No. 138, Original

In the
Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

Before Special Master
Kristin Linsley Myles

DEFENDANT STATE OF NORTH CAROLINA'S BRIEF IN SUPPORT OF CONTINUED BIFURCATION OF THE LITIGATION

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DEFENDANT STATE OF NORTH CAROLINA'S BRIEF IN SUPPORT OF CONTINUED BIFURCATION OF THE LITIGATION

Pursuant to the Special Master's directive during the Wednesday, January 27, 2010 conference call, Defendant State of North Carolina ("North Carolina") respectfully submits this brief requesting the Special Master reaffirm the existing bifurcation of the above captioned litigation.[1] The issue that South Carolina has raised for consideration is whether the Special Master should reverse the status quo and alter the existing Case Management Plan ("CMP"), to which South Carolina and North Carolina both agreed long ago. North Carolina opposes South Carolina's recent change of position on bifurcation and submits that bifurcation is an appropriate case management device that will foster judicial efficiency in this case. As set forth in more detail in Section III below, the types of discovery required for a Phase II determination are much greater in scope and different in kind than the discovery required for Phase I. Only if South Carolina prevails on the Phase I threshold issue should the parties proceed to Phase II discovery. The structure of the current CMP is efficient and is consistent with the approach taken by Special Masters in other original actions. Moreover, jettisoning the existing CMP will prejudice North Carolina.

I. PROCEDURAL BACKGROUND

Supreme Court equitable apportionment cases require a downstream State to show that upstream water uses have caused real or substantial injury or damage by clear and convincing evidence as a threshold that must be met **before** the Court will reach or decide an equitable apportionment of a river. *E.g., Colorado v. New Mexico*, 459 U.S. 176, 187-88 (1982); *see also Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

South Carolina has repeatedly agreed that this case should be bifurcated into two distinct phases. South Carolina has recognized that it has the burden of showing it has incurred substantial harm caused by North Carolina **before** this case can proceed to Phase II: "Phase

[1] In support of its position, North Carolina incorporates the arguments set forth in its June 16, 2008 Brief Regarding Issues for Phase I and its June 23, 2008 Reply Brief Regarding Issues for Phase I.

One should be limited to South Carolina's showing of injury; that is, the harms to South Carolina caused by acts in North Carolina. If, at the conclusion of Phase One, the Special Master finds that South Carolina has met its burden of proving injury, then Phase Two should commence . . . ." *See* Brief of the State of South Carolina Concerning Phase One and Phase Two Issues and Timing ("2008 SC Brief") (June 16, 2008) at 3 (emphasis added). South Carolina's counsel confirmed Plaintiff's position during the March 28, 2008 bifurcation hearing when he informed the Special Master that South Carolina's "burden at the first phase is to show that we suffered injury by virtue of consumption occurring in North Carolina." *See* Statement of David Frederick, 3/28/08 Tr. 86:21-23.

Consistent with the parties' understanding that the litigation would first address the narrow issue of whether South Carolina could show that acts in North Carolina have caused substantial harm by clear and convincing evidence, they submitted a case management plan that provided for bifurcated discovery and did not address Phase II discovery or trial issues.[2] In fact, the CMP specifically notes, "[i]n the interest of minimizing litigation expense, this matter will be bifurcated as set out in a separate order." CMP at 4. The CMP further provides, "[i]n 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." *Id.*

In contemplation of the entry of a separate bifurcation order, the parties briefed the bifurcation issue to the Special Master in their 11th Progress Reports submitted February 3, 2009 ("SC Prog. Rpt. 11" and "NC Prog. Rpt. 11" respectively). In its submission, South Carolina proposed bifurcation which required it to show in Phase One "'clear and convincing evidence [of'] some real or substantial injury or damage' caused by water uses in North Carolina." SC Prog. Rpt. 11 at 3. North Carolina's articulation of the Phase I issue was similar ("Whether South Carolina has shown by clear and convincing evidence that specific water uses or withdrawals in

[2] Except that ¶ 4.1 provides, "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." CMP at 4.

North Carolina have caused or imminently threaten to cause harm of serious magnitude to specific, existing uses of the Catawba River in South Carolina."). *See* attachment to NC Prog. Rpt. 11. The primary disagreement between the parties was whether the harm proven must be a **specific** harm caused by **specific** uses in North Carolina. *See* SC Progress Report 11 at 3, fn *. Except for that one disagreement, the parties agreed that after discovery on the alleged harms to South Carolina caused by North Carolina, the Special Master would determine whether South Carolina had proven by clear and convincing evidence some real or substantial injury or damage and that this would be the one issue addressed by the Special Master and the parties in Phase I.

During the February 5, 2009 telephone conference with the Special Master, North Carolina and South Carolina concurred that their disagreement on the standard of proof for Phase I **did not** prevent bifurcation. *See* 2/5/08 Tr. 8:10-14 and 7:20-24. As counsel for South Carolina explained, the dispute was one that would likely be resolved on a motion for summary judgment wherein the Special Master decides "what the Court's cases require in terms of proof for South Carolina." 2/5/09 Tr. 6:17-25 through 7:1-24. Both Parties agreed that Phase II would include a determination of whether the benefits to North Carolina outweigh the substantial injury or damage proven by South Carolina in Phase I and, if necessary, provide for an equitable apportionment of the waters of the Catawba River between North Carolina and South Carolina based on a balancing of the equitable apportionment factors. *See* SC Prog. Rpt. 11 at 3; NC Prog. Rpt. 11 at 2 of the attachment. At the conclusion of the discussion about the phases for bifurcation, the Special Master recognized that the disagreement about whether South Carolina was required to prove the cause of its harm with particularity did not need to be resolved in order to establish phases for the litigation. 2/5/09 Tr. 12:1-7.

From February 2009 until now, the parties continued with discovery pursuant to the bifurcated process set forth in the CMP. However, following the Supreme Court's resolution of the intervention issue, South Carolina reversed its position and now urges that the Special Master discard the CMP which sets forth the bifurcated litigation schedule established for this case. *See* January 26, 2010 Correspondence to Special Master Kristin Myles from David

Frederick ("SC Prog. Rpt. 14").

II. BIFURCATION IS AN APPROPRIATE CASE MANAGEMENT TOOL

Bifurcation is frequently used to manage large complex litigation. The Federal Rules of Civil Procedure, which may be used as a guide in original actions, provide: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one of more separate issues [or] claims." Fed. R. Civ. P. 42(b); *see* Supreme Court Rule 17.2. "Bifurcation is appropriate where determination of one issue could wholly eliminate the need to try another complicated or time-consuming issue . . . ." Manual for Complex Litigation 616 (2004). As Professor Moore observed: "Resolution of a key issue may determine the outcome of an entire proceeding. In such a case, and so long as the issue may be reasonably separated from the remainder of the case, bifurcation of that issue for trial is likely to be conducive to judicial economy and expedition." 8 Moore's Federal Practice § 42.20[6][a] (3d ed. 2006); *see also Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999) ("[B]ifurcation may be appropriate where, for example, the litigation of the first issue might eliminate the need to litigate the second issue.").

Special Masters have long recognized bifurcation may be appropriate in original actions, including cases involving water rights. In both equitable apportionment cases and compact cases, there is a threshold issue which must be proven before a complaining party is entitled to a remedy. In the most recent water rights case tried before a Special Master (*Kansas v. Colorado,* Orig. No. 105) discovery and trial were "bifurcated into liability and remedy phases." Fifth & Final Report at 9 (Jan. 2008). In the first phase of that case, the Special Master found Colorado was liable to Kansas, thereby requiring the parties to proceed with the remedy phase. The length and cost of the remedy phase in *Kansas v. Colorado* was substantial. Trial of the remedy phase consumed 56 days spread out over three months. Fourth Report at 1 and 4 (Oct. 2003). Forty witnesses, primarily expert witnesses, testified during this trial phase. *Id.* at 1. The transcript of the remedy phase spans 8,697 pages. *Id.* Had Colorado prevailed in Phase I, the costs of the Phase II trial would have been avoided.

Furthermore, because *Kansas v. Colorado* was divided into multiple phases, the Court was able to address exceptions to the Special Master's findings and conclusions as the proceeding progressed. A total of five separate reports were filed by the Special Master with the Court in *Kansas v. Colorado*. *See* 514 U.S. 673 (1995); 533 U.S. 1 (2001); 543 U.S. 86 (2004); 129 S. Ct. 1294 (2009). The bifurcated proceedings were more efficient because of the Court's guidance.

Likewise, in *Oklahoma v. New Mexico* (Orig. No. 109), the Special Master recognized the appropriateness of bifurcating the proceeding into a liability phase and remedy phase. Report of Special Master at 3 (Oct. 15, 1990) ("All parties agreed that the proceedings initially be confined to resolution of the question of whether New Mexico has violated the Compact and that consideration of issues pertaining to any appropriate relief for any violation that might be found be deferred until after that determination."). In light of the law and experience of other original jurisdiction cases involving water rights, bifurcation stands as an appropriate case management tool which should be used in this case to streamline discovery.

III. BIFURCATION WILL PROMOTE JUDICIAL EFFICIENCY

A. A Mini-Trial on the Issue of Harm Will Be Beneficial to the Special Master and to the Parties and Could Be Efficiently Conducted.

Continuing forward with this matter as currently bifurcated will result in a substantial savings of both time and cost if South Carolina does not meet its threshold burden. In addition, even if South Carolina meets its threshold burden and the parties proceed to discovery and determination of the Phase II issues, it is likely that there will be a time and cost savings to the extent that the Special Master's findings at the conclusion of Phase I will provide focus to the parties' Phase II discovery.

If the Special Master continues with bifurcated litigation, the parties would continue to engage in limited discovery pursuant to the CMP.[3] This discovery would continue to be

[3] In its Status Report of January 26, 2010, South Carolina referenced "[t]he broad requests for documents in North Carolina's third-party subpoenas and the wide range of entities subpoenaed" in support of its position that bifurcation is no longer feasible. SC Prog. Rep. 14 at 3. However, North Carolina has engaged in Phase II discovery only to the extent that it is convenient and efficient to both the parties and to the entities from whom discovery has been sought in accordance with CMP ¶ 4.

focused on the facts at issue in Phase I. The Special Master could then conduct a mini-trial on the Phase I issue.

Should South Carolina prevail at the end of Phase I, bifurcation would still promote judicial efficiency. A ruling on harms and causation in Phase I will produce a more streamlined proceeding in Phase II. If the Court makes findings that merit this case going forward, the parties would be in a better position to focus discovery on the benefits received by North Carolina from the specific water uses that cause harm in South Carolina. In addition, by identifying the particular harms suffered by South Carolina, the parties would be in a better position (through settlement) to work together to find ways to address those harms before engaging in further Phase II discovery. *See* Steven Gensler, Bifurcation Unbound, 75 Wash. L. Rev. 705, 706 (2000). If settlement discussions are not successful, the parties and the Court can move forward into Phase II discovery with a more precise idea of what additional discovery will be needed. A focused approach resulting from dividing the litigation into logical phases will save the Special Master and the parties time and reduce costs whether the litigation concludes after Phase I or continues to Phase II.

By contrast, as discussed *infra,* massive discovery would be required should Phases I and II be recombined at this point in the litigation. North Carolina would require additional time to complete fact discovery and significant additional time would be required for expert discovery. A consolidated trial of Phase I and Phase II issues could encompass many months or even years.

B. BIFURCATION WOULD ALLOW THE PARTIES TO DEFER TIME-CONSUMING AND EXPENSIVE DISCOVERY.

If Phase I is limited to South Carolina's proof that it has suffered specific and substantial harms caused by uses in North Carolina, then the discovery required to prepare for Phase I will be restricted in scope, time, and geography (subject to the efficiency provision of CMP at 4). Phase II, on the other hand, will require discovery, motions and trial on the nature and economic value of upstream water uses in order to determine if benefits from North Carolina's upstream water uses substantially outweigh the demonstrated downstream injury.

Furthermore, to effect an equitable apportionment, the Special Master will quantify not only the relevant consumption in North Carolina and South Carolina, but also the value of that consumption. Without a narrowing of the issues, Phase II will require a broad examination of issues evaluating water uses in **both** States, including uses that implicate adjoining basins via interbasin transfers ("IBTs") and wastewater discharges. *See, e.g.,* list of South Carolina IBTs attached as **Exhibit 1.** If South Carolina's claims remain undifferentiated, the discovery necessitated will be substantially broader than would be the case if the focus were on specific Phase I uses and harms, and would likely include extensive data compilation, model development work, and economic analysis.

As set out below, North Carolina's counsel and expert witnesses have identified numerous areas of factual and expert discovery which could be appropriately deferred until Phase II. Each of these categories of discovery would require substantial time, energy and costs to complete, thereby expanding the length and cost of trial exponentially. This non-exclusive list illustrates North Carolina's concern that merging Phase II discovery into the current Phase I will only serve to substantially delay the resolution of this action and increase the cost of this proceeding.

1. Valuation of Established Water Usage.

In *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), the Supreme Court expressly noted that in an equitable apportionment action, the Court must consider both the "extent of established uses" and "the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former." Thus, the economic value of water uses in both States must be calculated during Phase II.

The economic valuation required by Phase II differs substantially from the information that will be before the Special Master in Phase I. In Phase I, the issue is relatively simple – whether an excess amount of water withdrawn and not returned from the Catawba River by North Carolina has caused substantial harm to South Carolina. Questions for Phase I include

the following: what is the volume of water released into South Carolina at relevant times, what is the quantity of water consumed by North Carolina, what is the volume of water required by South Carolina, and what is the flow of the River after North Carolina and South Carolina consumption at locations where the harms have been experienced. The only place in Phase I for economic analysis would be to provide some measure of the substantial harm claimed by South Carolina. In contrast, Phase II focuses on what use is made of the water removed from the Catawba River. If South Carolina's claims are not narrowed by the Special Master's determination in Phase I, Phase II will require that every withdrawal in both States be accounted for and a value determined for the end use of water withdrawals in both States. As a result, the magnitude of discovery necessary for Phase II far exceeds Phase I discovery.

2. Comparison of Number of Persons Served in Each State from the River.

Under *Connecticut v. Massachusetts,* 282 U.S. 660 (1931), South Carolina is not entitled to an "equal" division of the waters of the Catawba River:

> [Water rights disputes] are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the equal . . . plane on which all the States stand . . . .

Id. at 670 (quotations omitted). Accordingly, South Carolina cannot simply demand half the flow from the River without demonstrating that such a division is equitable. Rather, this Court must take into account various equitable factors, such as the impact upon the population served by the River in both States. That analysis must begin with an estimate of the number of people (and businesses) within the Catawba River Basin and nearby areas served by withdrawals from the River. The task of estimating the population within the Catawba River Basin is not as easy as it may seem at first glance. Census data will undoubtedly serve as the starting point for that analysis. The last census, however, was conducted in 2000 and is ten years out-of-date. Extrapolating from ten-year-old census data is fraught with uncertainty. *See, e.g., Abrams v. Johnson,* 521 U.S. 74, 100-01 (1997).

The task of providing the Court with an accurate count of the people living within the Catawba River Basin who benefit from use of the water from the River would be much less complicated if this case were dividing into phases as set out in the current CMP. Although preliminary data will be available from the 2010 census in December 2010, the data necessary for evaluation of population at the county-level will not be available until March 2011. www.2010.census.gov/2010census/how/key-dates.php. Given that reliable census data needed for the remedy phase will not be available for another year, combining Phase I and Phase II will inevitably produce further delays. In contrast, if the case were to continue on a bifurcated track, the lack of accurate census data should have no impact on the schedule. Census data are not necessary for Phase I. Accordingly, there is no need to delay Phase I proceedings in order to ensure the availability of accurate census data.

3. Identification and Valuation of Other Water Sources in South Carolina.

South Carolina will not be able to prevail in a balancing of the equities if the evidence ultimately shows that a balancing of the harm to North Carolina caused by limitations on consumption outweigh the benefit to South Carolina of the resulting increase in river flows. *Colorado v. New Mexico*, 459 U.S. 176, 186 (1982). Accordingly, during Phase II, it will be necessary to determine the economic cost and benefit of the additional water that South Carolina seeks. That analysis will require a determination as to whether South Carolina could obtain that additional water more economically from alternative water supplies. Technical and economic feasibility analysis of alternative water supplies will be costly and time consuming.

a. Increasing storage capacity. South Carolina's claim against North Carolina is focused upon periods of drought. The impact from drought conditions is not as severe when a State has sufficient water storage capacity. Accordingly, during Phase II (if it is necessary to reach that phase), the parties will be required to evaluate: 1) whether South Carolina's harms could be eliminated by increasing the number and size of its reservoirs and 2) whether the additional cost of increasing water storage capacity in South Carolina exceeds

the harm that North Carolina would incur if the Court were to order a reduction in North Carolina's water usage. As with other tasks that the CMP defers until Phase II, the degree of analysis to answer this question is daunting.

About 39 tributaries flow into the South Carolina section of the Catawba River at issue in this case. Thus, South Carolina has a variety of options for damming tributaries and increasing the amount of storage water it could use to supplement the flow of the Catawba River in times of drought. Additionally, the amount of storage water in South Carolina could be increased by altering lake levels in South Carolina's Fishing Creek Reservoir, Great Falls Reservoir, Cedar Creek Reservoir and/or Lake Wateree. Evaluating each of these options will require the expertise of multiple disciplines. Additional reservoirs could only be added if they were technically feasible. This analysis will require consideration of various environmental factors, as well as consideration of the cost and time necessary to obtain permits for such dams. Expert witnesses would also need to assess the cost of constructing any such facility – both in term of construction costs and the cost of land that would be necessary for any such reservoir. Operational and maintenance costs would also need to be considered. The expert witnesses would need to take into account the potential impact upon Duke Energy's existing reservoirs, as well as a variety of other factors (such as loss of storage water through evaporation). There will also be an opportunity to evaluate and monetize additional benefits (*e.g.*, recreation and tourism) and harms (*e.g.*, lost property taxes) to South Carolina from any additional reservoirs.

b. <u>Increasing water supply through IBTs</u>. South Carolina has authorized a number of IBTs both out of and into the Catawba River Basin. Thus, South Carolina must concede that it is technically and economically feasible to supplement the water flowing into the Catawba River Basin through its management of IBTs. In Phase II, it will therefore be necessary to determine whether the cost of supplementing the flow of water into the Catawba River Basin is less than the harm that North Carolina will suffer if the Court restricted water usage in North Carolina. Such an evaluation will require consideration of the hydrological and

environmental impacts upon both the source and receiving basin, the construction and operational costs necessary to accomplish such a transfer, and an evaluation of any legal restrictions on such a transfer. If the case is not bifurcated and the parties need to evaluate alternative water supplies, the hydrological work would have to include all potential source basins, as well as alternatives available to current receiving basins, greatly expanding the time and effort required by expert witnesses retained by both States.

c. <u>Modifying treatment processes and storage of treated water</u>. South Carolina also may be able to mitigate or eliminate many of its alleged harms by either increasing the efficacy of its water and wastewater treatment facilities or increasing its storage capacity for treated water. *See* Bill of Complaint at ¶ 17. A complete evaluation of all available options to increase the quantity and quality of South Carolina's water supply and the costs of these options is not required under Phase I of the current CMP. Finally, it must be remembered that the potential alternative water supplies referenced above (whether increased reservoirs, alteration of IBTs or increased treated water storage capacity) may be more or less useful and economical in certain segments of the River than in others. This will only further complicate the analysis necessary to determine a balancing of the equities.

4. Identification and Valuation of Other Water Sources in North Carolina.

In the event South Carolina overcomes its threshold burden of establishing harm, North Carolina intends to present evidence that South Carolina has multiple alternative water supplies available and that the equities therefore weigh in favor of North Carolina. On the other hand, North Carolina fully expects that in Phase II, South Carolina will argue that North Carolina has alterative water supplies available to it and these alternative water supplies must be considered in a balancing of the equities. Should South Carolina pursue this litigation strategy, Phase II will encompass an evaluation of alternative water supplies in both States.

5. Analysis of Water Usage in North Carolina That Benefits South Carolina.

In an equitable apportionment action, the Court must weigh "the damage to upstream

areas as compared to the benefits to downstream areas if a limitation is imposed on the former." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). In conducting this benefit/detriment analysis (a task that the CMP currently defers until Phase II), the parties will have to engage in extensive discovery of the significant quantities of water that are withdrawn in one state for the benefit of the other. These uses include the generation of electricity within one State consumed by the other, water consumed in North Carolina by South Carolina commuters, and water use at the border between the States.

a. <u>Electricity generated by water consumption in North Carolina</u>. A significant quantity of the water from the Catawba River withdrawn in North Carolina is used to cool nuclear reactors and coal-fired units operated by Duke Energy. Although a great deal of this water returns to the river, it does so at a higher temperature and, as a result, a substantial amount of water is lost to the atmosphere in the form of evaporation. Duke Energy is the largest consumer of Catawba River water in North Carolina. Electricity generated by Duke as a result of water consumption in North Carolina may be used in either North Carolina or South Carolina depending on daily needs and facility output. Phase II discovery will require an evaluation of costs and benefits relating to the generation and use of electricity. Such an evaluation will require layers of discovery and expert analyses. Expert testimony will also be needed to compare the value of the consumption of electricity in one State with the value of any harm caused by evaporation of water in the other State. That analysis will require evaluating operating characteristics of Duke Energy facilities. A balancing of the equities will be extremely complicated and will involve scores of witnesses who will never have to testify unless South Carolina can meet threshold showings of substantial harm and causation.

b. <u>Water consumed in North Carolina by South Carolina commuters</u>.

Charlotte is the largest city in either North Carolina or South Carolina. It is a major metropolitan area with a workforce of over 1.2 million people situated near the border between North Carolina and South Carolina. As a result, thousands of workers who live in South

Carolina commute to work each day in North Carolina. The quantity of water consumed in North Carolina by those South Carolina residents is not inconsequential. That consumption – and the substantial benefit South Carolina residents receive – should be appropriately taken into account in a balancing of the equities. Like many other issues that have been deferred until Phase II under the current CMP, the economic value of water consumed by South Carolina commuters is essentially irrelevant unless South Carolina can first show that it has incurred a substantial harm at the hands of North Carolina.

If North Carolina is to be given an appropriate credit in an equitable apportionment for the water consumed by South Carolina residents who commute to Charlotte, the parties will need to conduct discovery on the number of workers commuting from South Carolina to the Charlotte area (as well as the number of Charlotte residents commuting to South Carolina), the demographics of the average commuter, the average amount of time each commuter spends in Charlotte, the quantity of water consumed due to the presence of the average commuter, and the amount of income and spending attributable to consumption that benefits South Carolina's economy. Although some commuter data are available as a result of studies done by the Charlotte Chamber of Commerce and the University of North Carolina at Charlotte, much of the specific information that would be needed to quantify this consumption could only be obtained through expensive and time-consuming surveys conducted by professional survey firms. Similarly, the economic analysis performed on that data to calculate the value for the consumption will require North Carolina to engage experts to undertake this analysis.

c. <u>Water use at the border of the two states</u>. A number of facilities and properties straddle the border between North Carolina and South Carolina in the Catawba River Basin. One of the largest of these properties is approximately 337 acres of developed and undeveloped land owned by Paramount Parks Inc. which includes Carowinds Water Park ("Carowinds"). Because the property is located in both North Carolina and South Carolina, Carowinds pays property taxes to both States. It also employs thousands of residents from both

States. All of the facility's water, however, is supplied by Charlotte-Mecklenburg Utilities ("CMU"). An analysis of Carowinds' water usage stands to be particularly significant during Phase II as South Carolina has signaled an intent to attack water use by water parks in North Carolina.

An even more complicated analysis will be required to evaluate water use by South Carolina municipalities such as Rock Hill. This town is physically located in South Carolina, but has its water supply intake in Lake Wylie above the USGS water gauge used by South Carolina to measure the flow into South Carolina, which could make Rock Hill's water use appear to be water consumption by North Carolina. *See* Bill of Complaint at ¶ 15. Thus, any Phase II balancing will require a credit to North Carolina for water taken by Rock Hill from Lake Wylie as part of the assessment of the flow of water into South Carolina.

Another variation on the issue of benefits to South Carolina from water provided by North Carolina involves York County, South Carolina. York County buys a substantial portion of its water from CMU. Other South Carolina municipalities also purchase water or services directly from CMU and/or other water distributors in North Carolina. These benefits will require weighing in Phase II, as will the benefit to South Carolina from the discharge of CMU's treated effluent below the above mentioned USGS gauge. Assessing purchases of water by Carowinds, CMU, York County, S.C., Rock Hill and/or other South Carolina communities and the benefit of treated effluent discharges to South Carolina will be an important part of Phase II as the parties present evidence regarding the benefits to each State. Under the current CMP, this analysis can appropriately be deferred until Phase II.

If Phase II were merged into Phase I, the parties will be forced to identify and analyze all municipalities whose water use has an impact across state lines as well as those manufacturing plants, businesses, developments, and other properties within the Catawba Basin that straddle the border. The parties will need to determine water usage by these entities and respective benefits and costs to both States. This will involve an evaluation of economic

benefits to both States, including secondary economic benefits. In addition, for properties, such as Carowinds, the parties will need to calculate the amount of property taxes both States receive from these facilities and determine the home State for the facilities' employees and users. A full analysis of these issues should not be overlooked in the weighing of equities, even though it may greatly complicate an equitable allocation.

6. Benefits to South Carolina Resulting from IBTs at Issue.

On August 5, 2005, before South Carolina's Bill of Complaint was filed, Danny Johnson, a senior employee of the South Carolina Department of Health and Environmental Control ("SC DHEC") emailed Thomas C. Fransen, then Head of the River Basin Management Section of the Division of Water Resources for the North Carolina Department of Environment and Natural Resources and informed him that an IBT, later one of the subjects of the Bill of Complaint, would *benefit* South Carolina:

> As follow-up to our recent conversation in Badin regarding the subject IBT [proposed 38 mgd Concord and Kannapolis] [interbasin transfer], I've re-discussed the matter with Bud [Dr. A.W. "Bud" Badr] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. *Besides, we get it back in the [Yadkin-]Pee Dee [River] where we may need it more anyway*. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

See Brief of the State of North Carolina in Opposition filed August 7, 2007, Declaration of Tom Fransen at 18a ¶ 43 (emphasis added). All of the IBTs specifically complained of by South Carolina in its Complaint - Charlotte's, CRWSP's and Concord/Kannapolis' - have their return flows into tributaries of the Yadkin-Pee Dee River, which also flows from North Carolina into South Carolina. As succinctly stated by Danny Johnson of SC DHEC in a candid moment, South Carolina itself may "need" that water more in the Yadkin-Pee Dee than it does in the Catawba.

In other words, whatever harm the IBT withdrawal of water from the Catawba may cause to South Carolina in the Catawba Basin may be out-weighed by the benefits South Carolina receives from the return flows in the Yadkin-Pee Dee. In balancing the equities between the States, such benefit to South Carolina must be analyzed and considered. In *Kansas*

v. Colorado, 206 U.S. 46 (1907), the Court noted that it must consider benefits to the downstream State (Kansas) of return flows resulting from irrigation by the upstream State (Colorado) even though "the locality of the benefit" in Kansas is different from the portion of Kansas that would have benefitted had the natural flow of the river remained unchanged:

> For instance, if [the irrigation of land in Colorado] has the effect, through the percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed.

Id., at 100-01. Analysis of the extent of the benefit to South Carolina will require discovery of documents and testimony relating to water uses and needs of South Carolina in the Yadkin-Pee Dee, expert modeling of the benefits South Carolina receives from the additional water, and expert economic evaluation of those benefits to South Carolina, including a comparison of detriment in South Carolina's portion of the Catawba River Basin as well as benefits received by IBT users in North Carolina. All of this discovery may be avoided if bifurcation is retained.

7. Evaluation of Cost and Feasibility of Conservation Efforts.

As set out above, Phase II will require an analysis of alternative water sources available to both States. However, the quantity of water available for consumption can also be increased by expanding conservation efforts. Accordingly, Phase II will require an analysis of the cost and benefits of conservation efforts that could be effectively implemented in both States. City planners and other professionals will be required to explain the effectiveness of conservation efforts and to quantify the increased water that could be made available as a result of conservation efforts. Economists will be needed to explain the monetary impact of conservation efforts on the local economy and economic efficiency of conservation alternatives.

8. Analysis of Historical and Projected Water Uses.

Under the current CMP, the focus of Phase I is the location, nature, degree and causes of harm to South Carolina. Phase II, however, will shift the focus from South Carolina's

harm to the benefits of water usage in North Carolina and a consideration of all the factors required for an equitable apportionment. Accordingly, Phase II will require a detailed analysis of North Carolina's historical and projected water usage. The records required to reconstruct historical usage will be voluminous as will the analysis of projected water usage. Under the current CMP, the parties can defer that discovery and analysis until Phase II.

* * * *

As set out above, the issues presently reserved for Phase II are vastly broader in scope than the Phase I issues. Discovery for Phase II would by necessity include collecting information about the river back to the earliest recorded historic data regarding flow, quality, and water use in the both States as well as economic analysis, evaluation of alternatives, and analysis based on consumer, population, and commerce. North Carolina believes the level of effort required for a broad weighing of equities will be at least ten times greater than the level of effort required under Phase I as set out in the current CMP.

IV. North Carolina Will Suffer Prejudice If the Litigation Is Consolidated

The Special Master has previously entered a case management plan with respect to discovery in this action and has ordered that the trial of this action be bifurcated. South Carolina, having previously agreed to such a trial structure, now seeks to change the rules. Remarkably, South Carolina asserts that in order to defeat South Carolina's proposed consolidation of Phase I and Phase II, North Carolina must show prejudice. The test that the Special Master should employ is not one of prejudice. Rather, it is whether principles of judicial efficiency merit altering the status quo under which the parties have operated for nearly a year. As set out above, it would be highly inefficient to dispense with bifurcation. That should dispose of the matter.

However, North Carolina would be substantially prejudiced if the existing CMP were gutted. First, the process of negotiating the current CMP was not inconsequential. Those discussions spanned a period of nine months. The parties exchanged multiple drafts and engaged in lengthy phone conferences in an effort to resolve their differences. Issues that could

not be resolved by the parties were briefed for the Special Master and required a substantial amount of the Special Master's time to resolved. North Carolina went to great lengths, which included working through Easter Weekend in March 2008, to accommodate the Special Master's request that the party States diligently work toward resolving as many of their differences as possible. Now, North Carolina is being told by South Carolina those efforts were meaningless and South Carolina wants to redo the current CMP. This would result in countless hours of attorney time being wasted. The Special Master's time (paid for by the parties) was expended unnecessarily. North Carolina negotiated the CMP in good faith based on a consistent understanding that the case would be bifurcated. If that is to be changed, many of the provisions of the CMP (such as limitations on the length of depositions) must be reworked – effectively requiring the parties to renegotiate a new case management plan.

Second, North Carolina has undertaken a substantial document production at great cost to the State. Should Phases I and II be merged, North Carolina will undoubtedly be subjected to a second document request that goes to Phase II issues. North Carolina could have planned its document production accordingly if it had known the scope of discovery at the onset. In light of additional Phase II discovery which may be served by South Carolina, North Carolina will need to reevaluate and potentially revisit the past year's discovery. South Carolina has failed to explain why these additional costs should fall on North Carolina .

Third, North Carolina has conducted and responded to discovery in reliance upon the existing CMP and the bifurcation of issues set out in that order. North Carolina has not attempted to gather all of the documents it will need to address Phase II issues nor has it retained all of the experts that it will need for Phase II. Given the amount of work that must be done to prepare and try Phase II issues (work that was appropriately deferred in light of its substantial cost and the fact that it may never be necessary), should the current CMP be rescinded, the parties will be no closer to trial today than they were on January 7, 2009 when the current CMP was entered. Such delay prejudices Defendant, Intervenors, and the Court.

This delay is particularly prejudicial given that the action has been pending for three

years, yet South Carolina has not specifically identified the harms or causes on which it bases its Bill of Complaint. North Carolina has sought information about South Carolina's harms on multiple occasions. *See* e.g. North Carolina's First Set of Interrogatories and Requests for Production of Documents served July 1, 2008 at Interrogatory No. 1. **In** its Response to Interrogatory No.1, South Carolina promised to provide information regarding its specific harms nine months after entry of the CMP. *See* relevant portions of SC's Response to NC's First Set of Interrogatories (July 31, 2008) attached as **Exhibit** 2. Although more than nine months have passed since the CMP was entered, South Carolina has not supplemented its response.[4] Thus, over three years into this action, North Carolina still does not have a specific statement of harms that South Carolina contends will satisfy its threshold showing. The current CMP forces South Carolina to specifically identify its harms for a threshold determination without burying those harms in a morass of evidence relating to Phase II issues. The Special Master should not adopt South Carolina's argument that harm and remedy be merged into a single undifferentiated period of discovery and trial.

V. Conclusion

North Carolina respectfully requests the Special Master continue bifurcated discovery, motions and trial, and affirm the existing CMP.

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[4] South Carolina has promised to supplement its response by March 25, 2010.

Exhibits