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August 6, 2008

Special Master Kristin L. Myles
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560 Mission Street, 27th Floor
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Re: *South Carolina v. North Carolina*, No. 138, Original; CRWSP's Letter Brief
Regarding Issuance of an Interim Report

Dear Special Master Myles:

The Catawba River Water Supply Project ("CRWSP") opposes South Carolina's request that you file an Interim Report granting the motions to intervene in this case.

As South Carolina recognizes, this is a question over which you must exercise your discretion. No rule requires the Special Master to file an Interim Report. In this original action, the Supreme Court only asked that the Special Master "submit Reports as she may deem appropriate." Order of Jan. 15, 2008. The Order leaves the decision to the Special Master's discretion. *Compare Mississippi v. Louisiana*, 346 U.S. 862 (1953) (specifically directing the special master "to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him").

Nor does the *Guide for Special Masters* (which has no authoritative standing in any event) indicate any special preference for Interim Reports on intervention motions, contrary to South Carolina's interpretation. The *Guide* (at 7) generally says that "[t]he Court may want the Master to file an Interim Report" "[d]epending on the type of relief sought by the motion," and it cites *United States v. Alaska*, No. 128 Original, merely as an example of a case where an Interim Report was filed. But there are also counter-examples of cases in which the Justices did not address the Special Master's ruling on intervention until the final report – or, at least, until a report that contained additional recommendations on the merits. *See Nebraska v. Wyoming*, 507 U.S. 584, 589 (1993) (report resolved summary judgment as well as intervention); *South Carolina v. Baker*, 485 U.S. 505, 510-11 (1988) (final report addressed both intervention and merits); *Arizona v. California*, 460 U.S. 605, 612-13 (1983) (noting that the Court had earlier refused to allow exceptions to the special master's intervention decision, *see* 444 U.S. 1009, and considering the propriety of intervention along with other issues in the master's final report).

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Thus, the Special Master has the discretion to decide whether to accede to South Carolina's request. In addition to the reasons offered by the other intervenors in opposing that request, CRWSP submits that South Carolina's delay requesting an Interim Report is an appropriate basis for the Special Master to decline to file an Interim Report on intervention at this time.

Under analogous rules from the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Appellate Procedure ("FRAP"), South Carolina has waited too long to request an Interim Report on the Special Master's intervention decision. The Special Master granted the motions to intervene on May 27, 2008. South Carolina requested an Interim Report more than 50 days later, on July 17, 2008. This delay is longer than the 10 days provided for filing objections to a magistrate judge's recommendations under FRCP 72(b)(2). It is also longer than the 30 days provided for filing a notice of appeal under FRAP 4(a)(1)(A). Nor does South Carolina's June 27 motion for clarification and reconsideration excuse its delay. For the reasons described in CRWSP's July 10 response to South Carolina's motion, at 2-4, that motion was both procedurally deficient and untimely, and thus would not extend the 30-day period under FRAP 4(a)(4)(A). Thus, South Carolina's delay in requesting an Interim Report on the Special Master's intervention decision well exceeds corresponding time limitations in the Federal Rules.

The fact that South Carolina waited until after intervention was granted and after its motion for reconsideration was denied leaves little reason to doubt that South Carolina's position is one of convenience. If intervention had been denied, South Carolina almost certainly would have strenuously opposed the issuance of an Interim Report as an unnecessary distraction from the course of the litigation.

Nor is there any basis to conclude that South Carolina has such an interest in immediate review by the full Court that it would be appropriate to divert the underlying case. As noted, it did not raise the possibility of an Interim Report until very late in the proceedings. Even then, South Carolina's counsel did not know whether the State would in fact be interested in seeking further review.

South Carolina nonetheless contends that the Special Master should file an Interim Report because "[i]ntervention is largely a dead issue at the end of a case, as there is no effective cure at that time for an erroneous decision." But this argument is directly contrary to the well-established rule in the lower federal courts that orders granting intervention are not "final decisions" subject to interlocutory appeal because they "can be effectively reviewed on appeal from a final judgment." *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (*per curiam*); see generally 15B Wright & Miller, Federal Practice and Procedure § 3914.18. For example, if the Supreme Court later determines that the intervenors were not entitled to participate in this

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original action, it can vacate any relief granted to the intervenors and limit the scope of the Special Master's decision.

Finally, although South Carolina continues to challenge the intervenors' participation, it has nevertheless treated the intervenors as parties by serving them with interrogatories, which under the FRCP "may only be directed to a party to an action." *University of Texas at Austin v. Vrtil*, 96 F.3d 1337, 1340 (10th Cir. 1996); *see generally* 8A Wright & Miller, Federal Practice and Procedure § 2171 ("[I]nterrogatories are limited to parties to the litigation."). Despite this inconsistency, South Carolina has not explained its position on whether discovery ought to be stayed while the Special Master is considering whether to issue an Interim Report and, if she decides to do so, while the Court considers the propriety of intervention. Because CRWSP believes that the Special Master was correct in allowing intervention and that South Carolina has neither procedural nor substantive grounds to challenge that decision or to demand an Interim Report, CRWSP intends to continue acting as a party to this original action.

Sincerely,



Thomas C. Goldstein
*Counsel for the Catawba River
Water Supply Project*

cc: Enclosed Service List

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,


v.

STATE OF NORTH CAROLINA,
Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,
Intervenors.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On August 6, 2008, I caused copies of the Catawba River Water Supply Project's Letter Brief Regarding Issuance of an Interim Report to be served by first-class mail, postage prepaid, and by electronic mail (as designated) to those on the attached service list.



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