

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

February 3, 2009

By E-Mail and First Class Mail

Special Master Kristin L. Myles
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, California 94105

Re: *South Carolina v. North Carolina*, No. 138, Original:
South Carolina's Eleventh Progress Report

Dear Special Master Myles:

In advance of the telephonic hearing scheduled for Thursday, February 5, 2009, we respectfully submit South Carolina's eleventh progress report concerning events that have occurred since the last progress report dated January 7, 2009.

Document discovery is ongoing. South Carolina made its third and fourth productions of documents on January 16, 2009, and February 2, 2009, respectively. The party States have exchanged proposals for search terms to be used in processing electronic documents, met and conferred multiple times, and appear to be near agreement on their respective search-term proposals. South Carolina received additional documents from Duke on January 9, 2009, and a second round of production from Charlotte on February 2, 2009. South Carolina also received a first round of production from Catawba River Water Supply Project on February 3, 2009.

At the direction of the Special Master in December's status conference, South Carolina has again met and conferred with North Carolina and the proposed intervenors to discuss the bifurcation issues identified by the Special Master and develop a consensus statement of the issues. Despite extensive, hours-long meet-and-confer sessions, the discussions resulted earlier today in an impasse requiring separate filings. Accordingly, South Carolina submits its proposed statement of the general issues to be decided in each phase.

South Carolina recognizes that various sub-issues may (or may not) arise subsequently in the litigation, whether on summary judgment or in the context of a motion to compel discovery or for a protective order. The extensive discussions among counsel provided a useful preview of various theories that the party States and proposed intervenors might seek to develop in discovery. South Carolina submits that a further refinement of topics to be addressed in Phase I should await further factual development and that the Special Master need not decide at this time - in the absence of any specific factual presentation or legal context - the relevance of any such sub-issues. The Special Master's previous statements that contention interrogatories may be


Special Master Kristin L. Myles

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propounded in due course to provide a more elaborate statement of the parties' positions also provides a useful tool to provide appropriate notice of litigation positions. Accordingly, the articulation of the issues set forth here is intended both to serve as a general framework governing discovery and to be without prejudice to any party's rights as the case proceeds.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D.C. Frederick". The signature is fluid and cursive, with a long horizontal stroke at the end.

David C. Frederick

*Special Counsel to the
State of South Carolina*

Enclosure: South Carolina's Statement of Issues

South Carolina's Statement of Issues

Phase I

Issue 1. Whether South Carolina has shown "by clear and convincing evidence some real and substantial injury or damage" caused by water uses in North Carolina, *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983) (citing, *inter alia*, *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)), as that standard has been articulated and applied by the Court in its equitable apportionment jurisprudence.*

Phase II

Issue 2. If South Carolina prevails with respect to Issue 1, whether North Carolina can demonstrate by clear and convincing evidence that benefits to North Carolina from existing water uses in North Carolina outweigh the substantial injury or damage, or harm of a serious magnitude, to South Carolina's present water uses.

Issue 3. If South Carolina prevails with respect to Issue 2, how the waters of the Catawba River should be equitably apportioned between North Carolina and South Carolina based on the Court's balancing of the relevant equitable apportionment factors, including but not necessarily limited to "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former," *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), and "reasonable conservation measures in both states," *Colorado v. New Mexico*, 459 U.S. 176, 190 (1982); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

* North Carolina has asserted that a showing of "specific" harm from "specific" uses must be demonstrated for South Carolina to prevail in the lawsuit. South Carolina respectfully disagrees that this Court's cases articulate such a standard and submits that it is unnecessary for the Special Master to resolve this issue at this time. Both sides are on notice of the other's positions, and this issue can be more completely briefed and argued at the summary judgment phase with a full factual presentation. Any effort at this time to resolve this disagreement in the absence of factual development would be premature.

SERVICE LIST

Special Master

<p>Kristin Linsley Myles, Special Master Amy C. Tovar Lori A. Nichols Munger, Tolles & Olson LLP 560 Mission Street, Twenty-Seventh Floor San Francisco, California 94105-2907 Phone: (415) 512-4000 Fax: (415) 512-4077</p>	<p>myleskl@mto.com tovarac@mto.com lori.nichols@mto.com Copies: Original and 4 copies, plus e-mail pdf</p>
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South Carolina

<p>Robert D. Cook Assistant Deputy Attorney General T. Parkin Hunter L. Childs Cantey Assistant Attorneys General 1000 Assembly Street, Room 519 Columbia, South Carolina 29201 Phone: (803) 734-3736 Fax: (803) 734-3524 agrcook@ag.state.sc.us phunter@ag.state.sc.us ccantey@ag.state.sc.us Copies: 3, plus e-mail pdf (Send overnight deliveries to street address. Send mail to P.O. Box 11549, 29211- 1549.)</p>	<p>David C. Frederick Rebecca A. Beynon Scott H. Angstreich Scott K. Attaway W. David Sarratt Michael K. Gottlieb Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 Phone: (202) 326-7951 Fax: (202) 326-7999 dfrederick@khhte.com rbeynon@khhte.com sangstreich@khhte.com sattaway@khhte.com dsarratt@khhte.com mgottlieb@khhte.com Copies: 3, plus e-mail pdf</p>
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North Carolina

<p>Christopher G. Browning, Jr. James C. Gulick Marc D. Bernstein J. Allen Jernigan Jennie W. Hauser North Carolina Department of Justice 114 West Edenton Street Raleigh, North Carolina 27603 Phone: (919) 716-6900 Fax: (919) 716-6763</p>	<p>cbrowning@ncdoj.gov jgulick@ncdoj.gov mbernstein@ncdoj.gov ajern@ncdoj.gov jhauser@ncdoj.gov Copies: 5, plus e-mail pdf (Send overnight deliveries to street address. Send mail to P.O. Box 629, 27602.)</p>
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Intervenors

Catawba River Water Supply Project

Thomas C. Goldstein Troy Cahill Akin Gump Strauss Hauer & Feld, LLP 1333 New Hampshire Avenue, N.W. Washington, D.C. 20036-1564 Phone: (202) 887-4000 Fax: (202) 887-4288 tgoldstein@akingump.com tcahill@akingump.com Copies: 3, plus e-mail pdf	James W. Sheedy Susan E. Driscoll Driscoll Sheedy, P.A. 11520 North Community House Road Suite 200 Charlotte, North Carolina 28277 Phone: (704) 341-2101 Fax: (704) 341-2105 jimsheedy@driscollsheedy.com sdriscoll@driscollsheedy.com Copies: 3, plus e-mail pdf
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City of Charlotte, North Carolina

James T. Banks H. Christopher Bartolomucci Audrey E. Moog Adam J. Siegel Hogan & Hartson LLP 555 Thirteenth Street, N.W. Washington, D.C. 20004 Phone: (202) 637-5600 Fax: (202) 637-5910 jtbanks@hhlaw.com hcbartolomucci@hhlaw.com amoog@hhlaw.com ajsiegel@hhlaw.com Copies: 3, plus e-mail pdf	DeWitt F. McCarley City Attorney Office of the City Attorney 600 East Fourth Street Charlotte, North Carolina 28202 Phone: (704) 336-2254 Fax: (704) 632-8328 dmccarley@ci.charlotte.nc.us Copies: 3, plus e-mail pdf
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Parker D. Thomson Hogan & Hartson LLP 1111 Brickell Avenue, Suite 1900 Miami, Florida 33131 Phone: (305) 459-6500 Fax: (305) 459-6550 pdthomson@hhlaw.com Copies: 3, plus e-mail pdf	H. Michael Boyd Senior Assistant City Attorney Charlotte-Mecklenburg Utilities 5100 Brookshire Boulevard Charlotte, North Carolina 28216 Phone: (704) 391-5110 Fax: (704) 632-8336 hmboyd@ci.charlotte.nc.us Copies: 3, plus e-mail pdf
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Duke Energy Carolinas, LLC

<p>Carter G. Phillips Virginia A. Seitz Roger R. Martella Ileana M. Ciobanu Sidley Austin LLP 1501 K Street, N.W. Washington, D.C. 20005 Phone: (202) 736-8270 Fax: (202) 736-8711 cphillips@sidley.com vseitz@sidley.com rmartella@sidley.com iciobanu@sidley.com Copies: 4, plus email pdf</p>	<p>Garry S. Rice Associate General Counsel Duke Energy Corp. Legal Affairs - EC03T 526 South Church Street Charlotte, North Carolina 28202 Phone: (704) 382-8111 Fax: (980) 373-9903 gsrice@duke-energy.com Copies: 3, plus email pdf (Send overnight deliveries to street address. Send mail to P.O. Box 1006, 28201-1006.)</p>
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