IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

PARTIAL OPPOSITION OF THE STATE OF SOUTH CAROLINA TO CITY OF CHARLOTTE'S MOTION TO PARTICIPATE AS AN *AMICUS CURIAE*

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
ELIZABETH H. SMITH
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

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Consistent with its prior position in this litigation, South Carolina does not object to the City of Charlotte's participation as an *amicus curiae* in the traditional manner, such as submission of an *amicus* brief where appropriate. South Carolina thus has no objection to Charlotte's ability to monitor the case by (1) receiving transcripts of monthly status conferences; (2) obtaining non-confidential filings, correspondence, and deposition transcripts through North Carolina, its *parens patriae*; and (3) attending public hearings as a spectator. Such participation by Charlotte would be consistent with the role of *amici curiae* before the Supreme Court generally, and as permitted by special masters in prior original actions.

South Carolina objects, however, to the extent that Charlotte's three specific requests go farther than that, because they would significantly burden or prejudice South Carolina, or unnecessarily tax the resources of the parties and of the Special Master. Charlotte — which the Supreme Court unanimously held is adequately represented by North Carolina — is not entitled to impose such burdens on the party States and the intervenors. Such burdens — which would only grow as other entities seek to participate as *amici curiae* at later stages of this proceeding — would interfere materially with the efficient resolution of this original action. The Special Master, therefore, should deny Charlotte's motion insofar as it seeks to go beyond traditional *amicus* participation.

I. *AMICUS* PARTICIPATION MUST BE HELPFUL TO THE COURT AND NOT BURDENSOME

The typical means of participation by an *amicus curiae*, including one denied intervention, is through submission of a legal brief. *See* 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1913, at 495-97 n.26 (3d ed. 2007) ("If the court determines to deny intervention altogether, it is common practice to allow the applicant *to file a brief* amicus curiae, but even this sometimes is denied.") (emphasis added, footnote omitted). Such *amicus* briefs have been permitted by lower courts only where they will be helpful to the Court, consistent with this Court's own rule concerning *amicus* briefs.[1] In addition, lower courts have emphasized that, "'[a]t the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure.'" *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) (quoting *Yip*, 606 F. Supp. at 1568).[2] Although the Special Master has discretion for good cause to permit *amicus* participation beyond the filing of briefs, our review of the case law

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[1] *See* Sup. Ct. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."); *see also*, *e.g.*, *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996) ("A motion for leave to file an *amicus curiae* brief . . . should not be granted unless the court 'deems the proffered information timely and useful.'") (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986) (table)).

[2] *See also Liberty Lincoln Mercury*, 149 F.R.D. at 82 ("When a court determines the parties are already adequately represented and participation of a potential *amicus curiae* is unnecessary because it will not further aid in consideration of the relevant issues, leave to appear has been denied.").

indicates that participation by *amici* in discovery and trial proceedings is highly unusual.

In this case, moreover, the Court held unanimously that the State of North Carolina fully represents the interests of Charlotte as its *parens patriae* and that "Charlotte's interest falls squarely within the category of interests with respect to which a State must be deemed to represent all its citizens." *South Carolina v. North Carolina*, 130 S. Ct. 854, 867 (2010); *accord id.* at 873 (Roberts, C.J., concurring in the judgment in part and dissenting in part). Accordingly, any assessment of whether Charlotte's participation would be helpful must consider whether North Carolina could just as well advance Charlotte's proffered factual or legal presentation. That same standard also should apply to any putative future *amici*, whether they support North Carolina or South Carolina. *See id.* at 867 ("Charlotte . . . occupies a class of affected North Carolina users of water, and the magnitude of Charlotte's authorized transfer does not distinguish it in kind from other members of the class.").

In *Virginia v. Maryland*, for example, the special master denied motions for leave to participate as *amicus curiae* by the Audubon Naturalist Society, the Loudon County Sanitation Authority (of Virginia), and Loudon County, Virginia. *See* Report of the Special Master Appendices at F-1 – F-3, *Virginia v. Maryland*, No. 129, Orig. (Dec. 9, 2002) ("No. 129 Report"), *available at* http://www.supremecourtus.gov/SpecMastRpt/Orig129SpecMasterApp.pdf. The special master reasoned that *amicus* participation would not be helpful in that case, "[b]ecause the complaint

raises legal issues that Virginia and Maryland, through competent counsel, could address adequately and completely and because both States were perfectly capable of evaluating and advancing any arguments suggested to them by the three *amicus* movants." *Id.* at F-1 – F-2.

In the same way, Charlotte should make available evidence supporting North Carolina's defense to North Carolina directly, without burdening the docket with unnecessary, separate submissions. The participation of Charlotte (or any other putative *amici*) should be limited to matters in which Charlotte can demonstrate that its specific contribution to the case will be helpful to the Court, above and beyond North Carolina's representation of Charlotte as its *parens patriae*.

In addition, whatever participation Charlotte is allowed should be structured so as not to burden South Carolina, delay the proceedings, or create disruptive scheduling challenges. An *amicus curiae* is, by definition, a "friend of the court" — not merely an advocate for its own interests — and the scope of its participation should therefore be crafted to avoid any undue burdens or delays in the litigation.

II. CHARLOTTE'S THREE INITIAL REQUESTS FOR *AMICUS* PARTICIPATION SHOULD BE DENIED IN PART

Charlotte states that it currently "does not seek a broad order granting permission to participate generally," but instead "envision[s] making specific requests to participate, or responding to specific requests from the Special Master or the Parties, as the case progresses." City of Charlotte's Motion for Permission To Participate As an Amicus Curiae at 2 (Feb. 19, 2010) ("Mot."). Charlotte acknowledges that it will have to show that any such future request will "'add[]

value or net benefit to the resolution of this matter that the State parties would not provide.'" *Id.* at 8 (quoting No. 129 Report at F-2) (alteration in original).

Charlotte seeks a ruling that it may participate in three specific ways as *amicus*: participating in conferences, receiving service of all filings and other documents, and attending all hearings and depositions. Although South Carolina does not object to Charlotte's participation as a traditional *amicus curiae*, these requests go well beyond that traditional role and threaten to burden the proceeding and prejudice South Carolina, particularly with respect to scheduling conferences, deposition logistics, and confidentiality of discovery materials. Those burdens would only become more pronounced as Charlotte seeks in the future to expand the scope of its participation and as other *amici* seek to participate on the same terms as Charlotte. For the reasons explained below, Charlotte's motion should be denied in part.

First, "Charlotte requests permission to take part in the periodic conferences with the Special Master." *Id.* at 2. South Carolina disagrees. Receipt by Charlotte of a transcript of those conferences as posted on the Special Master's website in the normal course will be sufficient to allow Charlotte to monitor the progress of the case. Charlotte also can arrange to obtain a copy of transcripts from its *parens patriae*, North Carolina. Although Charlotte reasons that "[c]ourts often conduct status conferences and motion hearings in open courtrooms" (*id.*), the monthly telephone conferences in this case are more akin to in-chambers hearings, whether

in person or by telephone, to which the general public is not invited, even if they subsequently could gain access to a transcript.

But even if Charlotte were allowed to be present at (or on the phone for) those conferences, its participation should be limited to being "allowed to *hear* discussions during the telephonic conferences" or to respond to any direct inquiry from the Special Master, but not otherwise to have a speaking role as do the party States and the intervenors. *Id.* (emphasis added). In addition, the scheduling of those conferences — which already requires coordination among the Special Master and numerous attorneys, all of whom have crowded calendars — should not depend on Charlotte's availability. Requiring that the party States and the intervenors also accommodate the restrictions of the calendars for counsel for *amici* will make scheduling exponentially more difficult. For example, in recently attempting to schedule a meet-and-confer following the January 28, 2010 status conference, the party States and the intervenors agreed on a mutually acceptable date, only to find that counsel for Charlotte was unavailable. Events in this litigation should in no way be driven by whether Charlotte is available to attend; instead, consistent with Charlotte's analogy to attendance by members of the public, Charlotte should be required to conform its own calendar to the conference schedule.

Second, "Charlotte asks that it be served with all filings and other documents, notices, and correspondence served on or provided to the Parties by any Party or the Special Master." *Id.* South Carolina does not object to Charlotte receiving copies of *non-confidential* filings and correspondence in this case, but

submits that its *parens patriae*, North Carolina, should be the party to forward any such filings and correspondence to Charlotte. More generally, each party State should be responsible for forwarding any materials to *amici* on its respective side, and which it necessarily represents as *parens patriae*. In this way, the party States and the intervenors can maintain one service list for the litigation — rather than separate lists for confidential and non-confidential documents — and need not amend those lists each time an *amicus curiae* might seek to participate in the future. South Carolina notes that Charlotte also may readily obtain all filings with the Special Master in this case itself, by accessing the Special Master's public website.[3] Moreover, some of the materials produced in discovery in this proceeding are subject to confidential or even trade secret protection, such as the source code for the CHEOPS model developed by a third party and used by Duke in its river system modeling. That thirdparty software developer has insisted that distribution of its source code be made as narrow as possible, and a protective order still has not been finalized. The more *amici* potentially entitled to access such materials, including portions of any pleadings, expert reports, or testimony reflecting such confidential or trade secret information, the more difficult it will be to persuade such third parties willingly to produce such materials. A requirement that the party States and the intervenors maintain multiple service lists for confidential and non-confidential materials will only cause administrative burdens for differentiations that otherwise should not be warranted or necessary.

[3] Neither this Court's rules nor the Federal Rules of Civil Procedure require service of any documents on an *amicus curiae*. *See* Sup. Ct. R. 29.3 (requiring service only on a "party"); Fed. R. Civ. P. 5 (same).

Third, "Charlotte requests permission to be present at all hearings and depositions." *Id.* South Carolina does not object to Charlotte's attendance at *hearings* as a spectator, because such proceedings presumably will be no different from those in open court at which the general public may attend. However, for the reasons set forth above, scheduling of those hearings should not depend upon the availability of Charlotte's counsel, no more than they would depend upon the availability of any member of the public. Similarly, Charlotte should not have a speaking role at hearings, except insofar as the Special Master specifically grants Charlotte such a role, consistent with the normal practice at oral arguments before the Court and in the courts of appeals. *See*, *e.g.*, Sup. Ct. R. 28.4, 28.7; Fed. R. App. P. 29(g).

South Carolina also does not object to Charlotte's attendance at any depositions taken by a party of a Charlotte witness, where Charlotte's counsel represents that witness. If that witness has obtained her own counsel, South Carolina likewise does not object to that counsel's presence at the deposition, though counsel for Charlotte would then have no special reason for attending. But South Carolina objects strongly to Charlotte's proposal that it be guaranteed attendance — as a spectator or otherwise — at depositions of other fact and expert witnesses. In the first place, such attendance is unnecessary. As with the correspondence and filings in this case, Charlotte also can receive non-confidential versions of deposition transcripts from North Carolina, which should be sufficient to

permit Charlotte to monitor the case in order to identify any specific issues on which it might later propose to file a brief as an *amicus*.

Moreover, even assuming the party States and the intervenors would not have to schedule depositions to accommodate Charlotte's calendar (and, for the reasons set forth above, it would be unduly burdensome to require them to do so), permitting Charlotte to attend depositions in person would burden the parties by creating unnecessary and unwieldy logistical difficulties, such as increasing the size of any needed space and requiring additional time to allow Charlotte's representatives to leave the room during any questioning concerning confidential materials. Those difficulties would then be magnified to the extent additional *amici* might be permitted to participate later in the case.

In all events, counsel for Charlotte should have no right to ask questions at depositions, other than depositions of Charlotte witnesses, where counsel for Charlotte represents the witness. Such questioning would extend the length of the depositions or improperly reduce the time available to the party States and the intervenors for questioning. Moreover, to the extent North Carolina finds it useful, it can confer with Charlotte's counsel in advance of a deposition regarding potential lines of questioning, or by telephone during breaks in the deposition. Allowing such conferences to occur during the deposition will simply slow down the course of the depositions.

In an analogous decision, the special master in *Alaska v. United States* denied the request of "Native Alaskan Amici" to participate during discovery in a

site visit — even at their own expense — explaining that the "Special Master does not believe that the presence of additional persons will materially advance his understanding of the issues in the case." Case Management Order No. 14, ¶ 2(g), *Alaska v. United States*, No. 128, Orig. (June 3, 2002), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/cmo-14.pdf. In the same way, live attendance by Charlotte's counsel at depositions will not increase the Special Master's understanding of the case any more than would Charlotte's receipt of deposition transcripts, which will enable Charlotte adequately to monitor the case.

Charlotte has identified no authority for permitting *amici* to attend depositions. Although Charlotte correctly notes that the special master in *Nebraska v. Wyoming* permitted *amici* "to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon a showing of good cause," there is no indication that *amici* were permitted to attend depositions in that original action. Special Master, First Interim Report at 6, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) (cited in Mot. at 6), *available at* http://www.supremecourtus.gov/SpecMastRpt/ORG%20108%20061489.pdf. Moreover, the special master in that case denied intervention to the *amici* in order "to protect the parties to the action against the prejudice and additional litigation obligations (*e.g.*, discovery, experts and additional evidence gathering) that might be caused by adding intervenors." *Id.* at 7. Here, too, the Special Master should protect the parties from burdens that *amici* can place on the discovery process by prohibiting their live attendance at depositions, providing

instead that they may receive non-confidential deposition transcripts from their home State.

Finally, Charlotte apparently envisions filing additional motions regarding the scope of its participation, "making specific requests to participate, or responding to specific requests from the Special Master or the Parties, as the case progresses." Mot. 2. Responding to multiple such motions — whether from Charlotte or other, future *amici* — will prove burdensome to South Carolina, North Carolina, and the intervenors, distracting their attention and efforts from developing the merits of the case and presenting it to the Special Master. Therefore, South Carolina respectfully requests that the Special Master, in ruling on the three specific requests Charlotte has presented, also discuss more generally the standards that will govern *amicus* participation in this matter. Such clear guidance now would reduce, if not eliminate, the need for burdensome and time-consuming disputes about the scope of such participation throughout the course of this case.

CONCLUSION

The Special Master should deny Charlotte's motion to participate as an *amicus curiae* in part and should limit Charlotte's current participation to (1) receiving transcripts of monthly status conferences; (2) obtaining non-confidential correspondence, filings, and deposition transcripts from its *parens patriae*, North Carolina; and (3) attending public hearings as a spectator, unless specifically granted leave to participate in argument by the Special Master.

Respectfully submitted,

DAYID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
ROBERTD. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
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LEIGH CHILDS CANTEY
Assistant Attorney General
ELIZABETH H. SMITH
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

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