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July 30, 2010

Via E-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: South Carolina v. North Carolina, No. 138, Orig.

Dear Special Master Myles:

This letter responds to your request at the last status conference for additional letter briefs on bifurcation, and specifically to your e-mail of July 22, 2010, in which you indicated those letter briefs were to assume the trial would not be bifurcated and were to focus on phased discovery or a clearly delineated summary judgment phase that would include the threshold question of injury.

Like North Carolina, Intervenors view the question of bifurcation of a trial as premature until discovery and summary judgment have been completed. We understand your presumption to be that the trial will not be bifurcated; nothing in this letter is inconsistent with that plan, although we believe the question can be deferred. This case is merely at the discovery stage and the Parties have been asked by you to furnish their views and proposals on whether discovery should be conducted in phases or be limited to or focused on particular issues. See, e.g., Fed.R. Civ.P. 26(f)(3)(B). This letter is intended to assist you in deciding how to proceed pre-trial in order to reach efficiently a Report and Recommendation to the Supreme Court on the merits.

For the reasons that follow, Intervenors believe it would be a mistake for Parties to proceed through discovery on all the many issues raised by the case with only the usual litigation parameter that anything likely to lead to admissible evidence is fair game. That would be uniquely unworkable in a case such as this one. Instead, Intervenors request that the Special Master establish a clear series of steps designed to focus and marshal the factual and legal issues in a way likely to facilitate an efficient and expedient resolution. To that end, Intervenors suggest, initially, there should be (i) an identification of the issues that plainly fall within what has been described as "Phase One" (discussed below); (ii) discovery on the Phase One issues; and then (iii) dispositive motions on those issues, including a decision about the States'

respective burdens of proof. After the Special Master decides these Phase One dispositive motions, the Parties will know the scope of the equitable apportionment phase, if any, defined by your decision(s) on South Carolina's allegations that it has suffered substantial injury caused by North Carolina.

This case should then move into Phase Two consisting of: (iv) discovery framed by the adjudicated threshold injury, the scope or content of which includes any benefits to North Carolina that outweigh South Carolina's alleged injury, followed by application of the equitable apportionment factors; and then, finally, prior to any trial, (v) dispositive motions resulting from Phase Two.

The Parties notably agree as to the scope of Phase Two: North Carolina will seek to show by clear and convincing evidence that the benefits of its uses outweigh the harms caused to South Carolina by such uses; to the extent North Carolina cannot prevail on its benefits, you will apply the equitable apportionment factors identified by the Supreme Court to the facts offered by the Parties which are admitted into evidence. To the extent there remain disputed questions of fact and/or law as to steps (iv) and (v) above, they will have at least been well defined by your rulings, facilitating a more focused trial.

This staged approach is sensible and essential to an efficient and just disposition. And, practically, it is the way this case has already been proceeding since South Carolina filed its Motion for Leave to File a Bill of Complaint more than three years ago. Over this span of time, while the Parties have litigated the question of intervention and whether South Carolina's claims are poorly defined and seemingly far-reaching, the Special Master has not been asked to referee any discovery dispute. The staged approach has apparently succeeded. We do not see a sound basis for jettisoning it now, well into the case.

Reversing the current phased approach and permitting discovery to proceed simultaneously on all the factual and legal issues implicated by the Complaint would render the case unmanageable. Before South Carolina has even satisfied the threshold question of injury, the Parties would be mired in the boundless pursuit of facts, exploring, prematurely and (to the extent that Defendant and Intervenors prevail in whole or in part in their dispositive motions) unnecessarily, benefits to North Carolina and the equitable apportionment factors under various presuppositions about the nature of South Carolina's alleged injury.

It may be, for example, that South Carolina will abandon prior to Phase Two or lose on summary judgment issues like injury to aquatic life, or harm to water quality or recreational uses, or authorized but not utilized withdrawals from the River, in which event the Parties should not expend time and expense pursuing discovery and expert testimony into North Carolina's benefits and the equitable apportionment factors on these issues. Likewise, North Carolina and/or Intervenors may abandon prior to or lose at summary judgment issues like the contributory value to South Carolina of inter-basin transfers from the Catawba River into the Yadkin-Pee Dee River which flows into South Carolina, as a reduction to South Carolina's alleged threshold injury, in which event it would be a waste of public time and money to pursue discovery on Phase Two issues relating to the Yadkin-Pee Dee. Phased discovery and phased dispositive motions are

optimal ways to reduce if not eliminate slogging through discovery on issues that realistically may never need to be resolved by the Special Master and the Court.

Although South Carolina has now recanted its previous strong endorsement of a phased approach, the mound of briefing by the States and Intervenors on this exact question identifies an identical position on burden of proof (clear and convincing evidence), and a common, almost identical position on the scope of both Phases. From the written submissions of all the Parties, it is evident there is only a single material point of divergence: whether South Carolina bears the burden of proving that *specific* injuries it has suffered are traceable to *particular* uses of water in North Carolina. And on that one point of divergence, even South Carolina has stated it is not necessary for you to decide at this time and the point can be more completely briefed and argued at summary judgment on Phase One. See February 9, 2009 status report of South Carolina.

The procedural bases for implementing the current approach may be found in Federal Rule of Civil Procedure 42(b) (which has already been briefed) and Federal Rule 26(f)(3)(B) referenced above. As Rule 26(f)(3)(B) illustrates, discovery in phases or limited to particular issues is not an aberration; it is mandatory that every discovery plan state the parties' views and proposals on this topic.

Phase One

South Carolina has now acknowledged that it claims injury and seeks apportionment only at times of low flow, including drought. (April 23, 2010 Hearing Tr. pp. 7, 9, 11, 12.) It contends that its only burden in Phase One is to show that at times of low flow, the "*available* water supply is insufficient to meet existing needs of water users in South Carolina," resulting in significant harm. SC Bifurcation Br. 14 (March 12, 2010) (emphasis added). (South Carolina said it was North Carolina's authorized uses in times of low flow which were harmful to South Carolina. See April 23, 2010 Hearing Tr. pp. 7, 11, 12.) Thus, under South Carolina's characterization of its injury, the following topics are relevant to Phase One: "[i] the aggregate water supply entering South Carolina and [ii] the ability of that aggregate water supply to meet existing South Carolina needs." *Id.* In addition, given South Carolina's injury, the Parties would conduct discovery on whether the harms resulting from insufficient water are "of a serious magnitude" as required by the Court's cases. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Fundamentally, while North Carolina and Intervenors agree that the foregoing topics are relevant (though certainly not dispositive) in Phase One, they assert, to carry its clear and convincing burden in Phase One, South Carolina must also show that *water use in North Carolina is causing South Carolina's harm*. NC Bifurcation Br. 3-4 (March 12, 2010). Hence, the Parties will need to conduct Phase One discovery on additional topics related to whether North Carolina has *caused* South Carolina's alleged harms.

For example, South Carolina must show that its harm is caused by uses in North Carolina, not just by drought itself. If North and South Carolina are required by law and agreement to conserve water consumption in times of low flow, including drought – that is, if *both* States are similarly unable to continue their existing, normal consumption and are both

suffering harms at the hands of nature – then South Carolina's harm is not caused by North Carolina but by the drought. To present this question to you for decision, the Parties would have to also conduct discovery on "[i] the aggregate water supply entering [North] Carolina and [ii] the ability of that aggregate water supply to meet existing [North] Carolina needs" in times of low flow, including drought. In other words, the Parties would conduct discovery on the effect of low flow, including drought, on existing reasonable water uses and the amount of water used in each State to determine whether uses in North Carolina are causing the alleged harm in South Carolina (and, if so, how much of that harm).

Additionally, South Carolina must show in Phase One that its harm is not being caused by its own failure to take reasonable measures to conserve and/or store water. This is not an inquiry into the "benefits and efficiencies of water uses within South Carolina, as well as South Carolina's efforts to find alternative sources of water." SC Bifurcation Br. 15. It is an inquiry into whether South Carolina has a self-inflicted harm avoidable through easy, relatively inexpensive steps which would minimize if not eliminate the harms it alleges at times of low flow, including drought. In Phase One, the Parties would conduct discovery on the topics of conservation, storage and other measures in times of low flow, including drought, and how those measures affect water supply and use under those conditions.

There may be other topics related to the question of whether North Carolina has caused the injuries claimed by South Carolina. Thus far, however, as noted above, the Parties have conducted Phase One discovery without any disputes related to the line between the Phases. The Parties should be able to continue in this manner under the existing Case Management Order, conclude flexible Phase One discovery and present the legal question of whether South Carolina has carried its burden on Phase One to you in the context of cross-motions for summary judgment.

Substantial cost and efficiency inevitably results from conducting a Phase One limited to the topics described above. If South Carolina is unable to carry its burden of presenting clear and convincing evidence of serious harm caused by North Carolina, there will be no need for the massive, expensive discovery of Phase Two that is set forth below. For example, North Carolina believes that it will be able to show that any harms suffered by South Carolina are caused by drought, not by uses in North Carolina, and, in any event, that any increment of South Carolina's harm that might be caused by North Carolina is of insufficient magnitude to allow the case to move forward.

Moreover, if the Special Master determines that South Carolina has carried its burden of proof in Phase One, she will also have determined that South Carolina has made a showing of specific serious injuries caused by uses of water in North Carolina at times of low flow, including drought. This determination is required for North Carolina to proceed in Phase Two and attempt to demonstrate that the benefits obtained from the uses of water that injure South Carolina outweigh those harms. In addition, if the Special Master decides that an equitable apportionment must be made, her determination of the South Carolina injuries caused by North Carolina will necessarily cabin the Parties' discovery on the specific equitable apportionment factors. *See supra.* Finally, the Special Master's determination of whether South Carolina has carried its burden in Phase One will provide all Parties with substantial information about the

merits of their respective cases, facilitating settlement discussions in this matter. A free-for-all through discovery provides little insight into the concerns and interests of the Parties in the River.

Phase Two

The Parties appear to be in agreement that numerous topics on which massive discovery would be required are relevant solely to a second stage that occurs only after you have decided that South Carolina has carried its burden in Phase One. Accordingly, at a minimum, the Special Master should postpone discovery on this set of topics until after a first phase that is followed by cross-motions for summary judgment on the question whether South Carolina met its burden.

Although the Parties do not agree that all topics listed below are material, they do agree that these topics would be addressed in Phase Two:

a. The cataloguing of the specific uses of the Catawba's waters in North Carolina, historically, today and as predicted for the future.

b. The determination of the value to North Carolina of the historic, current and future uses of the Catawba's waters in North Carolina.

c. The value of enhanced flow in other South Carolina river basins resulting from transfers from the Catawba,

d. The value of electricity generated in North Carolina for South Carolina customers (offset by the value of electricity generated in South Carolina for North Carolina customers),

e. The value of water consumed in North Carolina by South Carolinians (offset by water consumed in South Carolina by North Carolinians),

f. The value of North Carolina water sold to South Carolina for consumption there,

g. The determination of the value to South Carolina of incremental increases in flow, historically, today and as predicted for the future.

h. The evaluation of the comparative value of the loss of Catawba waters in North Carolina and benefit of increased Catawba water in South Carolina, historically, today and as predicted for the future.

i. The evaluation of the existence and costs of alternative sources of water for North Carolina and South Carolina, including (i) increased storage, (ii) conservation, (iii) efficient use of inter-basin transfers, and (iv) improved wastewater treatment.

The discovery topics just described cover massive amounts of documents and data. Critically, their examination will also require extensive and expensive expert analysis. None of the Parties believe that these topics are relevant to a determination of whether South Carolina has carried its burden in Phase One. Because its burden in Phase One is clear and convincing

evidence, South Carolina is likely to have difficulty reaching Phase Two, which is another compelling reason for phased discovery and phased dispositive motions. And, as noted, whether or not North Carolina and Intervenors prevail in Phase One, postponement of discovery on these topics will have provided tremendous potential cost and efficiency savings to all Parties, even South Carolina.

Even if South Carolina carries its burden in Phase One, postponing discovery on the foregoing list of topics results in no loss of efficiency. The Case Management Order allows discovery during Phase One of topics related to Phase Two when it would be efficient to do so. And, there is indisputably substantial, expensive discovery – such as expert discovery on the valuation of uses in North Carolina and the comparative value of uses in North and South Carolina – that does *not* overlap with any Phase One issue and thus can be postponed without any inconvenience or loss of efficiency. Clearly, South Carolina benefits from well-defined discovery during Phase Two, rather than early pursuit of every imaginable factual scenario of harm that could conceivably be caused by North Carolina.

In sum, the Special Master should allow the case to continue under the current Case Management Order with discovery proceeding in phases followed by phased dispositive motions. Regardless of whether the trial of this matter is bifurcated, discovery and dispositive motions in phases achieves efficiency and enhances good stewardship of litigation resources, not to mention public funds.

Respectfully submitted,

DRISCOLL SHEEDY, P.A.

James W. Sheedy

cc: 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 July 30, 2010, I caused copies of the Letter Brief on Bifurcation Intervenors' Letter to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those parties set forth in the service list attached to the Joint Case Management Plan as Appendix A.

Respectfully Submitted,

By: _____

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JULY 30, 2010