Driscoll SHEEDY

A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

James W. Sheedy
Lic. in SC Only
Direct: 704 341 2102
Fax: 704 341 2105
jimsheedy@driscollsheedy.com

Ballantyne: 11520 N. Community House Road
Suite 200 | Charlotte, NC 28277
South Carolina Office: 222 E. Main Street
Suite 204 | Rock Hill, SC 29730
www.driscollsheedy.com

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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: Reply of Intervenors Catawba River Water Supply Project and Duke Energy to Opening Brief of South Carolina on its Disputed Issues under the proposed First Amended Case Management Plan, *South Carolina v. North Carolina*, No. 138, Orig.**

Dear Special Master Myles:

In its Opening Brief, South Carolina raises five (5) disputed issues under the proposed First Amended Case Management Plan (CMP), which are: inclusion in discovery of the benefits of North Carolina interbasin transfers (IBT) on neighboring South Carolina receiving basins and of the benefits of electricity generation in either State; the length of the discovery period (i.e., fifteen months versus three years); the numeric limitations on depositions, interrogatories and requests for admissions; the meet-and-confer process for contention interrogatories; and when schedules should be proposed for expert discovery.

Although they do not agree with South Carolina on a number of other issues that South Carolina apparently chose not to brief, Intervenors hereby reply to South Carolina's assertions about the scope and length of discovery. Intervenors otherwise remain firm in their positions on the other disputed issues as set forth in Intervenors' opening letter brief. Those positions are incorporated by reference here as there is no need to supplement or repeat such positions given that South Carolina does not raise new arguments in its brief. The positions asserted in Intervenors' opening letter brief provide a reasonable and efficient path forward for the Court and all the parties which balances the need to provide adequate discovery on these complex issues against pursuing an efficient and expedient result.

South Carolina's argument for fifteen months is premised on excluding from discovery the benefits of North Carolina IBT to South Carolina and of electricity generation in either State.

South Carolina suggests, *first*, that discovery on such benefits may commence after summary judgment on threshold injury; and, *second*, that the benefits of North Carolina IBT to South Carolina will be ruled irrelevant in this case after South Carolina has made its motion seeking such relief.

South Carolina's first suggestion is essentially that your Honor should have bifurcated a portion of the discovery in this case, upon which your Honor has already ruled to the contrary, and all parties covered in their opening briefs. But, South Carolina has now introduced a discovery period after summary judgment on threshold injury, and has not allotted any time for it. Moving a large portion of the discovery to a time period after summary judgment on threshold injury does not shorten the time for discovery. This issue, NC IBT flowing into South Carolina, involves the obvious benefit to South Carolina from CRWSP's 5 MGD and Charlotte's 33 MGD of IBT discharged into the Yadkin Pee-Dee Basin, as opposed to no such discharge and instead a withdrawal of 38 MGD from the Yadkin, a 76 MGD difference to those downstream in the Pee Dee area of South Carolina. Also, Duke's upstream electricity generation in the River is consumed at least in part in South Carolina. The factual issues on NC IBT flowing into South Carolina and electricity generation are there and time will have to be set aside for document production, interrogatories, requests for admission and depositions to investigate these issues. This could take as much time as discovery on threshold injury (which cannot be accomplished in fifteen months anyway). The addition of this second discovery period to the period for threshold injury results in North Carolina's projection of three years.

South Carolina's second suggestion presupposes a motion that has not yet been filed, a hearing which has not been held and a ruling that is speculative at this time. Denial of such discovery is not before your Honor for ruling based on the status of the case today. South Carolina may not like that North Carolina and Intervenors have placed these benefits at issue in the case, but until there is a ruling otherwise North Carolina and Intervenors are entitled to discovery on such benefits in accordance with Fed. R. Civ. P. 26 incorporated into the CMP.

South Carolina argues for an abbreviated discovery period of fifteen months for the entire litigation stage which your Honor describes as entitlement to a remedy. This litigation stage encompasses all of the case except for the fashioning of a remedy or decree. Hence, discovery into threshold injury (i.e., harm to South Carolina caused by North Carolina), whether the benefits to North Carolina outweigh any downstream injury and all of the equitable apportionment factors (e.g., physical and climatic conditions, consumptive use of water in the several sections of the River, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former), would be completed according to South Carolina within fifteen months from the date of entry of the CMP.

This is unrealistic. Fifteen months is an insufficient time to finish threshold injury, whether benefits to North Carolina outweigh any downstream injury and all of the equitable apportionment factors. There are no compelling reasons to believe document discovery and the other discovery devices, especially depositions, all of which will be used in the entitlement to a

remedy phase could be completed within fifteen months. It has taken two years so far for primarily the States, with some modest document requests from Intervenors, just to engage in document discovery on threshold injury which is still unfinished. Your Honor's decision that the first phase will be entitlement to a remedy has necessarily expanded the scope of existing document discovery into areas that have not previously been the focus. Once all of the documents have been produced, the parties will begin to turn their attention to other written discovery, after which depositions will commence. This is a case in which the sequencing of discovery is important in order to achieve efficiency. South Carolina says that if fifteen months is not enough time, any party may move on the basis of good cause for an extension of the discovery period. "Good cause" is normally invoked when there are unforeseen complications in discovery after the entry of a scheduling order which warrant that a court re-visit and extend the schedule. In this case, it is immediately apparent that fifteen months is too short a time period. In fact, it is unlikely the parties will even finish threshold injury within fifteen months.

For the reasons stated herein, your Honor's ruling against bifurcation should not be re-litigated by South Carolina through its proposal to move the benefits of NC IBT and electric generation into a phase after summary judgment on threshold injury. Time will be needed by the parties during entitlement to a remedy in order to investigate the benefits of NC IBT and electric generation. Three years is an appropriate period for the parties to finish discovery on threshold injury, whether the benefits to North Carolina outweigh any downstream injury and all of the equitable apportionment factors. The version of the CMP proposed by North Carolina and the Intervenors should be adopted.

Respectfully submitted,

DRISCOLL SHEEDY, P.A.

James W. Sheedy

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