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October 20, 2010

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 Initial Brief re First Amended CMP

Dear Special Master Myles:

Under separate cover, the Parties have submitted a joint proposed First Amended Case Management Plan ("First Amended CMP"). Included in the First Amended CMP are highlighted sections setting forth the language requested by either South Carolina or North Carolina that is not agreed to by the other Party. In this Initial brief, North Carolina states its position on disputed sections of the proposed First Amended CMP.

1. Section 5.2 Scope of Discovery under this CMP
[Yellow highlighted language in proposed First Amended CMP at 7]

North Carolina is satisfied with the section as written because it appropriately addresses the fact discovery that will take place before the trial on South Carolina's entitlement to a remedy and recognizes there will be future amendments to the First Amended CMP to address expert discovery and accommodate additional discovery as needed.

North Carolina objects to adding South Carolina's proposed language to this section as it is similar to the bifurcated schedule that the Special Master already rejected.[1] During the August 20, 2010 telephone conference, the Special Master

[1] To the extent that the Special Master is inclined to reconsider her August 20, 2010 oral ruling regarding bifurcation, North Carolina believes numerous issues regarding equitable apportionment issues could be deferred until after a threshold showing is made by South Carolina.

explained that the threshold showing of whether there is an injury is best done "after all the evidence is in." Aug. 20, 2010 Tr. at 17:19-25. Based on the August 20, 2010 oral ruling, the trial on South Carolina's entitlement to a remedy will include evidence regarding the threshold issue of injury *and* the balancing of the equitable apportionment factors. In light of the Special Master's decision to bifurcate the case *after* a trial on both the issue of the threshold proof of harm and the issue of the balancing of the equities, it is not possible to defer discovery on issues included in the equitable apportionment balancing analysis. For this reason, South Carolina's suggestion to defer part of the discovery needed for an equitable apportionment analysis is not consistent with the Special Master's August 20, 2010 oral ruling on bifurcation and should be rejected.

2. Section 5.3.9 Requests to Admit
[Yellow highlighted language in proposed First Amended CMP at 9]

South Carolina requests the addition of a new section 5.3.9 which, contrary to Fed. R. Civ. P. 36, seeks to limit the number of requests for admissions served by the Parties to 300 per side. North Carolina objects to limiting the use of requests for admissions for three reasons.

First, assuming for the sake of this argument that the First Amended CMP were to limit the number of requests for admissions each party can serve, it would be unfair to limit the collective number of requests for admissions available to North Carolina, Duke Energy Carolinas, LLC ("Duke Energy"), and the Catawba River Water Supply Project ("CRWSP") to the same number of requests South Carolina has reserved for itself. Such a proposal is based on the mistaken assumption that the interests of North Carolina, Duke Energy, and the CRWSP are the same. Such an assumption is inaccurate. That Defendant and the Intervenors have separate interests was expressly recognized by the Court when it allowed intervention by Duke Energy and the CRWSP on the grounds that neither State could properly represent the interests of Duke Energy and the CRWSP in this litigation. *South Carolina v. North Carolina*, 130 S. Ct. 854, 864-868 (2010). Each party is entitled to have an equal opportunity to request admissions. It would be unfair to require North Carolina and the Intervenors to negotiate with each other to claim a certain number of requests for admissions in order to prepare for trial in this case.

Second, there should not be any numeric limitation on the number of requests for admissions each party can serve because the Case Management Plan entered January 7, 2009 ("CMP") did not include a numeric limitation. South Carolina's suggested revision should be rejected because it seeks to change the Parties' negotiated agreement set forth in the CMP. The scope of discovery under the proposed First Amended CMP is much broader than discovery contemplated by the CMP. As the Parties did not restrict the number of requests for admissions for

the limited discovery which was part of the initial CMP, there is even less reason to limit requests for admissions now. The Parties have already agreed that Rule 36 is applicable to this litigation. South Carolina has failed to identify any change in circumstances that would support limiting the provisions of Rule 36 incorporated in the Parties' agreement as set forth in the CMP.

Third, the Federal Rule, recognizing that the use of requests for admissions serves to expedite trial, does not restrict the number of requests for admissions. Rule 36 provides,

> (a)(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of rule 26(b)(1) relating to:
>
> (A) facts, the application of law to fact, or opinion about either; and
>
> (B) the genuineness of any described document.

South Carolina's request for a pre-set numeric limitation would thwart the purpose of Rule 36 which is to promote trial efficiency by eliminating uncontested factual matters and eliminating issues that are not really in dispute between the Parties. Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371 (1962). The Parties should make full use of this case management device as it will allow for a more efficient trial on South Carolina's claims.

South Carolina may be concerned that if there is no pre-set limitation, requests for admissions may be so voluminous and framed in such a way that the answering party will be unduly burdened. However, instead of imposing an artificial pre-set numeric limitation, North Carolina suggests a better guard against inappropriate use of requests for admissions is for "the responding party [to seek] a protective order under Rule 26(c)." Rule 36, Fed. R. Civ. P., Notes of Advisory Committee on Proposed Rules (1970).

For these reasons, South Carolina proposed language limiting the number of requests for admissions should not be included in the First Amended CMP.

3. Section 5.4 Timeline for Completion of Fact Discovery.
[Yellow and teal highlighted language in proposed First Amended CMP at 10]

The primary difference between the Parties' positions in this paragraph is that South Carolina requests mandatory language requiring that fact discovery shall be completed in 15 months. North Carolina's proposed language *anticipates* but does not require that fact discovery will take three years given the addition of discovery on equitable apportionment factors. North Carolina further recognizes that including discovery on the benefits of interbasin transfers to the Yadkin River Basin and the benefits of electricity generated from water use in North Carolina will greatly increase the time required for fact discovery and that this discovery is

necessary and should take place before the trial on South Carolina's entitlement to a remedy (a position that South Carolina disputes).

North Carolina is not confident that the Parties can accurately predict how long fact discovery will take. During the briefing on bifurcation, North Carolina estimated that discovery on Phase II issues would be "at least ten times greater than the level of effort required under Phase I as set out in the current CMP." *See* North Carolina's March 12, 2010 Brief at 17. North Carolina's proposed language is an effort to compromise between South Carolina's position and North Carolina's previous estimate of the amount of time required for discovery. Accordingly, North Carolina suggests the following language allowing three years for fact discovery be used in the First Amended CMP:

> The parties anticipate that fact discovery may be completed within three years from the date the CMP is signed. The parties anticipate that fact discovery shall precede expert discovery; however additional fact discovery may be required following receipt of expert reports provided after the close of fact discovery if South Carolina objects to and does not respond to Contention Interrogatories until such time as it provides expert reports.

A further dispute arises from South Carolina's request that all fact discovery be finished before expert discovery. Such a case management plan is not workable under the circumstances because, as South Carolina would have it, North Carolina would be barred from conducting any fact discovery after receiving South Carolina's expert reports and only then learning the full nature and extent of South Carolina's allegations.

From the time South Carolina filed its complaint, North Carolina has been seeking information about South Carolina's specific allegations. For example, during the dispute between the Parties leading up to the entry of the CMP, North Carolina requested the CMP require that South Carolina provide a Statement of Particularized Harm including, *inter alia*, a detailed and specific statement of South Carolina's harms and the cause of those harms. July 14 letter to Special Master Kristin L. Myles from Christopher C. Browning at 2-3. In response, South Carolina proposed that within 9 months of the date the CMP was approved, it would provide in response to NC's contention interrogatories information on the harms that occurred in the South Carolina portions of the Catawba River Basin and the "activities in North Carolina that South Carolina believes that its experts will be able to demonstrate caused one or more of the identified harms." July 3, 2008 letter to Special Master Kristin L. Myles from David C. Frederick at 1-2.

This promise to provide information was reiterated in South Carolina's response to Interrogatory No. 1 of North Carolina's First Set of Interrogatories. There, South Carolina

> agreed to provide information on the harms that it alleges have occurred in the South Carolina portions of the Catawba River Basin *within nine months of the date the Case Management Plan is approved.* South Carolina also agrees to provide at that time information on the interbasin transfers, consumptive uses and other activities in North Carolina that South Carolina believes its experts will be able to demonstrate caused one or more of the identified harms.

SC Responses to Interrogatories dated July 31, 2008 2, 2010 at 8-9 (emphasis added). More than twenty months have passed since the CMP was entered and South Carolina has not yet provided information demonstrating that North Carolina has caused South Carolina's alleged harms. Instead, South Carolina now claims North Carolina must wait for this information until South Carolina submits its expert reports. *See, e.g.,* Plaintiff South Carolina's Responses to Defendant North Carolina's First Set of Contention Interrogatories served April 2, 2010 at 2, 5, 7, 26, 28, 31, 32, 33, 34, 36 and 37.

According to the terms of the proposed First Amended CMP, the Parties will not submit a schedule for expert discovery for another 6 to 30 months. North Carolina is advocating for the earlier date, but if South Carolina were to prevail, North Carolina would not know before the close of fact discovery which interbasin transfers, consumptive uses, and other activities in North Carolina South Carolina claims have caused it harms. Nor would North Carolina know the volume of water used in North Carolina that South Carolina claims causes it harm, the minimum amount of water South Carolina alleges must flow into South Carolina in order to prevent its harm, or the minimum flow at Lake Wylie that South Carolina contends is necessary to avert its purported harms. South Carolina's position is that it will only provide this information through expert reports and expert discovery shall take place after fact discovery closes. It makes no sense for North Carolina to wait until after the close of fact discovery to get this information and then not be able to conduct fact discovery on South Carolina's specific claims. To guard against such a result, South Carolina's proposed language should be rejected.

North Carolina has proposed language in this section consistent with the language of Section 6.6.2 below (relating to expert discovery) which recognizes that if South Carolina does not respond to baseline questions regarding the cause of its alleged harm until it submits expert reports, then North Carolina may require additional fact discovery after it receives South Carolina's expert reports. North

Carolina respectfully requests the Special Master enter the language it has proposed which provides for flexibility during discovery as needed.

4. Section 5.5 Deadlines for Expert Discovery
[Yellow and teal highlighting in proposed First Amended CMP at 10 and 11]

South Carolina initially proposed that deadlines for expert discovery be addressed through a future case management plan. North Carolina was willing to agree to this proposal as long as the Parties began negotiating deadlines for expert discovery within a reasonable time. Accordingly, North Carolina agreed with South Carolina's initial proposal to present joint or individual proposals for expert discovery deadlines to the Special Master within six months of the date the First Amended CMP was entered.

But, South Carolina changed its position regarding the date by when the Parties should submit an expert discovery schedule to the Special Master when it saw North Carolina's request for a three-year period for fact discovery. Instead of counting six months forward from the date the First Amended CMP is entered, South Carolina's new proposal counts backwards from the close of fact discovery. There is a substantial difference between these two dates. Under South Carolina's proposed plan, the Parties would not even propose a schedule for expert discovery for another 9 to 30 months (depending on whether fact discovery closes in 15 or 36 months). Such a delay would not be beneficial to the litigation and is unfair to North Carolina.

North Carolina submits that the Parties should continue working together to move the litigation forward and that an effective means of doing so is to begin working together to craft an expert discovery schedule as soon as the First Amended CMP is entered so that the expert discovery schedule can be submitted to the Special Master within the next six month. Six months is more than sufficient time for the Parties to develop and propose a schedule for expert reports and related discovery.

5. Section 5.7 Discovery Not to Be Duplicative
[Yellow highlighted language in proposed First Amended CMP at 11]

South Carolina has requested the inclusion of a sentence in this section providing an example of the requirement that "The Parties shall endeavor not to serve duplicative discovery." North Carolina suggests that including an example of the stated principle is unnecessary. North Carolina defers to the Intervenors' position on this issue.

6. Section 6.1 Disclosures/Supplemental Responses to Contention Interrogatories Already Propounded in the Case
[Teal highlighted language in proposed First Amended CMP at 12 and 13]

North Carolina requests the Special Master include language in the First Amended CMP in order to address some difficulties which have arisen with responses to contention interrogatories and to reflect the present status of ongoing discovery disputes relating to contention interrogatories already propounded in this case. Specifically, North Carolina requests the following language:

> Some parties have already exchanged contention interrogatories regarding certain issues in the case and have been engaged in negotiations regarding the adequacy of the responses. Following entry of this CMP, the parties may supplement their responses to contention interrogatories. Specifically, Plaintiff shall have 60 days from the date this CMP is entered by the Special Master to supplement its responses to contention interrogatories. Defendant and Defendant-Intervenors may have 60 days following receipt of Plaintiff's supplemental responses to supplement their responses to contention interrogatories. No party shall refuse to respond or to supplement a response to a contention interrogatory on the grounds that discovery is not yet complete or, where the party chooses to rely on its experts to provide its response, that the service of expert reports has not yet been required.

One of the difficulties experienced by North Carolina after it propounded its First Set of Requests for Responses to Contention Interrogatories to South Carolina was that South Carolina objected on the grounds that it was not yet required to submit expert reports under the CMP. The contention interrogatories did not require or request an expert report but simply requested the evidence presently known to South Carolina that allegedly supports its claims against North Carolina. Under the proposed language for the First Amended CMP, Parties will not be allowed to postpone providing responses to contention interrogatories on the ground that expert reports are not yet required.

Under the present CMP, there is no time limitation on when contention interrogatories could be served. *See* CMP § 5.2.1 (Jan. 7, 2009). The Special Master contemplated that discovery tools in the case management process would require South Carolina to provide "greater specificity as to the precise harms it alleges and the relief it seeks in a manner sufficient for North Carolina and any other adverse parties to formulate their defense." *See* CMO No. 8 (Sept. 24, 2008). Even South Carolina agreed that within 9 months of the date the CMP was approved, it would

provide information regarding the harms caused by North Carolina. *See* SC Responses to Interrogatories dated July 31, 2008 2, 2010 at 8-9. To date, South Carolina has avoided providing North Carolina with facts and evidence in support of the general contentions set forth in its complaint alleging North Carolina caused it harm. The language proposed by North Carolina would clarify the Parties' obligation to provide timely responses to contention interrogatories without further delay.

7. Section 6.2 Number of Contention Interrogatories
[Teal and yellow highlighted language in proposed First Amended CMP at 13]

The Parties disagree on the appropriate number of contention interrogatories which should be allowed by the First Amended CMP and whether the number should be allowed *per party* or *per side.* These issues are also relevant to Section 6.3 Number of Interrogatories and Section 6.6.1 Depositions of Fact/Lay Witnesses.

North Carolina proposes the following language be included in this section:

> Each party may serve no more than 75 contention interrogatories on each other party. The Intervenors may serve a combined total of no more than 75 contention interrogatories collectively. The contention interrogatory counts shall include all contention interrogatories previously served. Each party served with contention interrogatories shall have 30 days from the date of service to respond. Without prior written approval of the Special Master, no additional contention interrogatories may be served.

South Carolina proposes that *each side* be collectively allowed to propound 40 contention interrogatories (including any which may have already been asked). This would result in North Carolina receiving one-third of the number of contention interrogatories that are available to South Carolina. North Carolina submits that South Carolina's proposal that North Carolina and the Intervenors share a limited amount of discovery is unfair and would prejudice North Carolina's defense in the litigation.

North Carolina further objects to South Carolina's proposed *per side* limitation because it is based on the incorrect position that the interests of North Carolina, Duke Energy, and the CRWSP are fully aligned in this case. The flaws of this position are discussed in more detail in the argument regarding Section 5.3.9 above and incorporated herein by reference. Each Party State should be entitled to ask the same number of contention interrogatories as the other State. The Intervenors have suggested that they can make do with fewer requests and have tailored their request accordingly.

The Parties also disagree regarding the appropriate number of contention interrogatories which may be used in discovery. Under the CMP for discovery on the Phase I threshold question, the Party States were limited to 30 contention interrogatories each and the Intervenors were not allowed to propound contention interrogatories. It is unrealistic to limit the number of contention interrogatories in the First Amended CMP to only 10 more than had previously been allowed. Discovery for the trial on South Carolina's entitlement to a remedy is much broader than the discovery required for Phase I on the threshold issue relating to South Carolina's injury. Now the Parties will require discovery on such issues as an analysis of water usage in North Carolina that benefits South Carolina, a valuation of established water usage, a comparison of the number of persons served in each State from the Catawba River, the identification and valuation of other water sources in South Carolina and North Carolina, benefits to South Carolina resulting from IBTs at issue in this ligation, evaluation of the cost and feasibility of water conservation efforts, and an analysis of historic and projected future water uses.

Moreover, South Carolina's proposed language would require that North Carolina share 40 contention interrogatories with the Intervenors while the original CMP allowed North Carolina 30 contention interrogatories to use all by itself. If South Carolina's proposed language is adopted, it is likely that North Carolina's opportunity to ask contention interrogatories under the proposed First Amended CMP will result in it receiving fewer contention interrogatories than before even though the issues for discovery are broader. South Carolina's unfair attempt to limit and reduce the number of North Carolina's contention interrogatories should not be allowed.

To date, North Carolina has served 10 contention interrogatories on South Carolina. If the Party States are each allowed 75 contention interrogatories, North Carolina will have 65 remaining to use as it prepares for trial on the threshold issues *and* the equitable apportionment issues. North Carolina submits that this is an appropriate amount and requests the Special Master adopt the requested language.

8 Section 6.3 Number of Fact Interrogatories
[Yellow and teal highlighting in proposed First Amended CMP at 14]

The Parties disagree on the appropriate number of fact interrogatories which should be allowed by the First Amended CMP and whether the number should be allowed *per party* or *per side*. Issues regarding the proposed limitation on interrogatories and whether the number should be allowed *per party* or *per side* were briefed in part in Section 6.2 and North Carolina incorporates those arguments by reference and requests the Special Master adopt the following language:

> Each party State may serve on each other party no more than 200 fact interrogatories, including discrete subparts. The Intervenors may serve a combined total of no more than 100 interrogatories, collectively. These interrogatory counts shall include all interrogatories previously served and to be served in this case. Interrogatories shall be labeled as such and be served on a date such that the response is due no later than the close of fact discovery. Each party served with interrogatories shall have 30 days from the date of service to respond. Without prior written approval of the Special Master, no additional interrogatories may be served.

South Carolina has proposed that each side be allowed only 100 fact interrogatories in this complex litigation. North Carolina submits that this number is too small especially if North Carolina is required to share its allocated number with the Intervenors. As the Parties prepare for a trial on South Carolina's entitlement to a remedy the issues are broader and require a significant increase in the number of interrogatories available to each Party. North Carolina suggests that 200 fact interrogatories per party is a more accurate projection of the number of interrogatories required to prepare its defense in this litigation than the number suggested by South Carolina per side given the need for discovery on *all* issues relating to South Carolina's entitlement to a remedy.

9 Section 6.6.1 Depositions of Fact/Lay Witnesses
[Yellow and teal highlighted language in proposed First Amended CMP at 17]

The Parties disagree on the appropriate number of depositions of fact/lay witnesses which should be allowed by the First Amended CMP and whether the number should be allowed *per party* or *per side*. North Carolina requests the Special Master allow each party to notice and take 150 depositions. South Carolina proposes the First Amended CMP be revised to allow only 30 depositions per side.

Through its discovery responses, South Carolina has identified approximately 88 witnesses to date. Moreover, other Parties in the Litigation have each identified additional witnesses increasing the number of fact witnesses presently identified to approximately 160. North Carolina anticipates that each Party will identify additional witnesses as discovery continues since the scope of discovery has expanded to include *all* issues relating to South Carolina's entitlement to a remedy. South Carolina's proposed number of depositions has no relationship to the number of witnesses already identified by South Carolina and should be rejected as grossly inadequate.

Furthermore, North Carolina's interests are not the same as those of the Intervenors. *See* argument set forth in Section 5.3.9 above. Therefore, North Carolina should not be required to negotiate for a share of the depositions assigned to Defendant and Intervenors as proposed by South Carolina. In fairness, as Party

States with the primary interest in this Litigation, North Carolina and South Carolina should each be allowed to notice the same number of lay witness depositions. For these reasons, North Carolina requests the Special Master adopt its requested language and allow 150 depositions of per party.

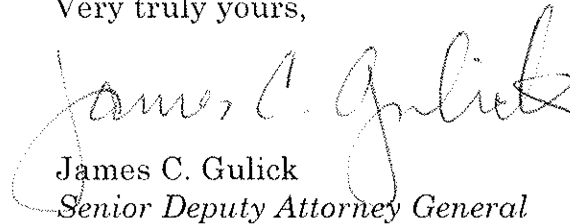
10. Section 6.6.2 Depositions of Expert Witnesses
[Teal highlighted language in proposed First Amended CMP at 18]

North Carolina has proposed language in this section consistent with that included in Section 5.4 above which recognizes that if South Carolina does not respond to Contention Interrogatories regarding its claims until it submits expert reports, then North Carolina may require additional fact discovery after it receives South Carolina's expert reports. North Carolina submits that its proposed language should be included in the First Amended CMP to ensure that the Parties are able to adequately prepare for trial.

* * * * * *

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

Very truly yours,



James C. Gulick
Senior Deputy Attorney General

cc: All Counsel of Record (via email only)