STATE OF NORTH CAROLINA
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Via Email and U.S. Mail
Kristin Linsley Myles, Special Master
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, California 94105-2907

Re: *South Carolina vs. North Carolina*, No 138, Orig.
North Carolina's Reply Brief regarding First Amended CMP

Dear Special Master Myles:

North Carolina respectfully submits this letter brief in reply to South Carolina's October 20, 2010 opening brief ("SC Br.") regarding disputed issues concerning the First Amended Case Management Plan ("First Amended CMP"). Following is a specific response to each of the arguments raised by South Carolina's opening brief in the order presented therein.

1. South Carolina's Request to Bifurcate Discovery is Inconsistent With the Special Master's August 20, 2010 Oral Ruling (§ 5.2)

It is ironic that South Carolina, after vigorously opposing bifurcation on the threshold issue of whether it can prove North Carolina caused it injury, and receiving a ruling generally in its favor on that specific issue, now seeks to impose a bifurcated discovery schedule. South Carolina seeks to exclude two specific issues from current discovery: 1) the benefits to each State resulting from the use of water to generate power and 2) the benefits to each State from water used in another basin. However, the Special Master stated explicitly during the August 20, 2010 telephone conference that any Party may conduct discovery on *any* aspect it considers relevant to the issues included in the trial on South Carolina's entitlement to a remedy. 8/20/2010 Tr. at 11. As such, the Special Master *has already ruled* that North Carolina is allowed to complete discovery and present evidence during trial on all issues, including operation of the reservoirs, generation

of electricity, and the benefits of long-term allocation of water in the River both within and without the River Basin.

North Carolina further objects to South Carolina's proposal because its revisions are based on an assumption that trial "will be preceded by summary judgment motions . . . on whether South Carolina has met its threshold burden to show injury." SC Br. at 5. North Carolina submits that while the Parties and the Special Master agreed that motions for summary judgment may be filed at any time, the Special Master did not establish a schedule contemplating that the threshold issue would be decided by motion. The only mention in the First Amended CMP of summary judgment is in the agreed-upon text that "summary judgment may be filed at any time." First Amended CMP § 14. And, although North Carolina may test South Carolina's proof by filing a motion on the threshold issue, there is no reason to conclude that the threshold issue will be determined on such a motion. On the contrary, the Special Master's comments indicate a ruling on the threshold issue may well follow the trial on South Carolina's entitlement to a remedy due to the interlocking aspect of equitable apportionment issues and threshold issues. Aug. 20, 2010 Tr. at 17-18.

The Special Master has explained clearly that the equitable apportionment analysis will be part of the trial on South Carolina's entitlement to a remedy. 8/20/2010 Tr. at 13-14. Therefore, the omission from South Carolina's proposed discovery schedule of a time for discovery on its proposed deferred issues leaves a massive hole that cannot be cured by reference to a future case management plan (as yet unwritten). South Carolina's proposed deferred issues are part of the equitable apportionment analysis – specifically, balancing the harms and benefits of various consumptive uses. Thus, discovery on those two issues must be made before the trial on South Carolina's entitlement to a remedy. As long as South Carolina's proposed language fails to provide a specific time for discovery on its proposed deferred issues before trial on South Carolina's entitlement to a remedy, South Carolina's proposal is incomplete, unworkable, unfair to North Carolina and should be rejected. Indeed, the schedule proposed by South Carolina is objectionable in that it *fails to provide any time* for discovery on its proposed deferred issues before trial on its entitlement to a remedy. Thus, South Carolina's request to defer discovery on certain issues and to establish a bifurcated discovery schedule should be denied.

2. South Carolina's Proposed 15-month Period for Fact Discovery is Inadequate (§ 5.4)

South Carolina asserts that 15 months is "a reasonable amount of time . . . to develop the factual record necessary to determine South Carolina's entitlement to a remedy." SC Brief at 8. This bald statement completely ignores the fact that South Carolina's proposal omits a large portion of the fact discovery required for a trial on South Carolina's entitlement to a remedy. Once these issues are included in the

Proposed First Amended CMP, the 15 month timeframe for discovery proposed by South Carolina is wholly inadequate.

As set forth above, the Special Master's oral ruling established that an equitable apportionment analysis is part of the trial on South Carolina's entitlement to a remedy. South Carolina does not dispute North Carolina's claim that discovery on the South Carolina's proposed deferred issues will be substantial and will include "layers of discovery and expert analysis and scores of witnesses." SC Brief at 6 *quoting* NC's Bifurcation Br. at 12 (March 12, 2010). Although South Carolina asserts that 15 months is a reasonable amount of time for discovery before trial, it is inconsistent and unreasonable for South Carolina to suggest that the same 15-month period is adequate for fact discovery *excluding* the proposed deferred issues and is also the right amount of time to conduct fact discovery *including* the proposed deferred issues. South Carolina's assignment of the same time frame for two discovery periods that are very different in scope reveals the inadequacy of its proposal. North Carolina's proposal, which anticipates that discovery will take approximately three years, is based on a careful assessment of what will be required before the trial on South Carolina's entitlement to a remedy.

South Carolina also takes issue with North Carolina's proposal that the fact discovery period be flexible and suggests any period set for fact discovery include a "firm end date, subject to extension only upon a showing of good cause." SC Br. at 9. North Carolina does not anticipate that any Party will drag out the discovery period as South Carolina suggests. SC Br. at 8-9. Yet, North Carolina is well aware of the way in which discovery in a complex case such as this may take longer than expected and how unexpected roadblocks can arise when conducting discovery on the broad scope of issues that will be part of the equitable apportionment analysis for the portion of the Catawba Wateree River Basin at issue in this litigation. Thus, North Carolina suggests that the 36-month period for fact discovery could be extended at the Special Master's discretion and considers the phrase "for good cause" an unnecessary addition to the language in the proposed First Amended CMP.

3. South Carolina's Limitation on the Number of Interrogatories is Unreasonable (§§ 6.2 and 6.3)

South Carolina's suggested language limiting the number of interrogatories available for discovery is not reasonable given the facts of this case. On the one hand, South Carolina proposes that each side be limited to 40 contention interrogatories and 100 fact interrogatories. (SC Br. at 9) On the other hand, South Carolina proposes that "50 contention interrogatories and 120 fact interrogatories per side should be sufficient, even if discovery concerning electricity generation and other basins is not deferred." (SC Br. at 10) The addition of 10 or 20 interrogatories is insufficient to conduct the necessary discovery in this case when all Parties acknowledge that discovery on South Carolina's proposed deferred issues will be

substantial. It makes even less sense to assert that discovery in this complex case, which involves multiple equitable apportionment factors, covers a substantial area, and includes a great variety of consumptive uses by multiple parties, can be accomplished with the limited number of interrogatories proposed by South Carolina. North Carolina's proposal for 200 fact interrogatories and 75 contention interrogatories will provide a more realistic opportunity for the Parties to do the necessary discovery in this case.

South Carolina seeks to engage the Special Master's sympathy by complaining that North Carolina's proposal will allow North Carolina and Intervenors to serve 450 interrogatories on South Carolina. SC B. at 9-10.[1] South Carolina's complaint is unrealistic and is based on the assumption that Defendant North Carolina and the Intervenors's have exactly the same interests. As recognized by the United States Supreme Court, neither State can adequately represent the Intervenors' interests. For this reason, each Party should be allowed to notice its own discovery and each Party State should be entitled to the same amount of discovery. To the extent that North Carolina and the Intervenors' interest converge, North Carolina, Duke and CWRSP will endeavor, as they already have been doing, to coordinate discovery requests and reduce the burden on all parties. North Carolina anticipates this practice will continue. However, at its core this is a case prosecuted by one sovereign against another. North Carolina should not be deprived of a right to defend itself that is at least equal to that of the other sovereign who initiated this litigation over North Carolina's objection.

Should the interests of North Carolina and the Intervenors diverge, North Carolina may very well be subject to the same number of interrogatories that could be directed at South Carolina. But it does not complain about the volume of such potential requests because in a matter of such magnitude, gravity and consequence as this, it is inconceivable that full and proper adjudication of the issues should be subjugated to South Carolina's unsupported assertions that the case does not need robust discovery mechanisms. The issues in this litigation involve many types of uses of the River, many different users of the water in the River, and are far-reaching, inclusive, and broad. Given the complexity of this case, deviating from the number of interrogatories contemplated by Federal Rule of Civil Procedure 33(a)(1) is appropriate and necessary.

In arguing for bifurcation, North Carolina described in detail the time consuming and expensive discovery which could be deferred if discovery was bifurcated. NC Br. (Mar. 3, 2010) at 6-17. This additional discovery includes the following:

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[1] This number (450 interrogatories) which may be directed against either Party State is the sum of adding 200 fact interrogatories (amount for a Party State), 75 contention interrogatories (amount for a Party State), and 100 fact interrogatories and 75 contention interrogatories (combined total allowed for Intervenors).

1. Valuation of established water usage,
2. A comparison of the number of persons served in each State from the River,
3. Identification and valuation of other water sources in South Carolina and North Carolina, (including increasing storage capacity, increasing water supply through IBTs, and modifying treatment processes and storage of treated water),
4. Analysis of water usage in North Carolina that benefits South Carolina, (including electricity generated by water consumption in North Carolina, the amount of water consumed in North Carolina by South Carolina commuters, and water use at the border of the two States),
5. Benefits to South Carolina resulting from IBTs at issue in this litigation,
6. An evaluation of cost and feasibility of conservation efforts, and
7. An analysis of historical and projected future water uses.

Given the August 20, 2010 oral ruling denying bifurcated discovery, these issues will be included in the discovery covered by the proposed First Amended CMP. North Carolina's review of these issues led it to conclude that completing the discovery required to prepare for trial on all threshold issues and equitable apportionment factors will include an amount of discovery that is ten times greater than that contemplated by the original CMP. Based on its assessment of the actual needs of the case, North Carolina proposed a realistic increase in fact interrogatories from 75 to 200 for each Party State. Likewise, increasing the number of contention interrogatories from 30 to 75 per Party State is consistent with the needs of the case.

Any concern that discovery will be repetitive or unnecessary can be addressed by the receiving party through a motion for protective order. Given this protection, there is no need to preemptively restrict the number of interrogatories available to each Party.

Moreover, during negotiation by the Parties of the original CMP, South Carolina agreed that each Party State would be allowed 75 fact interrogatories and 30 contention interrogatories in Phase I of a bifurcated discovery schedule (which did not include equitable apportionment factors). CMP at § 5.2.1. South Carolina's present proposal (100 fact interrogatories and 40 contention interrogatories per side) will result in North Carolina receiving fewer interrogatories under the proposed First Amended CMP than it received under the original CMP even through the discovery to be conducted under the First Amended CMP includes more issues. South Carolina's proposed limitation on the number of interrogatories

allowed by the First Amended CMP is an effort to gain a litigation advantage over North Carolina rather than address the actual discovery needs in this case and should be rejected.

4. South Carolina's Limitation on the Number of Fact Witness Depositions is Unreasonable (§ 6.6.1)

South Carolina argues that the number of depositions provided by North Carolina will result in a "lopsided ratio" burdening South Carolina "with three times the number of depositions that South Carolina is permitted to take." SC Br. at 11. Once again South Carolina's argument incorrectly assumes that Defendant North Carolina and the Intervenors's have exactly the same interests. For the reasons explained in detail in Section 3 above and incorporated herein by reference North Carolina asserts that each Party should be allowed to notice its own depositions and each Party State should be entitled to the same number of depositions. Under North Carolina's proposed language, it, like South Carolina, is only entitled to take 150 depositions. Since there are multiple parties, each Party, including both South Carolina and North Carolina, will be in the position of defending depositions noticed by each of the other Parties. However, such depositions will not be duplicative since under the terms of the proposed First Amended CMP, duplicative discovery is not allowed. South Carolina is not any worse off than any other Party under North Carolina's language. The same cannot be said for North Carolina if South Carolina's proposed language is implemented.

In addition, South Carolina suggests that the 300 hours provided by its proposed language is sufficient to "allow for a full exploration of the factual issues relating to this case." SC Br. at 10. South Carolina's assumption is incorrect. Given North Carolina best assessment of the needs of the case, 300 hours of deposition time is not enough. However, South Carolina's proposal is actually more restrictive. Under South Carolina's proposal each side will be limited to only 30 witnesses. Already the Parties have identified approximately 160 fact witnesses. When the count is expanded to include entities already subpoenaed in this case, this number increases to around 200 identified witnesses. Under South Carolina's proposal the Parties would be unable to depose each of the fact witnesses already identified in the case. Given that written discovery is not yet complete, it is probable that additional witnesses will be named. Thus, South Carolina's limiting language will interfere with necessary discovery and should be rejected.

South Carolina suggests that if the Parties cross notice depositions, the cross-noticed deposition will not be counted against the 30 deposition per side limitation imposed by South Carolina's proposed language. SC Br. at 10. However, South Carolina misreads the proposed First Amended CMP, which only provides that any Party who cross notices a deposition will not have that deposition counted in its total number of depositions. § 6.6.1 The language does not prevent the deposition from counting against the Party who first notices the deposition. Thus, this

language does not solve the problem created by South Carolina's proposed language limiting allowed depositions to 60 in number when over three times that number of fact witnesses have already been identified in the case.

South Carolina also suggests that the language proposed by North Carolina is objectionable because it will result in more than 6000 hours and over two years of depositions. SC Br. at 11. In making this objection, South Carolina assumes there will be a single deposition track and that each deposition will use up the entire 10 hours allotted for each it. Such assumptions are invariably inaccurate. Undoubtedly the Parties will conduct multi-track discovery and will prepare for and depose more than one witness at a time. Moreover, it is unrealistic to suggest that every deposition will take exactly 10 hours; most will conclude in far less than 10 hours.

In support of its position South Carolina arbitrarily points to a scheduling order in another case: *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 DLC, 2004 WL 802414 at *2 (S.D.N.Y. Apr. 15, 2004). The scheduling order in that securities litigation is not instructive here given the different needs of each case. Furthermore, the number of witnesses listed in each case is not the same and the limitation on depositions in that case does not include depositions allowed of individual claimants. The issue here should not be determined by what one district court judge did under manifestly different facts. Instead, the Special Master should consider whether the proposed language sets aside an appropriate number of depositions for discovery in this complex litigation. Given the number of witnesses already identified by the Parties, it is apparent that North Carolina's proposed language is consistent with the need for discovery in this case. South Carolina's proposed language is not and should be rejected.

5. South Carolina's Limitation on Requests for Admission is Unreasonable (§ 5.3.9)

South Carolina argues that because the Special Master can limit requests for admissions, she should do so. This argument is inconsistent with South Carolina's own concession that "if used effectively, requests for admission can narrow the issues in dispute and serve to streamline trial." SC Br. at 13.

As set forth in the original CMP, § 4.3, the Parties have already agreed to the terms of Federal Rule of Civil Procedure 36 which does not impose any limit on the number of requests which can be used in the litigation. South Carolina has not provided any reason to change this agreement. Furthermore, if any Party serves requests for admission that "bog down discovery proceedings and delay an ultimate resolution," S.C. Br. at 13, a motion for protective order can address and resolve such a problem. Thus, there is no reason to modify the terms of the CMP relating to requests for admissions and South Carolina's proposal should be rejected.

6. South Carolina's Proposed Language Regarding § 5.7

South Carolina's choice of language to convey that the Parties have agreed "to endeavor not to serve duplicative discovery" is duplicative and does not convey the change in the Intervenors' circumstances since entry of the CMP. North Carolina recognizes that the dispute over this section is more form than substance. As stated previously, North Carolina accepts the Intervenors' position in response to South Carolina's proposed language on this issue.

7. South Carolina's Proposal Regarding When to Submit Expert Discovery Schedules Would Result in Delay (§ 5.5)

One of the prime, continuing disputes in this matter is South Carolina's steadfast refusal to disclose essential theories of its case by hiding behind the claim that these are expert-type materials. Putting aside the question of whether South Carolina was remiss in filing its Complaint in the first place if it did not already have available witnesses with well-formed opinions supporting its allegations, South Carolina is now attempting to forestall even *the development of a schedule* for disclosure of its experts' opinions. After well-over three years of litigation, it is remarkable to say the least that South Carolina remains so reticent to even discuss a schedule for expert disclosures.

North Carolina disagrees with South Carolina's assertion that the Parties should delay submitting a schedule for expert discovery until fact discovery is almost complete and respectfully requests the Special Master require the Parties to submit a schedule for expert discovery within six months of the date the First Amended CMP is entered. Delays in the litigation would result if the Parties do not begin contemplation and implementation of a schedule for expert discovery after the First Amended CMP is signed by the Special Master.

North Carolina's requested language is based on the history of the case. Initially, South Carolina objected to providing initial disclosures in this case and suggested North Carolina wait until South Carolina provided responses to contention interrogatories to learn more about the claims in the Complaint. When the time came for South Carolina to respond to contention interrogatories, it again deferred its response on certain issues by responding that it would disclose its position when it served expert reports. Given South Carolina's general and specific objections to providing basic information about its claims on the grounds that it is relying on its experts to answer those basic questions and its expert reports are not yet due, it is imperative that the Parties have the opportunity to negotiate, sooner rather than later, a schedule for when expert reports will be due. Beginning these discussions as soon as reasonably possible, as North Carolina suggests, would significantly move this case along by establishing the times and terms under which South Carolina finally would be required to provide full disclosure of the theories and conclusion that it should have already known when it filed its Complaint.

8. North Carolina's Proposed New Section Relating to Contention Interrogatories is Consistent with the Procedural History (§ 6.1)

South Carolina characterizes North Carolina's proposed language in § 6.1 as an attempt to "pre-judge a pending discovery dispute." SC Br. at 16. North Carolina disagrees with this assessment of the purpose of the proposed language. North Carolina is not requesting the Special Master "pre-judge" any existing discovery dispute. However, North Carolina does not disagree that specific discovery disputes between the Parties are pending and will be resolved, if necessary, on motions to compel.

North Carolina does contend that the existing discovery dispute suggests in part that South Carolina is resisting the intended use of the contention interrogatories. Therefore, North Carolina suggests this general section be added to the First Amended CMP to reflect that South Carolina had originally suggested that responses to contention interrogatories be used in place of initial disclosures as a means for South Carolina to provide information regarding its claim. Specifically, South Carolina had indicated in arguing against North Carolina's request that South Carolina provide a Statement of Particularized Harm that it would provide *through responses to North Carolina's contention interrogatories* "information on the interbasin transfers, consumptive uses, and other activities in North Carolina that South Carolina believes that its experts will be able to demonstrate caused one or more of the identified harms." SC Revised Proposal for Phase One Discovery (July 3, 2008).

Since the original CMP adopted South Carolina's suggested method for providing information regarding the cause of its injury *in advance of expert reports*, North Carolina submits that the First Amended CMP should be revised to achieve this intended use in light of the fact that the original CMP provided for the use of contention interrogatories in place of a requirement that South Carolina provide initial disclosures. Including this language in the First Amended CMP would remind the Parties of the intended purpose of the contention interrogatories and thereby guide the Parties' use of this discovery tool.

9. South Carolina's Proposal Requiring Fact Discovery to Precede Expert Discovery Would Deprive North Carolina of its Right to Target Fact Discovery to South Carolina's Expert Opinions. (§ 5.4)

Since the beginning of this litigation, North Carolina has requested South Carolina provide information regarding its claim that North Carolina caused it substantial injury because South Carolina has asserted that the IBTs specifically mentioned in the complaint are only examples of North Carolina's alleged over consumption. Most recently, this request was made through North Carolina's request for South Carolina's responses to contention interrogatories. Generally, and in response to specific contention interrogatories, South Carolina objected to

providing information in response to certain of the contention interrogatories and stated that some of the information requested would be provided later through its expert reports. North Carolina's proposed language is designed to guard against the eventuality that South Carolina will not provide such information until after the close of fact discovery. If North Carolina only learns the basics of South Carolina's claims after receiving South Carolina's expert reports after the time has passed to conduct fact discovery, North Carolina would be deprived of an opportunity to target its fact discovery to respond to South Carolina's claims. Given the unresolved issues regarding when South Carolina will provide discovery on all aspects of its claims, the language proposed by South Carolina does not sufficiently protect North Carolina and Intervenors from the possibility that they will need to take additional fact discovery after receiving South Carolina's expert reports. Thus, South Carolina's proposed language should be rejected.

South Carolina's suggestion that its "good cause" language will provide the necessary protection against such an eventuality is inaccurate. The Parties should not have to file a motion in order to receive further discovery it has been repeatedly promised by South Carolina would be forthcoming. This is especially true given the complexity of the claims. In this case, it is likely that information may be provided during fact discovery as part of the millions of pages of documents and electronic files produced, but that the significance of the information will not be apparent until such time as South Carolina provides its expert reports. Given this possibility, the language suggested by North Carolina fairly protects each Party and should be adopted.

CONCLUSION

For the reasons set forth above, North Carolina respectfully requests that the Special Master adopt its proposed language for the First Amended CMP on all disputed issues.

Very truly yours,

Mary L. Lucas

for James C. Gulick
Senior Deputy Attorney General

cc: All Counsel of Record (via email only)