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August 16, 2010

By Email and First-Class Mail

Kristin Linsley Myles, Special Master
Munger, Tolles & Olson LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105-2907

Re: State of South Carolina v. State of North Carolina, No. 138, Original

Dear Special Master Myles:

In light of the prior briefing on this topic, Intervenors will reply to South Carolina's principal arguments that the Special Master should discontinue phased discovery.

First, South Carolina's position would require that the parties immediately begin to engage in full unitary discovery, including expert reports, on all conceivable factual issues even if some of them prove ultimately to be non-discoverable. These issues include the cataloguing of the specific uses of the Catawba's waters in North Carolina, historically, today and as predicted for the future; determining the value to North Carolina of the historic, current and future uses of the Catawba's waters in North Carolina; the valuing of water consumed in North Carolina by South Carolinians (offset by water consumed in South Carolina by North Carolinians); and the valuing of water consumed in South Carolina as a result of North Carolina's inter-basin transfers from the Catawba River. Discovery related to these issues would take years and cost millions. Until the threshold burden of harm has been resolved in this case, there is no real limit on the scope of factual issues related to the Catawba that the parties must explore. Even if South Carolina were to carry its threshold burden of demonstrating substantial harm to it caused by North Carolina, afterwards (as a result of that determination) Phase Two discovery will be better focused, more efficient and less expensive. Phasing discovery, accordingly, is a much more sensible approach.

South Carolina agrees that deferring certain factual issues is a helpful tool for managing the case. Specifically, South Carolina concedes that it would be more efficient to phase discovery on whether North Carolina's inter-basin transfers benefit South Carolina consumers in other river basins, SC Brief 3, suggesting that any discovery on this issue be postponed and pursued only in a separate phase. South Carolina's tacit recognition that phasing is efficient

logically supports the postponement to Phase Two discovery of all factual issues relating to application of the equitable apportionment factors.

South Carolina's acknowledgment, coupled with the history of this case, significantly weakens South Carolina's contention that Intervenors bear a "heavy burden" to show that phasing would be more efficient. SC Brief 2. In fact, in light of South Carolina's prior agreement to conduct phased discovery, the time that has passed, the resources invested in the Case Management Order (CMO) and discovery thus far, South Carolina should carry the burden of showing that phased discovery is no longer warranted. Although South Carolina asserts that continued phasing of discovery would render the case unmanageable, for the past two years all parties have been operating under the CMO which clearly contemplates phasing. The parties have effectively and independently managed discovery thus far and will no doubt continue to do so, unless the existing framework is abandoned.

South Carolina nonetheless claims that phasing discovery will not be efficient because the parties will come to the Special Master with repeated disputes about whether requested material falls within Phase One. SC Brief 2. South Carolina makes the related argument that if discovery continues to be phased, the Special Master will have to resolve disagreements about the legal standard for Phase One "in the context of discovery motions." SC Brief 3. Initially, these claims are counter-intuitive. As noted above, the parties have been conducting discovery under the CMO for over two years without bringing a single dispute to the Special Master. Moreover, a summary judgment ruling on the scope of South Carolina's harm caused by North Carolina (if any) could render discovery on many topics unnecessary, heading off discovery disputes related to these topics that would otherwise have to be resolved in unitary discovery.

South Carolina spends the bulk of its letter brief arguing about the legal standard necessary for it to show harm, rather than focusing on the question whether discovery should be phased. The question of the proper legal standard for Phase One is not currently before the Special Master. The question presented is whether the continued phasing of this case is efficient and beneficial, and it is. At the very least, discovery should be postponed on the substantial list of matters all parties apparently agree are in Phase Two, including the valuation of uses in North Carolina and the comparison of the value of those uses with the value of incremental increases in water to South Carolina at times of drought or low flow.

Intervenors briefly note, however, that South Carolina's ability to present clear and convincing evidence of substantial harm caused by North Carolina remains in serious doubt. In asserting that it need only show that "water demands exceed the available water supply" and that "the complaining State is harmed from that lack of water," SC Brief 4, South Carolina relies on a series of equitable apportionment cases applying the common law of prior appropriation where all the party States are governed by that water rights doctrine. North and South Carolina,

however, follow riparian law. Under that regime, property owners are entitled to engage in reasonable uses and may not injure downstream users also engaged in reasonable uses of the river.

A drought or low flow may prevent all upstream and downstream users from engaging in their customary reasonable uses of the river; but, when that occurs in riparian States, the inability of users in the downstream State to engage in their reasonable uses does not, without more, constitute clear and convincing proof of substantial harm caused by the upstream State. The downstream State must also show that its harm is not simply caused by a drought, but instead that it is caused in some substantial part by overconsumption in the upstream State. *See Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). That is, in a riparian regime, all States must proportionately share the burden of the drought; a downstream State is harmed by an upstream State only if the upstream State fails to do so.

This is not a tort standard, as South Carolina pejoratively claims, SC Brief 5. It is a standard that reflects the shared benefits and burdens of the riparian regime, and the Supreme Court's precedent. North and South Carolina must share the burden of a drought; and North Carolina and Intervenors assert that they are doing so under the current regime.

Although this issue is not before the Special Master, Intervenors could not allow South Carolina's contentions related to its ultimate burden of demonstrating substantial harm to go unanswered. Not only is South Carolina's lengthy attempt to assert that it has carried its Phase One burden in no way dispositive of the issue of phasing, it is also extremely premature.

Respectfully submitted,

Virginia A. Seitz
On Behalf of Intervenors

cc: All Counsel of Record