

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

CERTIFIED
COPY

TELEPHONIC CONFERENCE

BEFORE SPECIAL MASTER KRISTIN MYLES

Thursday, July 17, 2008

Reported by:

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SOUTH CAROLINA,
Plaintiff,
vs. No. 138
NORTH CAROLINA,
Defendants.

Telephonic Conference before Special
Master Kristin Myles, beginning at 12:03 p.m. and
ending at 2:59 p.m. on Thursday, July 17, 2008,
before DANA M. FREED, Certified Shorthand Reporter
No. 10602.

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Thursday, July 17, 2008

12:03 p.m. - 2:59 p.m.

MR. FREDERICK: David C. Frederick, David Sarratt and Scott Attaway for South Carolina.

MR. BROWNING: Chris Browning and Jennie Hauser here for North Carolina.

MR. PHILLIPS: This is Carter Phillips for Duke Energy. And I think at some point Virginia Seitz will be joining us as well.

MR. SHEEDY: Good afternoon, Jim Sheedy and Susan Driscoll here for Catawba River Supply Project.

MR. BANKS: And this is Jim Banks for the City of Charlotte. And Mike Boyd from the office of the city attorney will be joining.

MR. COOK: Bob Cook and Parkin Hunter, South Carolina.

MR. GOLDSTEIN: Tom Goldstein for the Catawba River Water Supply Project.

(Off the record.)

SPECIAL MASTER MYLES: Why don't we proceed. My inclination would be to proceed first with the motion for clarification or reconsideration if everyone is present that needs to argue that. Is there any party that's not currently represented on

1 the phone by the person that will be arguing that
2 motion? Okay. Why don't we go ahead and do that
3 then? Moving party would go first. And why don't
4 we -- I don't think we need to set a time limit. Why
5 don't you just go ahead and make your arguments and
6 then we'll let everyone else go? And I don't think it
7 particularly matters what order.

8 MR. FREDERICK: Very well, Special
9 Master Myles. This is David Frederick for
10 South Carolina. And before I go too far, since our
11 last telephone conference, I have gotten a new phone.
12 And if you encounter any of the same interruptions in
13 the vocals, if you could please let me know. We have
14 tried to address the problem that we experienced last
15 time.

16 SPECIAL MASTER MYLES: Okay.

17 MR. FREDERICK: Our motion for clarification
18 is based on the use of the phrase "limited purpose" or
19 "limited purposes" as to each of the intervention
20 motions granted. Our view is that that phrase has to
21 have a meaning, the intervenors at the hearing in
22 Richmond represented that they had limited purposes.
23 But as soon as their motions were granted,
24 notwithstanding the order, they've immediately
25 expanded their purpose and the role that they seek to

1 play in the litigation. Purposes that they identify
2 involve interests that go to the framing of an
3 equitable apportionment decree.

4 And importantly, the interests that you
5 identified in the order that the May 27th order
6 identified, all go to interests that are appropriately
7 addressed only at Phase 2 of this bifurcated
8 proceeding and not at Phase 1.

9 For Charlotte, for instance, the order
10 identifies an interest warranting intervention, quote,
11 for protecting its interest in descending the current
12 interbasin transfer regime in its own permanent in
13 particular. That's at pages 9 and 10 of the order for
14 the Catawba River Water Supply Project, at page 11,
15 the limited purpose is to execute the transfer
16 challenged by South Carolina, close quote.

17 And importantly, the order disagrees with
18 Catawba's assertion of an interest on the part of it
19 users in Union County and its limited purpose is only
20 to execute the transfer from south of the border to
21 North Carolina. And likewise, the order uses the
22 phrase "limited purposes" to describe Duke's interest
23 and that goes to Duke's interest in defending the CRA
24 which has not been approved by FERC and its license
25 application to FERC.

1 Now, our submission is that as to each of the
2 interests that have been identified in the order, that
3 all go to the equities of whether or not each of the
4 intervenors' right to have a certain amount of water
5 should exceed the interests of anybody else to get
6 water. And that is a question that goes to the
7 equities of weighing respective rights and interests
8 to water much which does not come into play in the
9 litigation until after a Phase 1 determination is made
10 that South Carolina has experienced injury as a result
11 of the uses and transfers of water by North Carolina.

12 So our submission is that the order is
13 framed, consistent with the representations that were
14 made by the intervenors at the Richmond hearing and
15 that the limited purposes that each of the intervenors
16 expressed does not entitle them to participate as full
17 parties in Phase 1, but at best restricts their
18 opportunity to participate in the litigation at
19 Phase 2.

20 Now, certainly to participate in Phase 1, it
21 would be inconsistent for the intervenors to do so in
22 light of those narrow purposes, because Phase 1, in
23 looking at harm, is going to involve a direct joinder
24 between the two states as to whether or not
25 South Carolina has been harmed by North Carolina's

1 uses.

2 Intervenors are unable to show a, quote,
3 "compelling interest," that is, quote, "unique," with
4 respect to disputing whether South Carolina has been
5 harmed by a lack of water. Presumably, everyone in
6 North Carolina has the same interest and they share
7 that and that interest is being represented by the
8 North Carolina Attorney General's office.

9 SPECIAL MASTER MYLES: Let me interrupt you
10 for a moment, Mr. Frederick, if you don't mind. A
11 couple questions. One, I did read the papers, so if
12 you could focus your arguments on some of the, some of
13 the points that were made in opposition to your
14 motion.

15 In particular, I guess, 2 points. One is
16 that it does seem not to follow necessarily that
17 because the order identifies particular interests in
18 terms of, say, defending a transfer, that that
19 necessarily means that that state's only interest is
20 in fashioning a decree that defends the transfer.

21 In ordinary usage, one would think that if a
22 party had an interest in defending a particular state
23 of affairs, they would have an interest in defending
24 the merits of the claim that would undermine that
25 state of affairs as well as the decree that would

1 literally change the state of affairs.

2 So I hope that question is comprehensible.
3 The point is only that it does not seem to me to
4 follow that the order identifies particular ultimate
5 interests that would justify intervention. But that
6 means that the intervention is to be limited to the
7 fashioning of a decree directed immediately to those.

8 In other words, you need to defend on the
9 merits in order to -- as the first part of saying why
10 the other side shouldn't get the relief they're
11 seeking. You're not just defending at the remedy
12 stage. So that's question number one.

13 Question number two is -- is the idea that
14 somehow -- I think it really goes to your point in
15 your briefs, both of them, that the cumulative effect
16 is what matters. The cumulative effect of all uses.
17 This goes back to the issue of Phase 1 and Phase 2
18 that we discussed on the last call.

19 One argument certainly is that only the
20 cumulative effects matter. All we're going to do is
21 look at the water coming over, how much is it, and
22 does South Carolina need more? But again, I'm not
23 sure there's any precedent for that view.

24 You cite -- you cite your own brief at pages
25 5 to 8 of your scope breach. But that brief cited

1 only that same case that we talked about last time
2 that -- hold on a minute. It was the one from 1982,
3 the Colorado versus New Mexico, but I don't think it
4 really was applicable to all equitable apportionment
5 situations because it was an instance in which the
6 river was fully apportioned by prior uses in New
7 Mexico.

8 So I don't think it -- the logic of it -- to
9 the extent it suggests that any diversion by Colorado
10 will affect the downstream state, I don't -- it
11 certainly doesn't follow within the logic of the
12 opinion that that applies to all equitable
13 apportionment circumstances.

14 So that then raises the question, is it
15 relevant to Phase 1, for example, whether the
16 transfers that are involved here are -- whether they
17 cause harm, whether the transfers here themselves
18 cause harm to South Carolina. And if so, to what
19 extent? That is certainly one issue. And then the
20 issue that we struggled with last time also, to what
21 extent is part of Phase 1 showing that the uses
22 upstream are harmful, helpful, beneficial?

23 Are those inquiries irrelevant to Phase 1 as
24 I think your present argument suggests? Or are those
25 part of a consideration of whether upstream uses that

1 are causing harm to South Carolina that warrants a
2 decree? So all of those questions.

3 And then finally, I guess, you emphasize
4 again the cumulative use and you're right that we did,
5 for purposes of discovery, say that the complaint
6 isn't limited to transfers. But it's certainly the
7 case that the complaint focuses, to a significant
8 degree, on transfers. In fact, that's the only
9 specific use that's mentioned in the complaint. And
10 although the ruling previously was that that didn't
11 limit discovery because the claims of relief were
12 broader than that. Nonetheless, I don't think it can
13 be denied that transfers are the focus of the
14 complaint.

15 So those are my sort of two-and-a-half
16 questions.

17 MR. FREDERICK: Well, let me try to address
18 them in the order in which you posed them.

19 First, I think that the complaint attacks the
20 North Carolina statute. And I think it's important to
21 keep in mind that since the statute also -- the
22 statute authorizes not only the large IBT transfers
23 that we mentioned, but it grandfathered in a lot of
24 existing transfers of the scores of transfers that are
25 permitted under the North Carolina statute.

1 And the complaint says that North Carolina
2 does not have a right to have that statute in light
3 the effects that it is having downstream. So if I
4 understand the question correctly, and I do invite
5 you, Special Master Myles, to interrupt me because
6 there was -- I was taking notes, but there was a lot
7 of material that you transmitted during your
8 questions.

9 The complaint is going at the State statute.
10 And it is that which is the fulcrum of the particular
11 incidents. But the way the order is framed, there
12 would be no limiting purpose or limiting principle
13 simply because a grandfathered use was permitted under
14 the state's statute or a smaller transfer or in the
15 case of Kannapolis a certificate is issued under
16 North Carolina state law.

17 All of those, under the logic of the broader
18 view of the order would invite intervention and we
19 would submit that that's not an appropriate way to
20 view the respective sovereignty. Now, you asked about
21 limiting to the purposes, I don't -- I think
22 respectfully, the order says they may intervene for a
23 limited purpose of doing a particular thing. And that
24 does not authorize them to participate for all
25 purposes in all manners.

1 As for this, there is Supreme Court
2 precedence directly on point. The Kentucky versus
3 Indiana case says at 281 U.S. Penn cite 174, that the
4 fact that an individual citizen there was made a party
5 defendant gives such an individual, and I'm quoting
6 here, no standing to litigate on his own behalf the
7 merits of a controversy which, properly viewed, lies
8 solely between the states. But only to contest the
9 propriety of the particular relief sought against him
10 in the case, the decision on the merits is against his
11 state.

12 This gives an individual defendant in such a
13 suit between states full opportunity to litigate the
14 only question which concerns him individually as
15 distinguished from the questions which concern him
16 only in common with all citizens of his state.

17 Our point is that these intervenors do not
18 have any unique or compelling interest in disproving
19 South Carolina's harm that is any different than what
20 North Carolina, as the party state, has. And as the
21 Kentucky case makes clear, if there is any limited
22 intervention right at all for an individual citizen,
23 and there you'll recall that the Court actually
24 dismissed the individual defendants when it determined
25 that the relief did not need to extend to them. It

1 will be only for the limited purpose of defending the
2 equities of the consumptive use that they are -- that
3 they are experiencing. So I hope that that addresses
4 your first question.

5 With respect to your second question, the
6 cumulative effects. I suspect that we may end up
7 talking quite a lot about cumulative effects for quite
8 some months. And I'm not sure that anything I can say
9 here will completely put to doubt the -- or put to bed
10 the doubts that you obviously are expressing about
11 whether or not South Carolina can prove harm because
12 of the cumulative effects of the big straw in
13 North Carolina.

14 The Nebraska versus Wyoming case in 1945 and
15 Wyoming versus Colorado in 1922, both speak to, or
16 seem to speak, in our view, to the cumulative uses by
17 the upstream state and what effects that has on the
18 downstream state. And the logic of that, it seems to
19 me to be completely insurmountable.

20 Water, as we discussed last time, is a
21 fungible product. If the flow rate that is necessary
22 to sustain South Carolina's businesses, its drinking
23 water quality, the ecology and wildlife that leads to
24 recreation would call for -- say, for instance, I'm
25 just using this as a figure, 1800 cubic feet per

1 second that goes through a certain flow measuring
2 point.

3 The fact that some water might be taken out
4 to service Charlotte, as opposed to Kannapolis, would
5 be immaterial to what ultimately affects the flow rate
6 that causes the harm. And that's why it is important
7 to keep in mind that the theory of the complaint is
8 that, at certain periods of low flow, the river is
9 completely appropriated.

10 Hence, that all uses of the river are being,
11 are taxing the ability of the river to meet all needs.
12 And so the Colorado case is completely on point if, at
13 certain periods of low flow, people in South Carolina
14 that historically were able to get water from the
15 river are unable to do so. And at that theory, any
16 incremental taking of water in North Carolina will
17 cause harms in South Carolina.

18 Now, that's not to say that Phase 1 will be
19 weighing the equities of the respective harms. It
20 simply is to say that the withdrawals of water in
21 North Carolina factually cause less water for
22 South Carolina uses that have been recognized as
23 historic uses. Phase --

24 SPECIAL MASTER MYLES: Mr. Frederick, what is
25 the burden that you need to prove to get through Phase

1 1? Simply that there's less water than some previous
2 time? And if so, how much less water?

3 MR. FREDERICK: Well, our burden at Phase 1
4 will to be show that we are suffering injury as a
5 result of the amount of water that is allowed to pass
6 into South Carolina. And that that injury may be
7 greater or lesser at different rates of flow --

8 SPECIAL MASTER MYLES: Does your injury
9 include, or not, the allocation that's provided for in
10 the comprehensive relicensing agreement?

11 MR. FREDERICK: Our contention, Special
12 Master Myles, is that ERA is not a sufficient basis
13 for understanding what the equitable apportionment
14 needs are, because it did not fully take into account
15 the uses in South Carolina. It was a model that was
16 developed by Duke for Duke's purposes. And it did not
17 take into account the downstream economic consequences
18 that we are seeking to vindicate in the lawsuit.

19 SPECIAL MASTER MYLES: But doesn't it
20 directly affect the flow of water into South Carolina?
21 I mean, doesn't it provide for a specific flow? So
22 assuming, even if, even accepting that it didn't
23 adequately consider all of the factors that would go
24 into an equitable apportionment, isn't it relevant to
25 determine what the existing flow would be if the state

1 of affairs that we -- you know, that we -- if it's
2 approved and therefore it establishes a baseline state
3 of affairs?

4 MR. FREDERICK: Well, I don't know that it
5 would be appropriate to call it a baseline at this
6 point in the litigation, Special Master Myles, because
7 we're trying to find out what data underlie the whole
8 formulation of the CHEOPS model that was the basis for
9 the CRA.

10 And I think it would be premature to say, on
11 the basis of no facts, that something that
12 North Carolina has relied on to justify its IDTs is
13 what -- what the facts are. The whole point of the
14 lawsuit is --

15 SPECIAL MASTER MYLES: I'm not saying that.
16 I'm not -- like I said, I'm not saying -- by saying
17 baseline, I did not mean to say that the flow into
18 South Carolina provided for in the CRA would be a
19 proper allocation under an equitable apportionment
20 analysis or that any of the data underlying it are
21 accurate, proper or otherwise, you know.

22 But is it relevant, is my question. Is the
23 fact that there's a possibility, whatever the
24 likelihood may be, that it is approved, therefore, as
25 a fact, it will provide a certain flow, whether or not

1 that's a good one or a bad one. That that amount of
2 water will be coming over the border, is that a
3 relevant fact?

4 MR. FREDERICK: I would suggest to you that
5 it is not relevant for Duke for analyzing Phase 1. It
6 is relevant only for understanding how Duke wants to
7 use it as Phase 2 to justify its FERC license defense.
8 But I would submit --

9 SPECIAL MASTER MYLES: If there's a legally
10 binding obligation on the part of somebody, call it
11 Duke or call it North Carolina, whoever's bound by the
12 CRA, to ensure that a certain amount of water is in
13 fact coming over the border into South Carolina, how
14 is that not a Phase 1 issue? I'm having trouble
15 understanding why that is not --

16 MR. FREDERICK: If the CRA does not provide
17 enough water --

18 (Discussion off the record.)

19 SPECIAL MASTER MYLES: Why don't you just go
20 again and speak a little more slowly and see if that
21 works.

22 MR. FREDERICK: Okay. The CRA is one way of
23 measuring water availability in the river. But the
24 low flows are a contention under the CRA on other
25 upstream-contingent consumptive uses. So the CRA may

1 provide one way of measuring a baseline for one
2 particular purpose, but it does not purport to capture
3 a way of understanding flow to ascertain harms in
4 South Carolina.

5 And so it might be -- very well be you would
6 consider this hypothetical, if more water is needed to
7 avoid harms to South Carolina, the CRA can be
8 satisfied, but more water is available to run through
9 Duke's dams. And, you know -- so if anything, Duke
10 should benefit by an analysis goes that sufficient
11 water is available under the CRA, because more water
12 would be available under a decree that would further
13 harms in South Carolina of overconsumption in
14 North Carolina.

15 So the mere fact that there is a relevant
16 point of inquiry does not make a full-fledged
17 justification for Duke or any of the other intervenors
18 to intervene.

19 And if I could just turn to the Catawba River
20 Water Supply, the order expressly denies their
21 interest as a consumer of water. And yet it says they
22 have an interest in defending, quote, the ability to
23 execute the transfer. But the transfer is done only
24 so that people in North Carolina can use or consume
25 water.

1 So factually, Catawba never argued that there
2 is some peculiar economic interest or something else
3 executing the transfer apart from the use by the
4 North Carolina consumers of that water.

5 SPECIAL MASTER MYLES: Well, wasn't that also
6 true of the city of New York which -- which the order
7 you analogized as too --

8 MR. FREDERICK: No, that was not true of the
9 City of New York. To the contrary, New York came up
10 with its own plan to dam the Hudson River and it went
11 to New York State under a statute that was not being
12 challenged in the lawsuit to gain approval for that
13 dam. And the lawsuit was directly directed at
14 specifically the dam that the City of New York was
15 purporting to build and the diversions from that.

16 And it was not an attack on the state
17 statute, as our lawsuit is. If -- it could very well
18 be the case, Special Master Myles, that if some
19 further upstream presumptive use that might not be
20 equitable after a Phase 2 analysis provides all the
21 water that the Catawba River Water Supply Project
22 needs to pump into Union County. And their
23 participation in the lawsuit will have been completely
24 irrelevant.

25 And our point is that the State of

1 North Carolina can adequately protect and defend the
2 various interests. Particularly at Phase 1 where
3 we're simply looking at whether or not harms have
4 occurred on South Carolina that derive from water
5 shortages and those water shortages can be traceable
6 to actions in North Carolina.

7 SPECIAL MASTER MYLES: Why don't we move --
8 why don't we hear from the intervenors next? Again, I
9 don't have a particular view on who ought to go first,
10 but --

11 MR. PHILLIPS: This is Carter Phillips. I
12 think, on behalf of Duke, I'd like to at least respond
13 to a couple of points that Mr. Frederick just made.
14 And because I think we have complete answers for them
15 that at least makes it easy to respond to, so I'm
16 inclined to do that, if that's all right with you.

17 SPECIAL MASTER MYLES: That's fine. Yeah.

18 MR. PHILLIPS: Well, first of all, the one
19 point that Mr. Frederick completely has ignored, both
20 in the motion to clarify and in his reply to us, is
21 that your order specifically identifies, as a
22 significant part of this case, the fact that the
23 question is, you know, South Carolina is seeking, and
24 here I'm quoting from the order on page 12, "seeking
25 the apportionment not of the natural flow of the

1 Catawba River, but of waters available solely or
2 primarily because they have been impounded by Duke."
3 And I don't see how it's going to be possible to
4 figure out anything about sort of who's harmed and
5 whether this is a serious harm or not a serious harm
6 without figuring out, in the first instance, what's
7 the appropriate baseline to use? Is it impounded
8 waters that are being used, or is it the natural flow
9 of the waters that are being used?

10 That seems to me a sort of core underlying
11 question that's going to have to be resolved. And I
12 think it's got to be resolved in the Phase 1 component
13 of it. And it goes to the precise and direct interest
14 that you've already determined to be a compelling one
15 and that justifies the intervention. And so that,
16 at least in my mind, is a complete answer.

17 The second point I would make is that the
18 distinction between Phase 1 and Phase 2 -- in a
19 conceptual sense, I understand it. I have to admit
20 that it seems to me it's quite fuzzy in that, even in
21 the proposed order, the suggestion was that you would
22 have discovery dealing with Phase 1 or Phase 2 issues,
23 along with Phase 1 issues.

24 So the idea of trying to artificially carve
25 out who can participate in one form or another seems

1 to me extremely inefficient and absent a, you know,
2 compelling reason, not something that the Court ought
3 to adopt or to recognize.

4 The third point is the one you've essentially
5 made in your own question, which is there's a big
6 difference between saying do you have a particular
7 purpose and then saying that and therefore, you're not
8 entitled to defend against the entirety of the merits
9 of the case.

10 In your order, at least with respect to Duke,
11 again, the last line or the last sentence of the order
12 on page 12, you say, "Duke has shown that it has a
13 unique and compelling interest in the outcome of this
14 original case," not in any particular allocation, but
15 in the outcome of this case.

16 And then it seems to me that then it follows
17 pretty naturally that we should be entitled to defend
18 against the entirety of the case under those -- under
19 those circumstances.

20 And then I guess two more points that I would
21 make. One is all of your questions with respect to
22 the CRA seem to me clearly to show that this is an
23 issue that's relevant. Mr. Frederick may be correct
24 that at the end of the day, it's not the final
25 resolution. Obviously, Duke believes that it should

1 be. But it's certainly relevant, I think, to all
2 phases of trying to figure out how to proceed with
3 this particular case and it's an obligation that
4 exists now. It's not one that's dependent on the
5 licensing arrangement. It exists now. The
6 agreement's been signed. It imposes duties on us.
7 And it seems to me that ought to be taken into account
8 from day one, not at some artificial time in the
9 future.

10 And then finally, Kentucky versus Indiana,
11 that that really is just asking you to reconsider your
12 prior ruling. I mean, the Court there concluded that
13 those particular individuals did not have a compelling
14 reason and --

15 (Interruption in proceedings.)

16 It did not, it did not provide for the kind
17 of artificial demarcation of the case in the way that
18 they're employing it here.

19 I don't know. Have I been cut off or is that
20 something else?

21 SPECIAL MASTER MYLES: I'm still here anyway.

22 MR. BROWNING: We're all here.

23 MR. PHILLIPS: Okay. I'm not sure what that
24 was.

25 In any event, I just don't think Kentucky

1 versus Indiana has authority for trying to impose the
2 kind of limitation that's being imposed here on a
3 party that has been found to be -- to have the kind of
4 compelling interest that justifies allowing them to
5 intervene in the first instance.

6 SPECIAL MASTER MYLES: You did say,
7 Mr. Phillips, at the hearing that we had in Richmond,
8 that you agreed that Duke's interest would be somewhat
9 limited in the sense that Duke is not a sovereign
10 state and therefore that its interest would not be the
11 same. I mean, its participation may not be the same
12 as that as one of the party states. It may be a good
13 time to ask you to elaborate on that thought here.

14 At a minimum, one would think that there may
15 be circumstances for Duke and for both of the other
16 intervenors where -- where there would be issues
17 outside the scope of what they might legitimately be
18 interested in defending, in terms of defending either
19 the transfers that are being challenged with respect
20 to the other two intervenors or Duke's interest.

21 So now that we have some discovery that's
22 been served and we have a greater more detailed
23 discussion of the scopes of Phase 1 and Phase 2, is it
24 worth revisiting the question of whether there are any
25 practical limitations on Duke's participation and what

1 are they?

2 Naturally, that may still be an abstract
3 question that can't be resolved until we have a motion
4 for a protective order or something to that effect, or
5 objections to discovery that get challenged. But I
6 just offer it as a possibility that there might be
7 more -- you might have more thoughts on that.

8 MR. PHILLIPS: Well, I don't think there's
9 any question. And I certainly meant it when I said it
10 at the initial hearing that obviously, we don't stand
11 in North Carolina's shoes for these purposes. I do
12 think Duke has an unusually broad interest here,
13 because it operates the entirety of this flow. And so
14 therefore, it's likely to have a pretty significant
15 concern about a wide range of issues.

16 But I can certainly imagine that there would
17 be some where we wouldn't have any interest. And if
18 we, for whatever reason, although I can't imagine that
19 we would, we'd stick our nose into it, I think
20 South Carolina could legitimately say to you, "I don't
21 see that Duke has any particular interest in, say, one
22 particular transfer or another as the litigation goes
23 forward."

24 To me, at least, it's a big leap, though, to
25 say we're going to try to come up with some artificial

1 distinction between the entirety of Phase 1 and the
2 entirety of Phase 2 and then we'll just wait until we
3 get to the Phase 2 part and see where you are at that
4 stage and now you're allowed to jump in. When,
5 you know, it's quite clear, to me at least, based on
6 the discovery demands that South Carolina has made on
7 Duke that we are intimately concerned and interested
8 in a lot of the Phase 1 issues that obviously
9 South Carolina is seeking to pursue.

10 And again, a lot of them go to the CRA and
11 the methodology that underlies that. And to say that
12 we're not -- that we're not an intervenor for purposes
13 of that inquiry just seems to me just flatly
14 inconsistent with your basic order that says that we
15 have a compelling interest in being involved here.

16 But there is no doubt that there are limits
17 to what we might be able to do. And my guess is when
18 they arose, it might well be that both North Carolina
19 and South Carolina would object to us doing something
20 if we're pushing this litigation beyond the bounds
21 that either of the states legitimately wanted to go.

22 SPECIAL MASTER MYLES: Okay. Why don't we
23 hear from --

24 MR. FREDERICK: Could I respond to a few of
25 those points, Special Master Myles? Or do you want me

1 to respond seriatim to each of the intervenors?

2 SPECIAL MASTER MYLES: I think it would
3 probably be more efficient if you could wait --

4 MR. FREDERICK: Okay.

5 SPECIAL MASTER MYLES: -- until all of the
6 intervenors have gone. Why don't we hear from --
7 again, I don't really have a preference as to Catawba
8 versus Charlotte, whoever wants to go first. And then
9 after those two speak and we'll see if North Carolina
10 wishes to say anything. And then why don't you then,
11 Mr. Frederick, give your response to everything?

12 MR. GOLDSTEIN: This is Tom Goldstein. And
13 maybe I can speak for the water supply project first.
14 I just have four points that I think I could helpfully
15 make.

16 In the framework for this, I think is that
17 there remains a considerable ambiguity about Phase 1
18 and at the very least on the part of us, a conviction
19 that Phase 1 is not going to be, at least in terms of
20 the discovery that's undertaken, hermetically lidded
21 to the abstract question of whether South Carolina is
22 getting less water than some level to be determined
23 otherwise. We think that there is more going on in
24 Phase 1 and that it would be counterproductive to seal
25 off Phase 1.

1 And so my four points are, first, it's not
2 accurate for Mr. Frederick to say that we are acting
3 in contravention of our representation and the
4 Special Master's order that our participation would be
5 limited. We have reiterated that at every possible
6 stage. But the non sequitur in South Carolina's
7 argument is that the order, by saying limited, was
8 limiting the participation of the intervenors to the
9 second phase versus the first phase. Of course, it
10 doesn't say that. That proposal was made at the
11 hearing. The order doesn't reflect it.

12 Instead, the order reflects something that's
13 much more sensible and that's a line that's drawn on
14 substance, not on procedural staging. And the
15 substantive line that's reflected in the order that we
16 committed at the beginning, the middle, and at the end
17 to stick by, is all right, what are the pieces of the
18 case and what's going on that's relevant to Catawba's,
19 the water supply project's, efforts to defend its
20 transfer as the authorized agent for the transfer?
21 And we remain committed to that.

22 We have no interest and there is no example
23 of us doing anything to the contrary. That's how our
24 client wants to spend its money, that's how we can
25 effectively spend our time, and that's how we can be

1 helpful.

2 Nobody doubts, and Mr. Frederick can tell us
3 if it's wrong to assume that South Carolina is going
4 to take considerable discovery about the use of the
5 water that is the 5 MGD withdrawal by the water supply
6 project to Union County. And to incorporate that into
7 its assessment of whether or not it's been harmed.
8 And we also think that it's very likely that there
9 will be a close relationship to the determination if
10 South Carolina says, "Here's an example of how we've
11 been harmed," and it's an example that's called out in
12 the complaint by its terms, that that will lead into
13 an analysis in Phase 2 that that use is inequitable
14 and we just don't think that those things can
15 logically be separated.

16 And so our, my first point, as I said, is we
17 intend to deal with things that are relevant to our
18 transfer, Phase 1, Phase 2, briefing, discovery and
19 the like.

20 The second is a point that South Carolina I
21 don't think yet has grappled with, is that the
22 proposed case management plan itself contemplates that
23 there isn't a hermetic division between discovery in
24 Phase 1 and Phase 2, that the parties are taking a
25 common-sense approach, recognizing that there are

1 going to be depositions, there are going to be
2 interrogatories, there are going to be document
3 requests.

4 And while South Carolina may intend to use
5 them for a particular purpose, it's much, much more
6 efficient for us to just not have, you know, Phase 1
7 discovery and have a fight about whether this is,
8 you know, technically maybe goes over the line into
9 Phase 2. If we're selecting the evidence and the
10 things that are relevant to the case, we ought to be
11 doing that. Now, if the things are only relevant to
12 Phase 2, certainly they can wait. But there's just a
13 tremendous logical overlap.

14 The third point is that the -- is related to
15 a point that I made in the course of our promise to
16 adhere to our representation in the Special Master's
17 orders to remain -- have our participation be limited
18 and focused to what's relevant to us. And that I
19 said, Look, when South Carolina tries to prove that
20 it's been harmed in part by the withdraw that comes
21 from the water supply project, that's going to
22 directly implicate Phase 2 and whether that's an
23 equitable use.

24 But the -- if you just simply look at what
25 the equitable apportionment factors are and we put

1 them on page 6 of our opposition to the brief, to the
2 motion, the Nebraska versus Wyoming and this is
3 reflected in a lot of different cases, the equitable
4 apportionment analysis includes, quote, unquote, the
5 expanded established uses and the existing, quote,
6 consumptive uses of water in several sections of the
7 river. And there just really isn't a substantial
8 argument. We think that that's not going to come up a
9 bunch in Phase 1 so we ought to be a part of helping
10 to educate the Court and collecting information
11 ourselves, delivering information about those factors
12 because they're going to be relevant in both Phase 1
13 and Phase 2.

14 The fourth and final point that I wanted to
15 make is that I don't think that the sort of move that
16 Mr. Frederick has made rhetorically from -- I know our
17 complaint calls out the Catawba River Water Supply
18 Project and its 5 million gallons, but what we're
19 really attacking is the statute, not that use.

20 Well, the statute is a framework for
21 authorizing certain uses. And so North Carolina
22 prospectively has to authorize, you know, particular
23 IBTs and authorize historical IBTs. And so there is
24 nothing intrinsically wrong with having a statute, it
25 is the uses of the water that are the problem and

1 that's why the intervention order is right to say,
2 Look, we are the agent here for implementing this,
3 you know, particular transfer. We are the people who
4 logically would defend it. And while we don't put
5 undue weight on it, it is certainly relevant that we
6 actually have, unlike North Carolina in its defense of
7 other consumptive uses, we have a substantial interest
8 in the water coming over the border because we are
9 over the border. We are in South Carolina. And
10 that's what does distinguish us -- in addition to the
11 fact that we're the authorized agent for the transfer,
12 that's what distinguishes us from anybody like
13 Charlotte or Duke. Thanks very much.

14 SPECIAL MASTER MYLES: Okay.

15 MR. BANKS: This is Jim Banks for Charlotte.
16 I'd just like to expand briefly on a point that both
17 Mr. Phillips and Mr. Goldstein touched on. And that
18 is that South Carolina is really arguing here for an
19 artificial bright-line distinction between the two
20 phases that would serve as the limitation on our
21 participation. And I think the rationale offered by
22 South Carolina that the two phases are not intertwined
23 is just plain wrong and needs to be explored just a
24 little bit. And I think it's easiest to see that by
25 starting from Phase 2 and what will be occurring at

1 Phase 2.

2 Phase 2, I think, should be viewed like a
3 balance pan scale in which the competing equities of
4 North Carolina and South Carolina will be weighed.
5 And those balance pans on the scale will be loaded up
6 with evidence at different phases of the case.
7 South Carolina, at that point, will present her
8 equities in the form of harms caused by activities in
9 North Carolina. And she will have to define those
10 harms both in terms of their scope and their type and
11 their amount. In other words, the costs she's
12 suffered due to water shortages as explained in her
13 complaint.

14 But she won't do that in Phase 2, she'll do
15 that in Phase 1 in order to show that her harms are of
16 a serious magnitude, which is the burden she must
17 carry in Phase 1. So that's what joins the two
18 phases. South Carolina presents her side of the case
19 that will be relevant in Phase 2 during the first
20 phase of the case, during Phase 1. And that is what
21 intertwines the two phases.

22 So that when Phase 2 arrives, Charlotte will
23 begin to load the other balance pan, if necessary, if
24 South Carolina has carried her burden and
25 South Carolina admits that that's an appropriate role

1 for Charlotte. But we will do that by showing the
2 value of the uses in North Carolina, a lot of which
3 are values that belong to Charlotte. And Phase 2 and
4 Phase 1 showings then get combined in the balance pan
5 and Charlotte, at that point, has as much interest in
6 the heft of South Carolina's pan, if you will, as it
7 does in the heft of North Carolina's. But Charlotte
8 can only address how much equity South Carolina loads
9 into her balance pan in Phase 1.

10 So our overall point is that Charlotte has to
11 protect her interest in that fashion and can only do
12 so in Phase 1. That's not to say that there shouldn't
13 be some practical limitations on Charlotte's
14 participation if that participation proves to be
15 burdensome or duplicative. Mr. Frederick just now
16 said that the intervenors immediately expanded our
17 role upon being granted intervention. But I think the
18 only example pointed to in the motion or the reply was
19 that Charlotte filed a brief. And, you know, we would
20 submit that that's not much of a burden at this stage,
21 and not enough to justify in advance imposing
22 limitations on hypothetical forms of participation
23 that Charlotte might come up with in Phase 1.

24 SPECIAL MASTER MYLES: Okay. Why don't we
25 hear from North Carolina if there's anything from

1 North Carolina?

2 MR. BROWNING: Your Honor, this is Chris
3 Browning. I will be very brief on the subject. In
4 terms of North Carolina's position, we believe that
5 the order that was issued by the Special Master
6 concerning intervention was well reasoned. We
7 certainly have no objection or complaint in any way
8 whatsoever with regard to that order. I think really
9 what we're talking about here is an issue of
10 practicalities.

11 And from North Carolina's perspective, we do
12 not see any reason to believe that -- and we certainly
13 don't anticipate, that any involvement by Duke or
14 Catawba Water Supply Project or Charlotte will in any
15 way disrupt discovery or the efficient management of
16 this case. In the event that one of those parties
17 were to be disruptive in the course of discovery, that
18 can be dealt with at that time. But we don't
19 anticipate that being an issue as this case proceeds
20 through discovery.

21 And with regard to practical considerations,
22 Mr. Frederick seems to want to separate Phase 1 and
23 Phase 2. And I think North Carolina agrees with the
24 intervenors, that as a practical matter, that really
25 doesn't seem to make a whole lot of sense,

1 particularly when you look at the language that
2 South Carolina has agreed to in 4.1 of the proposed
3 discovery order about Phase 2 issues where necessary
4 will be dealt with, discovery will be conducted in
5 Phase 1. Now, when you have a witness that's been
6 instrumentally involved in the case to be on the
7 witness stand, you really can't separate some of the
8 facts of a witness in asking the questions, you're
9 going to have to bleed over into Phase 2.

10 Moreover, I would certainly agree with
11 intervenors that their interest isn't limited just to
12 Phase 2 issues, but their interests are brought into
13 play by South Carolina during Phase 1 of the
14 proceeding. Thank you.

15 SPECIAL MASTER MYLES: Mr. Frederick, before
16 you go, just a couple of things you might want to
17 incorporate into your reply. Two questions that have
18 been raised. I don't mean to -- I don't mean to limit
19 the other points that were made. One of these is in
20 addition to the other points and the other one just, I
21 think, is something you haven't addressed yet. The in
22 addition point is the statute which you do say is the
23 focus of your complaint as Mr. Goldstein says, you're
24 now quoted as saying that, okay, we're really
25 attacking the statute, not the transfers so much.

1 But one question I had about that is the
2 statute, as I read it anyway, pardon me if this is
3 wrong, requires a permit for certain transfers. In
4 other words, it's a prohibition on transfers without a
5 permit. I don't know what other states have, whether
6 other states -- and I also don't know what -- what law
7 would govern if there were no statute, would that, if
8 there were no statute, could anybody just transfer
9 water without a permit?

10 So if the latter, then are you really
11 attacking the statute or are you really attacking the
12 transfers? Because the statute isn't really --
13 although you say in your complaint it implicitly
14 authorizes these transfers of less than, you know,
15 less than the threshold, the 2 million threshold. It
16 seems like what it really does is it just doesn't
17 address those transfers or it doesn't require a permit
18 for them. But it isn't so much an enabling statute as
19 a prohibitory statute. So that's one question. I
20 don't know if that's correct, but I'd like you to
21 address that.

22 And the second question is a couple of people
23 have pointed out about the merging of discovery in the
24 case management order. If there's going to be
25 discovery that naturally will carry into Phases 1 and

1 2, and I think we all agree that we ought not to try
2 to limit the scope of discovery because that might not
3 be efficient in the long run. Then how do you address
4 that point that a couple of the intervenors made? But
5 I don't mean to again discounts the other points they
6 made, or whatever additional points you want to make.

7 MR. FREDERICK: Well, let me address those
8 two questions first and then I'll go back to the
9 arguments that have been made by the other side.

10 With respect to your first question, Special
11 Master Myles, the statute that was enacted to
12 authorize interbasin transfers, is a prohibitory
13 statute and an enabling statute at the same time,
14 because it says that users can transfer up to a
15 certain amount without getting a permit and above that
16 amount, they must get a permit.

17 And, you know, there becomes a certain point
18 at which the basic theory in the complaint has to be
19 understood and accepted under basic pleading
20 principles. And that is yes, the statute is what we
21 are complaining about and yes, we are complaining
22 about the fact that the statute has authorized
23 particular transfers, because those, the
24 implementation of that statute has caused a problem.

25 The fundamental principle here, and I want

1 you to keep this in mind, if you would, please, is
2 that North Carolina gets to approve these transfers
3 without considering downstream effects in
4 South Carolina. And the fundamental principle of
5 equitable apportionment, as federal common law, is
6 that a state has an equal right in what happens with
7 the river that goes between the two states. That
8 doesn't mean that we have a right to an equal amount
9 of the water, but it does mean we get a say what
10 happens and that North Carolina is obliged to consider
11 downstream effects when it authorizes these very large
12 transfers of water. And that the state statute is
13 invalid because it does not give consideration of
14 those downstream effects.

15 So I think that, I think that, you know, the
16 facts that these individual intervenors are taking
17 advantage of a North Carolina statute is -- is
18 relevant in the sense that it does provide a factual
19 basis for us to identify the harms caused in
20 South Carolina and to point to a particular source of
21 those harms. But that does not give any of the 25 or
22 so believed to be transferors of water a unique and
23 compelling interest in participating in this lawsuit.

24 It was Justice Jackson, in writing separately
25 in the New Jersey case, who said the original actions

1 are not intended to be town hall meetings where
2 everybody who has some complaints about something gets
3 together. The order, in limiting participation in the
4 purposes, you know, we thought created an acceptable
5 boundary on the limitations. But none of the
6 intervenors today have expressed any desire or purpose
7 of limitation of their role, whatsoever. And the
8 words "limited purpose" are being written completely
9 out of the order as implemented by the intervenors in
10 this. And let me talk about the second point that you
11 made, the merger of discovery. Our point, in agreeing
12 to that with North Carolina, was to recognize that
13 it's a practical effect that if you are deposing
14 someone and you get into certain issues would
15 ultimately be facts for Phase 2, that it was efficient
16 to make that inquiry.

17 But there has never been a demonstration not
18 in the order, not by any of the intervenors, that
19 North Carolina cannot adequately represent every one
20 of the defendants' or intervenor defendants' interests
21 in asking a particular witness what the costs and
22 benefits of a particular use of water might be,
23 whether they're in North Carolina or South Carolina.

24 And the basic problem here is that the
25 adequacy of representation is a point that the

1 intervenors run completely away from because they
2 can't show that North Carolina can't represent their
3 interests in attempting to disprove harm. They simply
4 can't do it and so they don't argue it. And when the
5 order says limited purpose and Mr. Phillips, he
6 candidly says that there might be some interests in
7 which Duke doesn't want to participate, he's hewing to
8 his brief and I respect that. The brief, though, says
9 that Duke feels like it can participate at its
10 inclination. And a limited purpose has to have some
11 definition to it to enable South Carolina to say,
12 "Special Master, you're calling balls and strikes and
13 that one's outside the strike zone." And we can look
14 to an order that says what's in and what's out.

15 And the whole point of our clarifying this
16 was that we thought that the intervenors had gone
17 beyond what the limited purposes were, because the
18 scope of Phase 1 was intentionally designed to limit
19 the litigation, to make it more manageable and more
20 focused on the first part of the inquiry in the case.

21 The second point I want to make about Duke's
22 position is that they've never responded to the fact
23 that if South Carolina prevails ultimately in this
24 lawsuit, more water presumably would be available than
25 is required under the CRA. And they never have

1 pointed out how Duke is somehow harmed by having more
2 water to let through its dams, so that it has more
3 electricity to sell and that South Carolina gets more
4 benefits by virtue of those discharges of water.

5 SPECIAL MASTER MYLES: I think they did
6 address that. They said that that's not -- I think
7 the gist of what they said was having tee'd up the
8 issue, South Carolina can't guarantee that more water
9 is the only outcome of the litigation. It may well be
10 that once we get to the equitable apportionment,
11 there's a determination that South Carolina is getting
12 too much water, that North Carolina should get more
13 than it's getting. I think that was their response.

14 MR. FREDERICK: But the point, though,
15 Special Master Myles, is that is a classic Phase 2
16 question. That doesn't go at all to the harms in
17 Phase 1 that South Carolina would experience. And --

18 SPECIAL MASTER MYLES: But I mean, your
19 question itself went -- under that logic, your
20 question itself was a Phase 2 question. I'm not sure
21 how the question has a bearing on the issue that we're
22 trying to decide now, which is, you know, assuming
23 South Carolina wins the case, does that help or hurt
24 Duke? I'm not sure that really has a bearing on
25 whether Duke could participate in Phases 1 or 2 or

1 both.

2 MR. FREDERICK: The point of my argument on
3 clarification is that the limited purpose that was
4 identified in the order is a purpose cognizable only
5 in Phase 2.

6 SPECIAL MASTER MYLES: Right. I understand
7 that point, but as I think I said at the outset, I'm
8 not sure it follows that that's the case. Some of
9 your arguments that you've made really go to the
10 merits of the underlying order that obviously -- I
11 know you've challenged the order and you think it
12 ought to be changed.

13 But some of the points you've made really
14 would go as well to Phase 2 as they do to Phase 1,
15 that North Carolina can adequately represent the
16 interests of all these intervenors. Therefore, there
17 should be no participation at Phase 1, because
18 North Carolina can ask the same questions that these
19 people can. But that logic also really goes to Phase
20 2. There is no reason why, if that's correct, then --
21 that's really a reconsideration argument.

22 MR. FREDERICK: Well, it does serve two
23 purposes. I will acknowledge that. But with respect
24 to the Phase 1 problems, there's never been any
25 attempt to demonstrate that there is a unique and

1 compelling interest that any one of the intervenors
2 has in trying to disprove a particular harm that is
3 separate from what North Carolina has.

4 SPECIAL MASTER MYLES: Yeah, but I mean, I
5 guess that's a good way of phrasing it, because it
6 helps me phrase my questions. Is once a party is
7 granted leave to intervene because they have
8 demonstrated a unique and compelling interest in the
9 outcome of the litigation, do they have to -- do they
10 have to show a unique and compelling interest at each
11 phase of the litigation to justify a particular form
12 of intervention at that point?

13 In other words, if there's going to be
14 discovery, does that party have to demonstrate a
15 unique and compelling interest in that particular
16 inquiry or discovery?

17 MR. FREDERICK: Well, let me try to answer
18 the question by just referring back to the order,
19 which -- and just the instance, and I don't mean to
20 pick on Catawba River because I think that the other
21 parts of the phase is functionally similar things.
22 The very last sentence of the part on Catawba River
23 Water Supply Project says they intervene for that in
24 the limited purpose, i.e., a singular purpose as
25 contrasted with the consumptive use by the

1 Union County citizens who are part of the Catawba
2 River project, which the previous paragraph says is
3 not a compelling interest standing alone.

4 And so, you know, I can see and I am familiar
5 with litigations where the intervention has been
6 limited for specific and discrete purposes and for
7 purposes of understanding how a limitation might be
8 framed, the way it is articulated in the order as to
9 CRWSP, is the, quote, ability to execute the transfer
10 which I take to mean get the water from South Carolina
11 to North Carolina but the part as to the consumption
12 in Union County, North Carolina is not a compelling
13 purpose that Catawba would have a right to participate
14 as a party, because the order says that is not a basis
15 for intervention.

16 And, you know, I can point to similar things
17 and we did in our reply brief, as to both of the other
18 intervenors. But the point I would like to stress
19 here is that, notwithstanding your question to the
20 intervenors, what is the limitation, they can't give
21 you one. So --

22 SPECIAL MASTER MYLES: Well, that's partly
23 because there's been no opportunity for there to be a
24 concrete limitation that arises. I don't -- again, I
25 don't see very strong logic to the point that if the

1 order says that CRWSP has a compelling interest in
2 defending its ability to execute the transfer, it may
3 intervene for that limited purpose. That that means
4 that they can only participate at the remedies phase.
5 I just -- I don't think that was the logic of what was
6 intended, certainly, in that order.

7 Like I think I said at the outset, if a
8 person is being -- if there's a lawsuit seeking to
9 enjoin somebody from doing something, yes, they have
10 an interest in preventing an injunction that covers
11 them and that prohibits their desired activity. But
12 at the same time, they have an interest in defending
13 the merits that get you to the remedies phase. That
14 is to say, is this -- is there an activity that's
15 wrongful that that person is doing? Is that activity
16 harming somebody? All of those phases are relevant to
17 that person's interest, even if their ultimate
18 interest is to prevent a decree directed to them
19 preventing them from doing something.

20 So that doesn't -- I recognize that still
21 begs the question of what particular interests each
22 party has along the way and how those might be limited
23 in discovery, for example. And it also begs the
24 question what is or isn't in Phase 1 or Phase 2. But
25 I do think that there's some force to the arguments

1 that, number 1, the two phases for discovery purposes
2 are going to be overlapping. And number 2, that it
3 would seem at least relevant to Phase 1 whether, to
4 what extent the transfers are occurring, for example.
5 To what extent is water actually being transferred.
6 I mean, a factual question might be you're authorized
7 to transfer a certain amount, how much are they
8 actually transferring. I mean, that would clearly be
9 a Phase 1 question, it seems to me. Maybe it's a
10 forgotten conclusion that the transfers are consuming
11 all of the allotted permitted transfer, but that's not
12 evident at least on the record as it stands now.

13 So I mean, that would be just a hypothetical
14 question that one would think naturally would fall
15 within Phase 1 in which the intervenors would have an
16 interest.

17 MR. FREDERICK: No different interest in the
18 state, this generally is *parens patriae* over all its
19 citizens. It's the limiting principle.

20 SPECIAL MASTER MYLES: You need to start
21 again, start again, Mr. Frederick. I don't think the
22 reporter got what you said just now.

23 MR. FREDERICK: There is no limiting
24 principle to that notion. Every individual who would
25 consume any amount of water would have to stand in

1 exactly the same position and the 22-some
2 nonpermitted transferors stand in exactly the same
3 position and Kannapolis and Concord stand in exactly
4 the same position. And there is no limiting principle
5 to separating out the individual consumptive uses or
6 transfers from the river as causing harm that are
7 distinct from the State of North Carolina as *parens*
8 *patriae* over the actions of all its citizens when
9 causing harm to another state.

10 SPECIAL MASTER MYLES: Let me ask you this
11 about -- that last point still seems to me to be a
12 reconsideration point; is that right?

13 MR. FREDERICK: Special Master Myles, I
14 respectfully disagree. The words "limited purpose"
15 have to have some meaning in the order and we are
16 trying to infuse them with a meaning that makes sense
17 in light of the Court's precedence. And the adequacy
18 of representation, the ability of the state to
19 represent those interests for whatever purposes are
20 permitted, have to have contents and meaning in light
21 of the court's precedence.

22 And our point is that limited purpose makes
23 sense -- if it makes sense at all and we do
24 respectfully disagree with the order, only as to the
25 equities of deciding where water gets allocated in

1 Phase 2 and what are the respective merits of each
2 person's claim to that water?

3 But that doesn't mean that you, that you
4 should disregard the Court's precedence in considering
5 what is a logical way to read the order in light of
6 limited purpose. I acknowledge that you went through
7 the cases and it is -- there is very little law on the
8 question of intervention standards. And we do take a
9 different view with the order as to how the test was
10 applied. Our submission, though, is that when the
11 intervention was done for a limited purpose, there has
12 to be some content to that.

13 SPECIAL MASTER MYLES: Okay.

14 MR. FREDERICK: The intervenors are not
15 offering one. Now, can I go further and talk about
16 Duke's points about the CRA and the artificial
17 distinctions with respect to its impoundment?

18 SPECIAL MASTER MYLES: Yes, that's exactly
19 what I was going to ask you to do next.

20 MR. FREDERICK: Sure. It is certainly true
21 that the Catawba is an impounded river. But the
22 interest that Duke is asserting does not have to do
23 with how much water is in the system. It has to do
24 with the rate of flow and when water gets discharged
25 and for what purposes.

1 And that ultimately is a Phase 2 question,
2 because if there was more water in the system but Duke
3 then can say at particular times of the year, we need
4 it for generating a certain amount of electricity for
5 a certain community, that goes to the economic value
6 of the respective uses of the water at any given time
7 and that is a classic Phase 2 balancing point.

8 MR. PHILLIPS: Special Master, can I have
9 just respond to that? All right. That's fine.

10 SPECIAL MASTER MYLES: Let him finish. Let
11 him finish.

12 MR. PHILLIPS: I understand and I apologize.

13 MR. FREDERICK: It is true that we directed
14 discovery to Duke very early on, because the CHEOPS
15 model -- and let me just take a moment to explain.
16 This was a computer model. A hydrology model that
17 Duke developed in part to justify its FERC license
18 application and its CRA. And this computer model has
19 been used by North Carolina to justify its interbasin
20 transfers and its other consumptive uses.

21 And we did move expeditiously to obtain, and
22 I have, you know, been in correspondence with Duke's
23 counsel to, you know, work through the processes of
24 getting that data and that information. But
25 importantly, the focus of that discovery is not

1 anything Duke is doing in particular, you know, it's
2 impoundment of a certain amount of water or it's
3 discharges at a particular amount of time, but rather
4 to get the model that Duke developed, that will --
5 that will be important in understanding the
6 hydrological conditions of the river. And so
7 Mr. Phillips is absolutely correct. We did issue
8 discovery as to that model and the focus of that, but
9 it was not because of a complaint about what Duke is
10 doing, but rather how that model would affect an
11 understanding of consumptive uses throughout the
12 river.

13 SPECIAL MASTER MYLES: Well, Mr. Frederick,
14 one point that I don't think you did address that you
15 might want to do is Mr. Phillips' first point that if
16 South Carolina -- no, maybe you did. Maybe it's
17 subsumed within what you said, but that if
18 South Carolina is seeking to apportion water created,
19 the level of flow isn't the natural flow. It's
20 already affected by Duke's operations both before the
21 CRA and currently and Mr. Phillips says that the
22 current terms of the CRA are binding, even though they
23 haven't yet been approved by FERC. So --

24 MR. FREDERICK: And that --

25 SPECIAL MASTER MYLES: The point is only

1 that --

2 MR. FREDERICK: Let me try to elaborate.

3 SPECIAL MASTER MYLES: Just to finish the
4 question. The point is only that -- only that isn't
5 that really necessarily part of Phase 1?

6 MR. FREDERICK: I think so. The issue of
7 whether there's enough water goes to how much the
8 river system has in it. And the question of whether
9 Duke should hold it for longer or discharge it earlier
10 in comparing its economic uses for electricity
11 purposes versus bay Bowater which, you know, has
12 suffered economic devastation by the lack of water in
13 certain low periods. Those are economic balancing
14 questions that occur at Phase 2. So I would
15 acknowledge that Mr. Phillips is on to something when
16 he says the Catawba River is an impounded river. But
17 that does not follow that, looking solely at the rate
18 of flow from one dam to the next answers the question
19 of equitable apportionment in this case.

20 And the question here is, is North Carolina
21 taking more out of the Catawba River before it even
22 gets to the various dams that Duke has. And
23 therefore, lessens the amount of water that can be
24 discharged into South Carolina.

25 Now, turning to the Catawba River Water

1 Supply Project. The question of what constitutes
2 Phase 1 and Phase 2 is -- is one that I think is
3 somewhat puzzling in lights of how the order frames
4 the limited purpose for Catawba. It distinguishes
5 between the consumption by Union County, the ability
6 to execute the transfer.

7 And there needs to be clarity in terms of
8 that, because what Mr. Goldstein is speaking to is
9 really the ability of the Union County people to
10 consume the water. He's never attempted to justify
11 any particular interest in the, quote, ability to
12 execute the transfer that is separate and apart from
13 the consumption by Union County of the 5 million
14 gallons per day.

15 And the order expressly says the consumption
16 by those citizens in North Carolina is not a unique
17 and compelling interest that stands any differently
18 than the consumption by anybody else in
19 North Carolina.

20 Moreover, their, you know, their position
21 about how limited they seem to be is belied by a
22 letter that we received just the other day from
23 Mr. Sheedy where he proposes that the case management
24 plan be amended with you ordering that North Carolina
25 and South Carolina pay for and participate in a

1 central document depository so that the intervenors
2 can be part of getting every piece of information at
3 the State of South Carolina's expense and to enter
4 into a protective order that is contrary to specific
5 negotiations that North Carolina and South Carolina
6 entered into in framing the case management plan.

7 So, you know, it is, it is one thing to say
8 Catawba River Water Supply Project has a limited
9 purpose and a limited interest. But their actions do
10 not accord with any limitation in role as a litigant
11 in the case.

12 With respect to the discovery issue, I've
13 already addressed the efficiencies there and the fact
14 that that speaks directly to the adequacy of
15 North Carolina. There is no showing that
16 North Carolina can't ask the right questions in
17 determining what is an appropriate Phase 2 kind of
18 inquiry.

19 And to the extent that there should need to
20 be follow up, that can be addressed in Phase 2 where
21 an intervenor, upon obtaining proper permission to
22 engage in that role can say, you know, we were not
23 part of the deposition of this particular witness, but
24 we think some additional questions should be asked
25 because we have a line that would go to a Phase 2

1 equitable balancing factor. And I would presume that
2 the States would behave reasonably in allowing a
3 further follow-up to occur.

4 So -- but what I think ultimately is
5 happening here is that Charlotte and CRWSP are trying
6 to get the equities tied into Phase 1 because they
7 don't have a unique interest in showing how South
8 Carolina's been harmed by North Carolina. The only
9 way they can justify their participation in Phase 1 is
10 to try to make it look like Phase 1 is really about
11 Phase 2 equitable balancing when, in fact, isn't --
12 states have disclaimed any interest in it being that
13 way. And that Phase 1 can proceed with the two states
14 examining the harms as alleged in the complaint and as
15 we will seek to prove during the discovery process.

16 Mr. Goldstein's fourth point I've already
17 addressed about the statute and the framework. And I
18 can say more about that if you would like. But
19 otherwise, I would turn to Charlotte's point. And
20 I've addressed his argument that Charlotte, in fact,
21 has never responded to North Carolina's point that
22 North Carolina itself views itself as able to
23 adequately represent Charlotte's interest. And that
24 certainly must be true in Phase 1.

25 With respect to the balancing of the harms,

1 he -- Mr. Banks says that he would be in there
2 arguing, you know, from the get-go about how valuable
3 it is for Charlotte to consume this water. But I
4 would submit to you that that is, at best, a Phase 2
5 question where you do an equitable balancing analysis
6 based on the respective merits of a person in
7 Charlotte drinking water from the Catawba versus
8 someone in Camden drinking the water.

9 And however much Mr. Banks wants to encroach
10 on the Phase 1 process of whether or not the water in
11 Camden is actually of drinkable quality because there
12 isn't enough water in the river by the time it gets
13 there is completely irrelevant that a person in
14 Charlotte happens to be enjoying high-quality drinking
15 water because there is a lot of it.

16 Now, with respect to Mr. Browning's point, I
17 can understand that North Carolina derives substantial
18 litigation benefits by having three comrades in arms
19 in a litigation. But he never responds to the point
20 that North Carolina's Attorney General's office can
21 adequately represent the states with respect to the
22 Phase 1 harm issues either.

23 So with that, I'm answer any other questions
24 you have. But those are the points that I would like
25 to --

1 SPECIAL MASTER MYLES: I don't have any other
2 questions at the moment. Why don't we let
3 Mr. Phillips go? He has a response to one of your
4 points.

5 MR. PHILLIPS: Yeah, I just wanted to make
6 two points, Special Master. I appreciate the
7 opportunity for a bit of a surreply. I appreciate
8 very much Mr. Frederick conceding that there is
9 something to the impoundment argument here. And the
10 problem with his response, though, is that it sort of
11 assumes the ultimate disposition of the case. And he
12 say, well, it may well turn out that North Carolina is
13 sucking all the water out before it gets to the point
14 of the impoundment. And that may be true. But that
15 may not be true and it may well be the case that what
16 we would find out is that without the benefit of the
17 impoundment, South Carolina wouldn't be getting
18 anything out of any of this at all.

19 We just have no way to know what should be
20 the baseline for making any evaluations of harm
21 without inquiring into some of those issues. And it
22 seems to me that that by itself says that Duke ought
23 to be entitled to participate Phase 1, Phase 2 and in
24 all respects, you know, putting even aside the
25 question of whether this kind of artificial limitation

1 makes any sense in general. And then the second
2 point, with respect to the discovery, while it's true
3 that you can look at the CHEOPS model as part of that
4 discovery, I just urge you to read the discovery
5 request that South Carolina has made. It is pretty
6 sweeping.

7 And the truth is, if we were not a party to
8 this litigation, I suspect we would be more than a
9 little bit agitating for limitations on that
10 discovery. But if anything, it proves the importance
11 of having Duke at Phase 1 participating as an
12 independent litigant. I think that discovery request
13 is conclusive.

14 MR. FREDERICK: As to that, Special
15 Master Myles, just this morning I corresponded with
16 Mr. Phillips' partner who said, "Hey, you know, we
17 appreciate this is discovery and it's broadly worded,
18 can we talk to you about engaging in reasonable
19 limitations?"

20 And we responded, "Yes, we'll be happy to
21 engage in dialogue with you." I don't think that
22 that's really an appropriate topic for this point.
23 Anybody who's been involved in any kind of civil
24 litigation understands that with discovery requests,
25 they are generally broadly framed and that the parties

1 work to narrow them once they gain a better
2 understanding of what files are contained in each
3 other's place. But as to the point about not knowing
4 about the baseline, these dams have been in existence
5 for decades and the notion that somehow South Carolina
6 will come out of this process with even less water
7 than the meager amounts that its getting in low flows
8 is a pretty remarkable proposition.

9 MR. PHILLIPS: But it assumes the outcome of
10 the case.

11 MR. FREDERICK: It assumes that Duke's
12 interest is going to be represented, if at all, at
13 Phase 2 but not in showing that South Carolina is not
14 getting enough water. That's a Phase 1 question.

15 MR. BANKS: This is Jim Banks. May I make a
16 few points briefly?

17 SPECIAL MASTER MYLES: Let me make sure I
18 understood Mr. Frederick's last point. You said --
19 you said what is a Phase 2 question, whether -- you
20 said, I wasn't quite sure I understood your point.

21 MR. FREDERICK: As I understood Mr. Phillips,
22 and I really hesitate to rephrase. But I gathered
23 from his point that there is a possibility that what
24 an outcome of this case would be that there would be
25 less water going into South Carolina than there is

1 currently. And my point is that because these dams
2 have been in existence for such a long period of time,
3 that it would be remarkable to think that
4 South Carolina would come away with less water than
5 its getting even in the low-flow periods which is
6 quite meager. And that that ultimately entails a
7 balancing of interests and a weighing of respective
8 costs and benefits as to the uses of the water and who
9 gets it.

10 SPECIAL MASTER MYLES: Okay. Let me just say
11 one thing about that. Because that wasn't what I
12 understood Mr. Phillips to be saying. And whether it
13 was or was not, it was sort of -- what I thought went
14 to a point, question that I had earlier, which was as
15 part of Phase 1, if Phase 1 is directed toward --
16 among other things, possibly, the question of how much
17 water is South Carolina getting now, surely that's an
18 issue. Right? And how does that compare with some
19 other state of affairs?

20 In other words, South Carolina has to show
21 harm because it is getting less water now than
22 something else, either -- now, maybe South Carolina
23 just wants to say it's getting less water than it
24 needs. And if that's the only inquiry, then it could
25 be getting the exact same amount of water it's always

1 gotten, but suddenly that's not enough.

2 But I understood South Carolina to be saying
3 more than that. I understood South Carolina to be
4 saying it is getting less now than it ought to be
5 getting or that it was getting at some prior state of
6 affairs. Now, that's maybe too fine a distinction,
7 less than you need versus less than you were getting
8 before.

9 But either way, it seems to me that it's
10 relevant to that question to figure out, again to use
11 Mr. Phillips' word, what the baseline is, what are we
12 comparing the current flow to? It's got to be
13 compared to something. Are we comparing it to what
14 was in existence 10 years ago? Are we comparing it to
15 what would be in existence if there weren't
16 impoundment at all?

17 MR. FREDERICK: Well, I think --

18 SPECIAL MASTER MYLES: He was saying that not
19 so much that the outcome could be that South Carolina
20 gets less, although that is certainly one outcome.
21 But rather that if it weren't for the impoundment,
22 it's not clear what South Carolina would be getting at
23 all. And therefore, it seems that you need to
24 at least take the impoundment into account in
25 evaluating what the flow is now and whether

1 South Carolina is being harmed by it.

2 And to add one little piece to it, you say,
3 well, North Carolina might be taking water out before
4 it gets impounded. But -- but the very function of
5 impoundment is part to moderate the flow so that when
6 the flow is heavy, then you're holding water sometimes
7 and then when it's -- when there's less water, then
8 you would be using some the impounded water to
9 increase the flow to make it more moderated.

10 In other words, so there would be less
11 fluctuation. Aren't those things that would be
12 considered not in Phase 2 because they're not -- even
13 if you accept the idea that only all equitable things
14 must be put in Phase 2, that would just be a factual
15 question about what flow South Carolina is getting and
16 whether -- whether it's being harmed relative to some
17 other state of affairs.

18 MR. FREDERICK: Let me try to answer it this
19 way. Court's cases say take the river as you find it
20 and the way we find the Catawba River is now with a
21 certain number of dams and a certain number of
22 reservoirs with impounded water behind it.

23 But the fact that those -- that state of
24 affairs exists does not mean that in a Phase 1 showing
25 of harm that the impounder of the water has a unique

1 and compelling interest in proving harm of inadequate
2 flows to the downstream state. I mean, otherwise, the
3 principle of intervention be any dam operator on any
4 river in America, whether it's Pacific Gas & Electric
5 and the Hetch-Hetchy Dam in the Yosemite Valley or if
6 it's somewhere else, it's to participate in an
7 equitable apportionment case between two sovereign
8 states that are representing the interests all of
9 their citizens.

10 And the fundamental -- the difficulty here is
11 that I agree with Mr. Phillips to the extent that
12 understanding a baseline is a part of a Phase 1
13 inquiry. And certainly, if we can show that as to a
14 certain baseline, any flows that go below that
15 baseline cause harm and should be remedied in a Phase
16 2 balancing of equitable interests, then we will have
17 met our Phase 1 burden of showing harm. That I would
18 submit to you would be the analogy to the Colorado
19 versus New Mexico case.

20 And our submission would be that in certain
21 periods of low flow, the river is overappropriated and
22 the baseline needs to be a higher baseline. But that
23 doesn't mean that Duke stands in exactly the same
24 shoes as any of the other intervenors or as to the
25 respected states in trying to prove or disprove that

1 South Carolina has suffered harm in those periods of
2 low flow.

3 SPECIAL MASTER MYLES: Well, maybe the better
4 way to phrase the question is, if the inquiry that
5 Mr. Phillips is proposing is relevant were made solely
6 by North Carolina -- I guess I'm trying to separate
7 the reconsideration issues from the issues of what is
8 properly part of Phase 1 and Phase 2. So if you
9 assume for the moment that only North Carolina is
10 seeking this discovery or seeking these issues to be
11 litigated, would they be Phase 1 issues?

12 MR. FREDERICK: Well, I would -- let me try
13 to answer it this way. The CHEOPS model that
14 Mr. Phillips is sending through the CRA will be
15 independently and adequately defended by
16 North Carolina, because that's the model used to
17 justify its interbasin transfers. And so in terms of
18 understanding the inadequacy of flow into
19 South Carolina, North Carolina will be relying on
20 exactly the same data that Duke has used for its CRA.

21 SPECIAL MASTER MYLES: Right. But is that a
22 Phase 1 question, is what I'm asking?

23 MR. FREDERICK: I think that -- I think that
24 the question of, is there enough flow. There will be
25 experts who are engaging in causation analysis to try

1 to link the flows and the adequacy of the flows to the
2 harms in South Carolina. That's what the experts are
3 going to be modeling. And what I think -- where I
4 depart company from Mr. Phillips is how he is trying
5 to use the CHEOPS model as a way to insinuate Duke
6 into Phase 1 when Duke has never made any
7 demonstration that it has an interest in showing that
8 South Carolina is harmed or not harmed by the amount
9 water.

10 Whereas, North Carolina does admittedly have
11 a litigation interest in trying to show that it is not
12 taking out more water than causes harm to
13 South Carolina.

14 SPECIAL MASTER MYLES: The expert modeling
15 that you just described, would that be part of Phase 1?

16 MR. FREDERICK: Yes.

17 SPECIAL MASTER MYLES: Okay. Is there
18 anything else, any other sur-surreply to points
19 anybody wishes to make?

20 MR. BANKS: Yes, this is Jim Banks for
21 Charlotte. If I may.

22 SPECIAL MASTER MYLES: Yes.

23 MR. BANKS: Just a few brief points on
24 comments Mr. Frederick has made. First, he's made the
25 point several times today that the intervenors have

1 not volunteered any limitations on the scope of our
2 participation in the case. And my point would be that
3 that's just not our role here. This is
4 Mr. Frederick's motion. South Carolina wants
5 limitations and it would seem to us that they have the
6 burden of justifying the particular limitations that
7 they're proposing in the motion.

8 Our response doesn't say no limitations ever
9 at any point are appropriate. We simply object to the
10 artificial distinction between Phases 1 and 2 that
11 Mr. Frederick is proposing as the limitation that his
12 client wants.

13 So our objection doesn't mean that we now
14 have the burden of coming forward with some
15 alternative types of limitations. We think the burden
16 should remain on the party that's seeking limitations
17 in the first place. If pressed, and I think we made
18 this point in our reply -- in our response brief, we
19 would say that there may be functional limitations on
20 the participation of intervenors in particular aspects
21 of Phase 1 and that those should be taken up if and
22 when they should arise. They haven't yet, as far as
23 I know.

24 We're arguing now about hypothetical burdens
25 on South Carolina from things that haven't even

1 happened. And there's plenty of authority in the
2 federal rules and thus in the case management plan for
3 Mr. Frederick to bring those objections to the Special
4 Master, as he surely will, and have those resolved.

5 My second point is that Mr. Frederick seems
6 to say that the inadequate representation test that
7 you find in some of the Court's cases should be
8 applied in designing the limitations on participation
9 by the intervenors. Even though the order rejects
10 that concept as a test for our intervention in the
11 first place.

12 We don't see the logic of that. We're here
13 in the case not because North Carolina fails to
14 represent our interest, but because we have a direct
15 interest in the outcome of the case as the order
16 explains.

17 Finally, Mr. Frederick said just a moment ago
18 that I had been arguing that I would be presenting
19 Charlotte's point of view on the benefits of uses of
20 water in North Carolina during Phase 1. I did not say
21 that. What I said and emphasized was that we would
22 intend to argue that the harms alleged and attempted
23 to be proven by South Carolina in Phase 1 do not arise
24 to the serious magnitude level that the Court's
25 precedents require. That's all I have.

1 SPECIAL MASTER MYLES: Okay. All right.
2 That's helpful.

3 Let me pose one more question primarily to
4 Mr. Frederick and then we can turn to the other issues
5 on the agenda. The question has to do with the
6 procedural arguments various people made in the
7 briefs, which were not addressed yet today.

8 But I think they -- I'd like to ask you,
9 Mr. Frederick, under what auspices are you bringing --
10 there's 2 phases to your motion. One, the motion for
11 clarification and the other is a motion for
12 reconsideration. And this is a point in the federal
13 rules that oftentimes is addressed by local rules.

14 I think it's correctly pointed out in some of
15 the briefs that the federal rules aren't necessarily
16 directed to this issue, but sometimes Rule 59E gets
17 used -- sometimes it's Rule 60B, I think.

18 But the question is, do you have a framework
19 under which you're proceeding? And if so, there were
20 also questions of timeliness. Right? There I think,
21 you know, on the motion for reconsideration, I'd
22 appreciate it if you could address the timeliness
23 issue.

24 MR. FREDERICK: Sure. We -- we briefed the
25 procedural aspects of this in the foot of our reply

1 brief. And I'm not sure I can elaborate any better
2 than what we said there, because there is no guidance
3 in the Court's rules and I don't think any of the
4 analogies under the federal rules are applicable.
5 You know, the truth of this is that because this is an
6 original action, as the deputy clerk has told me
7 several times, there is a certain sense in which the
8 parties are operating in a rather free-flowing way
9 with the rules operating in a less formalized manner.
10 Particularly, with respect to these issues.

11 Now, as to timeliness, I think that the
12 argument that's being made by the intervenors is
13 frivolous, to be candid. Because it was only when
14 they made statements in submissions, both in briefs
15 and in letters, as to the scope of Phase 1 and 2, that
16 it became clear that they intended to represent
17 themselves as full-fledged parties and that the
18 limited purpose language of the order was not going to
19 be observed or given any substantive meaning. And
20 within a week after they did that, we filed our motion
21 to clarify or, in the alternative, for you to
22 reconsider. And I'm going to say after an hour and a
23 half, hour and 40 minutes in this hearing today, the
24 intervenors have given no substantive meaning to the
25 phrase "limited purpose" in the order.

1 And so our motion to clarify, I would submit,
2 is fully justified because we don't have rules of the
3 road going forward to understand how we can enforce
4 what those limited purposes might be at any
5 substantive level for any particular aspect of this
6 litigation.

7 And respectfully, because of that, unless
8 there is a theory that provides some limitation and we
9 offered that in distinguishing between Phase 1
10 participation and Phase 2 participation, then
11 respectfully, you should reconsider the order. And I
12 think that that kind of an approach is perfectly
13 timely, given the sequencing of events.

14 We would -- you know, we have signaled that
15 we think that the order is incorrect but that if the
16 order is clarified to limit the participation of the
17 intervenors to Phase 2, that, you know, we would be
18 prepared to proceed with the litigation in that form.

19 But the -- we think that as we briefed on the
20 reconsideration issues, if those limitations are not
21 imposed, that the order is contrary to precedent and
22 Mr. Banks, I think quite candidly, said that the order
23 does not provide any role for the adequacy of
24 representation point. And that is one of the elements
25 of the test as articulated by the Court in New Jersey

1 versus New York.

2 SPECIAL MASTER MYLES: Well, let me ask you
3 this: I understand your point that -- well, about the
4 limited purpose language in the order. But there's
5 really -- your motion really asks for two things.
6 One, you ask for two alternatives. One, you ask for
7 clarification as it applies to discovery. You're
8 asking for clarification of what the intervenors'
9 rights are as regards to discovery going forward.

10 MR. FREDERICK: No, I don't think that's
11 correct. I think it's as to their forbility to
12 participate in Phase 1.

13 SPECIAL MASTER MYLES: Yeah, okay. Fair
14 enough. It's a Phase 1 --

15 MR. FREDERICK: They acknowledge that they
16 will be engaging in discovery responses to us and
17 making objections. And as Mr. Phillips said, if they
18 think that we've gone too far, we expect that they
19 would complain about that.

20 But just as any of the people that are going
21 to be getting subpoenas who are third parties may well
22 complain about the scope of the subpoenas. But that
23 doesn't entitle them to full-party status for purposes
24 of making briefs and issuing expert reports and all
25 the other things that entail tremendous costs and

1 cause potentially large prejudice to South Carolina
2 from a resource perspective and an ability to litigate
3 this case as one sovereign complaining about the
4 actions of another sovereign.

5 SPECIAL MASTER MYLES: Okay. Fair enough.
6 But I mean, that's a question that could go to -- you
7 could call it discovery Phase 1 and Phase 2, you could
8 call it a motion for a protective order, you could
9 phrase it any number of different ways. It's not --
10 it's not a foregone conclusion, it would be a motion
11 to clarify the original order.

12 But the second part of your motion is for
13 reconsideration of the order. And that's the part
14 that really -- where the timeliness issue comes up. I
15 think you are right that insofar as you're seeking to
16 limit the participation of the intervenors to
17 something that is less than full participation, then
18 the timeliness issue is less of a concern.

19 It's really -- the timeliness issue really
20 goes to the second part of what you're asking for,
21 which is really you're saying that the order itself
22 was ill-considered and ought to be changed. Not just
23 clarified, but it ought to come out the other way.
24 And that part is what I was really asking you to
25 address on the timeliness perspective.

1 MR. FREDERICK: Well, and that -- but it
2 flows directly from the first part, Special
3 Master Myles. Because we read the order as we think
4 it's written to put limited purpose in. And if you
5 clarify and say South Carolina, you are incorrect. I
6 put the words "limited purpose" in the order but I
7 didn't mean them and they have no substantive content,
8 then the -- then that is what we are responding to as
9 a new order. And our arguments in the second part
10 say, you should not issue that order because that
11 would be violative of the court's principles and
12 precedence. So it would --

13 SPECIAL MASTER MYLES: But many of your
14 arguments that -- many of your arguments as I think we
15 touched upon earlier, would equally well say that the
16 intervenors should not be part of Phase 2 either,
17 because again, the State could adequately represent
18 them at Phase 2 just as well as it could at Phase 1.
19 That's really a reconsideration argument. It's not a,
20 it doesn't turn on the limited language, the word
21 "limited purpose" in the order. It turns on the
22 correctness or not of the underlying order itself.

23 I'm not saying that your motion is untimely;
24 I'm just asking you to address the timeliness issue
25 and what standards govern timeliness of the part of

1 your motion that is a pure motion for reconsideration?

2 MR. FREDERICK: I don't think that there are
3 substantive standards that either or any of the
4 parties have pointed to that would suggest that its
5 untimely, other than a generic "somehow this doesn't
6 seem fair, we should have filed this sooner."

7 But the reason we didn't file it sooner is
8 excused by the fact that we didn't know that the
9 intervenors were going to read the order contrary to
10 the words in the order until we discovered their
11 submissions that were made three weeks after the order
12 was entered.

13 So I don't think there's any timeliness
14 problem there at all. We brought the order to the
15 Court's attention upon really the soonest practical
16 time we could in light of how the intervenors were
17 interpreting the order.

18 SPECIAL MASTER MYLES: But one -- one aspect
19 of it that you, I want to go back to is when you were
20 discussing Duke's argument, you said that the argument
21 Duke was making, having to do with the CHEOPS model,
22 is a Phase 1 issue. But that the --

23 MR. FREDERICK: I did not say that, Special
24 Master Myles. I did not say that. What I said was
25 that the CHEOPS model is going to be scrutinized by

1 the experts to look at the hydrological conditions of
2 the river which will be a Phase 1 issue. But the fact
3 that it's created a CHEOPS model for its own corporate
4 profit-making incentives does not make that a Phase 1
5 issue.

6 SPECIAL MASTER MYLES: But you said that the
7 modeling that would be done relative to the CHEOPS
8 model would be Phase 1.

9 MR. FREDERICK: No, what I said was that the
10 experts that we would be retaining would be looking at
11 the CHEOPS model, would be looking at the data that's
12 being used and would be seeking to model, create their
13 own model of hydrological conditions on the river.
14 But that does not make the CHEOPS model a Phase 1
15 issue.

16 CHEOPS is simply a data point that will be
17 used to determine hydrological conditions on the
18 river. As Mr. Phillips put it, a baseline, if you
19 will. But that doesn't make it a -- that does not
20 make Duke's uses of the CHEOPS model for its
21 profit-maximizing purposes a Phase 1 consideration,
22 which is going to look only at the harms to
23 South Carolina of under -- under the lack of access to
24 water.

25 SPECIAL MASTER MYLES: But you said that if

1 North Carolina were making the same argument, putting
2 aside the equities of the uses but rather just using
3 the CHEOPS model as a basis for a factual argument to
4 the state of affairs of the river, that would be a
5 Phase 1 issue. Right?

6 MR. FREDERICK: Well, what I said was that
7 the same data is being used for two different
8 purposes. North Carolina is using it to justify
9 sucking water out of the Catawba River and
10 transferring it to other places. Duke is using this
11 same data to defend its CRA and its FERC application.

12 And our objection, fundamentally, is to
13 North Carolina's use of that data to justify its IBTs.
14 That does not make Duke's CHEOPS model the issue in
15 Phase 1 in the sense that, you know, how Duke is
16 defending it for its CRA is not going to be a Phase 1
17 issue as we conceive the case.

18 SPECIAL MASTER MYLES: But is it relevant in
19 Phase 1.

20 MR. FREDERICK: Relevant. It asks for
21 intervention, Special Master Myles. There has to be a
22 compelling interest that is unique and that cannot be
23 adequately represented in some other way.

24 And let me say, just further, that the CHEOPS
25 model, and we haven't pulled it apart yet, that may be

1 exactly depictive of what the hydrological conditions
2 are. We just don't know. But my point is that the
3 data that is -- that is created in that model does not
4 justify intervention by Duke.

5 SPECIAL MASTER MYLES: But that's not the
6 issue.

7 MR. FREDERICK: The issue is whether --

8 SPECIAL MASTER MYLES: If that's the issue,
9 then you do have to address -- I'm very confused by
10 your argument, because you're saying that you didn't
11 know that any of the intervenors would want to be part
12 of Phase 1. That's why I asked the relevance
13 question, because is the CHEOPS model relevant to
14 Phase 1? Because if I've already granted them leave
15 to intervene, then I don't think each and every act of
16 intervention is governed by a compelling interest
17 standard. The compelling interest standard goes to
18 the correctness of the original order granting or
19 denying intervention. Once intervention is granted,
20 surely we're not going to look at every single
21 discovery request to see if it's governed by -- it
22 meets a compelling interest standard. We're going to
23 have another -- there may be practical limitations on
24 what the discovery goes to.

25 But my question was, if I've granted

1 intervention, thus that order exists, and if there's
2 going to be an order reconsidering it, you know, the
3 time clock, whatever it may be, starts running, then
4 if the CHEOPS model, for whatever purpose it's being
5 used, is relevant to Phase 1, wouldn't that be
6 anticipated by even your reading of the order that if
7 the -- that if the limited purpose means that only
8 issues that are relevant to that intervenor are to be
9 considered at that part of the litigation, then if
10 it's relevant to Phase 1, then Duke could be expected
11 to be participating at that phase.

12 That's what I'm having trouble with. We keep
13 flipping back from what would be naturally part of
14 Phase 1 to whether intervention is warranted in the
15 first place.

16 MR. FREDERICK: Well, I would acknowledge
17 that Duke has a different interest than the other
18 intervenors. And that that's articulated in the
19 order. And so whatever we say here about Duke does
20 not justify expansion of purposes by the other
21 intervenors. But the order's very last words on page
22 12 say, "For the limited purposes discussed above,
23 it's intervention for the limited purposes."

24 And we read that order to have content and
25 meaning and not to say that once you decided that they

1 were to be intervenors that they were able to be
2 full-fledged party -- have full-fledged party status
3 in the case.

4 And it's in light of the Supreme Court's test
5 that we read the limited purposes of the -- as I
6 mentioned in the -- in the Kentucky case. Kentucky
7 versus Indiana. I mean, we read the order in light of
8 the precedents as we understood them. And the
9 "limited purposes" language that's apparent from the
10 order.

11 SPECIAL MASTER MYLES: Okay. That's fair
12 enough. I understand the point.

13 MR. PHILLIPS: Special Master Myles. This is
14 Carter Phillips for Duke. We didn't raise the
15 procedural issue, so I'm not inclined to respond to
16 Mr. Frederick's point. But one of the others may want
17 to.

18 SPECIAL MASTER MYLES: If not, that's okay.
19 It's in the briefs. We don't need to rehash it if
20 nobody has anything new to add. I don't mind moving
21 on.

22 I'm going to put you on hold for one second.
23 (Off the record.)

24 SPECIAL MASTER MYLES: This is Special
25 Master Myles again. I just think it's probably best

1 if I state on the record at this phase what -- what
2 I'm going to do on this motion. So that people
3 have -- people could proceed. We will put something
4 out in writing, but I want to lay out what the ruling
5 is.

6 On the issue of clarification of the existing
7 order and the words "limited purpose," the motion to
8 clarify, to the extent it asks that intervenors be
9 limited to Phase 2 only, is denied. Largely for the
10 reasons I've already stated, that the issues don't --
11 the purposes for which intervention was granted,
12 although limited in the way described in the order,
13 are not naturally or logically limited to giving these
14 parties the ability to address the form of relief that
15 is crafted at Phase 2.

16 As all the intervenors have pointed out, many
17 of their interests are implicated in Phase 1 as well.
18 Both the issue of the transfers, which for the reasons
19 already stated, but I will repeat it again, the
20 challenge to the transfers does not implicate only
21 whether there will be an order enjoining a transfer at
22 the end of the day, it also appears to implicate other
23 factual questions and other questions relating to the
24 transfers and the transferees that go to Phase 1, that
25 would go to Phase 1 issues.

1 So I don't see that as a natural limitation
2 on the participation of the intervenors that are
3 affected by transfers, Catawba and -- and the city of
4 Charlotte.

5 With respect to Duke, again, we've covered
6 this, but I'll just summarize. I think Duke's
7 interests are implicated in what we understand to be
8 Phase 1. Granted, Phase 1 definition has not been
9 entirely laid out in concrete. But it seems under
10 even the narrowest definition of Phase 1, issues that
11 implicate Duke are going to be raised. And I do think
12 that's the discovery that's been posed, even if it's
13 narrowed in subsequent meeting and conferring
14 negotiations.

15 Still, the point is that the discovery does
16 illustrate how Duke's interests are implicated in
17 Phase 1. That being said, I think that the gist of
18 this order is that there is no natural division
19 between Phase 1 and Phase 2 that either follows from
20 the limited purposes of the intervenors' interest, or
21 that presenting natural division between -- it doesn't
22 follow from the terms that were used in the order, nor
23 does it follow from any practical limitation on the
24 intervenors' interests.

25 That being said, there are other mechanisms

1 to test the limits of what legitimately can be
2 discovered by intervenors or the phases in which they
3 can participate.

4 With respect to discovery, I think in
5 addition to the guide that we have from the purposes
6 of intervention, which are relevant to this question,
7 we also have the guide of the federal rules in these
8 standards for discovery which are much broader than
9 the standards for either admissibility or perhaps
10 other procedural rights that you have the test of
11 being -- I don't know the exact phrase, but reasonably
12 calculated to lead to the discovery admissible
13 evidence surely must have a bearing on what the
14 intervenors are going to be allowed to do in terms of
15 discovery. Which is not to say they have full
16 participation as parties, but some of those issues
17 that may arise down the road are really hypothetical
18 at this point.

19 And it can be brought to my attention by
20 means of a motion for a protective order if it's
21 discovery or clarification to case management issues
22 that may arise when we get to the point of experts.

23 I think that some of the concerns that
24 South Carolina raises are legitimate. But I think
25 they're really premature. They don't follow naturally

1 that -- the division of South Carolina is now
2 proposing, doesn't follow naturally from the order
3 that was issued. And it also can't really be
4 evaluated until we have concrete discovery or other
5 issues in front of us to draw a line.

6 So both -- all three intervenors have
7 confirmed their commitment to the proposition that
8 their interests are limited to their own interests as
9 intervenors, depending on what that interest is. But
10 I think there's some merit to the point that until
11 there's some reason to, it's hard to stake out what
12 exactly those limitations must be. It's hard to say
13 what those limitations must be until there's some
14 concrete application to which the limitation could
15 apply.

16 So with respect to the second part of the
17 motion, which is to reconsider underlying order.
18 Without passing for the moment on the timeliness of
19 the motion, I'm not inclined to grant the motion
20 largely because the issues raised in the motion were,
21 for the most part, if not entirely, issues that were
22 raised in the original briefs and were not -- and were
23 resolved by the order.

24 In other words, I don't think there's
25 anything new among the arguments that South Carolina

1 makes that were not made and considered before. I
2 know there is no hard and fast standard for
3 reconsideration in this context. And we may want to
4 have law of the case if nothing else going forward
5 although technically it wouldn't apply to the
6 subsequent order. But most standards for
7 reconsideration apply some view to be presented that
8 wasn't -- that wasn't considered in the original
9 motion. So --

10 Let me put you on hold for one more second.
11 I'm going to come back in a moment.

12 Sorry about that.

13 Okay. So that is the ruling on the motion.
14 I'll follow up with something in writing, and may
15 attempt to address what standards should apply to a
16 motion for reconsideration. But I think whatever
17 standards apply would not warrant reconsideration of
18 this order.

19 So why don't we move on to the next set of
20 issues?

21 MR. FREDERICK: Special Master Myles, this is
22 David Frederick for South Carolina. We take exception
23 to the ruling of the Court and ask that you frame your
24 written order in the form of an interim report. I
25 have checked with the Court what the procedure would

1 be for South Carolina, and just to preserve whatever
2 appellate options we have, I understand that the
3 appropriate form would be for this order to be in the
4 form of an interim report. That's not to say that we
5 would take exceptions to it or that the exceptions
6 that we might take would be later after a later
7 report, you know, for which some other development in
8 the case would accrue.

9 But for purposes of having this as an order
10 that would potentially be appealable, we would
11 respectfully ask that you frame your writing as an
12 interim report.

13 SPECIAL MASTER MYLES: Do you mean the order
14 on the reconsideration motion or the order on the
15 underlying intervention motion?

16 MR. FREDERICK: I think that you can frame
17 them either or both. But certainly your
18 reconsideration motion that we've asked for, to frame
19 that as an interim report that incorporates your
20 earlier order would enable us to have an opportunity
21 to raise an exception with the justices.

22 MR. GOLDSTEIN: Special Master Myles. This
23 is Tom Goldstein, if I could comment on that for a
24 second.

25 SPECIAL MASTER MYLES: Sure.

1 MR. GOLDSTEIN: So what's going on here, just
2 to step back, is the court's original referral order
3 gave you discretion to issue whatever, if you go back
4 and read it, to issue the report that you deem
5 appropriate. We moved to intervene and you issued an
6 order granting the motions to intervene and there was
7 no request made to certify this, do it in the form of
8 a report that would go to the justices
9 interlocutorily.

10 And then there was a motion to reconsider and
11 there was no request to put it in a form that would
12 cause an interlocutory appeal to the justices. And
13 now finally having lost not once, but twice,
14 South Carolina, for the first time, asks that you
15 change the posture of this.

16 And the -- we don't think that you should
17 exercise your discretion in that way, because the only
18 purpose of doing it will be so that South Carolina
19 could take an interlocutory -- proceed with
20 interlocutory review before the justices. And if
21 that's what South Carolina wanted, it could have asked
22 for that when we moved to intervene and it was
23 referred to you after the first ruling, but this has
24 turned into a one-way ratchet in which it hoped, I
25 think, to win before you and then have the issue

1 finally resolved before then -- and only having lost
2 twice make the request to divert the case potentially
3 to the Supreme Court. Because that's the only
4 possible upshot is to take an appeal on the basis of
5 an interim report and order.

6 And the -- it really is a matter for your
7 discretion. Sometimes intervention motions, when
8 they're resolved, are addressed interlocutorily. But
9 the justices and sometimes Special Masters deal with
10 it in their final report. But we think that a really
11 telling point is that if South Carolina believed that
12 was the appropriate disposition, it had a long time to
13 raise that with you before just conveniently when it
14 happened to lose for the second time to turn it into
15 sort of a one-way ratchet.

16 MR. FREDERICK: Can I respond to that,
17 Special Master Myles?

18 SPECIAL MASTER MYLES: Why don't we see first
19 if anybody else wants to say anything. And then yes.

20 MR. BANKS: Yes, this is Jim Banks for the
21 City of Charlotte. I'd like to make one brief point.
22 And that is if this request is going to be put to the
23 Special Master, it should be done in a form of a
24 motion with a supporting brief. And we should all
25 have the opportunity to brief our oppositions to the

1 motion.

2 And secondly, that motion should only be made
3 if and when South Carolina decides that it intends to
4 take exception and elevate this issue to the justices
5 not to have the report issued as a sort of loaded
6 pistol that's always available to South Carolina to
7 use whenever it chooses to.

8 MR. PHILLIPS: This is Carter Phillips for
9 Duke. I share the sentiments that have been
10 expressed. I don't impugn any bad motives to
11 Mr. Frederick as a consequence of this. I think it
12 probably occurred to him at this stage that that might
13 be a reasonable way to proceed.

14 But it seems to me none of us would object
15 if, in the final report that you issue, you, you know,
16 expressly deal with the issues of intervention so that
17 if South Carolina wants to raise it as part of a final
18 list of exceptions, assuming it has reason to be
19 unhappy with the ultimate disposition of the case,
20 that that issue will be around.

21 But, you know, I do think South Carolina has
22 got to commit to whether or not they're going to seek
23 to do -- to seek an interlocutory review at this
24 point.

25 SPECIAL MASTER MYLES: Mr. Browning, do you

1 want to add anything before Mr. Frederick responds?

2 MR. BROWNING: No, Your Honor. I think there
3 is nothing for us to add at this point.

4 SPECIAL MASTER MYLES: Okay. Mr. Frederick.

5 MR. FREDERICK: I made inquiry of the clerk's
6 office about the appropriate procedure if orders
7 sometimes are incorporated into final reports of
8 Special Masters, and sometimes they are not. There is
9 apparently not a consistent procedure. There are
10 several cases, however, in which preventions have been
11 made by Special Master's and the practice according to
12 Ms. Rapp, the clerk who handles original cases, is for
13 Special Masters to use them in the form of interim
14 reports.

15 What the intervenors want to do now is to
16 play "gotcha" by saying we don't have
17 a right to object to an order that we don't think is
18 a correct order and that in Mr. Phillips' view, we
19 have to wait until the case is over before we can say
20 the entities shouldn't have been allowed to
21 participate in it.

22 Now, I have not consulted with the Attorney
23 General, and so I'm not authorized to say whether we
24 would or would not make exceptions. But Special
25 Master Myles, you said you were going to write this up

1 as an order. All I asked was that you frame it as an
2 interim report so that we would comply with the
3 requisites as set out by the clerk's office.

4 And, you know, Mr. Goldstein's insinuation
5 that somehow we should have known exactly how this was
6 going to play out or Mr. Banks' request that we have
7 even more briefing on these ancillary questions is all
8 part of our objection to begin with, which is that
9 these entities which are sub-sovereigns, they are
10 political subdivisions of the States, are driving the
11 litigation. And it is the tail wagging the dog point.
12 And we believe that that's not a correct way for the
13 litigation to proceed.

14 And we respectfully ask and move, if that's
15 how you should deem it, that you just frame this order
16 as an interim report, so that we have whatever options
17 we would be authorized to take.

18 MR. BANKS: Special Master Myles, this is
19 Jim Banks. I just wanted to make one brief point.
20 We're somewhat familiar with this practice of interim
21 reports. And our view would be that it is not the
22 usual practice to elevate intervention decisions in
23 interim orders and that it would be an unusual thing
24 to do, despite what Mr. Frederick thinks he heard from
25 the Clerk's office. And that's why we think it would

1 be important to brief the question if they insist on
2 presenting this request in the form of a motion.

3 MR. FREDERICK: All I can do is give you the
4 case numbers that Ms. Rapp gave to me as examples of
5 where in prior original cases, original number 119 or
6 original number 120 where the Court had referred
7 motions to intervene to Special Masters, got interim
8 reports, and procedures followed from there.

9 SPECIAL MASTER MYLES: Did those result in
10 opinions being issued by the Court?

11 MR. FREDERICK: Sometimes they do and
12 sometimes they don't, Special Master Myles. And I
13 would just point out in New Jersey versus New York
14 there was argument and briefing on the merits and
15 there was argument and a decision by the justices on
16 the intervention question. More often it is a result
17 in just an order granting or denying. But the
18 practice appears to be varied.

19 SPECIAL MASTER MYLES: In New Jersey versus
20 New York, was it done as an interim report?

21 MR. FREDERICK: On a motion to intervene,
22 motion for leave to intervene. I don't know whether
23 the Special Master issued --

24 SPECIAL MASTER MYLES: Here's what I'd like
25 to do on that. I think we just ought to have -- I'm

1 inclined to say we ought to have briefing on this, but
2 really just a letter brief of no great length like,
3 you know, three pages at the most in a letter brief to
4 address this issue of whether it's proper for
5 South Carolina to seek an interim report at this stage
6 and whether -- whether that's what I ought to do.

7 It does seem odd to me to issue an interim
8 report on the issue, on just the reconsideration
9 motion. So part of the question would be whether I
10 ought to convert the original order into an interim
11 report subject to the reconsideration motion being
12 part of that. So I think that would be helpful.

13 I don't think it's unfair to ask that,
14 because this is, after all, a briefing on the question
15 of intervention. It's not -- I don't see it as the
16 intervenors driving the litigation. I see it -- I see
17 what they're doing is addressing the issue of whether
18 they should or should not have been allowed to
19 intervene, which certainly is something that they --
20 they are the only ones that really have a strong
21 interest in addressing other than South Carolina.

22 So I don't see that as being an unfair
23 request. And it would probably be helpful just to
24 have it -- to have the arguments and points laid out.

25 MR. PHILLIPS: Special Master, this is Carter

1 Phillips. When would you like the letter briefs? I
2 assume you want them filled simultaneously or do you
3 want them one -- and then you want South Carolina to
4 go first and then us to respond?

5 MR. BROWNING: And Your Honor, this is Chris
6 Browning. If I could make a suggestion, as I
7 understood what Mr. Frederick was saying, he is not
8 certain as to what the position of the South Carolina
9 Attorney General would be, whether they will, in fact,
10 need an interim report.

11 Would it make sense to make that
12 determination before people start incurring the
13 expense of doing briefs and incurring your time for
14 something that could potentially be a moot issue to
15 begin with?

16 SPECIAL MASTER MYLES: Well, maybe what
17 that -- Counsel is first -- rather than doing
18 simultaneous briefing, to do, have South Carolina go
19 first. Why don't we have South Carolina submit
20 something, if South Carolina can decide what it wants
21 to do, that certainly would be helpful, you know,
22 before it does its submission.

23 There is some expense involved in creating an
24 interim report. Doesn't it have to be printed? And
25 that's an expense I think that gets borne by the

1 parties. Correct me if that's wrong, but I think
2 that's the case. So let's set a time frame for that.
3 Mr. Frederick, when can you have something in?

4 MR. FREDERICK: Well, if I could say the 29th
5 of July at the earliest.

6 SPECIAL MASTER MYLES: Okay. And will that
7 involve -- will that include a statement as to whether
8 South Carolina does intend to go forward with an
9 exception?

10 MR. FREDERICK: I can't -- I can endeavor to
11 do what I can.

12 SPECIAL MASTER MYLES: All right. So we'll
13 put that down for the 29th.

14 MR. FREDERICK: If you could make it the
15 30th, that would give me an extra day from when I'm
16 back. Would that be acceptable, Special Master Myles,
17 the 30th of July?

18 SPECIAL MASTER MYLES: Yes. And then -- how
19 much time would the intervenors want to respond?

20 MR. GOLDSTEIN: Special Master Myles, this is
21 Tom Goldstein. I don't think a lot of time unless
22 something unusual papers in the papers and we need to
23 ask you for additional time, I would think a week
24 after that.

25 MR. PHILLIPS: This is Carter Phillips. I

1 had the same gut reaction with the seven days would be
2 plenty.

3 MR. BANKS: This is Jim Banks. The 6th would
4 be fine.

5 SPECIAL MASTER MYLES: In the interest of
6 full disclosure, I'll be on a vacation beginning on
7 the 6th for a couple of weeks. I don't know if that
8 affects anybody. I can still read it. I can read
9 what's done, but I'll be back on the 20th. So I may
10 not be in a position to issuing anything until the
11 20th. We have a call on the 22nd, though. Right? So
12 we may able to just pick it up on the 22nd. Is that
13 right?

14 MR. PHILLIPS: That's correct.

15 SPECIAL MASTER MYLES: Okay. So what other
16 issues do we have? We have the case management plan
17 and the changes which have been made to it, which we
18 have.

19 MR. BROWNING: Your Honor, this is Chris
20 Browning. The other issues are with respect to
21 essentially the timing of expert reports and the
22 nature of South Carolina's statement of particularized
23 harm. South Carolina has certainly come a long way
24 since the last hearing and has essentially agreed to
25 now provide a statement of particularized harm. And

1 the need for North Carolina -- the issues that
2 separates us the most, is the amount of time that
3 South Carolina proposes be given to North Carolina
4 with respect to our expert reports. And I would be
5 glad to address that issue, if it would be helpful at
6 this point.

7 SPECIAL MASTER MYLES: Sure. It's the first
8 issue in your letter. Right?

9 MR. BROWNING: Yes, Your Honor. And from our
10 perspective, we believe that to be the most important
11 one.

12 As South Carolina has -- their proposal would
13 give their expert witnesses basically 21 months from
14 when the case management issue order is issued to
15 provide their expert reports. In contrast to that, we
16 have three months after that to provide our expert
17 reports. And with an issue that's as complex as this
18 that involves modeling of an entire river system, a
19 river system that we won't know the segments that are
20 put into play until perhaps as late as when we receive
21 their expert reports, it's simply not practical or
22 feasible to expect North Carolina to do that sort of
23 modeling and have its experts to do the appropriate
24 analysis during a 3-month time period.

25 We have been in constant communication with

1 our expert witnesses and they are adamant that the
2 proposal that South Carolina is putting forward would
3 put North Carolina at a substantial disadvantage and
4 our experts would not be able to do the sort of work
5 that they would need to to be able to appropriately
6 respond.

7 Our original request was after South Carolina
8 identifies, provides their expert report,
9 North Carolina would have nine months to prepare its
10 expert report. That is the -- what we are told is the
11 bare minimal amount of time necessary to do the
12 modeling that cannot be done until we have the
13 information we need from South Carolina.

14 SPECIAL MASTER MYLES: Your second issue on
15 the statements of particularized harm, does that
16 affect the analysis of how much time you need in the
17 first question?

18 MR. BROWNING: No, Your Honor. That is a
19 suggestion as a way that I think would be helpful for
20 all the parties to have early on, a commitment as to
21 what South Carolina will be providing and we have
22 proposed language to get the ball rolling on that
23 front. We think that's what we have on page 3 of our
24 letter is a very rational and reasonable approach.
25 And would be -- be the sort of information

1 South Carolina should be provided.

2 But I think it makes sense to -- lets
3 everybody get out on the table at the outset what we
4 expect South Carolina to be providing as opposed to do
5 it, as South Carolina has suggested, through
6 contention interrogatories which presumably will not
7 be served for some time now.

8 SPECIAL MASTER MYLES: Okay. Mr. Frederick.

9 MR. FREDERICK: We picked up on the
10 suggestion that you had made in the prior hearing
11 about contention interrogatories and using them in the
12 traditional way these things are done in the federal
13 rules. The mechanism for identifying with the harms
14 that South Carolina has suffered. And that was a
15 suggestion that the Special Master had made that we
16 thought, you know, comported with the normal
17 procedures.

18 And what North Carolina has done is to say
19 even though they had suggested that sort of thing
20 originally, and you had picked up on that as a
21 proposal, now that's not good enough that we've got to
22 write some kind of report. And they've amplified on
23 the specificity from what they had argued for and that
24 we had negotiated on and what they proposed on
25 June 16th, adding things of all great specificity and

1 clarity so that later on they can say we did not meet
2 every jot and tittle of the specific requirements of
3 harm. They go way beyond what the federal rules
4 require.

5 And so I think that their position on the
6 statement of interest finds no support in the federal
7 rules. There is no effort really to create or cite
8 precedent for that kind of imposition on
9 South Carolina. And we're not aware of any authority
10 for that -- for that view.

11 Now, with respect to the expert reports, we
12 are puzzled here, because the justification for
13 protracting this on litigation, which we have agreed
14 to do a longer Phase 1 recovery process, we thought to
15 accommodate North Carolina so that their experts could
16 begin to analyze the harms in the period after we have
17 identified them with the specificity that, you know,
18 we've agreed to provide in the contention
19 interrogatory answers.

20 I don't know why their experts can't begin
21 modeling when we provide those contention
22 interrogatory answers and why their experts need a
23 full nine months to deal with the data that our
24 experts have, so that this matter, you know, extends
25 on to basically three-plus years of factual discovery

1 just on Phase 1.

2 I mean, at this rate, we're all going to be
3 retired by the time this case ends. And
4 North Carolina can't offer any justification for why
5 they have to get the data that our experts are going
6 to be using, because they've already got the data.
7 They have the CHEOPS model, they have it in a native
8 form. They presumably can do whatever models they
9 need to run once we have provided the harm
10 specification that they need.

11 They never explained why three months is an
12 insufficient time when you add it to the nine months
13 of fact discovery and the three months that our
14 experts have, their experts are going to basically
15 have the identification of harm
16 15 months -- or sorry, 15 months in which to do their
17 analyses.

18 And so, you know, in the interest of moving
19 the case along, we would ask that that proposal be
20 rejected.

21 MR. BROWNING: Your Honor, this is
22 Chris Browning. Let me explain why the statement of
23 particularized harm, although it will help us in
24 getting our handle on the case and being able to
25 prepube what South Carolina is claiming as the harm,

1 it wouldn't be reasonable for our experts to start
2 work doing very expensive modeling analysis just based
3 on that statement of particularized harm.

4 And I don't know if you have got a map of the
5 Catawba River in front of you, but right now we don't
6 know how far down the river we're going to be seeing
7 harms. And South Carolina wants to include, with
8 respect to the statement of particularized harms, a
9 very broad reopener that allows them to add to those
10 harms and based upon additional information that they
11 weren't able to evaluate fully earlier or essentially
12 words that effect.

13 So we have a real concern we won't get a
14 statement of particularized harm at the end of nine
15 months that shows the harms in the upper portion of
16 the Catawba River Basin. And if we were to start our
17 experts witnesses to do an analysis based upon that,
18 what's going to happen, or what could potentially
19 happen is down the road, South Carolina exercises that
20 reopener and says, "Oh, we've already learned that
21 because of a waste bill in Charlotte, it has trickled
22 down to Charleston South Carolina is harmed as a
23 result. You have an entire segment of the river where
24 you have not been able to do the very detailed
25 analysis of all the other inflows, the other

1 tributaries that would impact that.

2 So if South Carolina is willing to give up
3 its reopener, that would make a substantial difference
4 in when our experts can get started. But given the
5 fact that they have said they need that reopener
6 there, I think it's very reasonable for us to say,
7 don't put us to the expense of doing this very costly
8 analysis of the river where that is going to be
9 changing through factual discovery, and South Carolina
10 themselves wants, three months after the end of
11 factual discovery, so they can assess that 18 months
12 and retool what their experts say they want an
13 additional three months after the close of factual
14 discovery.

15 And what we're asking for, Your Honor, is not
16 very much. South Carolina is willing to give us three
17 months. We're asking for six months more, which is
18 very reasonable given the complexity of this case, to
19 have nine months for our experts to do what they need
20 to do and are telling us the time that they will have
21 to have to do this in a rational and reasonable
22 manner.

23 SPECIAL MASTER MYLES: Well, what about
24 something like this? If South Carolina is required to
25 provide its specific information on interbasin

1 transfers, consumptive uses, et cetera, and other --
2 as it puts it in the letter, other activity that
3 South Carolina believes its experts will be able to
4 demonstrate, will be able to demonstrate caused one or
5 more of the identified harm. So South Carolina can
6 will provide that specific information nine months
7 from the date of the case management plan.

8 And then thereafter, that would be the
9 presumptive statement of the harms. In other words,
10 the reservation of rights to supplement what exists,
11 but it would be subject to a standard such as for good
12 cause shown. But in any event, it would trigger more
13 time on the part of South Carolina to respond.

14 If South Carolina sticks to its original
15 statement, then the time would be -- then
16 North Carolina would have the time that it -- that is
17 provided for in the current proposal, which is to say
18 nine months from the date of the disclosure plus an
19 additional three months to prepare its own report.

20 But if South Carolina's disclosure is either
21 incomplete, because South Carolina later comes up with
22 other harms that it wants to rely on once it serves
23 the expert report, or, if the disclosures are
24 inadequate, because they're vague, they're general,
25 they're not specifically -- sufficiently specific

1 to -- to permit North Carolina's experts to respond,
2 then in either of those circumstances, North Carolina
3 would get more time. Would that work? Because that
4 seems that it would address both North Carolina's
5 concern which is valid and legitimate to have, to have
6 its experts know what they are addressing, and it
7 addresses South Carolina's concern about not
8 necessarily extending the schedule such a long time,
9 which I think is also a valid and legitimate concern.

10 I don't want to have this case extend for
11 such a lengthy period of time if it can be avoided.
12 It also puts somewhat the ball in South Carolina's
13 court to be sufficiently specific and complete that it
14 won't essentially be penalized by having additional
15 time granted to North Carolina.

16 MR. FREDERICK: Special Master Myles, we
17 stand ready to meet that burden. But I think that the
18 recognition needs to be made that North Carolina has
19 to provide information that -- what concern triggered
20 the reopener provision was that very late-produced
21 documentary information or data that would not make it
22 possible within the nine-month framework to be able to
23 identify those harms.

24 And it was -- it was occasioned by concerns
25 that we would not get information in a timely fashion

1 that would enable our experts to work with it to come
2 up with a statement that would be responsive to the
3 contention interrogatories. And so, you know, we are
4 comfortable with this schedule subject to if there
5 were to be an occasion where we would need to
6 supplement, that North Carolina get a reasonable
7 amount of time.

8 But it's got to be contingent also on
9 North Carolina abiding by its obligations to provide
10 absolutely as much material as fast as possible so
11 that we have the full amount of time with which to
12 work.

13 MR. BROWNING: Your Honor, this is Chris
14 Browning. I believe your question was directed to me
15 and I will do my best to respond to it, although I'm
16 having a little bit of trouble with, in light of
17 Mr. Frederick's comments, trying to keep your specific
18 question in mind.

19 But I think your question was to the effect
20 of, if there were a very limited reopener for
21 South Carolina, could North Carolina's experts start
22 their work and could we reduce the time that way?
23 Your Honor, we would still be extremely concerned
24 about that, because -- let's assume that there is a
25 legitimate situation that gives rise to the reopener,

1 what is caused is North Carolina, their experts doing
2 extremely extensive analysis to potentially have to
3 reinvent the wheel, where South Carolina goes from
4 complaining one day about a spill of one chemical in
5 the Catawba River and the next day potentially
6 complaining about another spill in a different
7 location.

8 If that reopener is activated, the analysis
9 that our experts could potentially have to do will
10 drastically change the equation and will cause us to
11 have to potentially redo work or jettison some of the
12 work that has already been done once that reopener is
13 exercised.

14 SPECIAL MASTER MYLES: Isn't he saying
15 that -- Mr. Frederick saying that the reopener in that
16 circumstance would be triggered only by late -- late
17 discovery by -- by North Carolina?

18 MR. BROWNING: He might be saying that, but
19 that's not the way I read what he -- his letter and --

20 SPECIAL MASTER MYLES: I'm not suggesting
21 that his letter would be the way it comes out. I'm
22 saying that what I'm proposing is something different
23 from what's in Mr. Frederick's letter. I agree with
24 you that the reopener's too broad if we're going to
25 have this time frame. What I'm proposing is there be

1 a more limited right to reopen where there's some
2 reason for doing so.

3 Is there a reason why this particular harm
4 was not identified in the original -- in the original
5 disclosure? So there's somewhat of a threshold that
6 needs to be met in order to add new issues. And then
7 if new issues are added, then additional time needs to
8 be added to address them.

9 The example you gave is a good one, because
10 if North Carolina were asked to disclose -- well, say,
11 particular activities that could give rise to harm and
12 it neglected to mention one of them, then that might
13 be good cause for South Carolina to reopen and provide
14 a different harm than was -- a new harm than what was
15 identified before. Whereas, if that was disclosed in
16 discovery, then their failure to include it might not
17 be excusable.

18 The other point I would add and then I'll let
19 you go on, Mr. Browning, is that, with respect to the
20 first point you raised about scope, which was what
21 part of the river in South Carolina is being
22 complained about? That is a topic on which it's hard
23 to imagine South Carolina not being able to be
24 complete in its original disclosure.

25 It's hard to imagine that South Carolina

1 cannot figure out by the time of its original
2 disclosure, what portions of the river it is -- it is
3 addressing. So I would think that the threshold there
4 would be very high, because there is no -- it wouldn't
5 really be a function of whether North Carolina had
6 provided adequate discovery, it would be a function of
7 whether South Carolina had done its due diligence on
8 its side of the border. So that's a valid concern but
9 that's one that should not arise, I would think. I'm
10 sorry to interrupt you.

11 MR. BROWNING: No, no, I appreciate your
12 comments, Your Honor. And let me -- Your Honor, I
13 think you focused on an issue is if you want our
14 experts to start doing the detailed and costly
15 analysis, there has -- the reopener on South Carolina
16 would have to be extremely limited in our view.

17 But I also think that, in a case of this
18 magnitude and this complexity, giving our experts no
19 more than three months after they have their --
20 South Carolina provide their expert reports is simply
21 going to be a recipe for disaster, in all candor, in
22 connection with this case, that there's got to be more
23 time.

24 I think South Carolina, the fact that they
25 have 21 months from now to prepare their expert

1 reports when they're the party that should be able to
2 know the harms they're relying upon, simply giving us
3 three months to respond to their expert reports is
4 simply not going to be enough. And I would rather be
5 realistic and try to put realistic deadlines in is
6 case than having to be -- going back to you during
7 expert discovery explaining all the reasons why what
8 we were advocating earlier came to pass. That it
9 simply couldn't be done and it has caused a train
10 wreck at the tail end this case.

11 That's what we're really trying to avoid.
12 We're taking the advice and strong sentiments of our
13 experts in terms of the amount of time they need and
14 what they need to do to respond to the reports of
15 South Carolina's experts.

16 SPECIAL MASTER MYLES: Okay. Well, why don't
17 I take that under advisement? I think that we may
18 come out somewhere in between. But I do think the two
19 issues are related. I think that the second issue
20 that's raised has a bearing. And the more detail
21 South Carolina can provide at the initial stage before
22 the expert reports are issued, the less the problem
23 that you're alluding to would -- the less likely that
24 that problem would arise.

25 MR. FREDERICK: What possibilities, Special

1 Master Myles, would be for North Carolina to take some
2 of the nine months that it's giving itself for fact
3 discovery and using some of those months for their
4 expert report?

5 MR. BROWNING: And Your Honor, another
6 possibility is that South Carolina has asked for
7 three months after the close of discovery before it
8 prepares its expert reports. That time could
9 certainly be shortened given the fact that
10 South Carolina should know it's harms when it filed
11 this lawsuit.

12 MR. FREDERICK: But that is objectionable,
13 Your Honor, for exactly the same reason that
14 Mr. Browning wants to have extra months for his
15 experts after the fact discovery is -- our experts
16 need to have the full factual record before they can
17 complete and do all of their modeling.

18 And it's the same issue, but a flip side.
19 Our point simply is that their experts can get started
20 before Mr. Browning seems to think they can.

21 MR. BROWNING: Your Honor, we appreciate you
22 taking this one under advisement and urge you to
23 seriously consider our very real concerns about having
24 this case organized well at the outset as opposed to
25 us having to come back to you at the end begging for

1 mercy.

2 SPECIAL MASTER MYLES: Okay. I think I'm
3 seeing a solution here that may work. Let me ponder
4 it and issue an order. I think that perhaps, again,
5 somewhere in between may be where we end up.

6 But as I was starting to say, I do think that
7 the -- I do want to emphasize -- I don't really think
8 when we get to Issue 2, I'm not sure that the form of
9 what this statement is matters, whether it's done as a
10 response to interrogatories or not. I'm not sure that
11 that matters.

12 If North Carolina were to issue the three
13 points that it issues here in its page 3 as
14 interrogatories and then South Carolina would respond,
15 so it isn't clear to me that setting that out -- I
16 think that the way it's written now, you know, that
17 there could conceivably be objections to it.

18 On the other hand, I think that a good faith
19 effort needs to be made by South Carolina to provide
20 something that can, can be truly a basis for
21 North Carolina to begin its serious work on both its
22 defense of discovery and its expert work.

23 So in a way, again, South Carolina needs to
24 proceed in a way that's going to provide the other
25 side with sufficient detail so they can begin to

1 respond. Otherwise, there's going to have to be an
2 extension granted to North Carolina. That's really
3 what's going to happen, is if the disclosure's not
4 adequate, more time is going to have to be granted.

5 Again, that's sort of the train wreck at the
6 end of the day, is ultimately North Carolina has to
7 have sufficient notice to get started. And this
8 interim, this disclosure is one way of beginning that
9 process, so we don't have to extend the case out for a
10 much lengthier period of time.

11 MR. BROWNING: Your Honor, this is Chris
12 Browning. You hit the nail on the head and exactly
13 our point with regard to this issue, that if there is
14 going to be some bickering as to the way that we are
15 asking for the information, if there are objections
16 that delay the process, that is only going to extend
17 things to the extent that everybody can work together
18 and come up with what South Carolina needs to be
19 providing at the outset, it's going to streamline the
20 process down the road.

21 SPECIAL MASTER MYLES: Right, right. Okay.
22 I think we've covered all three issues. I mean,
23 really the first three issues. So we have the last
24 issue that North Carolina raises in its letter, which
25 is rebuttal reports. Do we want to talk about that

1 next?

2 MR. BROWNING: Your Honor, this is Chris
3 Browning. Our point is very simple that if there are
4 going to be rebuttal report, it would probably make
5 sense to have those extremely limited so that we don't
6 see something new at the outset, particularly if it's
7 something new where we've lost our opportunity.

8 I don't think that the case management order,
9 and it's probably an oversight on our part, directly
10 addresses that. I think if rebuttal reports are
11 extremely limited, as North Carolina would expect,
12 there probably wouldn't be a need for surrebuttal
13 reports.

14 But again, our suggestion is have it limited.
15 And in the event that there is an extraordinary
16 circumstance, that might allow South Carolina to file
17 a rebuttal expert report, it might make sense to keep
18 that opened as well for North Carolina under the same
19 circumstances, to file a surrebuttal report.

20 SPECIAL MASTER MYLES: That's the usual
21 procedure would be if South Carolina raises new
22 matters in its rebuttal report, then to that extent,
23 North Carolina would be allowed a surrebuttal. I
24 think that is the normal rule. I don't have a
25 particular preference on whether that gets imbedded

1 into the order or whether that get addressed as it
2 arises, if it arises.

3 MR. FREDERICK: Surely there would be some
4 good cause shown standard.

5 MR. BROWNING: For what, though?

6 MR. FREDERICK: For having North Carolina get
7 the last word on expert reports.

8 SPECIAL MASTER MYLES: No, no, I think that
9 the good cause would simply be if South Carolina
10 raises matters outside the scope of --

11 MR. FREDERICK: Right. And my point is that
12 North Carolina has to show for good cause that it
13 could justify having the surrebuttal report
14 opportunity. It's premature to make that part of the
15 case management now. A point of advocacy that
16 North Carolina would make if they could justify the
17 good cause, that would warrant a surrebuttal expert
18 report at the time.

19 SPECIAL MASTER MYLES: Well, I don't really
20 think of it in terms of good cause. The way it
21 usually works, at least as I've seen, is if somebody
22 has a motion, then a person opposes that motion, then
23 the reply usually is responsive to things that are in
24 the opposition.

25 But if the reply raises new things, new

1 ground for relief that weren't in the original motion,
2 then that gives rise to a right to a surreply. It's
3 not really a good cause standard. It's
4 a question of whether new matter is raised that wasn't
5 within the scope of the opposition.

6 MR. FREDERICK: I guess our experience,
7 Special Master Myles, is that that's done by motion,
8 you know, for leave to file an expert surreply. And
9 that motion has to justify the extenuating
10 circumstances that would warrant that. And that's all
11 we're saying should happen here. I mean, as the party
12 with the burden of proof at Phase 1, we think we
13 should get the last word.

14 MR. BROWNING: Your Honor, I think this might
15 work itself out. But if we were to file a rebuttal
16 report and it truly did not cover a new issue raised
17 by Mr. Frederick's experts, I'm sure Mr. Frederick
18 would be moving to exclude that report. So I think
19 you have probably given us the guidance we need on
20 this particular issue.

21 SPECIAL MASTER MYLES: Okay. Yeah, I would
22 think so.

23 MR. FREDERICK: Well, I'm not sure I
24 understand. We're talking about North Carolina's
25 surrebuttal expert report which we don't think is a

1 proper thing unless they have good cause to do it,
2 which it's obviously premature now. And I think
3 Mr. Browning is trying to have you order that that
4 would be an accepted part of the case management plan
5 which we would object to.

6 SPECIAL MASTER MYLES: I think that's a good
7 point. I did not mean to say that North Carolina may
8 go ahead and file a surrebuttal report subject to its
9 being excluded. What I'm saying is, if North Carolina
10 asked me for leave to file such a report to address
11 new matters that were raised by South Carolina in its
12 rebuttal report, I will grant it.

13 MR. BROWNING: Thank you, Your Honor.

14 SPECIAL MASTER MYLES: To the extent that it
15 requests -- to the extent that there truly are new
16 issues raised in the rebuttal report that are not part
17 of the original -- that are not in the -- in North
18 Carolina's report, that are not going to issues
19 covered by North Carolina's report.

20 MR. BROWNING: And that's all we were
21 requesting, Special Master Myles.

22 SPECIAL MASTER MYLES: You're right. I did
23 not mean to suggest there was a blanket authorization
24 for a surrebuttal subject to objections. I think we
25 should have -- I think we should have an authorization

1 for opening reports, responsive reports, rebuttal
2 reports addressed to issues within the scope of the
3 responsive reports. To the extent there are issues
4 that are outside of that, then a surrebuttal would be
5 appropriate.

6 What needs to be done next? Do we need to
7 incorporate some of this into a new revised draft of
8 the case management order?

9 MR. SHEEDY: Special Master Myles, this is
10 Jim Sheedy on behalf of CRWSP. Just a quick point for
11 purposes of the Court's information. As I indicated
12 at the end of the last call, the intervenors did meet
13 and confer and I'm pleased to report to the Court
14 reached some consensus about three different proposed
15 changes to the case management plan.

16 I don't see any need to get into those in
17 this call. We communicated those to Mr. Frederick.
18 He was very prompt in letting me know that he
19 suggested that we set aside some additional time to
20 flesh out the differences over those three
21 suggestions. And I indicated to him that the
22 intervenors were certainly open and amenable to that.

23 So I'm just speaking up at this juncture to
24 make the Court aware that as to the intervenor's
25 suggestions about the case management plan, that we

1 would prefer to carry that forward until the next
2 conference call, which I think is the August 22nd.

3 SPECIAL MASTER MYLES: That makes sense, yes.
4 That's a good idea.

5 MR. FREDERICK: And by that time, Mr. Sheedy
6 can actually flesh out what costs they want
7 South Carolina to incur for their discovery benefits
8 and, you know, provide further proposals that are not
9 spelled out in the letter that he sent.

10 MR. SHEEDY: Well, and I don't think, Special
11 Master Myles, that we necessarily view it the way that
12 Mr. Frederick just phrased it. But again, I'm not
13 sure that there's a dispute yet over this that the
14 Special Master needs to hear. So perhaps we can just
15 table this until August 22nd.

16 And again, I just spoke up because I wanted
17 the Court to have the perspective that there may be
18 some additional changes to the case management plan
19 still in the offing.

20 SPECIAL MASTER MYLES: Yeah. And it makes
21 sense that there would be -- not that there would be,
22 but that there might be. And yes, it's fine to put it
23 off until the 22nd. Obviously, North Carolina wants
24 to be part of those discussions too or it should be if
25 it wants to be.

1 MR. SHEEDY: And in fairness to
2 North Carolina, Special Master Myles, North Carolina,
3 too, has been in this loop. And as I understand it,
4 based on Mr. Frederick's representations about
5 North Carolina's position, North Carolina would also
6 like some additional time within which to meet and
7 confer and the intervenors are very open to that.

8 SPECIAL MASTER MYLES: Okay. Okay. That's
9 good. Hopefully by the time of the next -- I'm sorry,
10 was there anything else on that? Okay. And are there
11 any other matters for today? I think not. I was just
12 going to mention that I will be trying to issue a fee
13 application sometime soon, it being past the six
14 months' anniversary of my appointment, I think I ought
15 to go ahead and do that. So I'll be doing that
16 pursuant to procedures that have been used by other
17 Special Masters. So you should be getting that
18 sometime relatively soon.

19 Is there anything else?

20 MR. FREDERICK: Not for South Carolina,
21 Your Honor.

22 MR. BROWNING: Not for North Carolina,
23 Your Honor.

24 MR. PHILLIPS: Not for Duke, Your Honor.

25 SPECIAL MASTER MYLES: And the silence from

1 the others, there is nothing from them either.

2 MR. SHEEDY: Not from CRWSP either,
3 Your Honor. This is Jim Sheedy.

4 MR. BOYD: Nor Charlotte. Mike Boyd.

5 SPECIAL MASTER MYLES: Okay. So we're set.
6 Why don't we reconvene, then, on the 22nd?

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1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review of
14 the transcript [] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee
17 of any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 Dated: AUG 04 2008

22
23 
24 DANA M. FREED
25 CSR No. 10602

Errata Sheet

Pg/Ln

Correction

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