

No. 138, Original

In the
SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff

v.

STATE OF NORTH CAROLINA,

Defendant

OFFICE OF THE SPECIAL MASTER

Case Management Order No.9
Regarding Case Management Plan

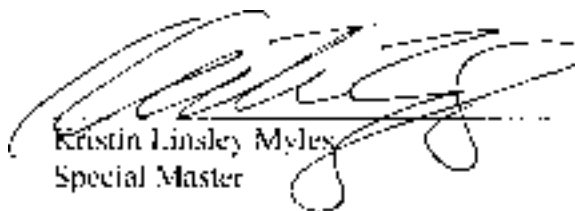
January 7,2009

WHEREAS the parties have agreed upon the form of a Case Management Plan to govern certain aspects of this action; and

WHEREAS the form of the Case Management Plan has been reviewed by the Special Master and discussed with the parties;

NOW THEREFORE, it is hereby ORDERED that the Case Management Plan attached to this Case Management Order No.9 shall be, and hereby is, entered as an Order of the Special Master, as of the date hereof.

Dated: January 7, 2009



Kristin Linsley Myles
Special Master

Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
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Tel: (415) 512-4000
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No. 138, Original

In the
Supreme Court of the United States

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.

 CASE MANAGEMENT PLAN

1. **Case Management Orders And Application Of Case Management Plan**

The Special Master will issue Case Management Orders ("CMOs") following conferences with counsel and at such other times as she deems appropriate. This Case Management Plan ("CMP"), together with all CMOs, will apply to and bind all parties, will control the course of the proceedings, and may be modified only by order of the Special Master. For convenience, "parties" here refers to plaintiff South Carolina, defendant North Carolina, as well as intervenors Duke Energy Carolinas, LLC, the City of Charlotte, and the Catawba River Water Supply Project. South Carolina plans to challenge the Special Master's Interim Report concerning both the fact and the scope of any intervention before the Supreme Court, so the participation by Intervenors permitted herein is subject to the Court's ruling on those intervention issues. Until the Court rules, Intervenor participation shall be governed by the Special Master's Case Management Order No. 7 (whose provisions are incorporated in this Case Management Plan), and any subsequent case management orders addressing the role of Intervenors in the case. Intervenors shall also receive service of all discovery served on parties and third parties and any documents produced in response to discovery requests, unless and until the Supreme Court issues a ruling overturning their status. With respect to any Intervenor participation issues not addressed herein or in CMO 7, until the Court rules, Intervenors may participate as parties subject

to South Carolina's right to dispute their participation in any respect on a case-by-case basis.

2. Filing Of Papers

2.1. Submissions To The Special Master

All documents shall be filed pursuant to the United States Supreme Court rules, except that all pleadings, papers, and documents should be filed with the Special Master on 8 ½ x 11 inch paper, and except as otherwise modified by the Special Master. The parties shall make filings with the Special Master and service upon the other parties by e-mail in searchable **PDF** format, with duplicate copies of any materials transmitted by-mail also sent by first-class mail. **In** the event filings are too bulky, or are otherwise unsuitable for transmission by electronic means, they shall be sent by some means of overnight delivery. An original and four copies of each document sent in hard copy shall be filed with the Special Master. All pleadings, papers, and documents submitted to the Special Master shall be served on counsel for the other parties in time for receipt on the same day that the Special Master receives them. Distribution need be made only to counsel and only in the quantities shown on the Distribution List attached hereto as **Appendix A**. All pleadings, papers, and documents submitted to the Special Master must indicate, in the certificate of

service or elsewhere, the means by which service or transmittal has been accomplished.

2.2. Discovery Materials

In order to keep the record free of discovery material that has not become evidence, all interrogatories, requests for production of documents, requests for admissions, responses, replies, and documents produced shall not be filed with the Special Master unless a party offers a particular sworn discovery response into evidence, uses such response to support or oppose a motion, or requires a ruling on a discovery dispute that the parties have been unable to resolve. In such event, only those portions pertinent to the purpose shall be filed.

2.3. Depositions

Deposition transcripts shall not be filed with the Special Master until offered and admitted into evidence or used to support or oppose a dispositive motion or to resolve a discovery dispute that the parties have been unable to resolve.

3. Status Conferences

At such times as the Special Master may direct, there will be monthly status conferences by telephone. Two days in advance of each status conference, each party (either separately or, by agreement, jointly) shall submit by-mail a progress report. The progress report shall update the status of each party's discovery efforts since the last update, describe any then-unresolved disputes,

and list any further discovery anticipated during the current month. **In** addition, every progress report shall set forth the general status of the matter as it has evolved since the last progress report. The Special Master will schedule and hold additional status conferences as she deems necessary.

4. Discovery

4.1. Bifurcated Discovery

In the interest of minimizing litigation expense, this matter will be bifurcated as set out in a separate order. Notwithstanding the bifurcated nature of these proceedings, the parties will make best efforts to conduct all discovery efficiently, and any party may, for convenience, conduct discovery into matters relevant to Phase Two questions during Phase One. This CMP is generally addressed to discovery in Phase One. **In** the event these proceedings reach Phase Two, the parties shall meet and confer and propose such modifications to this plan as are necessary and mutually agreeable at that time.

4.2. General

Discovery will proceed on Phase One pursuant to Federal Rules of Civil Procedure 26-37 and 45, except as otherwise modified herein or by other order of the Special Master. Discovery will commence and be completed in accordance with the schedule stated herein, with all time periods to be computed hereunder in accordance with Federal Rule of Civil Procedure 6. Further discovery will be allowed beyond the

schedule stated herein only upon motion to the Special Master and for good cause.

4.3. Federal Rules Of Civil Procedure 26-37 And 45

The Federal Rules of Civil Procedure applicable to discovery, Rules 26-37 and 45, shall govern the proceedings before the Special Master with the following exceptions:

4.3.1. Rule 26(a)(1)

The disclosures required in Rule 26(a)(1) will not apply.

4.3.2. Rule 26(a)(2)-(4)

These portions of Rule 26 will apply, except insofar as they are trial-specific and except that: (i) all time schedules and deadlines will be determined by the Special Master; and (ii) because the provisions of Rule 26(a)(4) requiring the filing of documents with the court are inconsistent with this CMP, the filing of all documents with the Special Master shall be governed by this CMP.

4.3.3. Rule 26(b)(5)

Rule 26(b)(5) will apply only as set out in section 7 of this CMP.

4.3.4. Rule 26(c)

Rule 26(c) will apply, except to the extent modified by section 9 of this CMP.

4.3.5. Rule 26(f)

Rule 26(f) will not apply.

4.3.6. Rule 27

Rule 27 will not apply.

4.3.7. Rules 30(a)(2), 30(d)(1), 31(a)(2), and 33(a)

The limitations in Rules 30(a)(2), 30(d)(2), 31(a)(2), and 33(a) on the number and length of depositions and number of interrogatories will not apply. The number of interrogatories and length of depositions will be as set forth in section 5 and Appendix B of this CMP.

4.3.8. Rule 32(a)(4)(B)

The 100-mile rule contained in Rule 32(a)(4)(B) will apply, unless otherwise agreed to by the parties and the witness or the Special Master so orders. *See* Rule 45, *infra*.

4.3.9. Rule 45

Rule 45 will apply with the exception that the subpoena power of the Special Master will not be limited geographically by the 100-mile rule. The parties shall cooperate with each other in securing the attendance of witnesses for depositions and shall each give reasonable notice to the other parties if a witness is recalcitrant and will require a subpoena.

5. Substantive Discovery

This discovery plan provides that substantive discovery on Phase One will proceed promptly and shall be concluded as expeditiously as reasonably practicable. To the extent possible, written discovery and the exchange of documents should be completed before deposition discovery begins. While there inevitably will be some overlap, the goal of this discovery plan is to proceed in an organized fashion that will avoid unnecessary or repetitive discovery efforts on the part of the parties.

Phase One discovery shall consist of a period of fact discovery followed by a period of expert discovery. Deadlines for fact and expert discovery shall be established in a subsequent case management order.

5.1. Written Discovery

Written discovery shall consist of the following and, to the extent reasonably possible, follow the schedule set forth herein. Responses to written discovery are due 30 days from the date of service. Except with respect to contention interrogatories, or where otherwise permitted by the Special Master for good cause shown, all written discovery shall be propounded no later than 60 days prior to the close of fact discovery.

5.2. Interrogatories

5.2.1. Party States.

During the fact discovery period, each party State may timely serve on the other party State not more than 75 fact interrogatories, including discrete subparts. In addition, each Party State may serve no more than 30 contention interrogatories, labeled as such, on a date such that the response is due no later than the close of fact discovery. Without prior written approval of the Special Master, no additional interrogatories may be served.

5.2.2. Intervenors.

Pending the Court's review of the status of Intervenors in this case, "[t]he Intervenors shall not be required to respond to Interrogatories, and shall not have the right to propound Interrogatories." Case Management Order ("CMO") 7, ¶ 2.b.

5.3. Requests For Production Of Documents/Inspections To Parties

Each party may serve requests for production of documents/inspection on the other parties. Pending the Court's review of the status of Intervenors in this case, "[d]ocument discovery shall proceed as between the States, and as between the States and the Intervenors, as though the Intervenors were full parties to this action, subject to the

right of any State or Intervenor to seek relief from the Special Master in the form of a Protective Order." CMO 7, ¶ 2.a.

5.4. Requests For Documents/Inspections To Non-Parties

The party States may serve on non-parties requests for production of documents/inspection as provided in Federal Rules of Civil Procedure 34(c) and 45. Pending the Court's review of the status of Intervenor in this case, "[t]he Intervenor shall not have the rights of parties with respect to the issuance of third party subpoenas." CMO 7, ¶ 2.d.

5.5. Requests To Admit

Each party State may serve requests for admission on the other party State. Pending the Court's review of the status of Intervenor in this case, Intervenor shall not have the right to propound requests to admit and shall not be required to respond to requests to admit. *Cf.* CMO 7, ¶ 2.b.

5.6. Deposition Discovery

"Deposition discovery shall be deferred pending final resolution of the intervention issue." CMO 7, ¶ 2.c.

5.7. Expert Discovery

The dates for service of expert reports required by Rule 26(a)(2)(B) shall be established in a subsequent case management order. Intervenor has indicated an intent to serve expert reports and present expert testimony, and South Carolina opposes any filing of

expert reports by Intervenors. Any disputes concerning expert reports or testimony, including the dates of filing, will be resolved in subsequent case management orders.

5.8. Discoverability Of Expert Materials

Discovery of experts shall not extend to (a) draft expert reports, including revisions or mark-ups, notes, or other work product prior to the final report, on which the expert does not intend to rely in support of his or her opinion; (b) expert work completed solely for settlement discussion purposes; or (c) communications to, from, or in the presence of an attorney for the party expecting to call the expert as a witness, unless the expert is relying on the communication in support of his or her opinion. Within 15 days after serving an expert report, the party expecting to call the expert shall produce to the other parties copies of all documents relied upon by the expert in the preparation of his or her final report. Readily available public documents (like books, USGS reports, etc.) need not be produced, provided that they are referenced. Documents already produced may be referenced by their Bates numbers. To the extent possible, all documents shall be produced in electronic format. Model codes (source and executable codes), documentation (including that imbedded in codes), and input and output data shall be produced in the electronic format originally used by the reporting expert. **If** evolving versions of models are used in

sequential analyses, the party that expects to offer the expert witness's opinion shall clearly identify changes from one version to another. **If** proprietary models are used, the party offering the witness's opinion must still produce the source codes, but shall be entitled to an appropriate protective order.

5.9. **Intervenor Discovery Not To Be Duplicative**

Discovery served on South Carolina by Intervenors shall not be duplicative of discovery served on South Carolina by North Carolina.

6. **Bates Numbering System**

All documents produced by the parties shall bear a distinctive Bates number. Each State shall begin each Bates number with the two-letter abbreviation for the State as designated by the United States Postal Service. For example, a South Carolina Bates-numbered document will begin SC 00001. All documents produced by Intervenors or non-parties shall state the identity of the Intervenor or non-party by proper name or recognized abbreviation before the Bates number. No party shall use any document that has not been Bates-numbered and produced, except by agreement of the parties, for impeachment, or for other good cause shown.

7. **Privilege Logs**

If a party withholds on the ground of privilege any written information (in hard copy or electronic form), it shall provide a privilege log to opposing counsel. These privilege logs shall set forth the following information: (a)

author's name, place of employment, and job title; (b) addressee's name, place of employment, and job title; (c) recipient's name, place of employment, and job title, if different than that of addressee; (d) general subject matter of document; (e) site of document; (f) nature of privilege claimed; and (g) consistent with Rule 26(b)(5), any other information necessary fairly to evaluate a claim of privilege if the preceding information is insufficient to do so. Privileged documents concerning attorney-client communications in this action between a party to this action and its counsel need not be logged. Documents concerning communications made pursuant to a joint-defense or common-interest agreement or privilege may be described in the log by category, so long as sufficient information is provided to permit fair assessment of the claim of privilege consistent with Rule 26(b)(5). Thereafter, any privilege log shall be supplemented to include any documents that are subsequently designated privileged by counsel.

8. **Confidentiality**

All documents or other tangible things containing a trade secret, protected personal information, sensitive public security information, or protected tax information may be designated "Confidential," so long as such documents have not been disclosed by the producing party to the public or third parties who are not under a duty to protect the confidentiality of the information.

The term "trade secret" shall mean business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:

- a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term "protected personal information" shall mean social security numbers; taxpayer identification numbers; driver's license or state identification numbers; passport numbers; checking account, savings account, credit card, or debit card numbers; personal identification (PIN) codes or passwords; or other personal account information protected by applicable law.

The term "sensitive public security information" shall mean sensitive information or documents, including specifications or drawings of infrastructure, that are protected by law from public disclosure for purposes of national security or public safety.

The term "protected tax information" shall mean tax-related information (such as tax returns, tax reports, tax records, or audits conducted by a taxing authority) that is protected from disclosure by federal, state, or local law.

Documents or portions of documents containing trade secrets, protected personal information, sensitive public security information, or protected tax information shall be so designated by stamping "Confidential- S. Ct. 138" on each page. Any party may contest the designation of a document as "Confidential," or request that a document not otherwise covered by this CMP be considered confidential, by serving an objection to such designation. The objecting party or parties and the producing party shall attempt in good faith to resolve the issue. **If** they are unable to resolve such dispute, it shall be the obligation of the party designating the items "Confidential" to move for a ruling regarding the propriety of the designation. The party requesting confidentiality shall have the burden of showing that such designation is appropriate. At a deposition, or within ten (10) business days after receipt of the transcript, a party or deponent may designate as confidential any trade secret, protected personal information, sensitive public security information, or confidential tax information, and such designation shall be served on all counsel. Confidentiality objections need not be made at a deposition and they shall not be a ground for a direction or refusal to answer, but counsel may indicate such designation during the deposition and the parties shall govern themselves accordingly. Depositions and transcripts will be considered to be confidential until expiration of the ten (10)-day period and thereafter as to any part or all so designated. Any individual not authorized by this CMP to be a recipient of confidential information may be excluded from a deposition

while such information is being elicited. In the event that a producing party wishes to have documents other than trade secrets, protected personal information, sensitive public security information, or confidential tax information treated as "confidential" pursuant to this CMP, the producing party shall promptly move the Special Master for an appropriate protective order.

Confidential documents or information subject to this CMP may not be disclosed to or used by anyone except those hereby authorized and by them only in the context of this case. Such individuals shall include counsel, the parties' specifically authorized employees, experts, and fact witnesses, together with such others as are agreed to by the parties or are approved by the Special Master. Each individual who is permitted to see such confidential documents, or given access to such confidential information, shall be bound to observe the provisions of this CMP with respect to all documents and information produced through these proceedings by signing a Non-Disclosure Agreement in a form agreed upon by the parties or approved by the Special Master if the parties cannot agree. The Non-Disclosure Agreement shall include an agreement to submit to the Special Master's jurisdiction for enforcement of this portion of the CMP and to return all such designated documents and information promptly at the end of the litigation.

9. Resolution Of Discovery Disputes And Motions To Quash And Seek Protective Orders

Before bringing a discovery dispute to the attention of the Special Master, the parties shall confer in an attempt to resolve the dispute. It shall be the responsibility of the moving party to initiate the conference promptly following the identification of the dispute. Failure promptly to initiate the conference, failure to respond promptly to the initiation, or failure to cooperate in dispute resolution may result in an adverse ruling regardless of the merits. If the conferences do not resolve the dispute, the procedure for resolving the discovery dispute shall be as follows:

9.1. Written Discovery Disputes

9.1.1. Failure To Timely Respond To Written Discovery Requests

In the event that timely responses to written interrogatories or document requests are not forthcoming, the proponent of the discovery should promptly file a motion to compel, which shall set forth the date the discovery was served and the due date for the responses, together with an averment of the default. No brief or copy of the interrogatories or document requests should accompany the motion. Upon receipt of such a motion, the Special Master, without waiting for a response, may enter an order directing the discovery to be provided by a certain date and including such sanctions as she deems appropriate.

9.1.2. Disputes Regarding Discovery Objections Or Adequacy Of Responses

In the event of a discovery dispute - in contrast to a default - arising by reason of the respondent's objections or concerning the adequacy of responses to interrogatories, document requests, requests to inspect, or requests to admit, the parties shall promptly and in good faith exert every reasonable effort to resolve their differences. Where objections are made, the objecting party shall provide all other discovery that such party does not consider to be objectionable. As a last resort, any unresolved dispute shall be submitted to the Special Master as follows:

9.1.2.a. The parties shall first submit the dispute orally by telephone.

9.1.2.b. If the dispute is not resolved telephonically, the parties shall make a written submission setting forth as to each individual discovery item in dispute the interrogatory, document request, request to inspect or request to admit, together with the answer or response, including any objection, as well as the parties' respective positions on a schedule set by the Special Master. These shall be set forth in sequence and, if

practicable, on a single page and, in any event, separate and apart from any other discovery dispute. Case citations and other authority should be included.

10. Deposition Disputes

10.1. General Procedures

Except as is expressly provided in paragraph 11.2 below, discovery disputes that arise during a deposition shall be resolved by submission to the Special Master, according to the same procedure set forth in section 9 governing disputes in regard to the adequacy of responses to written discovery.

10.2. Disputes That Require Immediate Resolution

Where a dispute arises at a deposition and a party believes that an immediate resolution is necessary to avoid the re-scheduling of the deposition or a significant disruption of the discovery schedule, the Special Master shall be telephoned.

10.2.1. If the Special Master is available and a telephone conference is held, the ruling of the Special Master shall be recorded in the deposition. The deposition shall proceed according to such ruling or direction. If the ruling or direction is that a witness must answer a question or questions despite an objection based upon claim of

privilege or work product, the objecting party shall not be deemed to have withdrawn or waived its objection.

10.2.2. If the Special Master is not available by telephone during the deposition, the dispute shall be noted for the record and the deposition shall proceed with respect to all other issues. Thereafter, the dispute shall be presented to the Special Master as provided in section 9.

11. Disputes Not To End Deposition

No party shall refuse to continue participating in a deposition with respect to matters not in dispute because of the unavailability of the Special Master to resolve a dispute telephonically.

12. Motions To Quash Or For Protective Orders

The following procedures are to be employed in situations where subpoenaed persons or entities desire to move to quash a subpoena or seek a protective order from the demand of a subpoena.

12.1. Subpoenaed Parties

If the subpoenaed entity or person is a party or the employee of a party, then the entity or person must seek appropriate relief from the Special Master pursuant to the procedures for resolving written discovery disputes in section 9.

12.2. Subpoenaed Entities Or Persons Who Are Not Parties

When a party subpoenas a person or entity, the party issuing the subpoena should serve upon the subpoenaed person or entity, along with the subpoena, a copy of section 9 of this CMP. The subpoenaed person or entity may seek relief under this CMP, by submitting the dispute to the Special Master pursuant to the procedures for resolving written discovery disputes in section 9.

13. Dispositive Motions

Motions to dismiss or motions for summary judgment may be filed at any time after the completion of deposition discovery in Phase One. A subsequent case management order will establish a date by which any dispositive motions must be filed.

14. Inadvertent Disclosure Of Protected Information

14.1. Non-Waiver Of Privilege Or Other Protective Doctrine By Inadvertent Disclosure

The inadvertent disclosure of any document that is subject to a claim that the document should have been withheld from disclosure as privileged information or protected attorney work-product material prepared or compiled in anticipation of litigation and not subject to discovery under the Federal Rules of Civil Procedure or the Federal Rules of Evidence ("Protected Material") shall not waive any privilege or other applicable protective doctrine for that document or for the subject matter of the inadvertently disclosed document if the producing

party, upon becoming aware of the disclosure, promptly requests return of the Protected Material and has taken reasonable precautions to avoid such inadvertent disclosure.

The receiving party is under an obligation to notify the producing party if the receiving party believes a protected document has been produced. The notification shall be in writing and shall identify each document in question with reasonable and sufficient particularity. The disclosure of any protected material shall cease to be "inadvertent" if, three (3) business days after the receiving party notifies the producing party that it has received the protected material, the producing party does not request in writing the return of the Protected Material. Notices and requests shall be made both by hard copy and by e-mail, and the time periods shall be based on delivery of hard copies, measured in accordance with Federal Rule of Civil Procedure 6. Each party may designate the persons to receive notice.

Upon written request by the inadvertently producing party, the receiving party shall (unless the receiving party disputes the producing party's claim in accordance with following paragraph) immediately return all copies of the Protected Material, electronic or otherwise, or destroy all copies at the producing party's option, and not use the information in the Protected Material for any purpose until further order of the Special Master. The term "copy" as used in this

Agreement shall include the substance of the document. In the event that the producing party requests destruction, the requesting party shall provide written certification of compliance within thirty (30) days of such written request.

In the event the receiving party disputes the producing party's claim as to the protected nature of the inadvertently disclosed materials, a single set of copies may be sequestered and retained by and under the control of the receiving party for the sole purpose of seeking determination by the Special Master of the issue pursuant to Federal Rule of Civil Procedure 26(b)(5)(B).

Any such Protected Material inadvertently disclosed by the producing party to the requesting party pursuant to this Agreement shall be and remain the property of the producing party.

The parties will take reasonable measures to protect against inadvertent disclosure of privileged and work product protected materials.

14.2. Confidential Treatment Of Protected Material

If Protected Material is disclosed through inadvertence or otherwise to any person not authorized under this Agreement, the party causing such disclosure shall inform the person receiving the Protected Material that the information is covered by this Agreement, make its

best efforts to retrieve the Protected Material, and promptly inform the producing party of the disclosure.

No use will be made of the substance of the Protected Material (e.g., the substance will be excluded from depositions, etc.), and no reference will be made to the Protected Material unless necessary to dispute another party's claim of privilege.

The party inadvertently disclosing the Protected Material will add the document(s) to its privilege log.

Any party may apply to the Special Master for further or additional protective Orders or, in the case of an Agreement between the parties, for any modification of the applicable provisions of the governing Case Management Plan, subject to the approval of the Special Master for good cause shown.

APPENDIX A - SERVICE LIST

Special Master

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South Carolina

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North Carolina

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Intervenors

Catawba River Water Supply Project

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City of Charlotte, North Carolina

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Duke Energy Carolinas, LLC

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APPENDIX B - DEPOSITION GUIDELINES

1. Cooperation

Counsel will cooperate with each other and exercise civility in all aspects of this litigation.

2. Waiver Stipulations

Unless contrary to an order of the Special Master, the parties (and, when appropriate, a non-party witness) may stipulate, in a suitable writing, to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for any discovery beyond discovery cutoffs or deadlines set by the Special Master are not valid without approval of the Special Master.

3. Scheduling

Except in extraordinary circumstances, noticing counsel shall consult in advance with counsel for the deponent, if any, and with opposing counsel, so as to schedule depositions at mutually convenient times and places.

4. Attendance

4.1. Who May Be Present

In the event an issue arises with respect to who may attend a deposition, the issue may be resolved on a case-by-case basis as contemplated by Rule 26(c)(I)(E) of the Federal Rules of Civil Procedure. During examination of a deponent about any document stamped "Confidential - S. Ct. 138" or its confidential contents,

persons to whom disclosure is not authorized under section 8 of this CMP shall be excluded.

4.2. Cross-Noticing

A party State may cross-notice a deposition. The cross-notice shall be served at least ten (10) days prior to the date noticed for the deposition unless otherwise provided for by an applicable rule or Case Management Order. When a cross-notice is served, the party States shall divide the transcription fees and costs in proportion to the length of the examination by each party. In the event of a cross-notice, the total time of the deposition shall not exceed 12 hours, except by agreement of the parties or order of the Special Master.

5. Conduct

5.1. Examination

Ordinarily, each party should designate one attorney to conduct the principal examination of the deponent. Examination by other attorneys for that party should be limited to situations where designated counsel must leave before the deposition is completed or is otherwise incapacitated.

5.2. Objections And Directions Not To Answer

Counsel shall comply with Federal Rule of Civil Procedure 30(d)(1). When a claim of privilege is made, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the

privilege, including (without limitation) the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

5.3. Time Limitations

Except with prior agreement of counselor written approval of the Special Master, no deposition may last longer than one (1) seven (7) hour day (or 12 hours for a cross-noticed deposition as provided above in section 4.2), provided that no such agreement of counsel may extend any discovery deadline. At the time a deposition is noticed, the noticing party will estimate the reasonable amount of time needed for the deposition. In the event any other party considers the proposed amount of time to be unreasonable, the dispute, if unresolved, may be referred to the Special Master pursuant to section 9 of this CMP.

5.4. Continuation Of Deposition

If a deposition is not finished by the end of the business 'day, it will continue on the following business day, subject to the availability of the witness and time limitations otherwise set by agreement or order of the Special Master. The parties may agree to continue or suspend a deposition until a mutually agreed upon later date, provided that the later date is within any discovery deadline set by the Special Master.

6. Documents

6.1. Production Of Documents

All documents should be requested and produced pursuant to sections 5.3 and 5.4 of this CMP. If a non-party witness is believed to have documents not previously produced, a subpoena to produce documents should be served at least thirty (30) days before the scheduled deposition. Arrangements should be made to permit inspection of the documents by both parties before the deposition begins. Any documents produced in such a manner should be Bates-numbered pursuant to section 6 of the CMP.

7. Videotaped Depositions

By request in its notice of a deposition, a party may record the deposition as permitted under Federal Rule of Civil Procedure 30(b)(3)-(4).

7.1. Video Operators

The operator(s) of the videotape recording equipment shall be subject to the provisions of Federal Rule of Civil Procedure 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

7.2. Attendance

Each witness and each examining attorney shall be identified on camera at the commencement of the deposition. All others present at the deposition shall be identified off-camera. Thereafter, generally

speaking, only the deponent (and demonstrative materials used during the deposition) shall be videotaped.

7.3. Standards

Unless physically incapacitated, the deponent shall be seated at a table or in a witness box other than when reviewing or presenting demonstrative materials for which a change in position is needed. The deposition should be conducted in a neutral setting, with only such lighting as is required for accurate video recording. Lighting, camera angles, lens setting, and field of view should be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibit and materials used during the deposition. Sound levels should be altered only as necessary to record satisfactorily the voices of counsel and the deponent. No eating or smoking by deponents or counsel should occur during the deposition.

7.4. Interruptions

The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during agreed "off the record" discussions.

7.5. Index

The videotape operator(s) shall use a counter on the recording equipment and, after completion of the deposition, shall prepare a log, cross-referenced to counter numbers.

7.6. Filing

The operator(s) shall send the original videotape in its original condition to the deposing party in a sealed envelope.

7.7. Objections

Requests for ruling on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. Each issue shall be separately submitted. If needed for a ruling, a copy of the videotape shall also be made available to the Special Master.

8. Telephonic Depositions

By stating in the deposition notice that it wants to conduct the deposition by telephone, a party shall be deemed to have moved for an order under Federal Rule of Civil Procedure 30(b)(7). Except where the parties agree to a shorter period, notice of a telephonic deposition shall be served at least thirty (30) days before the deposition. Unless an objection is filed and served at least twenty (20) days before the deposition, the motion shall be deemed to have been granted. Other parties may examine the deponent telephonically or in person. All persons present with the deponent shall be identified in the deposition and shall not by word, or otherwise, coach or suggest answers to the deponent. The parties agree that, when a live deposition has been properly noticed, but because of extenuating circumstances there arises a

need to conduct the deposition telephonically, consent to conduct the deposition telephonically shall not be unreasonably withheld.

9. Use

Under the conditions prescribed in Federal Rule of Civil Procedure 32(a)(1)-(4), as otherwise permitted by the Federal Rules of Evidence, or as agreed to by the parties with approval of the Special Master, depositions may be used against either party.

10. Supplemental Depositions

To the extent a deponent acquires new information, forms new opinions, or finds new grounds to support previous opinions, any party may move for a supplemental deposition. Such motion shall be made for good cause shown within thirty (30) days of a party's learning of the new information, opinion, or grounds from supplemental discovery responses provided under Federal Rule of Civil Procedure 26(e) or any other source. If permitted, the supplemental deposition shall be treated as the resumption of the deposition previously taken. However, the supplemental deposition itself shall not exceed four (4) hours, in the absence of agreement of the parties or order of the Special Master. Supplemental depositions shall be reasonably limited to addressing the new information, new opinions, or new grounds that justified the taking of the supplemental deposition. Supplemental deposition examination shall not be repetitive of prior examination.

11. Rulings

Rulings on objections made during a deposition will be resolved according to the procedure set forth in section 10 of the CMP.