

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

TELEPHONIC CONFERENCE

BEFORE SPECIAL MASTER KRISTIN LINSLEY MYLES

Thursday, March 12, 2009

Reported by:

DANA M. FREED

CSR No. 10602

JOB No. 103840

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SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendants.

Telephonic Conference before Special
Master Kristin Linsley Myles, beginning at 11:00 a.m.
and ending at 11:13 a.m. on Thursday, March 12, 2009,
before DANA M. FREED, Certified Shorthand Reporter
No. 10602.

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1 Thursday, March 12, 2009

2 11:00 a.m. - 11:13 a.m.

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4 MR. FREDERICK: This is David Frederick. And
5 I have Scott Attaway here in Washington for South Carolina.

6 MR. BROWNING: And for North Carolina this is
7 Chris Browning, Jenny Hauser, and Allen Jernigan.

8 MS. SEITZ: And for Duke Energy, this is
9 Virginia Seitz.

10 MS. DRISCOLL: For CRWSP, Susan Driscoll and
11 Jim Sheedy are present.

12 MR. GOLDSTEIN: And Tom Goldstein and
13 Troy Cahill.

14 MR. BANKS: For the City of Charlotte,
15 Jim Banks. And I should have on Mike Boyd and Parker
16 Thomson.

17 MR. BOYD: Mike Boyd is here.

18 MR. COOK: Bob Cook, Childs Cantey, and
19 Parkin Hunter. South Carolina.

20 SPECIAL MASTER MYLES: Is that everybody? Is
21 that everybody? Okay. Why don't we get started?
22 I think this may be our shortest call ever. Reading
23 through the statements, there don't seem to be a lot
24 of issues. I don't think anybody -- I assume, I mean,
25 we wouldn't have a discussion about anything going on

1 at the court. So we're just going to wait for that,
2 obviously.

3 Why don't I ask you, Mr. Frederick, what you
4 would like to discuss today?

5 MR. FREDERICK: We don't have an agenda item
6 for you, Special Master Myles, today. Our progress
7 report lays it out. We're continuing with discovery,
8 document review, as well as the briefing before
9 the Court. But we don't have an issue that we
10 specifically need to raise with you today. Thank you.

11 MR. BROWNING: Your Honor, this is
12 Chris Browning. North Carolina would reiterate
13 Mr. Frederick's comment.

14 SPECIAL MASTER MYLES: I'll raise one
15 question with everybody. But other than that, I think
16 we should probably not spend everybody's time on the
17 call. It sounds like discovery is progressing.
18 There's been a document production and a new document
19 request that's been made. But other than that,
20 everything's going, it sounds like everything's going
21 smoothly.

22 One question arose internally here, in
23 connection with the United States having submitted
24 a brief to the Supreme Court, is whether the
25 United States should have some involvement in the

1 proceedings before me. If they're going to have
2 opinions on issues like this. For example, in
3 hindsight, you know, one might have thought of
4 requesting their views on the intervention issue at
5 the stage of there being motions filed rather than
6 after the fact.

7 Likewise, there's been some hint of the
8 interest of the United States in the pleadings.
9 North Carolina, I think, pleads that the United States
10 is an indispensable party to the action. I don't
11 think that that's ever been raised directly in the, in
12 the conferences we've had. But I ask the question not
13 necessarily to be answered now. But it once occurred
14 to me, and I think even alluded to in the very first
15 hearing we had in Richmond, as to whether the
16 United States ought to be involved in light of the
17 FERC issue and now their interest in other issues.
18 Either by way of seeking their review, their views on
19 significant matters, as a matter of course, or
20 otherwise as the defense North Carolina has asked.

21 Does anybody want to speak to that, or do you
22 want to ponder it and let me know later?

23 MR. FREDERICK: This is David Frederick for
24 South Carolina, Special Master Myles. I am aware that
25 the United States has monitored the case as it does

1 many litigations. And past practice has been that
2 when the United States perceives its interest to be
3 implicated, it seeks to intervene and to participate
4 fully. And in other instances, it has been content to
5 rest on its ability to file an Amicus brief without
6 permission, just simply under the rules of the Court,
7 to make its use known.

8 SPECIAL MASTER MYLES: Are the parties both,
9 when you say the Court, that the U.S. is monitoring
10 the case, has both parties been making reports to the
11 United States? How is it conducting the monitoring?

12 MR. FREDERICK: Well, all the pleadings are
13 on the website, Special Master Myles. And this
14 was -- I have no firsthand knowledge about the state
15 of the monitoring. Other than when I had a
16 conversation with the DOJ lawyer, he said, yes, we
17 have been, we have seen what's been on the
18 Special Master's website. And, you know, been
19 generally kept apprised through that process.

20 SPECIAL MASTER MYLES: Okay. Well, would it
21 make sense to request their views on significant
22 issues that happen in the case when we're at this
23 stage? At the Special Master stage.

24 MR. GOLDSTEIN: Special Master Myles, this is
25 Tom Goldstein. And I don't have direct experience

1 with this question. I certainly agree with
2 Mr. Frederick's sense of what their practice is, and
3 he knows, he has had it confirmed to them they're
4 paying attention. I think it would be -- you're
5 obviously familiar with the CDSG process in which
6 the Court has a question presented and it, you know,
7 invites the government to file. That's generally the
8 first stage that demerits that the Court, of course,
9 relies on the government to make it own judgment.

10 One compromise to consider, and this
11 I think we're all just sort of thinking aloud about
12 ideas. One thing that you could easily do, if you
13 were interested in having the benefit of the federal
14 government's views in advance, rather than later when
15 the case gets to the justices, is you could consider
16 sending a simple letter that says, you know, in the
17 event that the United States perceives that it has an
18 interest then the Special Master certainly welcomes
19 the United States to express that through an Amicus
20 brief, or if in a preventative appropriate
21 circumstance, a motion to intervene. And that would
22 reconfirm what they'll probably already assume and
23 that is you're willing to hear from them.

24 I think it would be more awkward case by case
25 for you to, sort of issue by issue to invite briefs

1 from them, just because it would be sort of a burden
2 on you and you might, we might miss something. And
3 the fact you didn't invite them on a particular thing
4 might be read to imply that you don't want to hear
5 from them. To the extent that you think that you
6 would benefit from a more active participation by
7 them, that might be the, the somewhat straightforward
8 way of putting it even a little bit higher on the
9 radar screen.

10 SPECIAL MASTER MYLES: That's a possibility,
11 yeah. The issue that most obviously presents itself
12 is the one related to the CRA and the FERC
13 proceedings. That's the one that I think that
14 North Carolina invoked as the basis for its
15 indispensable party defense. Other than intervention
16 which they obviously turned out to have an interest
17 in. But that's presumably going to be resolved, so we
18 won't have that issue recurring one would think. But
19 the other issue is, the one that looms is that FERC
20 one.

21 MS. SEITZ: Special Master Myles, this is
22 Virginia Seitz for Duke. I would think, you know,
23 whether or not it would be critical to get their views
24 would depend on the procedural context in which that
25 was T'd up. And so I think, you know, we should all

1 keep it in mind. But I would hope that we could
2 postpone any decision about exactly how to request
3 their views unless you were to, you know, in a blanket
4 way as Mr. Goldstein suggests indicate that you would
5 always welcome their views. Other than that, I think
6 it would be best to wait for the issue to arise, see
7 what the procedural context is and perhaps make a
8 decision in that setting.

9 SPECIAL MASTER MYLES: That makes sense.
10 Well, does anybody else have a thought on that?
11 I didn't want to leave anybody out here. What about
12 North Carolina?

13 MR. BROWNING: Your Honor, excuse me, I'm
14 losing my voice today. Your Honor, I think that
15 sounds like a very reasonable approach. I would not
16 be -- given the current briefing before the
17 Supreme Court, I think it might make sense to wait
18 to see how the Supreme Court resolves the issues and
19 then approach the question of inviting the views of
20 the United States at that time.

21 SPECIAL MASTER MYLES: That makes sense, too.
22 All right. Well, absent further agenda
23 issues or even housekeeping, I think we should, we
24 should -- does anyone else have any comments?
25 I thought we ought to just end the call early and let

1 everybody get on with things. Does anybody else have
2 any thoughts on the United States? And are there any
3 housekeeping issues not reflected in the status
4 reports?

5 And I don't think we need to reschedule an
6 appointment. We have one next month, I believe, on
7 the calendar. But then --

8 MR. FREDERICK: Special Master Myles. I'm
9 sorry.

10 SPECIAL MASTER MYLES: Yes, go ahead.

11 MR. GOLDSTEIN: I'm sorry, I should have
12 interjected a little bit before. I just wanted to
13 know if you have a new person in mind, as the
14 successor to Amy Tovar, that you wanted copied on
15 things.

16 SPECIAL MASTER MYLES: I did. But this
17 person seems to have possibly disappeared from the
18 list of candidates. So I have to find someone else.
19 I got a couple of requests from that to Lori, and I
20 appreciate your asking. But I, I don't have anybody
21 right now. The person who had wanted to I think isn't
22 going to -- it's not going to, it's not going to work
23 out with her schedule. So I'm going to hopefully
24 identify someone else in the next week or so.

25 And what else? I think that's it. That's

1 all I have. Okay. Thanks everybody. We'll talk to
2 you in about a month.

3 MR. BROWNING: Okay.

4 SPECIAL MASTER MYLES: Okay. Bye bye.

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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.

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22 Dated:

23

24

25

DANA FREED
CSR No. 10602