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October 20, 2010

Via Electronic Mail and U.S. Mail
Kristin Linsley Myles, Special Master
Munger, Tolles & Olson, LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, CA 94105-2907

Re: Letter from Intervenors CRWSP and Duke Energy Regarding First Amended Case Management Plan, *South Carolina v. North Carolina*, No. 138, Orig.

Dear Special Master Myles:

This letter responds to your request at the last telephonic status conference for letter briefs on any disputed sections of the proposed First Amended Case Management Plan (CMP). I am writing on behalf of intervenors Catawba River Water Supply Project (CRWSP) and Duke Energy (collectively, Intervenors)

As indicated in the proposed CMP submitted by North Carolina, there are ten areas of disagreement among the parties. Intervenors take no position on the dispute between South Carolina and North Carolina over sections 5.5 (deadlines for expert discovery) and 6.1 (disclosures / supplemental responses to contention interrogatories). Intervenors' position on the remaining eight disputed sections is set forth herein.

1. Perhaps the most contested issue is in section 5.2 which relates to the scope of discovery.. South Carolina believes discovery into the benefits of North Carolina interbasin transfers (IBT) on neighboring South Carolina receiving basins, and the benefits of electricity generation in either State should be deferred until after summary judgment motions on whether South Carolina has met its threshold burden to show injury. North Carolina and Intervenors believe that discovery on these two issues should *not* be deferred, now that you have ruled the case will be divided into liability and remedial phases, which would "include any and all issues that either party thinks are relevant" to each such phase. (August 20, 2010, Telephonic Hearing Tr. p. 11.) Since "each side can discover the issues it believes will go into that entitlement inquiry," discovery into the benefits of IBTs to other basins and into the benefits of electricity

generation in either State is relevant to the entitlement inquiry and is not related "solely to the question of shaping a decree." (Id.) Benefits of IBT to other basins in South Carolina is inherently a part of whether South Carolina can make the requisite showing of liability, as are the benefits to either State from electricity generation. Both benefits are relevant to threshold injury and to the equitable apportionment factors. If South Carolina overcomes its burden of showing injury caused by uses in North Carolina, there must be an examination of the benefits of those same uses *before* an equitable apportionment decree can be fashioned. South Carolina is claiming harm from IBTs in North Carolina, but wants to prohibit discovery on the benefits of that use until a later date. Now that the case is scheduled for a trial on entitlement to a remedy, preventing discovery on these two issues, i.e., benefits of IBT and electricity generation, would needlessly hamstring North Carolina and Intervenors in the preparation of their cases on entitlement. This is especially true in light of your comment during the August 20, 2010 telephonic hearing that the new structure of the case "allows people to proceed somewhat at their peril. If they think an issue isn't relevant, it turns out to be relevant, then they won't have developed that issue." (Id. at 40.) Intervenors do not want to proceed down the perilous path described by your Honor. Although both States and Intervenors previously favored deferral of discovery on the benefits of IBTs and electric generation, all of their positions were espoused in the context of whether discovery should be bifurcated or phased. Now that your Honor ruled otherwise, it makes little sense to carve out two issues from the entitlement to a remedy while still supporting the belief that all issues relating to South Carolina's entitlement to a remedy will be uncovered through a unitary discovery process. Discovery on the benefits to the receiving basin of any IBT from the Catawba River and the benefits of electricity generation in either State should not be deferred unless entitlement to a remedy will be re-visited by your Honor and bifurcated as previously advocated by the parties but declined by your Honor.

2. In section 5.3.9, there is a proposed number limitation on requests to admit. South Carolina has suggested a combined total of 300 requests for admission for North Carolina and Intervenors, with 300 requests for admission reserved to South Carolina. North Carolina and Intervenors want to follow the current Fed. R. Civ. P. 36; it does not impose a limit.

3. In section 5.4, the States disagree both as to the length of time for fact discovery and whether fact discovery shall precede expert discovery absent good cause. Intervenors support North Carolina's request for a fact discovery period of three years; provided, although it is anticipated fact discovery will precede expert discovery, certain additional fact discovery may be necessary after receipt of expert reports or the taking of expert depositions. Since there is now one trial on entitlement that includes an analysis of harms caused to South Carolina by uses in North Carolina and a weighing of the benefits of those uses, factual discovery is necessarily extremely broad. South Carolina's belief that all factual discovery can be completed in a little over a year is surprising and unsupportable, considering the case is now three years old and still in document production just on threshold injury. Over a million pages of documents and additional electronic documents have been produced in relation to the harms about which South Carolina has complained. Document discovery has not yet been primarily focused on beneficial uses. It is highly probable that as many pages of documents, if not more, will be produced in response to discovery on beneficial uses. It is easy to predict that it could take at least another three years for document discovery related to benefits. By adding deposition discovery, North

Carolina's proposal of three years seems much more sensible than attempting to get all fact discovery accomplished in a little more than one year.

Furthermore, it is probable that expert reports or depositions of experts will disclose theories or issues that will require additional factual discovery by the opposing parties. Parties should be able to engage in such discovery without having to apply to the Special Master for permission to do so. Requiring parties to move before the Special Master would needlessly slow down the case. In the event a party has an objection to certain discovery propounded after receipt of expert reports or holding expert depositions, that objecting party has the right to petition the Special Master for protection from such discovery under Fed. R. Civ. P. 26(b) and (c). That is the proper method to limit discovery, not a preordained blanket prohibition on factual discovery after receipt of expert reports or conducting expert depositions.

4. Intervenors object to the insertion South Carolina has proposed for section 5.7. There was specific language in the original Case Management Plan that addressed discovery from Intervenors not being duplicative. At that time, the intervention decision was on appeal to the Supreme Court and Intervenors' status as parties was in question. That has now been resolved and Intervenors have party status in this case. The sentence, "The Parties shall endeavor not to serve duplicative discovery," is sufficient. Intervenors are parties in the case and, like the party States, have an obligation to minimize any duplicative discovery, from which South Carolina may be relieved under Fed. R. Civ. P. 26(b) and (c) if it is aggrieved. That has been the practice up to this point and Intervenors have no reason to think such practice should change. There is no need for the sentence South Carolina proposes, because the prior sentence adequately protects all parties from duplicative discovery.

5. Intervenors support the proposal of a combined total of seventy-five contention interrogatories to be served by Intervenors, as set forth in section 6.2. Limiting North Carolina and Intervenors to a total of forty contention interrogatories, as requested by South Carolina, is too small a number. This is especially true, considering the number will include those already served by North Carolina. North Carolina has already served ten contention interrogatories, which effectively limits North Carolina and Intervenors to thirty going forward. One-third or less than thirty is too few to enable Intervenors to serve enough contention interrogatories to narrow their issues in this case. Interevenors request seventy-five contention interrogatories to share jointly between CRWSP and Duke Energy.

6. In section 6.3, a combined total of one hundred (100) fact interrogatories to be split between Intervenors is appropriate. South Carolina's proposal to limit North Carolina *and* Intervenors to a total of one hundred fact interrogatories does not allow for full written discovery. North Carolina has already served six interrogatories on South Carolina, which would leave North Carolina and each Intervenor with around thirty interrogatories each. Thirty is not an appropriate number, given the expanded scope of the case into entitlement to a remedy and a remedial phase. Intervenors need a reasonable opportunity to propound written discovery on both party States, which cannot be accomplished with only thirty fact interrogatories for each. A combined total of one hundred for Intervenors is a much more reasonable number and is not unduly burdensome to either party State.

7. Section 6.6.1 addresses the depositions of fact or lay witnesses. Counting the subpoenaed parties and witnesses listed by the two States results in almost two hundred potential witnesses in this case, exclusive of experts. It is reasonable to think that of those two hundred witnesses, counsel for Intervenors could collectively notice up to seventy-five depositions, exclusive of any cross-noticed depositions. It makes little sense to limit arbitrarily Intervenors to deposing less than twenty percent of the named witnesses in the case (without any consideration for those as-yet unnamed). For full and fair discovery, Intervenors must have an adequate opportunity to conduct depositions. Granting Intervenors the right to depose collectively seventy-five witnesses is much more reasonable than a paltry limit of thirty.

8. Finally, as to section 6.6.2, Intervenors would refer above to the discussion in numbered paragraph 2 about section 5.4 of the CMP, i.e., whether additional fact discovery may be required after expert reports and depositions. Rather than repeat their reasoning, Intervenors hereby incorporate the above discussion by reference thereto. Additional fact discovery should be allowed, subject to the rights of any party under Fed. R. Civ. P. 26(b) and (c) if it is aggrieved.

In summary, the purpose of the tasks outlined in the CMP is to provide all parties with an opportunity to pursue full discovery on all issues which are relevant or likely to lead to the discovery of admissible evidence. The CMP is designed as a management tool to administer the case through to conclusion. It should not be used as a vehicle for any party to abuse the other, either through burdensome discovery demands or the deferral of discoverable facts and/or issues.

Respectfully submitted,

DRISCOLL SHEEDY, P.A.

James W. Sheedy

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