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Kristin Linsley Myles, Special Master
Munger, Tolles & Olson LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105-2907

Re: State of South Carolina v. State of North Carolina, No. 138, Original

Dear Special Master Myles:

Intervenor, Duke Energy, seeks to present in concise form its position on its participation in Phase I and in the discovery process of this litigation.

In its June 16, 2008, brief addressing Phase I issues (at 15-16), South Carolina contends that the intervenors, including Duke, "should not be participants in the Phase One trial and should have no or very limited roles in deposing witnesses during Phase One" on the theory that Phase I should concern only the harms suffered by South Carolina and that Duke lacks any interest in that question. Both the premises and the conclusion are faulty.

First, as North Carolina's June 16, 2008 brief addressing Phase I issues correctly explains, Phase I cannot be limited to South Carolina's proof of all harm related to the Catawba. Phase I necessarily embraces discovery concerning the cause and extent of the alleged harms. In light of Duke's involvement in the impoundment and flow of the Catawba's waters in the operation of its business and under its FERC license, Duke's interests are deeply implicated in Phase I. For example, as North Carolina's brief observes (at 8), "[i]n proving that its alleged injuries are caused by water consumption in North Carolina, South Carolina must demonstrate that, during drought or other low inflow periods, Duke's standard operating practices would have resulted in flows that are sufficient to avoid those injuries but for the consumptive uses in North Carolina." Duke's activities with respect to impoundment and the flow of the River are integrally related to any attempt by South Carolina to characterize a particular consumptive use in North Carolina as causing harm.

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Second, Duke strongly disagrees with South Carolina's assumptions concerning the limits on its party status, see, *e.g.*, South Carolina's Reply In Support of CMP at 6; this appears to be a collateral attack on the order granting Duke's motion to intervene and conferring party status. What is critical here, however, is that assuming that Duke may only participate where its interests are directly affected, it is, at the very least, premature to exclude Duke from Phase I or, indeed, from any depositions or other aspect of the discovery process, as South Carolina proposes in its version of the Case Management plan. Duke's activities and interests are deeply implicated in determining whether specific consumptive uses in North Carolina have caused harm in South Carolina. There should be no blanket exclusion of Duke from either Phase I generally, or from depositions or the discovery process specifically. Duke has no intention of duplicating questions already asked by other counsel or of otherwise complicating depositions or, of appearing at depositions that in no way involve its interests. The issue can be addressed subsequently if counsel does not exercise appropriate restraint.

Duke respectfully requests that the Special Master decline to exclude Duke from Phase I or any particular discovery activity in this litigation.

Sincerely,

Carter G. Phillips

cc: All parties required to be served by the service list (by e-mail and first-class mail)