And I'd like to start getting that in place as  
9 well to resolve the -- the issues over what the phases  
10 would be. Because we ran into this indirectly in  
11 discussions over -- even over intervention with what  
12 would the scope of Phase 1 be, what are the issues,  
13 et cetera. Some of which I alluded to in the report,  
14 but.... And I think we need to come to terms on that.

15 So I just want to open a discussion of what's  
16 the best way I guess to tee those issues up for  
17 resolution. And I'm happy to resolve disputes rather  
18 than leaving them kind of out there for later  
19 resolution. I agree that some further clarity may  
20 come from discovery in the passage of time.

21 But frankly, this has been an issue that's  
22 been lingering in the case for awhile. And I'm not  
23 sure that greater clarity is going to come. And I  
24 think we can achieve greater clarity if we just tee it  
25 up in some fashion, so....

1           MR. GULICK: Special Master, this is  
2 Jim Gulick. Perhaps this is something that the  
3 parties addressing those matters, that the parties  
4 could put in the form of proposals to you. And we,  
5 of course, could talk to each other and see if we  
6 could, to the extent we could reach any agreement,  
7 further agreement, that would be good. For a couple  
8 of reasons, I would propose something like the middle  
9 of January to get you something.

10           SPECIAL MASTER MYLES: To get proposals --

11           MR. GULICK: As to how to bring these issues  
12 to -- and that's simply because I've got -- we're kind  
13 of overloaded here with a couple of other things.

14           SPECIAL MASTER MYLES: Okay. So would the  
15 proposal that comes in January, for whenever we  
16 decide, would that be a kind of framework for  
17 resolution that one, for example, something like a  
18 briefing schedule, you know, that we would have to  
19 tee up whatever, however we wanted to defined the  
20 issue, what is the nature of the scope of Phase 1 and  
21 Phase 2.

22           MR. GULICK: I think, yes.

23           MR. FREDERICK: Well, Special Master Myles,  
24 this is David Frederick.

25           I thought we briefed the relative issues that

1 we thought would be in Phase 1 and Phase 2, and that  
2 the parties at least agreed that Phase 1 was going to  
3 address itself to harms in South Carolina and where  
4 the disagreements arose were in two areas. One was as  
5 a standard for showing harm. It was our position that  
6 that was something that could be briefed at the time  
7 summary judgment is presented to you.

8 And the second disagreement was that the  
9 intervenors wanted to explore evidence of the relative  
10 benefits to them of various water usages which we had  
11 argued was a Phase 2 question. But there was never  
12 resolved in -- in the course of the briefing over what  
13 Phase 1 and Phase 2 would look like.

14 SPECIAL MASTER MYLES: Right.

15 MR. GULICK: So I don't know that there's  
16 additional briefing that needs to be done. It's  
17 simply a question of how we're going to crack those  
18 two nuts.

19 SPECIAL MASTER MYLES: Well, I'd be happy to  
20 hear from others on this. My recollection was that  
21 there was a general agreement early on, but that where  
22 we started to break down on the agreement was what  
23 defines Phase 1, what is -- how do we properly frame  
24 what is a harm to South Carolina. And I think we all  
25 ended up agreeing that the harm to South Carolina

1 would have to -- that inquiry would have to include  
2 harm from what, which then opens the door to uses by  
3 North Carolina. And possibly even uses or issues not  
4 by North Carolina such as drought conditions, I  
5 assume, would be part of whether there is harm to  
6 South Carolina, which then --

7 MR. FREDERICK: Caused by --

8 SPECIAL MASTER MYLES: Pardon me?

9 MR. GULICK: I apologize. Caused by North  
10 Carolina's use of the water. I apologize,  
11 Special Master. This is Jim Gulick.

12 SPECIAL MASTER MYLES: Right. What harm is  
13 there to South Carolina that's caused by uses in  
14 North Carolina? And I think we ended up agreeing that  
15 that had to be part of Phase 1. It would then open  
16 the door to definitional problems that I don't think  
17 we ever resolved. Is that correct?

18 MR. FREDERICK: Well, this is David Frederick  
19 for South Carolina. The emphasis on "caused by  
20 North Carolina" is one that has to be addressed within  
21 existing hydrological conditions. And the issue of  
22 what happens during drought conditions in periods of  
23 low flow is something that is a distinct inquiry to  
24 levels of consumption or interbasin transfer amounts  
25 from North Carolina on the North Carolina side of the

1 boundary.

2           And I hear North Carolina persistently argue  
3 this notion of causation that is not present in the  
4 cases. And particularly, when there are drought  
5 conditions in periods of low flow, the issue of  
6 causation is not one that the supreme court's cases  
7 have required the kind of causality like tort  
8 causation that North Carolina has been consistently  
9 and erroneously arguing for.

10           SPECIAL MASTER MYLES: Right.

11           MR. BANKS: Special Master, this is Jim Banks  
12 for Charlotte. We take great exception with that. We  
13 think that the Courts' cases clearly show that not  
14 only must South Carolina demonstrate actual harm, but  
15 also it must demonstrate that that actual harm is due  
16 to uses of water in North Carolina. And that doesn't  
17 mean that one necessarily goes all the way to the  
18 question of whether those uses are meritorious, but  
19 the actual causation-in-fact element has to be there.  
20 Otherwise, we shouldn't have this case.

21           MR. FREDERICK: Except that that's not  
22 consistent with Nebraska versus Wyoming, which looks  
23 at drought as the baseline for determining what was  
24 the appropriate amount of water that each state was  
25 entitled to.

1           MR. GULICK: Special Master, this is  
2 Jim Gulick.

3           Obviously, there's debate on this subject as  
4 to what -- how these things are to be looked at.  
5 Certainly, for example, if -- and I just want to make  
6 this -- I don't think it can be necessarily resolved  
7 today, I don't believe. But, for example, if  
8 South Carolina claims that water quality issues that  
9 occur in South Carolina at any time during drought or  
10 otherwise are caused by uses in North Carolina, it  
11 does bring into question of whether or not activities  
12 in South Carolina are actually the cause. And so it's  
13 a, it's a -- it's not an easy -- as easy an issue as  
14 it sounds. In fact, as it sounds, as it might appear  
15 to be in principle.

16           SPECIAL MASTER MYLES: Yeah. I agree with  
17 that. Meaning that I agree it's not an easy issue.  
18 It seems to me, just hearing what people are saying,  
19 that there's definitely an issue over the legal  
20 standard that governs the evaluation of the harm to  
21 South Carolina. I think there's a legitimate dispute  
22 over, for example, what base -- what the baseline is  
23 against which one measures the harm to South Carolina,  
24 the consideration of drought conditions or not.

25           And then against that background, how does

1 one evaluate the uses by North Carolina? And then  
2 perhaps even adding in there what any causation caused  
3 by South Carolina, although that -- again, I'm  
4 assuming that would be disputed.

5 So there's a dispute over those things right  
6 now and how they fit into the analysis. This is one  
7 of the reasons I asked for what people thought were  
8 the relevant cases. It was pretty clear that this was  
9 going to be an issue in trying to -- even just in  
10 something as simple as trying to bifurcate. So  
11 without having -- trying to resolve any of these  
12 issues obviously now, I think we need to figure out a  
13 way to try to get them resolved if we're going to have  
14 a bifurcation.

15 So, Mr. Frederick, I think that what we had  
16 was a proposal to try to tee these issues up in a way  
17 that they can be resolved. Now, you're right to raise  
18 the points that you did, but it does seem that they're  
19 disputed. And therefore, we need some mechanism to  
20 resolve the dispute. And therefore, perhaps the best  
21 thing is for the parties to meet and confer over a  
22 mechanism to resolve the dispute and try to move  
23 toward implementation.

24 Ultimately, what I'd like to see is  
25 implementation of the missing parts to this case

1 management order in the separate case management  
2 order. Most importantly, the case schedule and  
3 what -- how we can move the case forward. And then  
4 bifurcation and what that would look like.

5 But if we need to resolve or at least analyze  
6 these legal issues in the course of doing that, that's  
7 fine. I don't think there's a problem with that. But  
8 I think we need to do it promptly, so we can get these  
9 procedural issues resolved.

10 MR. GULICK: Special Master, this is  
11 Jim Gulick. We would be happy to meet and confer with  
12 the other parties and discuss a way to get things teed  
13 up.

14 SPECIAL MASTER MYLES: Okay. Now I want to  
15 just add, even the context of all this, I do think  
16 that you all, especially if you all agree on what to  
17 do, have significant control over the procedural  
18 movement of this action. But I need to exercise some  
19 control as well, especially over moving it along.

20 I do want to add to the list of issues that  
21 get considered and met and conferred about whether --  
22 once we take into account all these issues and the  
23 legal issues that get resolved, whether bifurcation is  
24 even an efficient way to proceed.

25 So everybody's agreed that it is -- we have

1 significant disagreements over what it means. And if  
2 one extreme view, for example, that all the issues  
3 we've discussed in this call are part of the analysis  
4 in Phase 1, it causes one to wonder what's left for  
5 Phase 2 and whether there ought to even be two phases.

6 So I don't want to pass -- I'm not giving any  
7 opinion on that issue, but I'm just thinking in terms  
8 of at one end of the spectrum in resolving this  
9 dispute, that question would naturally arise. Meaning  
10 if one resolved all disputes in favor of inclusion,  
11 inclusion of those issues in Phase 1. So I offer that  
12 as just something that may be out to be thrown into  
13 the mix in terms of meet and confer.

14 MR. FREDERICK: This is David Frederick. And  
15 I think your point is well taken, Special Master  
16 Myles, and we'll be, you know, ready for a discussion  
17 with North Carolina when we can meet and confer.

18 MR. GULICK: Jim Gulick, Your Honor.

19 Likewise.

20 SPECIAL MASTER MYLES: Okay. So do we --  
21 excuse me for not knowing this. Do we have a date in  
22 place for January? We do. Right?

23 MR. FREDERICK: January the 9th.

24 SPECIAL MASTER MYLES: Okay. So shall we  
25 plan on having some sort of submission before that and

1 what should it be? I mean, I think we should. So the  
2 question is what should it be? Should it be in  
3 attempt to reach some of these issues, or is that too  
4 ambitious over the holidays?

5 MR. GULICK: I think it would be too  
6 ambitious. That would be too ambitious,  
7 Special Master. This is Jim Gulick.

8 SPECIAL MASTER MYLES: Okay.

9 MR. GULICK: But we may be able to at least  
10 scope some of this before then.

11 SPECIAL MASTER MYLES: Okay. And identify  
12 what the issues are. And I want to emphasize that if  
13 there's -- not for purposes of a submission before  
14 January 9th, but as part of the discussion, if there's  
15 a need to resolve some of these legal issues as a  
16 threshold matter, that's fine. I don't think we need  
17 to wait for the summary judgment phase. I don't want  
18 to prejudice the summary judgment phase either.  
19 And -- but to the extent that, you know, there's a  
20 need to determine what is -- what are the appropriate  
21 issues in an equitable apportionment, I think that's  
22 the sort of question you have to decide along the way  
23 sometimes in cases. And I don't think there's  
24 anything wrong with that.

25 MR. FREDERICK: Special Master Myles, if I

1 could respectfully disagree, to the extent that in a  
2 case like this that -- where the facts application to  
3 legal principle is such a critical part of the way  
4 the Court has decided these cases, we would express  
5 some concern about the issuance of anything that might  
6 look like an advisory opinion prior to the point where  
7 we've had a chance to fully develop the factual  
8 record.

9 SPECIAL MASTER MYLES: That may be. On the  
10 other hand, the issue may arise in the context of  
11 deciding other issues in which case it wouldn't be an  
12 advisory opinion. There also may be ways of allowing  
13 for, you know, clarification down the road if  
14 additional facts have come to light that alter the  
15 earlier analysis. It may not be set in stone, but it  
16 may be necessary as a means of guiding what we're  
17 doing now.

18 So you can address that as well, but -- if  
19 you want in the meet and confer, the extent to which  
20 we should be having briefing on legal issues.  
21 However, you yourself have raised a number of legal  
22 issues in this call alone, just in terms of what  
23 considerations are or are not appropriate for an  
24 equitable apportionment. And I don't see how we can  
25 proceed forward in the case without resolving some of

1 those issues. At least at a general level. So you  
2 all can raise that, you know, put that in the  
3 discussion.

4 MR. MARTELLA: Special Master, this is Roger  
5 Martella for Duke. Just so I can understand clearly  
6 the path for January. The notion would be a meet and  
7 confer by which we would have a list of issues that we  
8 would then try come to consensus on besides agreeing  
9 at some further point in the upcoming time after  
10 January 9th?

11 SPECIAL MASTER MYLES: I think so. Although,  
12 I think it was part of a proposal that we have. Not  
13 that it's a list of issues, but a -- a proposal or  
14 a proposal that's agreed upon for moving forward with  
15 resolving the case management issues that we now have  
16 outstanding. That is, one, trial schedule, discovery  
17 cutoff, expert dates cutoff, et cetera, which we had  
18 discussed in a prior call early in the case I think  
19 when -- I think when Mr. Phillips or Ms. Seitz was on  
20 the phone for Duke. I don't know that you were on the  
21 phone. But we discussed, you know, setting firm dates  
22 for those things and those dates no longer exist.

23 So we're trying to come up with a way of  
24 setting new dates that can take into account the  
25 contingencies we have in the case, most notably the

1 intervention issues. That's one.

2 And then, two, as part of that, we need to  
3 figure out what, if we're going to have phases in the  
4 case, what are they? That's produced a lot of  
5 uncertainty including an apparent inability to reach  
6 agreement on the dates, because the uncertainty over  
7 what the phases are has made it apparently difficult  
8 to agree on what the dates for the trial schedule are.

9 So that's the background of the January  
10 submission is what -- how would we resolve those  
11 issues. And then as part of that, there may be a list  
12 of issues that need -- might be appropriate for  
13 resolution, not as an advisory opinion but as part of  
14 resolving case management issues in the course of  
15 that. I think that's the more complete, at least my  
16 understanding of what we're doing here.

17 MR. MARTELLA: Thank you for clarifying that.  
18 This is Roger Martella again. That's very helpful.  
19 I think the challenge we have seen in picking the  
20 dates specifically is because only the document  
21 discovery is moving forward with the intervenors,  
22 which we're not objecting to, of course. There is  
23 a notion that catchup discovery, assuming our  
24 intervention is confirmed, for nonduplicative  
25 discovery. And so we would want to -- that would not

1 be decided, of course, until after the intervention  
2 status was confirmed one way or another.

3 SPECIAL MASTER MYLES: Right.

4 MR. MARTELLA: If you could propose dates to  
5 work from that date forward.

6 SPECIAL MASTER MYLES: I agree with that, to  
7 some extent, that -- that the resolution of  
8 intervention is going to be what drives the catch-up  
9 discovery schedule. But I really don't think that  
10 that is such an obstacle that it needs to delay the  
11 attempt to do a case management schedule. It may  
12 require either contingencies, alternatives -- meaning  
13 alternatives like Alternative A and Alternative B in  
14 terms of a path. If this or if that. Or it may just  
15 require a provision that is a bailout provision in  
16 case something unexpected happens. You could proceed  
17 on either of those paths, rather than just throwing up  
18 your hands and saying, well, we can't know for sure  
19 until that's resolved. I'd rather proceed on some  
20 sort of definitive schedule, even if it has  
21 alternatives or bailouts built into it.

22 MR. MARTELLA: Thank you. That's very  
23 helpful.

24 SPECIAL MASTER MYLES: Okay. So I think  
25 where we are then is I'm going to try to sign the

1 existing case management order next week and get that  
2 to you. If I have any questions, I'll let you know.  
3 And in the meantime, the parties will meet and confer  
4 and get me something by way of a proposal for  
5 resolution of remaining case management by, what, two  
6 days in advance? Or do we need more than that?

7 MR. FREDERICK: This is David Frederick.  
8 I would suggest that we do it in the context of our  
9 progress report.

10 SPECIAL MASTER MYLES: Pardon me?

11 MR. FREDERICK: I would suggest that we do it  
12 in the context of our progress report to be filed  
13 two days before the --

14 SPECIAL MASTER MYLES: Yes, that's fine. If  
15 there's major issues otherwise that needs to be called  
16 to my attention earlier, that's fine. But it sounds  
17 like the holidays are really going to prevent people  
18 from doing any substantive briefing anyway. So I  
19 think that's fine to have a two-day window.

20 Okay. Is there anything else on that or have  
21 I left anything out?

22 All right. The only other issue I have is  
23 with respect to fees. Okay? Let me just throw this  
24 out. The usual procedure is to submit a motion to  
25 the Court which I think I will be doing. I have sent

1 you already the -- what was the then existing estimate  
2 of fees as of the time I sent it, which I think was  
3 about a month ago. That's been more -- that's been  
4 changed. And I think what I'm going to do is do it up  
5 through the month of November, so that it will be a  
6 definitive number as of now. Everything after that,  
7 including this call, would come on a subsequent  
8 motion.

9           And then the allocation, I'm happy to have  
10 discussion about that now. I received everybody's  
11 briefs. I think my inclination is to, for the present  
12 purpose, for the purposes of this going cycle which is  
13 January, I should note that there's almost a -- we're  
14 now at the one-year anniversary, roughly. A little  
15 bit more of the case. So one year. But since I have  
16 been involved was January of 2008. And that's going  
17 to be what's covered. January to November 2008.

18           For that period, I'm going to use the  
19 allocations that I had proposed in my last -- on our  
20 last call -- which is 50/50 for things that are not  
21 related to intervention. And 25/25 and then the 16  
22 number for the intervention-related matters. That's  
23 what I'm going to do for this purpose.

24           Going forward, as I said before, I think if  
25 the interventions are sustained, affirmed, whatever,

1 then I will do something different. And it may well  
2 be something along the lines of what North Carolina  
3 proposes. But I'm not deciding that now. But I think  
4 that I will do something different that will apply to  
5 everything, since then we'd have full parties.

6 Obviously, if the interventions are not sustained,  
7 then it will probably go back to 50/50 for everything.

8           So that's what I'm going to do, although I'm  
9 happy to hear any other points that need to be made  
10 that aren't already in the letters that people  
11 submitted. Here's what I wanted to throw out and that  
12 is just because my employment is with a law firm and  
13 my law firm, like all of yours, I'm sure, tries to get  
14 year-end stuff done by the end of the year. I mean,  
15 the year stuff done by the end of the year.

16           It would be great if you could set up a  
17 procedure that this assumes -- I don't know if anyone  
18 plans to object to my fees. And if they do, that's  
19 fine. I pretty much told you what they are. And this  
20 procedure may not work if there is such an objection,  
21 but the proposal would be that I just invoice -- a lot  
22 of Special Masters have a fund, which we didn't do in  
23 our case, against which the Special Master just draws.

24           And then I think they notify the Court at  
25 some point in time about what the fees were. So

1 the Court doesn't get that much involved.

2 Here, what I'd like to do, if I can, is just  
3 send out whatever the final numbers are. See if  
4 those, you know, if those are not objectionable to  
5 anybody, if they could be paid, and then submit a  
6 report to the Court in the usual fashion, but with an  
7 indication that the parties have been informed  
8 directly.

9 So I throw that out as a possible procedure.  
10 And if people have thoughts on it, I'd welcome that.

11 MR. SHEEDY: Special Master, this is Jim  
12 Sheedy for CWRSP. We certainly don't intend to lodge  
13 any objection. And further, if I could supplement as  
14 follows. If we could receive an electronic billing,  
15 what amounts to a pdf, of our 16.67 percent, we  
16 certainly will make every effort for your law firm to  
17 be in receipt of our share of this before year-end.

18 SPECIAL MASTER MYLES: Okay. Does anyone  
19 else have any thoughts? It would be helpful to hear  
20 from people. If people do, that's fine, we can handle  
21 them as they come up. It's without prejudice to  
22 anybody. Anybody who desires to object.

23 MR. GULICK: Special Master, this is  
24 Jim Gulick. I suppose we were -- North Carolina was  
25 the only party that expressed disagreement. We are,

1 of course, advertent to the fact that you made, the  
2 point that you made a couple of times that this is  
3 only for the intervention side of this. I certainly  
4 can't say that we will actually lodge an objection.  
5 But we stick with our view that, that it out to be  
6 50/50 in the plaintiffs' side and the defendants' side  
7 for all purposes.

8 I would say that we would hope that we get to  
9 something that does not in fact involve a lot of  
10 revisiting, frequent revisiting of what the allocation  
11 is going to be, which will of course take time and  
12 energy for everybody.

13 MR. FREDERICK: This is David Frederick for  
14 South Carolina. We, of course, strenuously disagree  
15 with the notion that having four entities on the other  
16 side of the case, which has increased the costs  
17 enormously to South Carolina, should be coupled with  
18 an additional burden that South Carolina has to pay  
19 50 percent of the costs of the case through  
20 essentially no -- no cause or fault of our own.

21 And we will -- we will resist, going forward.  
22 North Carolina's proposed allocation is not consistent  
23 with the Courts' cases which have allocated on the  
24 basis of the Special Master's determination of what an  
25 appropriate allocation of fees based on what's

1 generated the costs in the case.

2 SPECIAL MASTER MYLES: Yeah, I thought you  
3 made some good points in your letter. I thought most  
4 of those went to what the allocation would be going  
5 forward. And most of those were good points on that,  
6 and might even give rise to a reason to deviate in  
7 particular circumstances. And since we don't know  
8 what those are at the moment, I didn't really feel the  
9 need to pass on those. But I did think you made some  
10 good points in your letter.

11 But for the moment, I'm just really talking  
12 about the fees that have been incurred to date. And  
13 so I didn't think that South Carolina; correct me if  
14 this is wrong -- had issue with that.

15 MR. FREDERICK: That's correct, Special  
16 Master Myles.

17 SPECIAL MASTER MYLES: Okay. I can only  
18 add -- go ahead.

19 MR. GULICK: Special Master Myles, this is  
20 Jim Gulick.

21 SPECIAL MASTER MYLES: I just was going to  
22 add that I think that you did make some good points in  
23 your letter. I think some of those points, you know,  
24 may ultimately -- the merit of some of those points  
25 may ultimately turn on how the Court goes on the

1 intervention issue.

2 In other words, if the Court agrees with  
3 South Carolina that intervention was not warranted, that would  
4 certainly support your position that the intervention  
5 has been over, has burdened the case. On the other  
6 hand, if the Court goes the other way, I doubt that  
7 that would be a conclusion one would draw then.

8 MR. FREDERICK: Well -- this is David  
9 Frederick. I think that there's a different way to  
10 look at it, which is that if the interventions are  
11 upheld, but there is a requirement and a burden on  
12 your time of, say, successive motions by the  
13 intervenor parties, and North Carolina is  
14 participating in or a recipient of those additional  
15 costs and burdens, there is no reason why South  
16 Carolina has to incur 50 percent of the costs of the  
17 case in that circumstance. I think you would allocate  
18 it on a reasonable basis on the ground of which entity  
19 and which entities are collectively causing the case  
20 to become much more expensive than it needs to be.

21 SPECIAL MASTER MYLES: Right. I think,  
22 though, that's more a function of trying to avoid  
23 duplicative work in ab initio rather than having to  
24 allocate the costs of duplicative. That's what  
25 happens. I think the main efforts should be trying to

1 avoid duplication before effort is expended.

2 MR. GULICK: Special Master, this is  
3 Jim Gulick. I just want to make two points very  
4 briefly and not belabor them. The first is that  
5 South Carolina elected to -- although it filed this  
6 suit, it named against North Carolina, I think it's  
7 pretty clear that it did actually specifically address  
8 activities of these -- of the people who are in fact  
9 the intervenors here.

10 So to say it is of no fault of its own is a  
11 position that it takes. But it is not -- it's not as  
12 clear as that, that it is not, that South Carolina is  
13 not involved in that.

14 SPECIAL MASTER MYLES: Yeah, that sort of  
15 goes to my point about it depends on how the Court  
16 comes out. Right? If the Court agrees.

17 MR. GULICK: I had one more point.

18 SPECIAL MASTER MYLES: Yeah.

19 MR. GULICK: And that is, if we're looking at  
20 the activities that address these things, to the  
21 extent that we've -- that the Special Master and the  
22 parties have been involved in dealing with these  
23 intervention issues, North Carolina has been much less  
24 involved in that than South Carolina has.

25 We have not -- we did not initially take a

1 position pro or con. We didn't brief those subjects  
2 at the outset, because we were not taking a position.  
3 And so we certainly were not the ones that filed the  
4 reconsideration motions. I'm not at all, you know,  
5 there are different ways -- my point is there are  
6 different ways of looking at that as well.

7 MR. FREDERICK: And one of those is that if  
8 North Carolina had opposed intervention and both  
9 states had opposed intervention, we wouldn't have gone  
10 through all this cost and expense. So North Carolina  
11 is completely complicit in all of those costs and  
12 fees.

13 And as a point that South Carolina is to be  
14 blamed for having specific information in its  
15 complaint, all of the equitable apportionment  
16 complaints that we examined had specific references to  
17 specific actions, but that did not entitle the  
18 entities that were withdrawing that water to  
19 intervention status.

20 SPECIAL MASTER MYLES: Okay. Fair enough.  
21 I think we're -- you know, I think we could proceed  
22 without having to debate the merits of intervention at  
23 this point in time. I don't think it's -- I don't  
24 think anything is going to change based on that, that  
25 kind of argument right now.

1 I mean, I don't think that -- in other words,  
2 I don't -- North Carolina is the only party that is,  
3 as I hear it, maintaining an objection to the existing  
4 allocation that I've asked about. South Carolina is  
5 not. And I think what I'll -- I don't think I've  
6 heard from the other intervenors, though. I probably  
7 should. But if -- why don't we do that first and  
8 then, and then I'll say what I was going to say. Are  
9 we missing anybody? I thought we were.

10 MR. BANKS: This is Jim Banks for Charlotte.  
11 Charlotte is in agreement with your proposal for  
12 allocation of the costs to date and would not be  
13 filing any objection to that. I will be very happy to  
14 confer with my client about their ability to expedite  
15 payment of an invoice. And we'll do everything we can  
16 in that regard.

17 Going forward, I think we've been clear as  
18 had the other intervenors that we agree with North  
19 Carolina's view that it ought to be a clean 50/50  
20 split. And that we ought not be revisiting that issue  
21 based on special circumstances, we ought to have a  
22 rule that applies and stick with it going forward.

23 MR. MARTELLA: This is Roger Martella for  
24 Duke. And I will join in those comments.

25 SPECIAL MASTER MYLES: Okay. So I think what

1 I'm going to do, subject to verifying that all of this  
2 is proper procedure, but I think it is, is prepare the  
3 invoice, electronically send it to all of you and then  
4 submit it to the Court as part of a motion with an  
5 indication that the parties have been invoiced  
6 directly.

7 And that still leaves open any parties'  
8 ability to file an objection, if they wish. But it  
9 also leaves open -- I will phrase it in terms that  
10 make clear to the Court that the parties have been  
11 invoiced. And therefore, they may just pay it  
12 directly. So then from the Court's standpoint,  
13 the Court will just wait to see if there is an  
14 objection, for example, from North Carolina. And if  
15 there is, then that will be resolved.

16 And obviously, no one would be penalized for  
17 filing such an objection, they just wouldn't. They  
18 would just file the objection and then the Court would  
19 resolve it. So absent word from anybody, that's what  
20 I'm going to do. Is there any other comments on that?

21 MR. GULICK: This Jim Gulick. Special Master  
22 Myles, I think that's fine.

23 SPECIAL MASTER MYLES: Okay. Then, are there  
24 any other issues that we need to resolve or discuss  
25 today?

1 MR. FREDERICK: It might be helpful, Special  
2 Master Myles, to get a date in February.

3 SPECIAL MASTER MYLES: Oh, I think that's a  
4 very good idea. Yeah. And hopefully the date in  
5 February -- by January we will be able to use the date  
6 in February productively from the standpoint of  
7 resolving these case management issues. Friday has  
8 seemed to work for people. Does Friday the 6th work  
9 for people?

10 MR. FREDERICK: On that day, I will be flying  
11 virtually all day.

12 SPECIAL MASTER MYLES: Well, we could do  
13 Thursday the 5th. Would that work?

14 MR. FREDERICK: Yes, for South Carolina.

15 MR. GULICK: Special Master, this is Jim  
16 Gulick in North Carolina. That works for me. I do  
17 not know about any of my fellows, but I would be able  
18 to make it.

19 SPECIAL MASTER MYLES: Okay. Anybody else?

20 MR. BANKS: This is Jim Banks for Charlotte.  
21 That date looks open for me.

22 MR. MARTELLA: This is Roger Martella. That  
23 would work fine.

24 SPECIAL MASTER MYLES: And I think we have  
25 Mr. Goldstein.

1 MR. GOLDSTEIN: That would work fine.

2 SPECIAL MASTER MYLES: Do you want to say  
3 11:00 a.m. my time, 2:00 your time?

4 MR. GULICK: That works. Special Master,  
5 this is Jim Gulick.

6 SPECIAL MASTER MYLES: Okay.

7 MR. FREDERICK: Yes.

8 SPECIAL MASTER MYLES: Okay. That's great.  
9 Now, is there anything else? As I said, if any issues  
10 arise that you need -- you want to run by by email  
11 beforehand, before the January, that's fine. If  
12 anyone wants to add anything or, you know, seek  
13 clarification on the format of whatever you're going  
14 to submit.

15 I don't know what its going to be at this  
16 moment, because you're going to meet and confer over  
17 it. But if there's any need to clarify what the  
18 formats going to be, just feel free to email with a  
19 question like that.

20 MR. GULICK: Thank you, Special Master. This  
21 is Jim Gulick. We'll make what progress we can.

22 SPECIAL MASTER MYLES: Okay. Good enough.  
23 All right. Thanks. I want to say, because it's going  
24 to be the new year next time we talk, it's been very  
25 interesting and a fascinating experience working with

1 all of you this year. And I hope you all have a great  
2 holiday.

3 MR. GULICK: We wish the same to you.

4 MR. FREDERICK: Happy holidays.

5 SPECIAL MASTER MYLES: Same to you.

6 //

7 //

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth; that  
6 any witnesses in the foregoing proceedings, prior to  
7 testifying, were duly sworn; that a record of the  
8 proceedings was made by me using machine shorthand  
9 which was thereafter transcribed under my direction;  
10 that the foregoing transcript is a true record of the  
11 testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review of  
15 the transcript [ ] was [ ] was not requested.

16 I further certify that I am neither  
17 financially interested in the action nor a relative or  
18 employee of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21

22 Dated:

23

24

25

---

DANA FREED  
CSR No. 10602