

---

IN THE SUPREME COURT OF THE UNITED STATES

---

STATE OF SOUTH CAROLINA,  
Plaintiff,

v. No. 138, Original

STATE OF NORTH CAROLINA,  
Defendant.

---

HEARING BEFORE  
SPECIAL MASTER KRISTIN LINSLEY MYLES

---

FRIDAY, APRIL 23, 2010

---

Courtroom 208  
United States Bankruptcy Court  
300 Fayetteville Street  
Raleigh, North Carolina  
9:00 a.m.

---

Volume 1 of 1  
Pages 1 through 130

---

A P P E A R A N C E SON BEHALF OF PLAINTIFF SOUTH CAROLINA:

David C. Frederick, Esquire  
 Scott K. Attaway, Esquire  
 Kellogg, Huber, Hanson, Todd, Evans & Figel, P.L.L.C.  
 400 Sumner Square  
 1615 M Street, N.W.  
 Washington, D.C. 20036  
 (202) 326-7900/(202) 326-7951  
 dfrederick@khhte.com, sattaway@khhte.com

Henry McMaster  
 Attorney General  
 By: Robert D. Cook, Assistant Deputy Attorney General  
 T. Parkin Hunter, Assistant Attorney General  
 Elizabeth Smith, Assistant Attorney General  
 Office of the Attorney General  
 State of South Carolina  
 1000 Assembly Street, Suite 519 (29201)  
 Post Office Box 11549  
 Columbia, South Carolina 29211-1549  
 (803) 734-3970/(803) 734-3736  
 agrcook@ag.state.sc.us, phunter@ag.state.sc.us,  
 esmith@ag.state.sc.us

ON BEHALF OF DEFENDANT NORTH CAROLINA:

Roy A. Cooper III  
 Attorney General  
 By: Christopher G. Browning, Jr., Solicitor General  
 James C. Gulick, Senior Deputy Attorney General  
 Jennie W. Hauser, Special Deputy Attorney General  
 Mary L. Lucasse, Special Deputy Attorney General  
 North Carolina Department of Justice  
 114 West Edenton Street (27603)  
 Post Office Box 629  
 Raleigh, North Carolina 27602-0629  
 (919) 716-6900  
 cbrowning@ncdoj.gov, jgulick@ncdoj.gov, dmazza@ncdoj.gov

ON BEHALF OF DUKE ENERGY CAROLINAS, LLC:

Virginia A. Seitz, Esquire  
 Sidley Austin, LLP  
 1501 K Street, N.W.  
 Washington, D.C. 20005  
 (202) 736-8015, vseitz@sidley.com

**A P P E A R A N C E S**  
(continued)

ON BEHALF OF CATAWBA RIVER SUPPLY PROJECT:

Thomas C. Goldstein, Esquire  
Akin Gump Strauss Hauer & Feld, LLP  
Robert S. Strauss Building  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036-1564  
(202) 887-4000, tgoldstein@akingump.com

ON BEHALF OF THE CITY OF CHARLOTTE:

James T. Banks, Esquire  
Hogan & Hartson, L.L.P.  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5600, jtbanks@hhllaw.com

T A B L E O F C O N T E N T S

ARGUMENT OF COUNSEL

Bifurcation of Discovery and Trial

By Mr. Frederick	5-29 62-97
By Mr. Browning	29-53 97-102
By Ms. Seitz	53-62 102-103

City of Charlotte's Motion for Permission  
to Participate as an Amicus Curiae

By Mr. Banks	103-107 121-123
By Mr. Frederick	107-118 123-129
By Mr. Browning	119-121

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

9:02 a.m.

The Court: Good morning.

Mr. Frederick: Good morning.

Mr. Browning: Good morning.

The Court: Shall we begin with bifurcation?

Mr. Browning: Yes, Your Honor. From North Carolina's perspective, that makes a lot of sense. I assume that South Carolina would want to go first since this is effectively their motion to change the existing case management.

Mr. Frederick: Actually, we think North Carolina should go first because there hasn't been a bifurcation order that's actually been entered to define the proceedings. So we're happy to let North Carolina go first, unless you want to hear from us first.

Mr. Browning: We're perfectly happy to keep the existing case management plan in place until somebody wants to move to change it.

The Court: I think it does make sense for South Carolina to go first, but everyone will have a chance to speak as they wish.

Mr. Browning: Thank you, Your Honor.

Mr. Frederick: Thank you. May it please the Court, Special Master Myles, we initially took the view that a bifurcation could make sense in facilitating progress in

1 the case because North Carolina disputed whether or not there  
2 was any shortage of water in South Carolina at all. And our  
3 belief was that an initial threshold showing of that shortage  
4 of water in certain periods of low flow could be readily  
5 demonstrated promptly within the proceedings.

6           As we discussed bifurcation with North Carolina, a  
7 dispute very quickly arose early on over what the scope of  
8 the various phases would be. And as you recall, almost two  
9 years ago we briefed this in issue in a preliminary way  
10 before any order was entered that specifically defined what  
11 the case would look like. Since that time, it's become clear  
12 that there is not a way to bridge the disagreement between  
13 the parties over what those phases would look like.

14           So our view is that the initial efficiencies that  
15 we thought could be served by limiting the case just to the  
16 states and having the intervenors participate just at the  
17 equitable apportionment--remedial phase are really not going  
18 to be served by any bifurcation at this point and that we're  
19 now far enough down the road we have laid out in approxi-  
20 mately 35 pages of contention interrogatory responses what  
21 our harm case will look like, North Carolina has that as to  
22 the intervenors, and that we ought to be more efficient in  
23 just going on to discuss and put together the entire case so  
24 that we don't have unnecessary arguments over matters of what  
25 should be in Phase I, what should be in Phase II, and the

1 like.

2           We believe that the normal way the Court has  
3 addressed equitable apportionment actions has been to allow  
4 the evidence to come in about shortages, about uses, about  
5 benefits, and that that will benefit the Court in this case  
6 because the same witnesses are likely to be testifying as to  
7 both shortages and benefits on the South Carolina side as  
8 well as harms that are occurring by increased consumption on  
9 the North Carolina side.

10           So at a number of different levels, we believe that  
11 efficiency is served by having a single proceeding that will  
12 encompass all of the evidence and that the way that this  
13 could play out is that we each put on our case, we explain  
14 why South Carolina has been injured by water shortages in  
15 particular periods of low flow, that we explain what the  
16 economic and other harms are associated with that shortage,  
17 that we explain what the benefits to South Carolina are of  
18 that, and that we go through the modeling to demonstrate that  
19 the interbasin transfers that have been authorized in North  
20 Carolina will cause a drop in the amount of water that's  
21 available for South Carolina.

22           And all that can be demonstrated. We can each put  
23 in our proposed findings of fact and conclusions of law. You  
24 can issue a recommended decision. We would only need to  
25 inconvenience witnesses once by the depositions that would be

1 taken and once through the trial testimony that would be  
2 adduced and that you would have before you the entire mass of  
3 the case without a lot of quibbling over what should be in  
4 what phase of the case.

5           And I think that the briefing here demonstrates  
6 pretty clearly that there is such a disagreement over what  
7 ought to be in Phase I of the case as North Carolina  
8 conceives it that no efficiency will be served at all. In  
9 fact, I think that our position is that the way North  
10 Carolina is viewing harm is not consistent with the Court's  
11 precedents.

12           So if we were to proceed along the lines that North  
13 Carolina is advocating, what they seek to do is to tilt the  
14 balance so heavily against South Carolina in Phase I of the  
15 proceeding that I think it would be inconsistent with the  
16 Court's precedents to proceed along the lines that they are  
17 advocating, because what they suggest is that South Carolina  
18 has to show shortage of water in South Carolina and that  
19 South Carolina did not do more--could not do more to  
20 ameliorate those particular harms through conservation,  
21 decreased use, availability of other water supplies, et  
22 cetera. And there is no precedent that we have seen  
23 indicating that that is the way the Court views this.

24           In fact, in the *New Jersey v. New York* case, what  
25 the Supreme Court did in a case involving two riparian states



1 was to look at the injuries that had been proffered by New  
2 Jersey to not view the case as one where New Jersey had to  
3 show there was a complete, full appropriation of all of the  
4 available water, but to argue that the interbasin transfer  
5 that was being proposed by New York was excessive to a  
6 degree. Instead of in excess of 600 million gallons per day,  
7 the Court ended up authorizing about 440 million gallons per  
8 day, and it said that the excess above that would have caused  
9 harm to the recreational uses in New Jersey as well as to the  
10 oyster beds that were supported by that amount of water.

11           And so I think what you've got here is a comparable  
12 situation where what South Carolina would be demonstrating  
13 throughout the case is in certain periods of low flow not  
14 enough water is coming down and it isn't our burden to  
15 demonstrate a kind of tort causation theory, but instead to  
16 demonstrate that as a shared resource the amount of water  
17 that is available to South Carolina is insufficient in those  
18 periods of low flow, and that the absence of that water in  
19 those periods of low flow is causing a real and substantial  
20 harm to people in South Carolina.

21           The Court:           If you were to take out that  
22 element, if you were--in other words, some of your position  
23 on bifurcation seems to depend upon accepting North  
24 Carolina's perception of Phase I, with which you disagree.  
25 You're saying taking them at their word and viewing their

1 definition of Phase I as operative, then the two would be in  
2 many ways merged. But if you were to take a more narrow view  
3 of Phase I, what would your position be then?

4           Mr. Frederick: Well, our position is if it can be  
5 articulated and defined, that is something that we would  
6 evaluate. But we've talked about this now for almost two  
7 years, and no one has come up with an articulation consistent  
8 with the Court's cases with on point precedent in equitable  
9 apportionment cases.

10           And I think the reason for that is that because  
11 this is an action in equity, you're constantly weighing the  
12 fairness of factors one way or the other, the harms versus  
13 the uses, the benefits versus the detriments. And that kind  
14 of weighing occurs in this kind of action and it inherently  
15 creates difficulties of definition.

16           And we've spent hours in meet and confer sessions  
17 over the years talking to the other side in a way to try to  
18 limit the issues and narrow them. And I don't want to say it  
19 is impossible to do that. I can say that with great diffi-  
20 culty skilled lawyers on both sides have been unable to reach  
21 an agreement on how to define the phases in a way that  
22 actually leads to efficiency.

23           And our view now, Special Master Myles, is that we  
24 have laid out our harm case as North Carolina has requested.  
25 They've had it for three weeks. They had it before they

1 filed their reply brief for the bifurcation. It is true that  
2 there may be some supplementation as we gain further  
3 evidence. That's part of the discovery process.

4           But we've laid out what we anticipate the core of  
5 our case to be with respect to harm, and we're going to  
6 proceed on the guise of how to justify South Carolina be  
7 ensured--being assured of a sufficient amount of water so  
8 that those harms are ameliorated and avoided in the future,  
9 when hydrologists expect that there will be future drought  
10 conditions that cause shortages of water.

11           I would also point, Your Honor, to the Colorado-New  
12 Mexico case, where the Court made clear that where there is a  
13 situation of a finite amount of water that the upstream user  
14 seeking to justify further diversions has to do so through  
15 clear and convincing evidence.

16           And our position is that in these periods of low  
17 flow the IBTs that North Carolina state law has authorized  
18 for future use will have to be justified by clear and  
19 convincing evidence against the existing uses that South  
20 Carolina has. Because water is fungible, any withdrawal from  
21 the North Carolina side that doesn't make it to South  
22 Carolina is going to necessarily cause harm when there is a  
23 situation of low flow.

24           And that will end up being North Carolina's burden  
25 to demonstrate that the additional amounts to be withdrawn

1 under their authorized IBTs can be justified under a clear  
2 and convincing evidentiary standard.

3           The Court:           What is it that you said--I  
4 wasn't--the Colorado case says that all--what does it say in  
5 relation to transfers and the burden of proof?

6           Mr. Frederick:       What it says is that where there's  
7 a fully appropriated water resource for the upstream state---

8           The Court:           (interposing) Colorado versus---

9           Mr. Frederick:       New Mexico.

10          The Court:           Okay. What page?

11          (Pause.)

12          Mr. Frederick:       I would look at pages 187 to 88 in  
13 note 13, where the Court specifically addresses the question  
14 of burden. But our point, Your Honor, is that what in effect  
15 I think the case is going to play out in demonstrating is  
16 that the IBTs have authorized under state law a particular  
17 amount of withdrawals in North Carolina. They've not used  
18 all of that capacity that has been authorized by state law,  
19 but there's no provision in state law to protect the down-  
20 stream users.

21                 And the case ultimately will come down to whether  
22 in periods of low flow there needs to be some modification on  
23 the amount that North Carolina can demonstrate by clear and  
24 convincing evidence it's justified in having at the expense  
25 of the existing users in South Carolina.

1           And that ultimately comes into the same kind of  
2 weighing of factors and harms that North Carolina asserts  
3 should be done on the South Carolina side, where under their  
4 view of Phase I we have to demonstrate that we couldn't have  
5 done more to prevent harm, and all of their uses, including  
6 their authorized IBT, which doesn't take into account the  
7 effects across the state line, have to be assumed as reason-  
8 able use.

9           And that position, Your Honor, is inconsistent with  
10 all of the Supreme Court cases that I've seen with respect to  
11 equitable apportionment. And it's certainly inconsistent  
12 with *New Jersey v. New York* and *Colorado v. New Mexico*.

13           The Court:           A couple of questions. One of the  
14 things that struck me about this idea of North Carolina  
15 having the burden of justifying all transfers is you used  
16 language to the effect that the transfer would--I forget  
17 exactly what you said, but it seemed to be in conflict with  
18 your position in the papers that said that the Court couldn't  
19 consider the fact that water comes back into another river  
20 basin. Is it the harm in that river basin solely or is it  
21 the harm to the state as a whole?

22           Mr. Frederick:    I think it's the harm within that  
23 river basin as demonstrated. I know North Carolina takes a  
24 different position. I've not seen any cases. In fact, one  
25 of the Nebraska and Wyoming cases, I believe, and one of the

1 Kansas and Colorado cases dealt with transfers.

2           But if you look directly at the *New Jersey v. New*  
3 *York* case, you've got a case where the water--that was an  
4 interbasin transfer from the Delaware River to the Hudson  
5 River to supply water needs for New York City. And it was  
6 water being taken out of a river basin, and the Court said,  
7 "Yes, New York can take a certain amount; it just can't take  
8 all that it wants to take." Now---

9           The Court:           (interposing) Did anybody raise  
10 or address the issue of whether water was flowing back into  
11 the Hudson and how much?

12           Mr. Frederick:   Well, there are--I don't know that  
13 there was evidence in that case. Of course, the Hudson---

14           The Court:           (interposing) But it doesn't go  
15 back--it wouldn't flow back anyway; right?

16           Mr. Frederick:   The Hudson, if my geography is---

17           The Court:           (interposing) I don't remember  
18 myself. It flows into the Atlantic Ocean, doesn't it?

19           Mr. Frederick:   ---accurate, borders New Jersey  
20 and New York. Whether there are intakes from the New Jersey  
21 side out of the Hudson is not something that I'm familiar  
22 with, although I do know that based on work on other cases  
23 that New Jersey does make riparian uses of the Hudson River.  
24 But I'm not prepared to represent that those water intake  
25 uses---

1           The Court:           (interposing) Right.

2           Mr. Frederick:     ---were part of the Court's  
3 analysis.

4           The Court:           Here it's different geographically  
5 only that the river into which it would flow would be  
6 entirely--would go--wouldn't be a shared river at the time it  
7 goes into South Carolina; right?

8           Mr. Frederick:     Right, but I think that if you  
9 were to look at kind of the natural ebb and flow of these  
10 equitable apportionment cases, it would be a tremendous  
11 burden to try to take one case over one dedicated river  
12 system and transform that into all basins that end up flowing  
13 down to the downstream state. The Court has never tackled  
14 that.

15           The Court:           I agree it's a difficult issue,  
16 and it's hard--at one end of the spectrum it's hard to  
17 imagine doing that, to take into account every system that  
18 may be interrelated.

19           But on the other hand, it's hard to imagine not  
20 taking into account water that is diverted and then flows  
21 back into a nearby river system that benefits the state, the  
22 complaining state. So it's hard to understand why you  
23 wouldn't take that into account if the issue is available  
24 water.

25           Mr. Frederick:     And that's why it isn't, because

1 if you look at the equities of the existing users, the people  
2 who bought property on Lake Wylie, who try to engage in  
3 recreational activities on Lake Wylie, who have sponsored  
4 fishing tournaments that have had to be canceled because of  
5 insufficient water, if you look at the industries that grew  
6 up over decades along the Catawba River and you tell them,  
7 "Well, I'm sorry, you're going to lose millions of dollars  
8 every year because of water shortages in Catawba, but the  
9 people over on the eastern side of the state, they get a  
10 benefit"--I don't think the Court has ever looked at equit-  
11 able apportionment as that kind of analysis. That would be a  
12 unique and unprecedented way to analyze harms to existing  
13 users. And of course those users don't benefit at all by the  
14 water that might come through the state on a different river  
15 system.

16           So in terms of weighing equities, the Court  
17 traditionally has looked at the interests of the existing  
18 users, who built up their interests over time and who are  
19 forced to deal with the shortages of water. And in this case  
20 the amount of water that's been authorized by these IBTs is a  
21 very large sum.

22           And coupled with the demonstrable changes to  
23 climate that have reduced rainfall, particularly over the  
24 last ten years and are projected to occur in the future, I  
25 don't think it's an answer to those people that a few drops



1 of additional water may be trickling down in some unrelated  
2 river system that they don't have access to.

3           The Court:           Okay.

4           Mr. Frederick:    And in any event, Your Honor, that  
5 is not something that could readily be done in any kind of  
6 definable view of Phase I except in North Carolina's view,  
7 which I would submit is one that's intended to delay the  
8 prosecution and completion of the lawsuit rather than to  
9 expedite it. Our interest is in expediting the lawsuit so  
10 that we can get to a decree that ensures an adequate flow of  
11 water to the people in South Carolina.

12           The Court:           So if we were to have phases, I'd  
13 like to get your sense of what--assuming--what would you--if  
14 you were to be able to define Phase I, if we were to have  
15 phases, what would Phase I be? What issues would be  
16 included?

17           I think there's a difference over whether--  
18 obviously harm to South Carolina, decreased flow, et cetera,  
19 some of the things you've put in evidence on already; right?  
20 So I think everyone agrees on that; right?

21           Mr. Frederick:    That's correct.

22           The Court:           Okay. Now, the next thing is uses  
23 by North Carolina. It sounds like you agree on that, that  
24 that's relevant, at least at a general level, that what uses  
25 North Carolina is making of the water is relevant, including

1 the transfers, but also consumptive use on the river, et  
2 cetera.

3 Mr. Frederick: We--in the Phase I brief that we  
4 did in the summer of 2008, and I forget the exact date, we  
5 laid out that---

6 The Court: (interposing) It was April. I  
7 have it here.

8 Mr. Frederick: It was even earlier than I  
9 remembered.

10 The Court: Well, I could be wrong.

11 Mr. Frederick: We laid out what we thought at  
12 that time. That was not an agreed position, and that was an  
13 attempt, Your Honor, to come to--I do want the record to be  
14 clear on this point, because those submissions followed  
15 several hours spanning several weeks, if I recall correctly,  
16 discussions with North Carolina and the intervenors to try to  
17 define Phase I.

18 And it was our effort to be a compromise document  
19 reflecting what we thought our position was in light of the  
20 statements that had been made by the other side. But it was  
21 also an attempt to define and restrict the necessary role  
22 that the intervenors would play because all the intervenors  
23 had asserted an interest in doing this, protecting their  
24 right at the back end to assert an equitable apportionment.  
25 And our view all along has been that they are adequately

1 represented by North Carolina vis-à-vis whether there's  
2 enough water flowing from North Carolina to South Carolina to  
3 trigger a weighing of the various apportionment factors.

4           So our view is that Phase I as we conceived it  
5 originally was simply to rebut North Carolina's assertion  
6 that there was an inadequate flow. Our point was yes,  
7 there's an inadequate flow, and we can demonstrate that and  
8 we can prove that, in certain periods of restricted capacity.  
9 And once we get to that, the question is what do you do about  
10 it, given that it is a shared resource and both states have  
11 an equality of right, even if not an equality of the actual  
12 distribution.

13           So our view is that at this point, given that they  
14 have pressed for many months for us to articulate what our  
15 harms are and we've now done that, there's not really a  
16 purpose to be served in the way we had originally conceived  
17 Phase I two years ago and that we should just get on with the  
18 case and let's---

19           The Court:           (interposing) But how about Phase  
20 I as defined more broadly, then, to include uses by North  
21 Carolina? I thought there had been agreement and I get the  
22 sense from the papers now that there would be agreement that  
23 Phase I, if there were to be one, would look at what's--would  
24 not just look at whether South Carolina has enough water to  
25 engage in the activities that historically it has done, but

1 also whether that diminution in flow is caused by North  
2 Carolina usage or not.

3           Mr. Frederick:    Your Honor, there is not--let me  
4 answer your question in this way.  Because water is fungible,  
5 any amount taken out and not returned to the river on the  
6 north side of the boundary is going to have an effect on the  
7 south---

8           The Court:           (interposing)  Not necessarily,  
9 because it may depend on timing.  You've been saying in  
10 periods of low flow.  So it's not necessarily the case that  
11 water taken out in the period of not low flow causes harm of  
12 the sort that you're describing.

13           Mr. Frederick:    And that's why as we have defined  
14 the harms in our contention interrogatory response, they are  
15 limited to periods of low flow.  And the case will--it will  
16 be like the *New Jersey v. New York* case, where when the water  
17 capacity gets down to a certain amount under the decree that  
18 the Court entered there, New York has to assure New Jersey  
19 that a certain amount will be available in the Delaware River  
20 to flow down.  And they can't withdraw from the basin--the  
21 Delaware River basin into the Hudson River basin an amount  
22 that would cause the cubic feet per second flow to decrease  
23 below a certain level.  That's what we would be talking about  
24 in any kind of equitable decree.

25                           And in those periods where through sufficient

1 rainfall both states have more than their fair share, there  
2 wouldn't be any of the kinds of restrictions on withdrawals  
3 that would be necessary in those periods. This would be--  
4 this case is about the low flow periods and the harms that  
5 are caused by more withdrawal than North Carolina's fair  
6 share in those periods of low flow.

7           The Court:           But what would--will you be making  
8 any showing if that were Phase I relating to North Carolina's  
9 uses? What would your--what would that part of your case be  
10 in Phase I?

11           Mr. Frederick:    That part of our case would look  
12 at--whether it's Phase I or Phase II or it's all mushed  
13 together, would look at North Carolina's consumptive  
14 patterns, its withdrawals, what's actually been taken out,  
15 how much has been returned. And it would look at that over  
16 different periods of time historically to show that in  
17 periods of low flow, North Carolina is taking out more than  
18 its fair share. That's in a nutshell what our case would  
19 demonstrate.

20           And our expert hydrologist will do this with graphs  
21 and pie charts and all sorts of things to show that when  
22 water reaches a certain level, what North Carolina is taking  
23 out is in excess of what should be available to preserve the  
24 interests of the South Carolina water users.

25           The Court:           But don't you also have to look at

1 the needs of the North Carolina water users? That's what I'm  
2 kind of confused by.

3           Mr. Frederick: And that's what gets into the  
4 whole balancing. That's why this all gets mushed together,  
5 Special Master Myles, because once you ask that question,  
6 which I concede is the correct question in the entirety of  
7 the equitable apportionment analysis, you're balancing in  
8 essence the future needs and capacities of the North Carolina  
9 population growth versus the existing uses of the South  
10 Carolina users. And that's how you have to ultimately  
11 determine what is each state's fair share when the water is  
12 scarce.

13           The Court: Uh-huh.

14           Mr. Frederick: And it's that very question--  
15 because North Carolina, I don't fault them for protecting and  
16 representing the interests of their citizens. They would  
17 like Phase I only to be about South Carolina and whether  
18 South Carolina could conserve more or get water from other  
19 places to meet the needs of the people that have been harmed  
20 and all that. But in fact---

21           The Court: (interposing) Assume for a moment  
22 that that is not part of Phase I, if we were to have a Phase  
23 I. I understand that was in your papers, and--but if you  
24 were to have a narrower Phase I that either includes--it  
25 includes the South Carolina water needs, it includes South

1 Carolina's current receipt of water and projected receipt of  
2 water in the sense of trying to show that there's not enough  
3 or there won't be enough, right, and then whatever showing  
4 gets made on North Carolina, assuming one could come up with  
5 a definition of that.

6           So what if that were Phase I? I guess what I  
7 wanted to ask is how long would you--I'm just wanting to get  
8 an estimate of time of trial and time to trial, between now  
9 and when the trial would be. If you could think about it--  
10 you don't have to answer on the spot, but what would be your  
11 estimate, assuming we can--I understand there's been  
12 difficulty defining Phase I, but that's because no one has  
13 ever asked me to define it. I can do that. We could just  
14 have a debate about that and come up with a definition that  
15 we think is workable.

16           Mr. Frederick: Well, consistent with the Court's  
17 precedents, and the Court---

18           The Court: (interposing) Right; of course,  
19 of course.

20           Mr. Frederick: And the Court hasn't---

21           The Court: (interposing) But I just mean it  
22 can be decided.

23           Mr. Frederick: But the question is to what  
24 benefit and what purpose in serving efficiency, both judicial  
25 efficiency and the efficiency---

1           The Court:           (interposing) Right.

2           Mr. Frederick:       ---of the witnesses---

3           The Court:           (interposing) Which is why I want  
4 to ask the question about timing. Assuming we--see, I am  
5 confident that we can come up with a definition of Phase I  
6 that would be comprehensible. In other words, it could be  
7 workable. But that doesn't answer your question about  
8 whether it's efficient and whether it makes sense to do it  
9 that way.

10           Mr. Frederick:    Or consistent with the Court's  
11 precedents.

12           The Court:           I'm only saying the definitional  
13 question really to me isn't the be-all and end-all of this  
14 case because we can deal with the definitional question.  
15 What we need to deal with more is the broader question of  
16 what's the most efficient way to proceed.

17                   And so assuming we can do a definition that doesn't  
18 include all of the equitable issues of--well, and including--  
19 it doesn't include--doesn't include alternative sources of  
20 water, doesn't include a valuation, economic valuation of  
21 uses, doesn't include the--I guess there must be a non-  
22 economic valuation of uses too, presumably. That would all  
23 be Phase II.

24                   What then would be--how long would it take the  
25 parties to get from now until the beginning of Phase I,



1 taking into account that you've already done a lot of the  
2 work in the discovery you just served, and then how long  
3 would it take to complete Phase I and then likewise for Phase  
4 II, versus how long would it take, do you think, to get to  
5 trial if it were a consolidated--or not consolidated, but  
6 nonbifurcated proceeding, and how long would that trial take?

7 Mr. Frederick: Let me start at the back end.

8 The Court: Okay.

9 Mr. Frederick: Okay.

10 The Court: Yeah.

11 Mr. Frederick: Because I think that the way we  
12 have been thinking about this is--because all, you know, the  
13 discovery requests have served--have requested what would be  
14 Phase II documents about the equitable apportionment factors.  
15 There's a lot of documents that have been produced.

16 We are still awaiting data from the Duke outside  
17 consultant on the CHEOPS model which did the hydrology  
18 modeling. I understand that we are very close to being able  
19 to get access to that. Our experts would need to evaluate  
20 that so that they can help determine their view of the hydro-  
21 logical reports.

22 But assuming that we were to get that relatively  
23 soon, my expectation is that we would be ready to go to trial  
24 on the entire case within the next 18 to 22 months, and that  
25 depending on how you defined the Phase I aspects of it with

1 respect to, you know, what needed to be proved, we would be  
2 ready to go in, you know, six to nine months.

3           I don't think--and it's hard to estimate here on  
4 the fly, Special Master Myles, what length of trial we're  
5 talking about, but our belief is that we're looking at  
6 probably 30 witnesses I think probably for both sides  
7 combined. Maybe they have more. I don't know. They can  
8 speak to that.

9           But our sense is that some of the witnesses would  
10 not need to be put on the stand for very long because they  
11 have relatively limited points to make, but that the experts  
12 who will be providing the greatest grist for the mill might  
13 actually be on the stand for multiple days in both cases, so  
14 that the trial itself would probably last several weeks  
15 unless you were to help provide an efficiency by allowing  
16 people to submit their testimony through a written means and  
17 then just do cross-examination before you, which would in my  
18 experience be a way to shorten the proceedings.

19           So there are ways that we can work through those  
20 case management mechanisms, but our belief is that we can be  
21 ready to go to trial relatively promptly and that, you know,  
22 some of the unknowns are really in whether or not having a  
23 Phase I, which in effect--and I think that it's fair to  
24 assume, given the way everything has been litigated in this  
25 case, even matters that probably shouldn't be litigated or

1 shouldn't need to be litigated, that there will be litigation  
2 over the definition of Phase I, that once Phase I happens, it  
3 can be expected that the party that did not prevail will go  
4 to the Court seeking exceptions. We'll have another year or  
5 year and a half delay before we can even start Phase II.

6           And our view is that the people in South Carolina  
7 ought not to have to wait for a determination of what their  
8 water rights are. We're prepared to put the whole case  
9 together so that there can be one unified record and the  
10 Court can make its evaluations of the various legal questions  
11 that will be raised and based on findings of fact as to what  
12 the capacity of the river system is.

13           Our view in short is that, you know, the more we  
14 spend time litigating and fighting over these definitional  
15 points, the less time we spend on the substance of the case.  
16 And we'd like to focus on the substance of the case.

17           The Court:           So when you said--you said several  
18 weeks, that the trial could go several weeks. Now, that's  
19 only if it's all together; right?

20           Mr. Frederick:    I believe that a harm case--I mean  
21 depending--and this is--I feel some uncertainty being that  
22 we're on the record about this, Special Master Myles, and not  
23 knowing how any Phase I would be defined or what purposes  
24 really would be served by that in view of the fact that many  
25 of the same witnesses we would have to put on would have to

1 be deposed for both Phase I and a Phase II and they'd have to  
2 be put on trial for Phase I and Phase II, but I would think  
3 that we could put a harms case on in not really very many  
4 trial days.

5           So I think if you look in terms of what the cases  
6 show for injury, the efficiency to the judicial process, the  
7 efficiency to the witnesses involved, just allowing the case  
8 to proceed, given the fact that the parties have already  
9 exchanged discovery that has invited the production and  
10 analysis of Phase II matters--and let me just point out one  
11 last point in favor of allowing the case to proceed as the  
12 normal course of equitable apportionment cases.

13           We believe that the prospect of a settlement and a  
14 compromise to ensure that in these periods of low flow the  
15 states could work out an appropriate compromise to ensure  
16 that South Carolina's needs are assured through settlement  
17 are best facilitated by moving in a direction where we get  
18 all the evidence out there. Everybody has got their  
19 positions staked out. Everybody knows what the case looks  
20 like. And then the powers that be can sit down to try to  
21 work out what would be a reasonable compromise.

22           That gets hindered the more phases and the more  
23 decisional points get put in place and the more opportunities  
24 for delay through appeal to the justices. And that doesn't  
25 serve the interests in having the parties come together to

1 try to work out their differences. Unless you have further  
2 questions---

3           The Court:           No. I'd like to hear from North  
4 Carolina. Thank you.

5           Mr. Browning:       May it please the Court, I will  
6 plan on speaking on behalf of North Carolina, and it's my  
7 understanding that Virginia Seitz will make a presentation on  
8 behalf of the intervenors.

9           In our entire nation's history, there have only  
10 been nine equitable apportionment actions with respect to  
11 nine different rivers. And there's good reason for that.  
12 These are the most costly and complicated types of litigation  
13 basically known to mankind. Analyzing a river, determining  
14 the values, determining the usage of the river is extremely  
15 complicated. And this is something that the Court should not  
16 rush. It should give the parties an opportunity to present  
17 their evidence and do it in a way that makes sense, because  
18 this court's decision will be binding for decades, if not  
19 hundreds of years.

20           There is no question that this original action has  
21 been a drain upon resources on behalf of both states. North  
22 Carolina has gathered documents in response to the existing  
23 discovery requests from over 200 document custodians. In the  
24 course of discovery, North Carolina has produced to South  
25 Carolina a total of 947,286 pages of materials. The State of

1 North Carolina has retained consultants to assist with  
2 electronic discovery of documents at the cost of hundreds of  
3 thousands of dollars to the State of North Carolina.

4           This has been a tremendous endeavor on behalf of  
5 both states, but more importantly, if Phase II is suddenly  
6 merged into Phase I, the effort, the cost, that North  
7 Carolina has incurred will be simply the tip of the iceberg,  
8 that there will be a tremendous number of costs associated  
9 with Phase II, balancing of equities, that we don't need to  
10 get to if South Carolina is unable to meet its threshold  
11 showing as set out in the Supreme Court's precedents that it  
12 has suffered substantial injuries that have been caused by  
13 the defendant state.

14           That is the threshold that the United States  
15 Supreme Court has set. That is a perfectly logical reason to  
16 separate this case into phases. That is what the parties  
17 proposed. That is what the parties have been working  
18 towards.

19           And suddenly North Carolina feels like the rug has  
20 been pulled out from under our feet, that we have been  
21 proceeding along those lines, planning, making progress  
22 towards discovery, and South Carolina suddenly says, "Well,  
23 now that we have a ruling on intervention, what had been  
24 worked out with regard to the case management plan no longer  
25 makes sense." From North Carolina's perspective, we have a

1 very tough time seeing why that about face by South Carolina  
2 has taken place.

3           Our experts, as we've talked to them to try to plan  
4 a logical way to sequence this case, we have had many  
5 conversations with them about what makes sense here. And  
6 those experts when we hear what they have to say in terms of  
7 the type of discovery, the type of evidence that must be  
8 presented, if you're balancing the equities between two  
9 states, North Carolina is fully convinced that the amount of  
10 time, energy, work, and effort that will have to be put into  
11 Phase II is ten times greater than what the parties have been  
12 working towards under the existing case management order with  
13 respect to how Phase I is defined. It makes a lot of sense  
14 to avoid those costs if they're unnecessary.

15           South Carolina has talked at length about its  
16 contention interrogatories and its 35 pages setting out its  
17 harm, but the fact of the matter is it is North Carolina's  
18 position that South Carolina will be unable to meet the  
19 threshold showing that the United States Supreme Court has  
20 set in equitable apportionment actions.

21           And even though South Carolina has recently served  
22 its contention interrogatories, of course one of the central  
23 questions is whether North Carolina has caused any harm to  
24 South Carolina and what those harms are. In its 35 pages of  
25 contention interrogatories, South Carolina describes in

1 slightly more detail what it has set out in the bill of  
2 complaint in terms of how it believes it's been harmed. But  
3 when it comes to the issue of causation in response to  
4 contention interrogatory number 4, South Carolina basically  
5 says with respect to causation, "It's simply premature. We  
6 cannot--we will provide our expert reports in due course as  
7 directed by the Special Master."

8           And Mr. Frederick turns to the case of *New Jersey*  
9 *v. New York*, the case concerning the diversion of water for  
10 the city of New York from the Delaware to the Hudson River.  
11 But we have to remember in that case we were talking about  
12 one specific interbasin transfer that could be readily  
13 evaluated by the parties.

14           That is not the case that South Carolina is  
15 attempting to make out here. What they're now saying is "We  
16 have been harmed by interbasin transfers and all of these  
17 other consumptions by North Carolina." Well, in that regard,  
18 North Carolina is still in the dark. We don't know what  
19 South Carolina is saying. Their contention interrogatories  
20 will tell you--just simply tell us, "We'll tell you what the  
21 excess water is that North Carolina has been taking when the  
22 Special Master issues an opinion or issues an order directing  
23 us to provide expert testimony."

24           But this case is fundamentally different from *New*  
25 *York v. New Jersey* because there you dealt--the Court was



1 dealing with one specific, definable interbasin transfer that  
2 the parties could take, consider, determine a calculation of  
3 harm and damages. Unfortunately, the bill of complaint that  
4 we're facing here is much more nebulous, referencing all  
5 interbasin transfers, and as we've learned in the course of  
6 the last couple of years, other consumption uses by North  
7 Carolina.

8           But North Carolina really needs to know at some  
9 point before we can proceed what it is that South Carolina is  
10 really saying that North Carolina has done wrong that has  
11 resulted in a substantial injury. That's why we've been  
12 fighting so hard to have South Carolina come forward and  
13 present its case so we'll know what to defend. That is why  
14 we're fighting so hard to keep this case in phases because we  
15 really need to know what South Carolina is complaining about  
16 in terms of the consumption by North Carolina, what is the  
17 quantity that we are taking that's in excess of what they  
18 believe is appropriate, so that we can really do the  
19 modeling, do the work to defend this case.

20           Now, as I've said, our experts have noted--informed  
21 us that the balancing of equities will require much, much  
22 more work than what the parties have previously presented to  
23 the Court as being the issue that can be resolved in Phase I,  
24 and if I could just take a few moments to explain why their  
25 analysis makes sense.

1           As we've talked about, one of the issues that  
2 clearly is a Phase II issue is the benefit that South  
3 Carolina receives from these IBTs that flow into the Yadkin  
4 River basin. Of course the analysis and flow of a river  
5 requires very complex computerized modeling, very expensive  
6 expert analysis. That expert analysis and that computer  
7 modeling does not come cheap.

8           We of course have somewhat of an advantage with  
9 regard to the Catawba River because Duke Energy has already  
10 done a substantial part of that work through its licensing  
11 process and the CHEOPS computerized modeling that already  
12 exists that will be a starting point for the analysis of the  
13 Catawba River.

14           With regard to the Yadkin River, however, the work  
15 will be substantial in trying to evaluate the flow, the  
16 hydrology of that river, but it's important in a balancing of  
17 the equities that we ultimately do that work. But that work  
18 can be postponed for another day.

19           All of the IBTs that South Carolina complains about  
20 in its bill of complaint, the flow from all of those IBTs go  
21 into the Yadkin River. The Yadkin River when it flows into  
22 South Carolina is the Pee Dee River in South Carolina.

23           As can be seen in Exhibit 1 and 2 to South  
24 Carolina's bill of complaint, what really set off South  
25 Carolina to file this lawsuit was the interbasin transfer

1 that was approved by the North Carolina Environmental  
2 Management Commission with respect to Concord and Kannapolis.  
3 That IBT allows Concord and Kannapolis to withdraw water from  
4 the Catawba River and discharge it to the Yadkin River.  
5 That's what caused this bill of complaint to be filed  
6 initially, or certainly when you look at the exhibits and the  
7 bill of complaint, you get that strong sense.

8           But the part of the story that South Carolina  
9 really tries to distance themselves from is before that  
10 interbasin transfer certificate was issued by the North  
11 Carolina Environmental Management Commission, our environ-  
12 mental people went to their counterparts, the environmental  
13 people at agencies in South Carolina, and basically said, "We  
14 have before us this IBT application. Does South Carolina  
15 want to be heard?"

16           Their environmental people responded that  
17 basically, "Thanks, but no thanks. We don't think it's a  
18 transfer of such significance to merit attention, but  
19 moreover it puts the water in the Yadkin River," where in  
20 their words--I'm sorry, puts it in the Pee Dee River, where,  
21 quote, "we may need it more anyway." That's set out in North  
22 Carolina's opposition to the bill of complaint, the  
23 declaration of Mr. Fransen.

24           The Supreme Court has made clear that in balancing  
25 the equities, the Court must consider the benefits to the

1 downstream state of water usage by the upstream state even if  
2 the, quote, "locality of benefit" in the downstream state has  
3 changed. That of course is the decision of *Kansas v.*  
4 *Colorado*, 206 U.S. at page 100-101.

5           Under *Kansas v. Colorado*, the benefit that South  
6 Carolina receives in the Yadkin River basin is clearly  
7 relevant in the balancing of equities. Fortunately, the  
8 existing case management order reserves that issue for Phase  
9 II because it will be a tremendous amount of work. It is an  
10 issue that the parties have not yet conducted discovery  
11 against.

12           And that really makes sense to hold that very  
13 complex issue off until a later day, because if South  
14 Carolina can't meet their threshold burden of proof, there is  
15 no reason to do modeling of a completely different river  
16 basin in order to balance the equities in this particular  
17 case.

18           As set out in our briefs, there are many other  
19 issues that North Carolina believes will have to be dealt  
20 with in Phase II, when Your Honor is faced with the balancing  
21 of the equities, that simply doesn't need to be considered at  
22 the current time.

23           One example is the fact that a tremendous volume of  
24 the Catawba River--or compared to other usages of the Catawba  
25 River, a great percentage of the river is used in connection

1 with the generation of electricity. There are nuclear power  
2 plants, coal fired power plants, in addition to the hydro  
3 facilities that Your Honor is very familiar with. But those  
4 plants have to have cooling water. Cooling water of course  
5 results in a significant amount of evaporation, water that is  
6 lost from the Catawba River.

7 Well, that electricity just doesn't benefit North  
8 Carolina that's generated by Duke Energy. It has benefits to  
9 South Carolina as well. Duke's service area is in South  
10 Carolina as well as North Carolina.

11 And doing that analysis of the consumptive usage as  
12 a result of the generation of electricity and which state  
13 really gets the benefit of that is going to be very, very  
14 complex, factual discovery, something that only has to be  
15 done when you're balancing the equities. It should be  
16 appropriately saved for a later date until South Carolina has  
17 first come forward and met its threshold showing of harm  
18 caused at the hands North Carolina.

19 As we've set out in the brief, one of the other  
20 issues that rightfully should be deferred until Phase II is  
21 the fact that the largest city in both of these two states is  
22 right at the border, Charlotte, North Carolina. That city--  
23 there are a number of workers from South Carolina that  
24 commute into the city each day.

25 Of course, as they're in the city of Charlotte,

1 they're consuming water. They are placing a tax--they are  
2 taxing the natural resources, the withdrawal of water from  
3 the Catawba River. That has to be considered at some point  
4 in the balancing of the equities, but it's not going to be an  
5 easy task to engage in. There is no reason to do it now. It  
6 should be deferred when we are at the stage of balancing the  
7 equities.

8           The same is true with respect to the many  
9 facilities that straddle the border between North Carolina  
10 and South Carolina. As we set out in the brief, one of the  
11 prime examples is Carowinds, a major theme park with a major  
12 water park, significant consumption. It is in both North  
13 Carolina and South Carolina. South Carolina is getting the  
14 benefit of property taxes for a substantial portion of that  
15 theme park, but all of the water for that park is drawn from  
16 North Carolina through the City of Charlotte.

17           Those sort of facilities we're going to have to  
18 identify, and we're going to have to try to somehow create a  
19 fair balancing as to who gets credit for the usage of water  
20 at those bistate facilities. And again, my point is that  
21 there are many, many areas here that will be very complicated  
22 discovery that will have to be done if this court is going to  
23 issue an order that will basically be binding for decades to  
24 come, but it's not going to be an easy task.

25           Let's take on the task that we can manage, which is

1 what the Supreme Court has said is the threshold showing of  
2 substantial harm to the complaining state that is caused by  
3 the defendant state. That is Phase I. That is a essentially  
4 what both sides agreed to in the progress reports dated  
5 February 3rd, 2009 from both states. The language in the two  
6 progress reports is remarkably similar. Both recognize that  
7 South Carolina has to show harm of a serious magnitude that  
8 was caused by North Carolina.

9           That is the case we should be trying to get our  
10 handle around, because we can do that in an efficient manner.  
11 But when we're talking about the balancing of the equities--  
12 and I could drone on and on as we did in our brief about the  
13 many tasks that we think are Phase II, but I believe Your  
14 Honor gets my point that we should be looking at cost savings  
15 and how to do this efficiently. We believe that treating  
16 this in phases makes an awful lot of sense.

17           The Court:           Let me ask you this, and I did  
18 appreciate the detail that was in your brief. So if there  
19 were to be a Phase I, and I'm going to--this is sort of the  
20 same question I asked Mr. Frederick a moment ago--and we  
21 could agree upon--at least we seem to be in agreement at a  
22 general level of what the question presented would be at that  
23 phase, is there substantial harm to the complaining state  
24 caused by the defendant state. I think we're on board with  
25 that; right? I think both parties are---

1           Mr. Browning:       (interposing) Yes.

2           The Court:           ---would agree to that.

3           Mr. Browning:       Phase I being the complaining  
4 state--both causation and harm would---

5           The Court:           (interposing) Right.

6           Mr. Browning:       ---need to be shown in that.

7           The Court:        So with that in mind, then, just  
8 getting back to this question about what that second part of  
9 it would be if you had to define Phase I, we've gotten into  
10 more detail in the brief in here than we did before about  
11 what those questions would be.

12                   And it seems to--seemingly the easy question is the  
13 transfers and what is this magnitude of water being trans-  
14 ferred out. That's one use by North Carolina that is alleged  
15 to be a harm. Then we have the other uses, consumptive uses  
16 and other uses, that South Carolina has said are their harm,  
17 but we haven't got a lot of detail about what those are.  
18 That's not really the issue, because they'll have that--if  
19 that's part of Phase I, that will be part of the case, so  
20 they'll have to put on their evidence at the latest--at that  
21 time.

22                   So how would you--would you envision that being the  
23 totality, then, of Phase I is to take--if we can look at all  
24 the uses of North Carolina, if one could quantify those, and  
25 then compare them against the needs of South Carolina, would



1 that be Phase I, or would you also, as South Carolina is  
2 contending, be wanting to look at conservation possibilities,  
3 ways that South Carolina could alleviate its harm without  
4 diminishing the flow that's now gone to North Carolina?

5           Mr. Browning:       Yeah. I believe that South  
6 Carolina is exaggerating one of the points we made in our  
7 early brief. The key here based upon the Supreme Court's  
8 precedent is they have to show causation and substantial  
9 harm. Now, the question then is how do you show causation.

10           We pointed out early on in our brief that a self-  
11 inflicted wound is not causation by North Carolina, if for  
12 example they have all of their taps running and are just  
13 having such gross waste of water that they can't show  
14 causation under that scenario. But in terms of the detailed  
15 work in terms of an economic analysis of cost benefit,  
16 conservation efforts, clearly all of that is Phase II.

17           Our only point--and it was a point that I thought  
18 we made in passing, so I'm kind of surprised that it got such  
19 great detail in South Carolina's briefs this go-around--is if  
20 you have a self-inflicted harm, you're not going to be able  
21 to show causation, but--that's our point.

22           The way I look at it, Your Honor, is what Phase I  
23 is about is South Carolina has to show that there have been  
24 harms, and they have to show it has been caused by North  
25 Carolina. So really what you're looking at on the North

1 Carolina side of the border is basically a volumetric  
2 analysis of how much water is being taken out of the river.  
3 The various things that Mr. Frederick ran through in terms of  
4 quantity of withdrawals, quantities of return, that's what's  
5 needed to calculate causation.

6           And where the real cost will come and the time and  
7 detail and attention will be when we're not doing that  
8 volumetric analysis for both states, but we're also trying to  
9 evaluate the usage and place economic value on how the usages  
10 take place, which is all the balancing and equities that go  
11 into Phase II.

12           So a long-winded way of saying your answer, yes,  
13 Your Honor, you're absolutely right. We look at Phase I as  
14 it is set out in our letter--progress report of February 3,  
15 2009 as being fairly straightforward. All of the Phase II  
16 issues that we ran through in our brief are truly Phase II.  
17 They do not come into play at Phase I, nor should they.

18           What we're asking is for this court to tell South  
19 Carolina they have to come forward, meet their threshold  
20 burden, show specific injuries, bring forth their witnesses,  
21 and explain to the Court how North Carolina has caused that.  
22 And it's that expert piece that we really need to get this  
23 case moving forward.

24           The Court:           Which expert piece?

25           Mr. Browning:        The causation; as I said, their

1 interrogatory--contention interrogatory number 4, where we  
2 are asking them how much--"What is it that you contend is the  
3 amount of water usage by North Carolina that should be  
4 eliminated in order to prevent substantial harms?" And their  
5 response is basically, "You'll find out when you get our  
6 expert reports."

7           The Court:           I see. Just a couple of  
8 questions. Is there an historical element to either of the  
9 parts that you've described in Phase I in terms of South  
10 Carolina's harm? Does the showing go back in time? Is it  
11 meant to say, "Okay, before we had this much water; now we're  
12 getting this much water"? And in the case of North Carolina,  
13 does it go back in time to say, "Prior uses were this amount,  
14 and now they're this amount"?

15           Mr. Browning:       Your Honor, I think prior usages  
16 have to probably be considered as background, particularly  
17 when you're dealing with a river system that fluctuates over  
18 time. And I gathered today from what Mr. Frederick said that  
19 they are really narrowing their case to simply drought, low  
20 flow type conditions. So if that's the case, you certainly  
21 need to consider the history of the river to have a better  
22 picture for that.

23           Of course it's our position that in light of the  
24 comprehensive relicensing agreement, the world has changed,  
25 that the problems that South Carolina saw previously during

1 drought have been mitigated substantially as a result of the  
2 change in the management of these dams by Duke Energy.

3           The Court:           Uh-huh. And does the--does that  
4 question about the effect of the CRA come into Phase I?

5           Mr. Browning:       Your Honor, again, I think it's  
6 going to be background that has to be considered in terms of  
7 whether South Carolina is experiencing a harm caused by North  
8 Carolina. With these new operating parameters and the  
9 basically guarantees that South Carolina has in terms of flow  
10 of water into the state, it's going to be much more difficult  
11 for them to prove their case based upon drought conditions  
12 and what took place prior to the comprehensive relicensing  
13 agreement.

14           The Court:           Uh-huh. Okay, that's helpful.  
15 Now, a couple other questions, and these aren't necessarily  
16 logically related, but one is Mr. Frederick's point about the  
17 burden of proof from Colorado versus Kansas. I hadn't  
18 focused on that passage in the case before, but---

19           Mr. Browning:       (interposing) Your Honor---

20           The Court:           ---do you have a--do you agree  
21 with his analysis of that case?

22           Mr. Browning:       We completely disagree with how he  
23 has tried to use *Colorado v. New Mexico*.

24           The Court:           Sorry; New Mexico.

25           Mr. Browning:       Footnote 13 sets out basically the

1 framework, and it reiterates the Court's precedent in terms  
2 of the threshold burden that I've been referring to, that the  
3 complaining state--and this is language at footnote 13 on  
4 page 188 of the opinion.

5           The complaining state, New Mexico, "must therefore  
6 bear the initial burden of showing that a diversion by  
7 Colorado will cause substantial injury to the interests of  
8 New Mexico." That is in a nutshell a summary of that  
9 threshold showing that South Carolina has to come forward  
10 with.

11           The Court:           Right. So then in the text---

12           Mr. Browning:       (interposing) Yes. Where we  
13 differ with Mr. Frederick is the next sentence then goes on  
14 that "In this case, New Mexico has met its burden since any  
15 diversion by Colorado, unless offset by New Mexico at its own  
16 expense, will necessarily reduce the amount of water."

17           It's that second step in the process where we  
18 disagree with him and his use of *Colorado v. New Mexico*  
19 because in this case, factually, the river was fully appro-  
20 priated so that basically early on in the opinion--I believe  
21 it's page 180--the Court notes that there is little, if any,  
22 water from the river that makes the confluence with the  
23 Canadian River. Yes, that's at page 180 of the opinion.

24           So factually, *Colorado v. New Mexico* is vastly  
25 different from this case. There has never been a time period

1 where the Catawba River has run dry, and with the dams that  
2 are operated, there has been continuous water flow.

3           So to take this case and say "During times of low  
4 flow, we don't have any burden of proof here; we are just  
5 like the complaining state in *Colorado v. New Mexico*" really  
6 doesn't make any sense because this is not a river that's  
7 been fully appropriated. There are--through many periods  
8 there is sufficient flow of water. And South Carolina can  
9 increase the number of dams along the river and take  
10 advantage of that excess flow if it were to so choose.

11           Instead what it's saying is, "North Carolina, you  
12 have many dams on your side of the border. Let that water  
13 go, or don't make use of that water in other river basins.  
14 Save it and send it down to us when we really need it." So  
15 that's why we think *Colorado v. New Mexico* is completely  
16 inapplicable the way they're trying to use it.

17           The Court:           Uh-huh. Okay. Now, I wanted to  
18 get at a couple of other questions that have been raised in  
19 the briefs about witnesses and experts. And this may be able  
20 to be folded into the question I asked Mr. Frederick also,  
21 which is if you had to do a ballpark estimate of time--you  
22 know, what's of interest really is time to trial and time of  
23 trial if we were to have the phases versus if we were to have  
24 the whole case.

25           Mr. Browning:       That's right.

1           The Court:           So if you could speak to those  
2 issues and maybe try to address also--there's the issue that  
3 South Carolina has raised about witnesses having to appear  
4 twice, so that's one issue, and then--in having to either  
5 appear at trial or in deposition twice.

6           And also just a question I had from the briefing  
7 about experts, to what extent is there overlapping expert  
8 testimony, or to what--or, you know, to the contrary, then,  
9 to what extent are the experts really distinct for the two  
10 sets of issues we're talking about here?

11           Mr. Browning:       Yes, Your Honor. Let me try to  
12 take that in order, and please set me straight if I get off  
13 track here. First of all, with regard to time to trial, let  
14 me first of all respond to Mr. Frederick's comment that if I  
15 understood what he's saying is he wants you to compress Phase  
16 II into Phase I, and we should be in a position to try this  
17 case in 18 to 22 months.

18           I might have misunderstood what he's saying, but  
19 let me explain from North Carolina's perspective why that's  
20 completely unrealistic. First, if you'll notice in their  
21 reply brief, all of the issues that North Carolina--or a  
22 substantial number of the issues that we are talking about  
23 that are involved in the balancing of the equities Mr.  
24 Frederick is basically saying it's not relevant, that for  
25 example Yadkin River, we don't get to have any evidence on

1 that category because it's irrelevant. With regard to  
2 commuters coming to Charlotte, he's basically saying it's  
3 irrelevant because you get the advantage of having workers  
4 from the state of South Carolina.

5           So he is--I think in his calculation of 18 to 22  
6 months is assuming that all of the issues that our experts  
7 have identified as being crucial nobody will have to bother  
8 with. So I think it's unrealistic in that regard.

9           I think it's also unrealistic given the fact that  
10 our first document request was served on South Carolina July  
11 1, 2008, and to my knowledge South Carolina is still in the  
12 process of providing additional electronic documents. If  
13 South Carolina has completed their document production, we  
14 will be bringing that before the Court here shortly because  
15 we do not think their production is complete. But it's taken  
16 them two years to get through the first document request that  
17 North Carolina has had out there, and that of course doesn't  
18 include all of what we're going to need to ask for if Phase  
19 II is suddenly lumped into Phase I.

20           So I think we need to be realistic about lead times  
21 on how much work will be done to gather this evidence. And  
22 we can all say things optimistically about when we can get to  
23 trial if it causes--if it advances our position, but I think  
24 the parties really need to step back and take a serious look  
25 at how much time is needed.



1           Now, if we are on the existing Phase I track, for  
2 us I think it is an effort to analyze the critical paths that  
3 need to be undertaken to bring Phase I to trial. As we've  
4 said consistently to Your Honor, that whenever we have South  
5 Carolina's experts' reports identifying what they claim to be  
6 the issue of causation, our experts will need nine months to  
7 go through this very complicated analysis, the computerized  
8 modeling, the effort that would need to be done, so in doing  
9 that calculation, as we've said throughout, that we will need  
10 nine months from the time we get their expert report.

11           So where that leaves us is how much time will it  
12 take to wrap up discovery to allow the intervenors to have  
13 their additional say with regard to discovery and the  
14 catch-up discovery they want to do. And like Mr. Frederick,  
15 I'm afraid that giving you a number off the top of my head  
16 probably is not going to be realistic, but we would certainly  
17 agree to sit down with all the parties and whichever way the  
18 Court is leaning in terms of case management directive to  
19 work out something that would be reasonable so that we can  
20 bring this case to trial as quickly as possible. But we  
21 think the most effective way to do that is to stick with the  
22 existing Phase I and the existing case management.

23           I think your next category was the overlap of fact  
24 witnesses. We do not think that there will be a substantial  
25 overlap. There might be some. But there of course are case

1 management ways to eliminate any potential difficulty. Mr.  
2 Frederick had raised the issue of possibly coming forward  
3 with creative ways to present the evidence at trial, which is  
4 something that we would certainly consider.

5 I don't think you will have many witnesses that  
6 will be both Phase I and Phase II, but to the extent that you  
7 are, they are probably witnesses that are at the various  
8 intervenors or the City of Charlotte, and they can  
9 certainly--they as well as the South Carolina witnesses can  
10 be accommodated in various ways, whether it's minimizing the  
11 overlap, working with them so we're not disruptive on their  
12 schedules.

13 But the fact of the matter is if you've got two  
14 relatively unrelated topics, doing someone's deposition at  
15 the outset of this case for two days is really not appre-  
16 ciably different from doing their deposition on Phase I for  
17 one day, and assuming you need it later on, their deposition  
18 on Phase II another day. So I think--I am optimistic that  
19 the attorneys in this case can work together to minimize any  
20 inconvenience with regard to witnesses.

21 Now, with respect to experts, there will be many  
22 categories of expert testimony that will not be covered in  
23 Phase I at all: things we've talked about in our brief, the  
24 analysis of census data and what that means, having someone  
25 get up here on the stand and walk through the data in a way

1 that the attorneys aren't fumbling through the data to try to  
2 explain it to the Court, things like electrical usage and  
3 generation by Duke Energy and which state benefits from that  
4 usage. Those categories are going to be expert witnesses  
5 that are totally unrelated from Phase II.

6 Now, North Carolina does envision that our hydro-  
7 geologist--we will probably use the same one to testify on  
8 Phase I with regard to the Catawba River and later on in  
9 Phase II, when he also has to discuss the Yadkin River, but  
10 there is no question a tremendous cost saving to split up  
11 that so that if we never need to get to an analysis of the  
12 Yadkin River, we don't have to expend all of those resources  
13 to get him into a position to opine about the Yadkin River.

14 The Court: Okay. One other question, just--  
15 this is just a fact finding question.

16 Mr. Browning: Yes, Your Honor.

17 The Court: To what extent have the--at least  
18 as you perceive it has the document production been covering  
19 both phases, or has it been largely limited to Phase--what we  
20 call Phase I issues?

21 Mr. Browning: With regard to our discovery  
22 request to South Carolina, they've objected, so it's been--to  
23 the extent they view something that is Phase II, so it's been  
24 very limited.

25 Mr. Frederick: I object to that. That's actually

1 not true, Your Honor. I know I'll get a chance, but I do  
2 want to just put out there that's just not accurate.

3 The Court: Well, let me hear from--let me  
4 hear from both of you on that, because I'd like to--I should  
5 have asked you that one when you were up, but---

6 Mr. Browning: And with regard to subpoenas to  
7 third parties, we went ahead and decided that given the  
8 provision of the case management order that allows us to go  
9 ahead and obtain Phase II discovery if it's efficient, it was  
10 much easier for these water users to go ahead and have them  
11 do one focused search rather than to be burdened with two  
12 separate subpoenas at different times.

13 The Court: So, for example, just hypotheti-  
14 cally in such a subpoena, what do you call it--what would you  
15 call the Phase I and Phase II issues to such a witness, say a  
16 witness that was a third party? You're asking them "What  
17 uses are you making of the water?"

18 Mr. Browning: Your Honor, basically our  
19 subpoenas were getting at the volumetric usage and various  
20 other related issues concerning---

21 The Court: (interposing) Well, then what  
22 would be the Phase II part of that, if there was one?

23 Ms. Lucasse: I would say drought.

24 Mr. Browning: Yes, Your Honor. Sorry for the  
25 interruption, but drought is a good example that. Where it

1 was something that we were viewing as a Phase II issue that  
2 we recognized, it was easier to go ahead and--since we were  
3 burdening the entity with one subpoena, let's go ahead and  
4 get them to gather it all in the same process.

5           The Court:           I see, okay. And then one other  
6 question, and I'll ask Mr. Frederick this also, is what  
7 about--we haven't really talked about depositions. And when  
8 do the parties anticipate wanting to commence depositions?

9           Mr. Browning:       I would defer to the intervenors  
10 in terms of how much additional catch-up discovery they would  
11 need. We have not had an opportunity to really confer along  
12 those lines, quite frankly. You know, deciding whether we  
13 have two phases together or one phase has certainly made it a  
14 little bit more complicated to have some of those conversa-  
15 tions as to what steps we take next.

16           The Court:           Uh-huh. Okay.

17           Mr. Browning:       Your Honor, if there are no  
18 further questions, it's the position of the State of North  
19 Carolina that there is no reason that your existing case  
20 management plan should be modified. The State of North  
21 Carolina would ask that South Carolina's request to modify  
22 that to merge Phase II into Phase I should be denied. Thank  
23 you.

24           Ms. Seitz:           Good morning. I'll attempt to be  
25 very brief. I first wanted to say that we, Duke Energy, have

1 served our catch-up document requests on South Carolina. We  
2 have not taken further steps. I think we anticipate serving  
3 also some contention interrogatories ourselves focused on our  
4 particular interests.

5           And I think the only additional point I want to  
6 make, since everyone seems to be in agreement that bifurca-  
7 tion should be maintained if it would serve efficiency  
8 purposes, is that if in fact Your Honor can define the  
9 phases, there's both the potential for early resolution of  
10 the case and for the narrowing of issues in Phase II  
11 critically in a phasing of the litigation.

12           For example, we're thrashing around, as you can  
13 tell a little bit, on causation. And once those expert  
14 reports are delivered and we actually have a sense of what  
15 the uses are in North Carolina that are causing the harm in  
16 South Carolina, I think that will focus and narrow  
17 substantially Phase II in ways that could significantly  
18 benefit.

19           If we don't do that and we simply litigate the  
20 entirety of the case without narrowing--the narrowing of  
21 Phase I and I might point out dispositive motions in Phase I  
22 could bring to the case, then we, you know, look at  
23 potentially having a vast amount of discovery connected to  
24 Phase II that might be unnecessary if you've already resolved  
25 either on dispositive motions or in a mini-trial some of the

1 issues of causation and harm--the amount of harm in Phase I.

2           So, you know, it's hard to predict at this point  
3 exactly how much benefit you might get from resolving the  
4 Phase I issues, but I think it has the potential--we all  
5 acknowledge it has the potential if they don't meet the  
6 threshold of ending the case, but it also even if it doesn't  
7 do that has substantial potential to narrow the case in Phase  
8 II and thus limit the amount of discovery that's done.

9           The last thing I'll say is that in light of the  
10 fact that the Supreme Court has put a significant burden on  
11 the state--the complaining state to cross that threshold to  
12 prove is a reason I think to maintain bifurcation because it  
13 demonstrates the importance to the Court of allowing an  
14 equitable apportionment case to be fully litigated.

15           It is, you know, essentially a sovereign to  
16 sovereign complaint of the highest importance. And so in  
17 order to take those next steps, there's a threshold showing  
18 that must be made. And I think it's appropriate to recognize  
19 that procedurally with the bifurcation that you've ordered.

20           On the specific issue of phases--because a lot of  
21 the conversation this morning has been about debating the  
22 contours of phasing and you've expressed confidence that I  
23 think we share that a definition, a workable definition, of  
24 Phase I could be done, particularly now that the case is  
25 confined to situations of drought and low flow. Since both

1 states operate under riparian regimes, I think the question  
2 is at times of drought or low flow is the water sufficient to  
3 meet existing reasonable uses. And North Carolina says in  
4 addition that the complaining state must show that the cause  
5 of that insufficiency is North Carolina uses and not the  
6 drought or low flow.

7           Now, how might this be shown? I think for example  
8 if North Carolina is not experiencing the drought harms that  
9 South Carolina is experiencing, if its recreational  
10 facilities are in full swing, if it is continuing to consume  
11 at the same rate that it consumes in times when there is no  
12 drought or low flow, that might be one way in which South  
13 Carolina could show that it's not the drought that's harming  
14 South Carolina; it's North Carolina's uses.

15           We think that's going to be a very difficult  
16 showing to make in light of the low inflow protocol, which  
17 imposes at times of low flow and drought very significant  
18 behavior changes, very significant regimes of conservation on  
19 both states.

20           So we think that there is some reason to believe  
21 that it's going to be hard for South Carolina to show that  
22 the harms of the sort it's experiencing, which are drought  
23 related harms, are not caused simply by the droughts, are not  
24 harms that North Carolina is also experiencing at the same  
25 time. But we think that is what Phase I should be about.



1           Now, there's some possibility that other types of  
2 evidence could be relevant in that Phase I proceeding. For  
3 example, if there's--since the standard is reasonable use,  
4 there may be some evidence that's relevant to show that  
5 certain uses in South Carolina aren't reasonable.

6           But I think both parties agree and the intervenors  
7 also agree that the issues that relate to balancing of the  
8 equities are simply not issues that are up for consideration  
9 in Phase I, in particular uses in North Carolina and their  
10 value and their value relative to the use of that same water  
11 in South Carolina, South Carolina--the availability in South  
12 Carolina of additional sources of water.

13           Those issues that are articulated in North  
14 Carolina's brief in some detail, everyone agrees that one way  
15 or another, however you define Phase I, those issues should  
16 not be in Phase I. And I think that necessarily means that  
17 we can create a Phase I that's limited, has the promise of  
18 reaching dispositive motions in an efficient way, and it  
19 would then allow the narrowing of the case substantially for  
20 Phase II.

21           On the expert witness front, I think it's signifi-  
22 cant to point out that experts addressing the first issues of  
23 harm to South Carolina and its causes would not be addressing  
24 the same kind of issues or modeling that would be required to  
25 address the value of uses in North Carolina of that increment

1 of water, and then compare the value of those uses in North  
2 Carolina to South Carolina. So at the very least, the type  
3 of expert work that's required and the nature of expert  
4 testimony that's required in phases is very different.

5           And I think that experts are the best example of  
6 the nonduplication of witnesses that you have in phases. And  
7 these are, I think as all the parties agree, going to be the  
8 witnesses that take the most time and the most effort on  
9 behalf--and the most testimony days for you when you hold a  
10 trial.

11           The last thing I think I'll say is that Duke  
12 witnesses would be different for the different phases of the  
13 trial. And I know that we are not the only or by any means  
14 the most relevant player here, but I can tell you that the  
15 people who would be testifying from Duke about the question  
16 of uses in North Carolina and the benefits to North Carolina  
17 of Duke Power's uses of water in North Carolina would not be  
18 the same folks that will be testifying about the modeling of  
19 the river that I think is principally at stake in Phase I.

20           The Court:           Well, I imagine that's true. That  
21 had occurred to me earlier, that even with other smaller  
22 entities, it may not be the same individuals who are  
23 testifying if it's a corporate entity.

24           Ms. Seitz:           And I think, as North Carolina  
25 indicated, a lot of the witnesses that you can anticipate

1 would require multiple deposition days and multiple trial  
2 testimony days would be from these corporate type entities  
3 and would often be the designated expert within those  
4 entities on the particular topic at hand.

5           The Court:           Uh-huh.

6           Ms. Seitz:           Settlement we think will be sub-  
7 stantially aided in addition by bifurcation. I think if--as  
8 I expect would be true after the dispositive motions on the  
9 Phase I issues that Phase II is significantly narrowed, I  
10 think that is the most conducive atmosphere to settlement  
11 conversations and that if the parties are just flinging over  
12 the transom at each other information on uses, cost of uses,  
13 benefits of uses in their relative states, that that's not  
14 going to narrow and focus the issues in a way that's most  
15 conducive to settlement conversations among the parties.

16           We agree with North Carolina also that in order for  
17 experts to respond to South Carolina's expert showing of the  
18 causation of its harms, it's going to require, you know,  
19 substantial expert work on the order of six to nine months  
20 also.

21           The Court:           Just--I don't mean to interrupt  
22 you, but---

23           Ms. Seitz:           (interposing) No, I'm finished.  
24 Are there are further ways that---

25           The Court:           (interposing) If it were--I mean

1 some of the points that are made on both sides seem valid in  
2 the briefing if you just--conceptually valid, that South  
3 Carolina makes the point that having everything all at once  
4 in the record is useful in certain ways, including for  
5 settlement they say, but also if it goes up to the Court for  
6 some interrogatory review to have the whole record available  
7 and therefore not have to redo issues--well, actually that  
8 would be the limited--that would be I guess a threshold issue  
9 that gets decided, then it gets remanded, and then you don't  
10 have to redo the trial.

11           So I guess it wouldn't be an interrogatory, but it  
12 would be a final report review but that gets sent back on  
13 some issue, versus going up on a Phase I interim report and  
14 then getting sent back and having to go back to trial. I  
15 think that was one of their points. I'm not articulating it  
16 very well, but having the full record would be more efficient  
17 from the standpoint of going up to the Court. And then  
18 having a full record would avoid obviously overlap, and the  
19 issues are all intertwined. So those are kind of the basic  
20 points.

21           If Phase I were--if Phase II were a manageable  
22 size--in other words, if the issues on Phase II were all  
23 manageable size, then it may be less efficient to split it up  
24 than to keep it together. It would just be a set of  
25 additional issues that would be part of the mix that you'd be

1 discovering, you'd be trying, you'd be--and maybe then you'd  
2 have a decisional tree that would allow you to make the  
3 decision in phases, but you'd have the whole record there.

4           So I guess that a lot of it does boil down to the  
5 factual question of what size would these phases be if we had  
6 them. So that's why I'm sort of trying to get at the  
7 relative size of the trial in the two phases versus one whole  
8 trial and the relative time to prepare them. Do you have a  
9 sense of the magnitude of what we call the Phase II issues?

10           Ms. Seitz:           I have the strong sense that in  
11 light of the multiplicity of factors that the Court has said  
12 are relevant to the ultimate equitable balancing, the  
13 balancing of the equities issue in the second phase, that  
14 it's far, substantially bigger than Phase I and that the only  
15 hope really to narrow Phase II is to force the parties to  
16 focus in Phase I their articulation of harms and the  
17 causation of harms.

18           Otherwise, the Phase II I think is--and I think  
19 history shows it if you look at the Court's other equitable  
20 apportionment cases. The length of time they routinely take,  
21 the number of phases they routinely endure as reports go up  
22 to the Court and come back down, it's pretty--these are sub-  
23 stantial, decade long litigations. And that's not--doesn't  
24 seem to be unusual because so many factual issues are  
25 relevant in determining the equitable apportionment of a

1 river between and among states.

2           And so the potential for ending the case after  
3 Phase I and the potential that a Phase I dispositive motion  
4 practice could limit Phase II I think is really the only hope  
5 for limiting what will otherwise be the massive discovery  
6 inevitably of Phase II.

7           And so you--you know, this is certainly within the  
8 wheelhouse of your discretion I think in terms of your power  
9 both to order it, and the pattern of Supreme Court cases will  
10 allow you to phase if you would like to and you ultimately  
11 believe it's more efficient.

12           And if as you say you believe you can define Phase  
13 I, it truly seems to us that it will both limit and manage  
14 Phase II and shorten the whole proceeding substantially.  
15 It's a fact question, I agree, for you whether ultimately you  
16 can make the case shorter by proceeding in phases or by  
17 proceeding all at one time. Are there further questions for  
18 intervenors?

19           The Court:           Not at this moment; thank you, Ms.  
20 Seitz. Mr. Frederick, you wanted to say something about the  
21 discovery and whether you objected to things on the ground  
22 that they're Phase II issues.

23           Mr. Frederick:   We--Your Honor, let me just  
24 address the document production momentarily. The document  
25 production has been comprehensive from South Carolina's

1 perspective. What we have continued to do is to update our  
2 production in light of documents that were created by South  
3 Carolina governmental officials since the previous production  
4 was made.

5           And that is why we view this as a continuing  
6 production. We're not freezing in time, you know, as of 2007  
7 all the documents created, but that as people from the  
8 various agencies have created documents that are relevant, we  
9 regard our obligation as a continuing one. So for instance  
10 documents created last month are going to be produced in due  
11 course. And I think that Mr. Browning may not fully under-  
12 stand that that is how we are treating our discovery obliga-  
13 tion with respect---

14           The Court:           (interposing) I thought he was---

15           Mr. Frederick:       (interposing) Secondly, we have  
16 continued to produce documents and will continue to produce  
17 documents as we view them as relevant to the entire case. To  
18 the extent that what they are asking for are documents that  
19 become part of our case that we get from third parties with  
20 respect to how they define Phase II, I can't represent here  
21 that we have produced all of those kinds of documents.

22           But the thing that is a bit tricky about the way  
23 the document production is operating in this case is that a  
24 lot the relevant documents are in the hands of third parties  
25 who have been subpoenaed. North Carolina subpoenaed in

1 excess of 115 people. We've subpoenaed quite a number. The  
2 people that are actually harmed are not the government  
3 agencies or the---

4           The Court:           (interposing) Uh-huh, sure.

5           Mr. Frederick:        ---respective governments.

6 They're the people of the state, and so---

7           The Court:           You wouldn't expect that.

8           Mr. Frederick:        That's right.

9           The Court:           So are most of the subpoenas to  
10 water users on both sides?

11           Mr. Frederick:       That's right. And the way the  
12 questions have been framed--North Carolina issued more or  
13 less the same subpoena to everybody and it asked for, you  
14 know, essentially all documents under the sun.

15                   I'm not faulting them for a broad and all-  
16 encompassing document request, but I think that you could  
17 look at their request and if you are a third party user  
18 assume that what's being asked is everything that goes to  
19 benefit as well as use and justifying those uses.

20           The Court:           So you're not objecting to those  
21 third party subpoenas on any ground relating to Phase I and  
22 Phase II? You're not involving yourself in those subpoenas?

23           Mr. Frederick:       That's correct. Well--that's  
24 correct.

25           The Court:           But in terms of your own



1 production, in terms of what the State of South Carolina has  
2 produced in its own document production, then you've limited  
3 that production to Phase I?

4           Mr. Frederick: I'm not aware that we haven't  
5 produced anything as it would pertain to Phase II. I will  
6 double check and make sure. We don't have any interest  
7 restricting any of the document production. Our volume  
8 happens to be less. We're a smaller state than North  
9 Carolina. And we are continuing our production as those  
10 documents are created.

11           But the way we have asked for documents and the way  
12 I understand they've been produced on both sides has been  
13 just whatever documents you have, in part because we've never  
14 been able to get any kind of agreement on what issues are  
15 going to be decided in Phase II versus Phase I. And that's  
16 caused I think both sides prudently just to be more expansive  
17 in the way they produce documents than they otherwise would  
18 be.

19           If I could address the causation issue, because I  
20 think something very important happened in the hearing that I  
21 want to make note of. And that is that for the first time  
22 North Carolina has conceded that causation shall be done on,  
23 quote, a volumetric basis.

24           And that is crucial because for two years they've  
25 been arguing that it's got to be like a tort standard, that

1 it's the Concord-Kannapolis transfer that's causing the harms  
2 or it's the Charlotte transfer that's causing the harms. I  
3 think they now concede what we've been saying all along, that  
4 you look at this on a volumetric basis.

5           And if I could just highlight a fact as we under-  
6 stand it, Special Master Myles, that's important for you in  
7 evaluating the sense and sensibility of an actual Phase I and  
8 Phase II differentiation, if you just look at the authorized  
9 amounts of interbasin transfers, the authorized amounts under  
10 North Carolina state law, you're somewhere in the area of 73  
11 to 85 million gallons per day. Okay, so---

12           The Court:           (interposing) You mean the ones  
13 that are permanent---

14           Mr. Frederick:       (interposing) That's correct.

15           The Court:           ---not the below the certain level  
16 that don't need a permit.

17           Mr. Frederick:       Right. And as to those we're  
18 doing discovery with---

19           The Court:           (interposing) Because that would  
20 be infinite, right, if you---

21           Mr. Frederick:       (interposing) Well, there are a  
22 finite number of people who live in North Carolina---

23           The Court:           (interposing) Right.

24           Mr. Frederick:       ---but it could potentially be  
25 large. We don't have reason to believe that it is in the

1 order of, you know, scores of millions of gallons per day,  
2 but we don't yet know because we haven't gotten all the  
3 documents as to those folks.

4           The Court:           Uh-huh.

5           Mr. Frederick:    But if I--let me just try to get  
6 this more concrete for you because I think that some of these  
7 questions of causation may not seem so concrete yet. But if  
8 you look at just what's authorized and you look at it in  
9 terms of the 73 to 85 million gallons per day, what's  
10 actually being consumed from those IBTs now we understand is  
11 in the nature of 15 to 20 million gallons per day.

12                   So what the hydrologists are going to end up  
13 showing is that if you compare what's actually being consumed  
14 with what they're authorized under the North Carolina state  
15 permits to take, it's a big gap. And the point of the  
16 lawsuit is if you get into periods of low flow and they take  
17 under state law--under North Carolina state law what they're  
18 authorized by that law to take, then you're going to create--  
19 it's a complete zero-sum game in those periods of low flow,  
20 where you're looking at less than 1,000 cubic feet per second  
21 of flow.

22                   And so when North Carolina now acknowledges that it  
23 is a volumetric inquiry, Duke I understand does not agree  
24 with that and Ms. Seitz' position on causation is different.  
25 So there's going to be--if I understand their positions, and

1 they seem to be contradicting each other, there will be  
2 disagreement on what constitutes proper causation to be  
3 determined. And that is an issue that goes directly to the  
4 Court's core precedents and is an issue that ultimately will  
5 be decided by the justices.

6 Efficiency is going to best be served by allowing  
7 the various parties to put in their evidence and then argue  
8 to the Court about how the legal standards for things like  
9 injury and causation and benefit and extent of conservation  
10 should be done.

11 If North Carolina, for instance, is serious that  
12 South Carolina actually has to build more dams on the Catawba  
13 River in order to protect its interests in water, that would  
14 require the Supreme Court to overrule *Colorado v. New Mexico*,  
15 where the Court said the downstream state does not have to  
16 take measures, quote, "at its own expense" in order to  
17 preserve its rights to the water and protection of the water.

18 I trust North Carolina was speaking in a hyperbolic  
19 way rather than serious because I don't think the Supreme  
20 Court's cases support the notion that South Carolina has to  
21 take those kinds of extreme measures in order to protect its  
22 interests.

23 And if you look--for instance, there has been talk  
24 about this notion of conservation in the low inflow protocol,  
25 one of the issues that will be addressed by this court in

1 whatever phase we presume will come out in the case. But the  
2 notion of the low inflow protocol it is true is designed to  
3 have each of the states operate at a certain point of  
4 consumption. And it is a regulatory mechanism that is done  
5 through the CRA for each state.

6 But if you look at the projections that Duke made  
7 about when Stage 3 of the low inflow protocol would be  
8 invoked, they've already--they're already off. Their 50 year  
9 projection was that it would only need to be invoked in four  
10 months in a 50 year time span. And yet in the first two to  
11 three years of that projection, the low inflow protocol at  
12 Stage 3 has already been invoked for 15 months.

13 The Court: But what does that mean, though?  
14 I mean I'm not following what follows from that.

15 Mr. Frederick: The model as projected for the low  
16 inflow protocol is understating the degree to which South  
17 Carolina is experiencing shortages of water.

18 The Court: But if the low inflow protocol is  
19 invoked and therefore in place, then what would be different  
20 if the model had been accurate in predicting how frequently  
21 it would need to be invoked?

22 Mr. Frederick: It's---

23 The Court: (interposing) I'm not following  
24 that.

25 Mr. Frederick: The model assumes that North

1 Carolina consumption can be at a certain level, okay, and  
2 that the conditions will require restrictions and reductions  
3 for only a limited number of months over a 50 year period.

4           And if the assumption is wrong, which it appears to  
5 be, then South Carolina suffers disproportionately because  
6 the low inflow protocol reduces the amount of water available  
7 to South Carolina, and what North Carolina is able to  
8 continue to consume and use without more drastic conservation  
9 measures is higher than the water available in South  
10 Carolina.

11           And so the point about having conservation in play  
12 is something that really ties into the equitable factors, but  
13 it also--when you analyze how the low inflow protocol was  
14 modeled, I think that the evidence is going to show that  
15 South Carolina is suffering harm almost on a nature of a per  
16 se basis in the same way that in *Colorado v. New Mexico*,  
17 where the river was overappropriated, because you'll see that  
18 as the case--as the hydrology is modeled, the more times you  
19 invoke the low inflow protocol, the less water is available  
20 in South Carolina.

21           The Court:           But isn't there also less water  
22 available in North Carolina?

23           Mr. Frederick:   It is, to be sure. But the point  
24 of it is whether or not it's accurate because that affects  
25 what other storage capacity measures you take in other time

1 periods. I mean if the---

2           The Court:           (interposing) But if it were  
3 accurately predicting the fact of the longevity of the  
4 drought conditions, if you will, then what would the result  
5 be in the low inflow protocol? Would it then require less  
6 water to be used by both states?

7           Mr. Frederick:    Yes, that's correct.

8           The Court:           So South Carolina would get---

9           Mr. Frederick:    (interposing) And less water to  
10 be transferred under these IBTs that have been authorized.

11           The Court:           So less water would be used by  
12 North Carolina than is provided for now under the low inflow  
13 protocol, but also less water would be available to South  
14 Carolina as well?

15           Mr. Frederick:    The point about the measurement,  
16 Your Honor, is what is absolutely critical about this whole  
17 modeling, because yes, when Stage 3 gets invoked, there's  
18 less water available on both sides. The question is how much  
19 less on the South Carolina side or were there ways to model a  
20 river differently, to understand it better, so that those  
21 protocol stages would be invoked differently.

22                           And I would submit to you that the question of  
23 triggering the low inflow protocol as a question of hydro-  
24 logical modeling is going to be very much at issue in the  
25 case and will be very much at issue at the beginning of the

1 case, so that one of the points that you will be charged to  
2 render fact findings on, you know, will be the questions of  
3 what are the capacity of the river, how much water flows  
4 down, what is available to be used--those are standard  
5 questions that special masters have to make fact findings  
6 on--and what are the projected levels in the future for water  
7 capacity. And those kinds of questions, which are routinely  
8 done as fact findings by special masters, will invariably  
9 call into question the way of engaging in analysis of how  
10 much water can be available.

11 I think the point--let me just address the point  
12 about the Pee Dee-Yadkin. We have opposed the production of  
13 documents concerning that river system. I can represent to  
14 you that we will continue to object if a motion to compel is  
15 brought. That will be decided by you.

16 That will be a subject that I'm sure if North  
17 Carolina hews to its position would be decided ultimately by  
18 the justices because I'm not aware of any case that has done  
19 a full-blown double equitable apportionment analysis with two  
20 major river systems. So that is going to be an issue that's  
21 going to ultimately go up, and there will have to be a  
22 decision about its relevance to deciding this, but---

23 The Court: (interposing) But not on an  
24 interim basis, presumably.

25 Mr. Frederick: It depends on how and where it's



1 defined as being relevant. If the point of injury that they  
2 assert in their briefs is correct, that we're not really  
3 suffering injury because we get a benefit from the Yadkin,  
4 then it becomes an issue to be decided sooner rather than  
5 later. If it's a question of the ultimate weighing of the  
6 facts and benefits, then it's presumably one that can be  
7 decided later.

8           The Court:           Well, it's funny because you've  
9 said in the past that the use of water within one state is an  
10 intrastate issue, and now--not that--I'm not going to--  
11 obviously that is on a different set of issues that you've  
12 said that---

13           Mr. Frederick:       (interposing) Yes.

14           The Court:           ---but---

15           Mr. Frederick:       (interposing) I still hew to that  
16 too.

17           The Court:           ---but that now it's not possible  
18 to consider water that's removed from one river basin. It  
19 still flows down into the state. It would be surprising to  
20 me if that were utterly irrelevant, but I guess that's really  
21 not an issue for today. But it does seem that it would be  
22 surprising that it would be utterly irrelevant that---

23           Mr. Frederick:       (interposing) I think it is  
24 legally irrelevant, Your Honor. And we will brief it that  
25 way and we will argue it that way, and we will go to the

1 justices on that point if necessary at the appropriate time,  
2 because I'm not familiar with any case, not a single  
3 equitable apportionment case, that concerns multiple river  
4 systems where the point in issue is one and where you have  
5 before you a rather defined problem. You have an amount of  
6 water authorized under state law permits that is four times  
7 the amount of actual use now, and the amount of actual use  
8 now is creating shortages in South Carolina during periods of  
9 low flow.

10           So at one level, this case can be very easily  
11 decided and done by a decree that says you can't do the IBT  
12 beyond a certain level. That would very simply solve this  
13 case without a lot of complexities that North Carolina wants  
14 to introduce that I think are more confusing than  
15 enlightening. And, you know, if you view causation in that  
16 fashion, I think that you'll be guided.

17           If I could turn briefly to the Colorado and Wyoming  
18 case and Nebraska and Wyoming, the Court there apportioned  
19 based on harms during the irrigation system. It was not a  
20 requirement to show harm throughout the entire course of the  
21 river flow. And the analogy here I think is pertinent to  
22 those periods of low flow.

23           The Court's decisions in those two cases, as well  
24 as the two I adverted to in my earlier argument, the *Colorado*  
25 *v. New Mexico* and *New Jersey v. New York*, indicate that

1 there's flexibility in deciding--in certain river conditions  
2 and certain time periods a decree can be entered to limit the  
3 amount that the upstream state can withdraw from the river  
4 basin.

5           And finally, with respect to--well, two last  
6 points. One is that with respect to the document production,  
7 Duke has served a document request that is the catch-up  
8 discovery that you ordered I believe three months ago. That  
9 has been--Catawba River Water Supply Project had issued a  
10 document request several years ago, and to my knowledge they  
11 have not yet served any catch-up discovery.

12           It appears from our analysis that the Duke request  
13 is largely, if not entirely, duplicative of what has already  
14 been requested by the parties. And it's not clear that there  
15 is any additional cache of documents that's not already been  
16 produced. But I think that it's fair to say that with  
17 respect to document productions, we are--you know, we're at a  
18 state where everybody knows what everybody else is going to  
19 be producing.

20           My final point is that on the burden to bifurcate,  
21 the question and I think the challenge and what has taken us  
22 now some time to work our way through is the question of what  
23 efficiency is really served. Duke here argues that a benefit  
24 of bifurcation is somehow to narrow the issues for Phase II,  
25 but they don't explain exactly what gets narrowed or how

1 that's consistent with the standards for deciding whether to  
2 bifurcate proceedings.

3           Ordinarily bifurcation occurs where you have  
4 liability to be determined and then you have damages done in  
5 a separate phase. I think the reason why the parties have  
6 had difficulty in their meet and confers agreeing on what  
7 should be in Phase I versus Phase II is because equitable  
8 apportionment cases don't readily lend themselves to the kind  
9 of bifurcation that the courts traditionally have handled.

10           And because I think you can reasonably expect that  
11 however you define Phase I there will be disagreements about  
12 the relevancy of evidence going into the Phase I pot versus  
13 the Phase II pot, at the end of the day ultimately it's going  
14 to be more efficient just to let the parties put on their  
15 cases and argue about the legal standards and for you to make  
16 the rulings.

17           Finally, I don't know where this notion about the  
18 ten times burden comes into play. They have asserted that  
19 several times in their papers. That's simply not consistent  
20 with what our experts have told us. It's not--I don't think  
21 it's consistent with, you know, a logic of how you would view  
22 the relative costs and benefits of use.

23           Ultimately I think your decision is going to come  
24 down to can North Carolina continue to sustain authorizing  
25 into the future an amount of withdrawals in--you know, to 50

1 or 60 million gallons per day and justify that on the basis  
2 of their future use versus the harms that will be demon-  
3 strable to the existing users in South Carolina. That's what  
4 the case is ultimately going to come down to. And it won't  
5 take, you know, five years of analysis of various people to  
6 kind of get to the nub of the question presented, which is  
7 just that.

8           The Court:           Before you sit down, I did have a  
9 couple of other questions. On the volumetric point that you  
10 made before, you were saying there's a difference of opinion  
11 between North Carolina and Duke the way they're stating what  
12 would be encompassed by Phase I. And you used the word  
13 "volumetric" to be a concession by North Carolina, that you  
14 would look at the amount of water that North Carolina is  
15 using.

16           Now, as I was reading the papers and listening to  
17 you all today, there is a difference between specific uses.  
18 There's a discussion about what specific uses North Carolina  
19 is--that you claim North Carolina is engaging in, and do  
20 those specific uses cause specific harms. And you've made  
21 the point correctly that water is fungible, so you can't say,  
22 well, this particular use causes this particular harm, which  
23 I don't think really is what they were saying.

24           I think what they were saying is you have to--in  
25 order to understand the volumetric nature of the North

1 Carolina uses, you have to look at particular uses, if  
2 nothing else to be able to say this--to add them up, to  
3 figure out how much there is and figure up what uses they  
4 are, just so you know what uses you're talking about, not  
5 just how much water there is in total. So I don't know if  
6 that--that to me is part of the volumetric analysis, even if  
7 you're identifying specific uses in North Carolina.

8           And I think one of the questions apparently that's  
9 been posed in the interrogatories is what specific uses is  
10 South Carolina complaining about, if you will, which I think  
11 goes to that same issue of what uses are we looking at here  
12 on the North Carolina side of the equation.

13           And I think everyone agrees that's part of Phase I,  
14 that it isn't pure volumetric, not just a number that you  
15 would add to that side of the ledger. You'd look at what  
16 goes into that number.

17           Mr. Frederick: I confess you've lost me, Special  
18 Master Myles. I mean I don't understand the distinction---

19           The Court: (interposing) Well, let me ask  
20 you this.

21           Mr. Frederick: ---between the .5 million gallons  
22 per day that their water park at Carowinds takes and the .5  
23 that might be part of a Concord-Kannapolis interbasin  
24 transfer from---

25           The Court: (interposing) Well, how do you

1 figure out how much they're using to begin with?

2           Mr. Frederick:    Oh, those--those records are  
3 available, and both sides are analyzing the withdrawal  
4 amounts.

5           The Court:        So in your mind, then, Phase I  
6 would simply be, you know, a fill in the blank, one number  
7 volume, this is it, and that's North Carolina's use. Then  
8 you'd turn to the South Carolina side of the ledger and you'd  
9 look at all the harm, what particular uses South Carolina is  
10 trying to make of the water but not able to because of this  
11 number that's coming from North Carolina.

12           Mr. Frederick:    It's a moving number, but in  
13 essence--I mean in a nutshell that's the gist of it. The  
14 reason it's a moving number is because there's a varying  
15 amount of water that's coming into the watershed, and so that  
16 necessarily affects how much gets withdrawn. It affects the  
17 degree to which it's used for power projects and---

18           The Court:        (interposing) And would that  
19 number be authorized water or would it be actual use, because  
20 you keep talking about how much is authorized. And I'm not  
21 sure what the magic--what that number is if it's not actually  
22 being used, because, you know, we were just saying that  
23 authorized could mean anything. If there was no law  
24 prohibiting the taking of water without a license, all the  
25 water would be authorized in that sense, so the real question

1 is what's being used.

2           Mr. Frederick: I think you've put your finger  
3 right on the nub of the concern that South Carolina has that  
4 instigated this lawsuit, and if I could just take a moment to  
5 try to unpack that in a way that I hope will be helpful to  
6 you.

7           The whole point about so much more water being  
8 authorized is that North Carolina state law says it's not  
9 relevant to determine whether or not South Carolina suffers  
10 any harm if that amount is taken out. And that's why  
11 South---

12           The Court: (interposing) But do any states  
13 do that? I mean---

14           Mr. Frederick: (interposing) Yes, South  
15 Carolina--yes, the model riparian rights code calls for that.  
16 South Carolina's law calls for downstream users' adverse  
17 effects being taken into account whenever you do an IBT.

18           The Court: So South Carolina's law requires  
19 South Carolina to consider, to the extent there are down-  
20 stream states, the interests of the downstream states?

21           Mr. Frederick: It's defined as downstream users.  
22 I'm not sure that it's been litigated in South Carolina  
23 courts. But the point of it is if North Carolina with  
24 impunity can allow its authorized users under state law to  
25 take more than what they're doing now up to an authorized



1 amount, that causes direct and real injury to South Carolina.

2           The Court:           But what if there were no law at  
3 all in the state prohibiting the taking of water? Then---

4           Mr. Frederick:    We would still be here, Your  
5 Honor, because in those periods of low flow there's not  
6 enough water coming down.

7           The Court:           But if they're not using it, it  
8 wouldn't be relevant. There wouldn't be a case. If there  
9 was no use, how can you have a case?

10           Mr. Frederick:    You have a case by existing users  
11 being affected adversely and you have projected future harms  
12 to existing users based on the amount that's being  
13 authorized.

14           If Charlotte doesn't have to go to South Carolina,  
15 Concord and Kannapolis don't have to go to South Carolina  
16 under North Carolina's theory of their state law in order to  
17 get permission by saying, "South Carolina, if we take out a  
18 full amount of our authorized use, are you going to be  
19 affected by that," that causes direct injury to South  
20 Carolina if in fact they do it. The whole point of having an  
21 injunction, Your Honor, is whether we suffer irreparable  
22 injury by the operation of the state law, which doesn't take  
23 into account---

24           The Court:           (interposing) But even--every  
25 injunction requires the consideration of harm.

1                   Mr. Frederick:     Right.

2                   The Court:           And if there's no--if there's no  
3 showing of a projected use and an actual use, then there  
4 would be no harm.

5                   Mr. Frederick:     But then why would they get the  
6 authorization under their permit to get that amount of water  
7 in the future? They're expecting greater water needs, and  
8 that's why they got their state law to permit them to get  
9 additional water. And it's that authorization coupled with  
10 the existing threshold of harm that creates the injury to  
11 South Carolina.

12                  The Court:           And is that the premise behind the  
13 statement that the river now is fully appropriated?

14                  Mr. Frederick:     At periods of low flow, correct.

15                  The Court:           Does the premise that it's fully  
16 appropriated include on the North Carolina side authorized or  
17 actual use?

18                  Mr. Frederick:     Actual use, actual use at periods  
19 of low flow, meaning that any additional amounts such as the  
20 60 extra million gallons per day that are authorized if they  
21 were to be taken in the future, that would cause direct,  
22 irreparable per se harm to South Carolina.

23                  The Court:           So when you say overappropriated--  
24 I mean fully appropriated I think is what you're saying.  
25 What does that exactly mean, then, taking into account you're

1 talking about uses--not authorized uses, but actual uses.

2           Mr. Frederick:     Actually we're talking about the  
3 capacity of the river to provide the sustained existing uses.  
4 So just to give you an example, when Lake Wateree goes down  
5 to the point where the industrial intake valves are exposed  
6 and they can't draw water out because they're just pipes that  
7 are sticking out into the air, that would be fully appro-  
8 priated.

9           So if you drew down another 60 million gallons per  
10 day and the pipes are now 10 feet in the air above the water  
11 level and it would take a certain amount of time to  
12 regenerate and replenish, that causes harm every single day  
13 to South Carolina.

14           The Court:           So fully appropriated doesn't mean  
15 that every drop of water under existing uses and under the  
16 conditions specified, say drought conditions, is used up;  
17 right?

18           Mr. Frederick:     That's correct.   That's how I  
19 understand the Court's cases because---

20           The Court:           (interposing)   Okay.   I just was  
21 wondering.

22           Mr. Frederick:     Yeah.   No, that's how--because---

23           The Court:           (interposing)   I've seen a fully  
24 appropriated river, the Rio Grande, when I was in El Paso,  
25 and that river is fully appropriated by the time it gets to

1 El Paso. There's no water left. It literally trickle flows.  
2 So I just was wondering.

3 Mr. Frederick: I'm from Texas, Your Honor. I'm  
4 well familiar with what you're describing. And it is true  
5 that, you know, by the time--and you could go even further  
6 south and by the time you get to Laredo, there's even less.

7 But the point here is that the South Carolina users  
8 who've built up their lives and their livelihoods on the  
9 expectations of a certain amount of water and they develop  
10 their industries and they develop their businesses for  
11 greenscaping and recreation and water use, and now they don't  
12 have the water anymore--they built their waterfront home and  
13 now their dock is completely exposed because it doesn't get  
14 down to the water because the water has receded to a certain  
15 amount--those people suffer real and substantial injury.

16 And it doesn't matter whether Concord took the  
17 water or the water park at Carowinds took the water or it got  
18 somewhere else. It's a function of the fact that that water  
19 isn't there anymore. And that is particularly true in  
20 periods of low flow where it can now be modeled that every-  
21 body is going to have to cut back a little bit. And the  
22 question is how much does each state have to cut back in  
23 order to protect the existing users' interests.

24 The Court: Uh-huh. Okay. That makes sense.  
25 Now, just regarding--is it number 4, question number 4, on

1 the interrogatories? I'm trying to find the--somewhere in  
2 here I have the---

3 Mr. Frederick: I don't have that in front of me.  
4 If the question is about--well, I'll let you ask the  
5 question. I'm sorry.

6 The Court: I think I have it here, number 6.  
7 Number 6? Is that right?

8 (Pause.)

9 Mr. Browning: Your Honor, interrogatory number 4  
10 is:

11 "What amount of the Catawba River water use in  
12 North Carolina, whether in the form of interbasin  
13 transfers, consumptive uses, or other activities,  
14 does South Carolina contend must be eliminated in  
15 order to prevent substantial harms to South  
16 Carolina?"

17 The Court: Okay. That--I see, so--and number  
18 6 is asking--because I don't have number 4. I don't think  
19 you gave me number 4 in the attachment to the reply brief;  
20 right?

21 Mr. Browning: Yes, Your Honor, you're right.  
22 It's interrogatory number 6 that's attached.

23 The Court: Yeah. So number 4 is the one that  
24 identifies particular harms that should be eliminated, in  
25 South Carolina's opinion. And then 6 just asks for the

1 identification of consumptive uses in North Carolina just  
2 simply---

3 Ms. Seitz: (interposing) And South Carolina.

4 The Court: And South Carolina, yes, but I'm  
5 just focusing on North Carolina for the moment, but yeah.

6 And so South Carolina declines to answer 6 in large part, I  
7 think, right, because of--do you have a copy of this?

8 Mr. Frederick: Not---

9 The Court: (interposing) It's attached to  
10 North Carolina's reply brief.

11 Mr. Browning: Exhibit 4.

12 The Court: Number 6 is. Number 4 is not.

13 Mr. Frederick: Exhibit 4; which tab is it?

14 Mr. Browning: Right here (indicating).

15 (Pause.)

16 Mr. Frederick: Yes. I'm sorry; what was the  
17 question, Your Honor?

18 The Court: Just that South Carolina has not  
19 given an answer regarding consumptive uses in North Carolina.

20 Mr. Frederick: That's correct.

21 The Court: And then on the other one, which I  
22 don't have here and I don't think you do either, South  
23 Carolina has declined to answer number 4 I think for similar  
24 reasons, except that it's saying "We'll produce an expert  
25 report at some point identifying"--what, identifying harms

1 from North Carolina?

2           Mr. Frederick: Well, let me address the expert  
3 report. Can I just address the part on number 6 first?

4           The Court: Sure. Yeah.

5           Mr. Frederick: What has played out over at least  
6 the last year, maybe the last year and a half or so, is an  
7 attempt to replicate Duke's CHEOPS model, which is the model  
8 that Duke used to provide hydrological projections of the  
9 Catawba River as part of the relicensing procedure with the  
10 Federal Energy Regulatory Commission.

11           And for the last nine months, we have been meeting  
12 and conferring with the outside consultants that Duke  
13 retained in order to get the source code for those model  
14 projections. And we either will have to file a motion to  
15 compel or we will get it worked out within the next week or  
16 so, but the consultants have the source code that would allow  
17 our consultants to be able to understand what the various  
18 variables are for making the projections that we believe  
19 understate the amount of water available. And that under-  
20 statement is reflected by the fact that Duke's guess that  
21 four months only over the next 50 years would trigger the low  
22 inflow protocol at Stage 3 proved to be wrong by a factor of  
23 4.

24           And so once we get that data and our experts are  
25 able to provide their completed analysis of the hydrology,

1 we'll be able to answer number 6 and that will be encompassed  
2 within their report, because I think what they will show is  
3 here's how Duke modeled it, here is where we think there are  
4 some flaws that need to be better understood, and once those  
5 are understood, you'll have a better picture of what the true  
6 state of the river is. So that is what we're waiting on. We  
7 still don't have that data after many months of trying to get  
8 it.

9           Now, with respect to number 4, if I understand the  
10 interrogatory, the question is do we care more about inter-  
11 basin transfers or particular forms of consumption. You  
12 know, as a matter of law, I'm not sure South Carolina has  
13 ever taken the position that any particular consumptive use  
14 that's not returned to the river is something that South  
15 Carolina has standing to complain about. Our position has  
16 always been that intrastate uses of water are for the  
17 sovereign state to decide.

18           So I'm not sure that we'll ever have a position  
19 that satisfies North Carolina in wanting--if what they want  
20 us to do is to, you know, target a--it's the Carowinds water  
21 park, that's the problem, I don't think we'll be in a  
22 position ever to offer a view that one form of consumptive  
23 use that doesn't return water to the basin is any more  
24 harmful than any other particular consumptive use.

25           The Court:           But if you were to have an



1 unbifurcated trial--I'm just trying to get at what you think  
2 you would be proving. If you were to have a trial that was  
3 not bifurcated, then you would have to do that, right---

4 Mr. Frederick: (interposing) No, no, because---

5 The Court: ---because you would have to go  
6 through and say, "Look, okay, now there's this use, there's  
7 that use, and there's the other use, and now we have to value  
8 those uses." So Charlotte, you know, has a certain amount of  
9 water that's being transferred for drinking water. How do we  
10 value that? There's a theme park that uses X amount of  
11 water. How do we value that? Do you not have to go through  
12 the analysis?

13 Mr. Frederick: I don't think so. I think the  
14 Chief Justice got it right in his opinion in the case when he  
15 said it's for each state to decide how to provide the value  
16 for the particular intrastate uses of water.

17 The Court: Yeah, but that was--I don't think  
18 that he was making the law of the case in that opinion. He  
19 was talking about--well, I don't think he was saying that  
20 ultimately all one does is not--that one doesn't look at uses  
21 of the water and the value of those uses, because if he was  
22 saying that, I think he'd be overruling a fair amount of  
23 precedent.

24 Mr. Frederick: No, I think his opinion was quite  
25 consistent with precedent, that the purpose of the equitable

1 apportionment is to decide how much each state gets of a  
2 river, and then it's for that state to decide--I mean it's  
3 for North Carolina ultimately to---

4           The Court:           (interposing) But how do you do  
5 that without analyzing existing uses?

6           Mr. Frederick:    If you take all of the actual  
7 uses, Your Honor, and you put some value on them, that  
8 creates a valuation that I think gets compared to the down-  
9 stream state.

10           But what the case will ultimately turn on are  
11 future uses by North Carolina against existing uses by South  
12 Carolina. And if you look at the equitable apportionment  
13 through that lens, keeping in mind that all existing uses may  
14 be okay in North Carolina, there may be some requirement of  
15 conservation--that will--you know, yet to be determined.

16           But if the ultimate decree is like it was in  
17 *Colorado* and in *New Jersey v. New York*, that when the river  
18 gets to a certain stage these cutbacks have to happen so that  
19 the existing users in South Carolina can be protected, that's  
20 a perfectly valid and routine form of equitable apportionment  
21 decree.

22           And that doesn't mean that you have to value, you  
23 know, the water experience of the kids at the Carowinds park  
24 versus the water drinkers in Charlotte. You just say here's  
25 the amount of existing use, and if that amount increases by,

1 you know, double or if it increases by triple, then the water  
2 intake valves on the South Carolina side are going to get  
3 farther and farther away from the water. And---

4           The Court:           (interposing) Well, what about  
5 this quote that we always have in the briefs--it's like in  
6 every brief--from *Colorado v. New Mexico*, "physical and  
7 climatic conditions, the consumptive use of water in the  
8 several sections of the river, the character and rate of  
9 return flows, the extent of established uses"---

10           Mr. Frederick:    Yeah.

11           The Court:           ---"availability of storage water,  
12 the practical effect of wasteful uses on downstream areas,  
13 the damage to upstream areas as compared to the benefits to  
14 downstream areas"? Do we not have to go through any of that  
15 analysis?

16           Mr. Frederick:    No. Those are the equitable  
17 apportionment factors that ultimately go to can a decree be  
18 fashioned to protect the downstream state and the upstream  
19 state's uses.

20           I mean, you know, I'm not discounting the fact that  
21 all those factors go into the case and they go into an  
22 evaluation of what decree gets fashioned. I'm suggesting  
23 that in a period of low flow, our position will be that  
24 certain protections need to be made for South Carolina, and  
25 in the periods of high flow those---

1           The Court:           (interposing) But what if--even  
2 in a period of low flow, what if hypothetically South  
3 Carolina's uses were all say--you know, this is purely hypo-  
4 thetical---

5           Mr. Frederick:       Okay.

6           The Court:           ---but just watering golf courses,  
7 and North Carolina's uses were all drinking water? Would you  
8 not undertake an analysis even in a period of low flow of the  
9 relative value of those two consumptive uses?

10          Mr. Frederick:       There would be an evaluation. I  
11 believe there would. And the Court has said on several  
12 occasions drinking water is the highest use of the water  
13 available to the state and its citizens.

14          The Court:           So you would have to know what  
15 North Carolina is---

16          Mr. Frederick:       (interposing) Yes.

17          The Court:           ---doing with the water no matter  
18 whether you're in low flow or not low flow. That would be a  
19 relevant inquiry.

20          Mr. Frederick:       It would. But the question of  
21 whether or not an equitable apportionment decree would impose  
22 on North Carolina a restriction on those particular uses is  
23 not so clear to me from the Court's cases, because what the  
24 Court's cases have held as I read them is if the amount of  
25 water coming down to the downstream state is sufficient, it's

1 up to the upstream state to decide how to allocate internally  
2 its intrastate allocation.

3 But to be sure, the drinking water of the people in  
4 any community will outweigh under any normal way of thinking  
5 about it a water park or some other use that is not  
6 commensurate with drinking water.

7 The Court: Uh-huh. So with that in mind, and  
8 assuming for the moment that there would be in Phase I at  
9 least an inquiry into North Carolina uses, what particular  
10 uses are being complained of in adding up to the consumption  
11 by North Carolina that you're complaining about? Okay, so  
12 assuming that's part of Phase I for the moment, when will you  
13 be in a position to answer question number 4 and question  
14 number 6?

15 Mr. Frederick: We would still take the position,  
16 as I understand the question, that number 4 is legally  
17 irrelevant because you add them all up. It's a total number.  
18 And that total number may fluctuate a little bit depending on  
19 high flow, low flow, but the harm is caused when the amount  
20 available in South Carolina drops below the amount that's  
21 necessary to protect the interests of South Carolina.

22 Now, the injury is caused when there is insuffi-  
23 cient water coming down across the border. Whether or not  
24 you then--if you're evaluating future uses and you're saying,  
25 "Okay, we're going to model this river" and there's a certain

1 amount and maybe there's a projected decision in Concord,  
2 North Carolina to do another water park and there is a  
3 planned industrial use in South Carolina, you know, hypo-  
4 thetically I suppose in the future you would weigh analysis  
5 of those things in determining whether or not as you model  
6 this in the future there would be a need to protect South  
7 Carolina uses.

8           But I think that for purposes of keeping the case  
9 simple and manageable, we're here primarily to protect  
10 existing users against future authorized use that becomes  
11 actual use in North Carolina.

12           The Court:           I understand that, but--I under-  
13 stand that's your position. But I was wondering if you had  
14 to respond to number 4, in other words if there was an order  
15 compelling a response, how long would that take?

16           Mr. Frederick:    I'd have to work with our experts,  
17 Your Honor.

18           The Court:           Okay. And then in terms of the  
19 CHEOPS, I was a little--partly just because I don't fully  
20 understand what's in the CHEOPS model, but you were saying  
21 you need the CHEOPS data to respond to number 6. What is it  
22 in the CHEOPS data that--is it data about existing or  
23 projected consumptive uses? Is that the data that you're  
24 needing---

25           Mr. Frederick:    (interposing) Yes.

1                   The Court:            ---to respond to number 6?

2                   Mr. Frederick:       Yes.

3                   The Court:            Okay.  That's helpful.  And then  
4 the final question, I think--I may have a couple of questions  
5 for the other side, but in terms of the CRA, you talked about  
6 how the assumptions going into it were flawed and that  
7 affected--it has affected the analysis.  Is there any--well,  
8 I guess I should ask this.  What phase is that at now?  It  
9 was extended by a year.  What's the status of the proceeding  
10 now?

11                   Mr. Frederick:        It's still pending.

12                   The Court:            Still pending, okay.  And is it  
13 awaiting anything?  Is it still awaiting further regulatory  
14 action at the state level?

15                   Mr. Frederick:        Yes.

16                   The Court:            Okay.  And is that regulatory  
17 action likely to be forthcoming anytime soon, or is it--do  
18 you have any--you may not be the best person to say, but do  
19 you know what the status of that is?

20                   Mr. Frederick:        I don't know when the state  
21 decision will fully resolve itself.  I know there is activity  
22 in that, but I don't know that there is a time line set by  
23 state law for a decision to be made.

24                   The Court:            And is the issue that you raised  
25 here today about the laws and the model--has that issue been

1 raised with anyone in that proceeding, in the CRA proceeding?

2           Mr. Frederick: Well, it is certainly before the  
3 FERC and I think that those FERC references have been  
4 adverted to in the state proceedings, but I have not been  
5 part of the state's--the state regulatory action in that  
6 process, Your Honor.

7           The Court: Okay. So maybe--would you  
8 anticipate if we went forward with Phase I that the CRA would  
9 be part of that proceeding? Would it be an issue? Would it  
10 be considered in Phase I if we had a Phase I?

11           Mr. Frederick: I think that it is fair to say  
12 that modeling projections and what effect on the future  
13 availability of water as projected under the CRA, as  
14 projected under the CHEOPS model, will be an issue that South  
15 Carolina will present at both phases, however they get  
16 defined, because that's a fundamental question here.

17           The Court: Just because the United States  
18 came in at the Supreme Court level on the intervention  
19 issue--or they had not come in at this level; they had not  
20 come in previously--would they--and you've told me before in  
21 an earlier proceeding that they monitor this case in some  
22 fashion or another, that they keep an eye on this case. Are  
23 they likely to want to come in in Phase I if the CRA and the  
24 licensing proceeding is at issue, either--I should really ask  
25 in Phase I or more generally at the trial?



1           Mr. Frederick: I would not hazard to speak for  
2 how the federal government would assess its interests at the  
3 various phases. It's safe to say the CRA itself explicitly  
4 says that water consumption is not an issue that it  
5 addressed, so--and FERC has taken the position that this case  
6 can proceed along its course and that will not, you know,  
7 affect how FERC views the licensing because the licensing is  
8 addressed to power needs. It's not addressed to water  
9 consumption.

10           The Court: Uh-huh. Okay. I did want to ask  
11 either--probably North Carolina about the issue about the  
12 difference--Mr. Frederick was saying there's a difference of  
13 opinion between you and Duke.

14           Mr. Browning: Difference of opinion between Duke  
15 and North Carolina?

16           The Court: On the subject of whether it's a  
17 volumetric analysis or whether there's some other---

18           Mr. Browning: (interposing) Yes, I appreciate  
19 you raising that, Your Honor. I always get a little bit  
20 nervous when Mr. Frederick says I've conceded something, and  
21 I will say that I think the record speaks for itself.

22           But my point is that in all of these other cases  
23 like *New Jersey v. New York*, you're looking at a specific  
24 interbasin transfer, a diversion of water, with a volumetric  
25 analysis. That of course needs to be the starting point for

1 Phase I. That is what we're trying to find out through these  
2 contention interrogatories, what it is that South Carolina is  
3 really trying to say North Carolina has done to cause them  
4 harm. And of course the starting point is volumetric.

5 I can't say that I was able to follow Mr.  
6 Frederick's argument to realize what he was saying in terms  
7 of the diversion between North Carolina and Duke, but I don't  
8 think I have--I think our position is fairly well set out in  
9 the briefs and what I said earlier today.

10 If, Your Honor, I could make another very brief  
11 point, Mr. Frederick was speaking in terms of *Colorado v. New*  
12 *Mexico* and was coming up with his definition of full appro-  
13 priation, which I don't think is consistent with the Court's  
14 case law. But it really doesn't matter how Mr. Frederick  
15 defines full appropriation or Chris Browning defines full  
16 appropriation. It matters what the Court said.

17 And I would turn the Court's attention to *Colorado*  
18 *v. New Mexico*, 459 U.S. at page 180. And it's just one  
19 sentence that I wanted to quote from, Your Honor. At page  
20 180, if yours is printed the same way that mine is, in the  
21 column on the left, the very bottom paragraph, the sentence  
22 here, "The Special Master found that most of the water of the  
23 Vermejo River is consumed by New Mexico users and that very  
24 little if any reaches the confluence with the Canadian  
25 River." That is a description of a river that has been

1 totally sucked dry.

2           The Court:           Where--mine didn't---

3           Mr. Browning:       (interposing) I'm sorry.

4           The Court:           ---print out, so what---

5           Mr. Browning:       (interposing) Yes, Your Honor.

6 If you're on page 180 of the Supreme Court--459 U.S.---

7           The Court:           (interposing) There it is. Here  
8 it is. I found it.

9           Mr. Browning:       Yes.

10          The Court:           Yeah.

11          Mr. Browning:       That is the crucial factual  
12 scenario that explains what the Court was referring to when  
13 it was referencing a river that was fully appropriated. That  
14 is not the Catawba River.

15                 Now, Mr. Frederick had also indicated that North  
16 Carolina doesn't give consideration to South Carolina users  
17 with respect to interbasin transfer certificates. Let me be  
18 clear that the current North Carolina statute expressly  
19 provides that initially in that permit South Carolina users  
20 will be considered. So that is set out in the statute as it  
21 currently exists, that South Carolina users will be  
22 considered in determining whether to issue an interbasin  
23 transfer certificate.

24                 The only other point that I'll make in passing is  
25 that in light of Mr. Frederick's objection during my

1 presentation, I must admit that I have to tell him that I  
2 appreciate him conceding that with respect to the discovery  
3 request of the Yadkin-Pee Dee River that South Carolina has  
4 not produced those documents.

5           Again, that is a very complicated issue that we do  
6 not think needs to be addressed until Phase II, and we don't  
7 think we'll be getting to Phase II because we don't think  
8 South Carolina can use *Colorado v. New Mexico* to win its day  
9 in court because the factual scenario in that case is vastly  
10 different from the Catawba River. If there are no further  
11 questions, again we would ask--yes, Your Honor.

12           The Court:           Just one. Thank you. On the  
13 issue of again the CRA being in Phase I, which I think I  
14 asked you about before, but is there a view as to whether the  
15 federal government, the FERC or the United States, is going  
16 to want to get involved in Phase I?

17           Mr. Browning:       Like Mr. Frederick, I would not  
18 want to hazard a guess as to their involvement. I would  
19 think--just speculating, I would think they would probably be  
20 more likely to wait until there's any report that you issue  
21 to the Supreme Court and then evaluate the situation at that  
22 point in time.

23           The Court:           Uh-huh. I think what---

24           Mr. Browning:       (interposing) But that's a guess  
25 on my part.

1           The Court:           What I contemplate doing anyway,  
2 and I might run this by the parties at some point in time, is  
3 asking them, like I probably should have done before on  
4 intervention. I didn't think they'd be interested, but in  
5 hindsight I would have asked them. You could just issue an  
6 order calling for the views of the solicitor general on the  
7 question of intervention.

8           Then you'd know earlier rather than later what  
9 their views are. And they don't have to say, but there's  
10 nothing that prevents I think them from submitting views in  
11 the phase--in the special master phase of the case, which I'm  
12 assuming they've done--you may know this--in other cases.

13           Mr. Browning:       Yes, Your Honor. That's certainly  
14 a possibility, and at the appropriate time I think it would  
15 be something for us to all be thinking about on our periodic  
16 conference calls, which I assume will be resumed here before  
17 too long. But I also agree with Mr. Frederick that the  
18 United States government does monitor original actions and  
19 they will jump in when they want to, but we can certainly  
20 evaluate that on a case by case situation.

21           The Court:           Right. It's an important  
22 question, I think, for whether--it doesn't really decide  
23 bifurcation, but I think it will be important to know in  
24 deciding what any trial will look like.

25           Mr. Browning:       Sure.

1           The Court:           I did want to ask Ms. Seitz one  
2 question.

3           Mr. Browning:        Yes, Your Honor.

4           The Court:           Thank you, Mr. Browning. It's the  
5 same question really, whether there was a difference of  
6 opinion on---

7           Ms. Seitz:           (interposing) I don't think there  
8 is a difference of opinion. I think I was attempting to be  
9 completely consistent with what North Carolina had said  
10 about, you know, the content of Phase I and what everyone  
11 agreed with in Phase II. And I would add that my experience  
12 in *Alabama v. North Carolina* is that the solicitor general  
13 does step in at the special master stage when it has an  
14 interest and files a brief.

15          The Court:           Uh-huh. Okay, that's helpful.  
16 And then I did want to ask you since you're probably the  
17 person most likely to know whether there's been any other  
18 developments in the FERC case that I should know about.

19          Ms. Seitz:           There's a pending motion by Duke  
20 for judgment on the question whether the South Carolina water  
21 quality certification is essential to proceeding with the  
22 license. It's been pending a long time. There's been no  
23 action for a long time.

24                                There's also litigation continuing on the 401 water  
25 quality proceeding in South Carolina. Like Mr. Frederick,

1 I'm not involved in that litigation on behalf of Duke, so  
2 what I know is that there are motions pending but that again  
3 there's been no resolution.

4 The Court: Okay. Thank you.

5 Ms. Seitz: Thank you.

6 The Court: Is there anything else on  
7 bifurcation? Maybe we'll take a very short break and then  
8 come back and deal with the issue of the amicus application.  
9 So I'll be back at 20 minutes--where is the clock in here?  
10 Maybe at a quarter of? Why don't we come back at 11:45?

11 (A recess was taken from 11:32 a.m. to 11:46 a.m.)

12 The Court: We can resume. The City of  
13 Charlotte, do you want to go first?

14 Mr. Banks: Yes. Good morning, Special  
15 Master, James Banks for the City of Charlotte.

16 The Court: Good morning, Mr. Banks.

17 Mr. Banks: I don't think South Carolina and  
18 Charlotte are very far apart on the issues surrounding our  
19 request to participate as an amicus curiae. To begin with,  
20 no party objects to our participation in some form, and so if  
21 the Special Master agrees that we would add value, the  
22 question really is in what form the participation should be  
23 granted.

24 We've asked for some fairly specific things and  
25 South Carolina has urged you to place restrictions on some of

1 those, but not all. And the first of those is participation  
2 in conferences that are periodically scheduled by and large  
3 on the telephone.

4           And while first saying that we should be satisfied  
5 with reading transcripts after the fact, I think South  
6 Carolina has moved to the point where it's sufficient if we  
7 are on the phone to listen, but not to speak unless we are  
8 responding to a specific inquiry.

9           Charlotte thinks that it's much more efficient and  
10 important for Charlotte to be in a position to interject a  
11 point from time to time on matters pertaining to Charlotte or  
12 facts that Charlotte would know about that no other party  
13 likely would understand because it's more efficient to do  
14 that at the time rather than to read a transcript, note an  
15 error or an assumption about something that's just not  
16 correct, and then need to seek permission to provide a  
17 clarification, perhaps even get an objection and have to  
18 brief that, and then finally make a submission that pertains  
19 to something that could have been corrected on the spot if  
20 Charlotte had had at least the opportunity during the  
21 conferences to ask your permission to speak to a particular  
22 point and not simply had to stay silent waiting for someone  
23 else to recognize that Charlotte might have something to say  
24 on that point and raise the issue of what is Charlotte's  
25 view.



1           So we want--we would like to have the opportunity  
2 to pipe up when it's relevant, recognizing that we're not a  
3 party, and that the matters that we would be legitimately  
4 addressing should we speak up would pertain to Charlotte or  
5 some fact bearing on Charlotte's practice of water withdrawal  
6 and distribution. So that would be the first request.

7           The second request we've made at least for initial  
8 participation is that we be served with everything that's  
9 filed, everything--other documents that are exchanged among  
10 the parties except of course for confidential information.  
11 We don't expect to get confidential information and would be  
12 prepared to assist the parties in maintaining separate lists,  
13 service lists, if that's necessary, so that it's not a  
14 complicated or logistically difficult thing for parties to  
15 exclude Charlotte from distributions that include confi-  
16 dential information Charlotte should not have.

17           Finally, we would ask that we be allowed to attend  
18 hearings and depositions. South Carolina has objected  
19 basically on logistical grounds that there would be  
20 considerations of the size of the room to be used to accommo-  
21 date extra lawyers or that more time would be consumed by  
22 Charlotte needing to exit the room and return when matters  
23 were to be discussed that Charlotte should not hear, so  
24 forth.

25           All I can say is that Charlotte is prepared to do

1 its best to not be disruptive, but again, it's important for  
2 Charlotte to be in attendance in case things come up that  
3 need to be clarified at a deposition or a hearing. The  
4 interest--Charlotte's interest would be in getting all the  
5 facts accurately on the record.

6           And there will be occasions when Charlotte under-  
7 stands that something has been said isn't quite right because  
8 of something Charlotte understands and others might not. And  
9 we would like to be in a position in the conferences to speak  
10 up and in the depositions to apprise counsel for North  
11 Carolina that something needs to be clarified so that the  
12 record is accurate. And it's too late to do that reading a  
13 transcript of a deposition sometime after the fact. It needs  
14 to be done on the spot.

15           And then I guess finally Charlotte would like the  
16 opportunity to ask the Special Master in the future for other  
17 means of participation should those needs arise in the course  
18 of the proceedings.

19           South Carolina has mentioned, for example, that in  
20 a traditional amicus role, the filing of amicus briefs on  
21 decisions of the Special Master or on dispositive motions  
22 might be appropriate. They've even mentioned that the  
23 proposed intervenors, Duke and CRWSP, if they were partici-  
24 pating as amici, should be able to present evidence, because  
25 they were arguing that they, Duke and CRWSP, were in

1 possession of information that would be valuable to your  
2 hearing of this case, and South Carolina said, well, they  
3 might as amicus parties be able to present evidence. And we  
4 think Charlotte should be in the same position to the extent  
5 there are issues on which evidence from Charlotte would be  
6 helpful to your consideration of the case.

7           So we would expect to come forward with those kinds  
8 of requests at a later date should the need arise. And we  
9 simply ask that in your order, if you should allow us to  
10 participate, that you make note that you would entertain such  
11 specific requests later on.

12           (Pause.)

13           The Court:           Okay. Thanks.

14           (Pause.)

15           The Court:           Just one moment.

16           (Pause.)

17           Mr. Frederick:   Thank you. I think that Mr. Banks  
18 is correct, that the points of disagreement are fairly  
19 narrow, but there is one overarching principle that is  
20 important. All nine justices agreed that Charlotte is  
21 adequately represented by North Carolina in the case. So to  
22 the extent that what Charlotte is seeking to do is to  
23 supplement what North Carolina can do in adequately repre-  
24 senting the City, I think their participation should be  
25 viewed through that lens.

1           Traditionally amici in the Court have been able to  
2 monitor the Court's web site to be able to get documents that  
3 are publicly available documents. I think that the question  
4 of participation and serving--Charlotte's role in monitoring,  
5 the example Mr. Banks gave, I think is one that is quite  
6 attenuated for participating in conferences. It's something  
7 that the North Carolina attorney general certainly is capable  
8 of doing.

9           The one point about service I think is important in  
10 light of the way things have proceeded with Duke's consultant  
11 concerning the CHEOPS model, and I do want to raise this  
12 because this is a matter of significant practical concern to  
13 South Carolina. We don't have any objection to Charlotte  
14 having access to the documents that are available on the web  
15 site for the case. That's perfectly adequate, and those  
16 documents are publicly available.

17           What causes us concern is the entity that Duke has  
18 retained as its outside consultant for the CHEOPS modeling  
19 has insisted on extremely stringent protective measures with  
20 respect to its internal data for its proprietary purposes,  
21 and to the point where we were negotiating over setting up an  
22 outside vendor so that there are specific stations that can  
23 be used to view this data. I fully expect that that--and  
24 they've asked for all of its data to be treated as confi-  
25 dential, and it's a humongous amount of data bits.

1           What I expect is that there will be a large number  
2 of documents created in the course of this litigation that  
3 use in some form or another those documents created by HDR or  
4 within HDR's files. And my concern is that by including  
5 Charlotte as an automatic receiving party of all filings that  
6 there will be the inadvertent disclosure of materials subject  
7 to protective order where one of the entities filing a brief  
8 here could have avoided by keeping a closed listserv of those  
9 recipients. And so I would like to protect our team from the  
10 inadvertent disclosure in a way that would cause objection by  
11 HDR simply by including Charlotte as though they are a shadow  
12 party able to receive all of the documents that get filed  
13 back and forth.

14           Now, I understood Mr. Banks today to say that he  
15 accepts the notion that there will be confidential  
16 protections and that they would not have access to that  
17 confidential information. My point is that by including an  
18 order that they automatically receive everything creates the  
19 kinds of administrative difficulties of protection that are  
20 hard to deal with when there may be a submission that  
21 includes in one footnote something that is included and it  
22 automatically gets sent over to Charlotte and that creates a  
23 problem that adds to the administrative burden to the states  
24 in a way that's unnecessary, particularly when as its *parens*  
25 *patriae* North Carolina can get all the documents, and if

1 Charlotte wants to develop a reporting relationship with  
2 North Carolina, it's certainly within North Carolina's  
3 capability to decide what documents go to Charlotte and which  
4 do not.

5           And with respect to the last point, attendance at  
6 hearings, we don't have any problem with Charlotte or any  
7 member of the public I suppose attending hearings, you know,  
8 subject to your approval if it is a public hearing. The  
9 problem that we had with their initial suggestion on  
10 depositions was that they were requesting the right as an  
11 amici to be asking questions at depositions and to be  
12 involved in the scheduling of depositions, which is difficult  
13 enough with the multiple players we have involved here. We  
14 didn't want to add to the administrative burden of having to  
15 deal with amici questions at depositions where North Carolina  
16 has insisted on very strict time limits for depositions to be  
17 taking place.

18           And then finally with respect to future requests,  
19 we assume that they'll be taken up on a case by case basis.

20           The Court:           In terms of--so you wouldn't have  
21 an objection anymore to their appearing at depositions as  
22 long as they're not involved in controlling the scheduling or  
23 involved in asking questions.

24           Mr. Frederick:   It is a problem obviously for--  
25 yes. I mean we have an objection, but it is not something

1 that I think can be--can't be overcome. It is a violation of  
2 the core notion that North Carolina adequately represents  
3 Charlotte. And we object to that extent because the justices  
4 we think spoke very clearly on that subject.

5           The Court:           But that has to do with inter-  
6 vention as a party. And the justices also said and you said  
7 that it was okay to be an amicus. So we just have to figure  
8 out where we draw the line.

9           Mr. Frederick:    No, that's correct. And I'm not  
10 aware of any amicus participating in a deposition. They  
11 haven't cited anything.

12           The Court:           You mean asking questions.

13           Mr. Frederick:    Well, even appearing at one.

14           The Court:           But do you know I mean one way or  
15 the other?

16           Mr. Frederick:    No, I don't, but I am speaking  
17 from a certain level of experience in doing litigation over a  
18 long period of time where it would be unusual to have people  
19 that are not parties sitting in on depositions without a  
20 demonstrable reason---

21           The Court:           (interposing) Right.

22           Mr. Frederick:    ---why they are there. I can  
23 understand why a Charlotte witness--I fully expect that Mr.  
24 Banks will be there for that deposition.

25           The Court:           Right.

1           Mr. Frederick:    I understand that.

2           The Court:        I guess amici can range over a  
3 whole broad spectrum of why they're interested. And many are  
4 interested in a more academic level, and they file briefs  
5 because they're interested in the legal issue that's being  
6 presented. So you wouldn't expect them to show up at  
7 depositions. But Charlotte's interest is more a--it's more  
8 at a factual level. It's more at a level that has to do with  
9 their interest in the particular factual subject matter.

10           Mr. Frederick:   They have to be able to demon-  
11 strate to meet any test for amicus participation that their  
12 value in that particular function demonstrably assists the  
13 Court. That's always the test for amicus participation. So  
14 having a Charlotte lawyer sit in a deposition, what value  
15 added to the Court I think is very difficult for them to  
16 articulate.

17           The Court:        So what is your ultimate position,  
18 then, on depositions? Where do you come out on that?

19           Mr. Frederick:   We object to them having a role in  
20 depositions. But I can say that if they are not able to ask  
21 questions and they're not able to affect scheduling, if you  
22 were to order that over our objection, I'm not sure that's a  
23 point that we would except to.

24           The Court:        Okay. And conferences, in terms  
25 of just being on the conference calls that we have---



1           Mr. Frederick:     (interposing)   The same position.  
2 I don't know how their listening to the call live demon-  
3 strably adds to the Court's understanding of the issues in  
4 the case.  May there be some particular point where we have a  
5 conference call and Charlotte, you know, will be, you know,  
6 at issue and there may be a case by case exception to that,  
7 but the teleconferences are transcribed and they have an  
8 attorney general who represents them.

9           The Court:           But do you have also any objection  
10 to the proposal that if they are on conference calls, say  
11 they're on conference calls, that rather than waiting to be  
12 asked if they have anything to add, because presumably that  
13 would be fine if someone were to say what--"Does Charlotte  
14 have anything to say on this," that if they have something to  
15 add they can ask for permission on the call to add something?

16           Mr. Frederick:    I think again the test is are they  
17 adequately represented by their state's attorney general.  
18 And again, is that something that we would except to---

19           The Court:           (interposing)   But why is--I'm  
20 having trouble with why that bears on the amicus analysis,  
21 because if a bunch of law professors can be an amicus in a  
22 case, you don't ask that question for them, are they  
23 adequately represented by their state or someone else.  You  
24 ask are they adding anything to the proceeding that's helpful  
25 as a friend of the Court.

1           Mr. Frederick:    And that's why original actions  
2 are fundamentally different from most lawsuits, Your Honor.

3           The Court:        But the participation of an amicus  
4 isn't particularly fundamentally different, is it?

5           Mr. Frederick:    Special masters have routinely  
6 denied any amicus participation by individual actors within  
7 the state. Special Master Lancaster did that in *Virginia v.*  
8 *Maryland*. That's not unusual because of the view that the  
9 states as *parens patriae* for all of their citizens represent  
10 them.

11          The Court:        But you had advocated the amicus  
12 mechanism as a way of solving the problems that you have  
13 identified with intervention.

14          Mr. Frederick:    I think there's a difference  
15 between having an amicus brief on a particular point of law  
16 which they would submit or some evidentiary point that---

17          The Court:        (interposing) But isn't  
18 Charlotte's main contribution to this proceeding factual and  
19 not legal? Why would Charlotte add anything on legal issues  
20 that would be helpful to the Court? It seems to me that  
21 their principal--not that they wouldn't have anything to say  
22 on legal issues. I'm sure they have excellent legal analysis  
23 of issues, but---

24          Mr. Frederick:    (interposing) But I agree with  
25 you. I agree with you there's a---

1           The Court:           Isn't their main--isn't their main  
2 contribution factual?

3           Mr. Frederick:    I think the question, though, is  
4 do they offer a perspective not adequately represented by the  
5 state's attorney general, who represents all the cities and  
6 all the citizens of North Carolina. Now---

7           The Court:           (interposing) But if that were  
8 the criteria, then--I mean obviously that doesn't apply at  
9 trial. We need to get evidence from all those people anyway;  
10 right? You can't--the State can't speak on behalf of all  
11 those citizens if there's a trial; right?

12           Mr. Frederick:    That's what the attorney general  
13 is charged with doing, Your Honor.

14           The Court:           But he can't testify if he doesn't  
15 have personal knowledge.

16           Mr. Frederick:    No, but he's charged with repre-  
17 senting them. We're not saying--the Charlotte witnesses will  
18 be called at trial. We expect them. We expect Charlotte to  
19 be represented and---

20           The Court:           (interposing) Right, obviously;  
21 right. I'm just saying that's obvious, that the attorney  
22 general can't go so far as to testify on behalf of fact  
23 witnesses. You have to have the actual fact witnesses there.

24           Mr. Frederick:    That's correct.

25           The Court:           So I think somewhere in between

1 these two points is where Charlotte falls.

2           Mr. Frederick: I accept that it is a continuum.  
3 And I think the point is whether to treat them as a shadow  
4 party or whether to treat them as a true amicus, where if  
5 they have any contribution to make, they request, you know,  
6 the specific opportunity to make that contribution. And I  
7 expect at that point we'll have no objection when they  
8 articulate exactly why they want to participate at a  
9 particular phase as an amicus.

10           I think that our principal concern, though, is with  
11 the confidential documents in treating Charlotte as a  
12 continuing player for all purposes when we have a web site  
13 that's a very good web site designed to allow people to  
14 facilitate their access to the documents.

15           Given how long it has taken to negotiate with  
16 Duke's consultant, I want to be scrupulous on our side about  
17 protecting the confidentiality measures that we're agreeing  
18 to. And I'm very concerned because I think that data will  
19 end up figuring in a lot of submissions, and I don't want our  
20 team to be in a position of an inadvertent disclosure.

21           The Court:           What protocol do we have now that  
22 protects confidential--confidential materials or materials  
23 referring to confidential materials from going onto the web  
24 site? I know that they shouldn't, but what mechanism do we  
25 have in place to prevent that?

1           Mr. Frederick: I believe we have agreed, at least  
2 in discussions, that we're not going to put confidential  
3 information up on the web site.

4           The Court: Right.

5           Mr. Frederick: But we haven't so far encountered  
6 this question.

7           The Court: Yeah, it seems to me there's two  
8 possible solutions. One is--you know, in the case of  
9 Charlotte--your solution that, well, North Carolina can just  
10 send Charlotte anything that is needed. And I think North  
11 Carolina objects to that, but we'll hear from North Carolina.

12           And then the other--but then the other option would  
13 be to have a mechanism that is a screening mechanism that  
14 would be used both for the web site and for Charlotte to make  
15 sure that materials that contain confidential information  
16 don't go in either of those places, which we probably need  
17 anyway. I mean we need to have some mechanism that  
18 identifies those documents. And if it's not adequately  
19 provided for already in the order, we probably need to come  
20 up with a mechanism.

21           Mr. Frederick: We have discussed that with North  
22 Carolina and the intervenors in way months past. And I think  
23 that the parties are capable of coming up with appropriate  
24 prophylactic measures with respect to that question.

25           But on the question of having automatic service,

1 that creates a different cluster of administrative issues and  
2 challenges that I want to raise with the Court because they  
3 can be--there's no outstanding reason why Charlotte can't  
4 accomplish its monitoring purposes in a different way without  
5 imposing an administrative burden on the parties with respect  
6 to confidential information.

7           The Court:           Uh-huh, but it--I agree, but it  
8 may be the same administrative burden because something has  
9 to be done in that service list to prevent disclosure on the  
10 web site. In other words, if it goes to Lori Nichols, who is  
11 my administrator, it will go on the web site unless someone  
12 tells her not to put it on the web site. So it's sort of the  
13 same--somewhat the same problem because it inheres in the  
14 very nature of an omnibus service list, the e-mail service  
15 list.

16           Mr. Frederick:    But it's different in this  
17 respect. The discovery so far has not been sent to your  
18 office.

19           The Court:           That's true.

20           Mr. Frederick:    And there's a lot of information  
21 that gets transmitted in those discovery papers will happen  
22 in the course of depositions being taken and the like.

23           The Court:           Okay. Fair enough. That's a good  
24 point. Does North Carolina want to add anything before I  
25 hear from Mr. Banks again?

1           Mr. Browning:     Your Honor, no, unless you have  
2 any questions. I think our position is set out in the brief  
3 before you.

4           The Court:        Well, I did have a question.  
5 Forgive me if it's in here, but I just couldn't--it seemed  
6 that you were supporting all three modes of participation by  
7 Charlotte: the conferences, filings, and hearings and  
8 depositions.

9           Then you elaborated on the filings issues, not  
10 wanting to have to take on the burden of providing things to  
11 Charlotte through North Carolina. But I don't think you  
12 elaborated on the other two points. So are you--do you have  
13 anything--any comments in response to Mr. Frederick's  
14 objections to say depositions, hearings, and conferences?

15          Mr. Browning:     Your Honor, our position is fairly  
16 simple, that we think that Charlotte--its presence in the  
17 monthly conferences and its participation so far has been  
18 helpful in guiding where this case goes. We are fully  
19 supportive of their continued participation as an amicus or a  
20 super amicus in whatever way the Court finds to be helpful.

21          And North Carolina will do whatever the Special  
22 Master would like for us to do to accommodate their continued  
23 presence and participation as the municipality that really  
24 has a bull's-eye painted on their back as a result of the  
25 bill of complaint. You tell us what we need to do and we'll

1 do it---

2           The Court:           (interposing) Okay.

3           Mr. Browning:       ---because we think Charlotte  
4 should be here.

5           The Court:           Yeah. And then in terms of the  
6 service issue, this issue of--I think that we need to resolve  
7 the issue of court filings in a more general way. So that to  
8 me seems to be something that, as I said a moment ago, has to  
9 be resolved across the board for court filings if there's  
10 going to be confidential material.

11           But what about discovery material? How should we  
12 manage that in terms of who is going to be the filter to make  
13 sure that Charlotte isn't--if we are going to have them  
14 receive copies of discovery, how do we ensure that they don't  
15 receive confidential discovery?

16           Mr. Browning:       Your Honor, I think that's just an  
17 issue in terms of internal firm management that you have in  
18 any litigation that you'll always have the risk of  
19 inadvertently sending something to the wrong address or the  
20 wrong location, but if you're diligent in your service list,  
21 those opportunities can be minimized.

22           And as long as you make good faith efforts,  
23 somebody is not going to hopefully drag you through the coals  
24 just because somebody in the office makes a mistake and sends  
25 it out to the wrong location. So I think we're really



1 spending a lot of time talking about a what if hypothetical  
2 here that I would not be too concerned about.

3           The Court:           Okay. Good.

4           Mr. Browning:       Thank you, Your Honor.

5           The Court:           Well, Mr. Banks, do you have  
6 anything more to add?

7           Mr. Banks:           Yes, Special Master. I'd like to  
8 touch briefly on one point that Mr. Frederick returned to  
9 several times. And that is his assertion that Charlotte's  
10 participation ought to be viewed through the lens of the  
11 conclusion that North Carolina represents Charlotte's  
12 interest.

13                   In the Supreme Court briefing on intervention,  
14 South Carolina pointed to two cases in which the role of  
15 amicus curiae was laid out by a special master in original  
16 actions. One of those, *Nebraska v. Wyoming*, was their chief  
17 example. The Chief Justice in dissent pointed to that same  
18 case and said, "This is a case very much like the one  
19 involving South Carolina and North Carolina. It's a very  
20 good example of how amicus curiae can participate in such a  
21 case."

22                   In *Nebraska v. Wyoming*, amici were denied inter-  
23 vention for the same reason Charlotte was, adequate repre-  
24 sentation by their states. The special master in that case  
25 offered all five the opportunity to participate as amicus

1 curiae, and several did. And he articulated the reason for  
2 allowing that as twofold: one, to help so that they could  
3 preserve their interest in the matters to be decided, and  
4 two, to serve as traditional friends of the court.

5           And here are the kinds of things that that special  
6 master allowed: submission of affidavits, filing of briefs,  
7 examination of witnesses, appearance at hearings, and intro-  
8 duction of evidence. Now, this is the very case that both  
9 the Chief Justice and South Carolina point to as providing  
10 the best example.

11           The second example is *Alaska v. United States* in  
12 2005. Again, a party was denied intervention and then  
13 allowed--on the basis that it was adequately represented by  
14 the State of Alaska and then allowed to participate. And in  
15 that case, the special master did precisely what Charlotte is  
16 requesting here as an initial matter.

17           It said that the amicus should be served with  
18 relevant filings, that they should be able to attend trial  
19 and hearings and to submit briefs on any subject to be  
20 decided by the special master. And then there would be a  
21 requirement for separate permission at future times to  
22 participate in other ways.

23           In neither of these cases was there a sort of good  
24 cause showing or a burden on the amicus curiae to demonstrate  
25 that their parent, the state party, didn't adequately

1 represent their interest or that they added something the  
2 State was incapable of adding. They were there to protect  
3 their interest, to provide factual information relevant to  
4 their issues, and to serve as a friend of the court. These  
5 are the cases that South Carolina points to.

6           The Court:           Who was the special master in  
7 *Nebraska v. Wyoming*? Do you know?

8           Mr. Banks:           Oh, I don't recall. We might have  
9 noted it in our--in our motion we provide citations to the  
10 web sites.

11           The Court:           Yeah. I saw that.

12           Mr. Banks:           And so that would be the place to  
13 check, but I've forgotten. That was a 1993 matter. And the  
14 special master was active in the late '80s, so I'm not sure  
15 whether it's possible to get any direct feel from that  
16 special master, how that worked out.

17           But in each of his succeeding reports to the Court,  
18 he had a special section on how the participation by amici  
19 had gone, and he said very positive things about the  
20 constructive contributions they had made to the case.

21           The Court:           Thanks. Mr. Frederick, do you  
22 have anything further?

23           Mr. Frederick:       Just two quick points as we point  
24 out on pages 9 to 10 of our brief. There was a good cause  
25 standard imposed in the *Nebraska v. Wyoming* case. And if

1 memory serves correctly, it was Owen Olpin who was the  
2 special master there. That good cause standard was required  
3 for the submission of the types of matters that Charlotte has  
4 now just adverted to.

5           And in *Alaska* it is true that the amici were  
6 allowed to participate with respect to certain matters, but  
7 the special master also denied participation in a site visit  
8 even at the amici's own expense on the grounds that it wasn't  
9 going to materially add to the Court's understanding of the  
10 issues.

11           The Court:           Who were the amici in *Alaska*?

12           Mr. Frederick:       They were Native American groups.

13           The Court:           Native groups; that's what I  
14 thought.

15           Mr. Frederick:       That's correct. So with that, as  
16 I say, our point is not that Charlotte is not allowed to  
17 participate as an amicus. We do believe that North Carolina  
18 cannot credibly complain about the burden administratively  
19 while imposing it on South Carolina. That doesn't seem to  
20 wash. In their brief when they complain about the adminis-  
21 trative burden of us asking North Carolina to superintend  
22 which documents can fairly be transferred to Charlotte and  
23 they want to pose the burden on us, that seems---

24           The Court:           (interposing) Well, wait. I'm  
25 not following why that would have been posed on you.

1           Mr. Frederick:    Because of the confidentiality  
2 issue. Mr. Browning says here that that's simply an issue of  
3 good office management. And our point is that we shouldn't  
4 have the burden of determining on any individual submission  
5 or any individual discovery matter whether there happens to  
6 be information that Charlotte shouldn't be given access to.

7           The Court:        You're going to have to make that  
8 determination anyway to determine whether it's confidential.  
9 Wouldn't it have to be stamped confidential or designated?  
10 I mean I don't see it as a particularly uniquely South  
11 Carolina burden.

12           If we have an order in place that determines that  
13 certain discovery materials may be deemed confidential and  
14 therefore not made available to the public, then everyone has  
15 a burden in producing materials to so designate them. And  
16 then other parties have the burden, if they disagree with the  
17 designation or believe that other parties' materials need to  
18 be designated that weren't, to undertake to have those  
19 designated.

20           But I think what North Carolina was saying, you  
21 were asking them to be the gatekeeper for all materials that  
22 would or would not go to Charlotte, which I don't think  
23 anyone is asking South Carolina to do either. It would just  
24 be a function of all parties who are designating documents to  
25 be careful not to forward any such documents to Charlotte.

1           Mr. Frederick:    It wouldn't be forwarded, Your  
2 Honor. Under Charlotte's proposal, they're included on the  
3 listserv of addressees for all documents. They asked to be  
4 served with all documents. That's what we object to.

5           The Court:        Right, but in terms of if you were  
6 to make documents available to Charlotte, there's three ways  
7 you could do it. One, you have an omnibus service list that  
8 goes to everybody. That doesn't work obviously because  
9 everyone except Charlotte is subject to the protective order,  
10 right, a protective order.

11           So the second option is to have them not be on any  
12 service list and have North Carolina have to decide on a  
13 piece by piece basis what they get and what they don't get,  
14 which doesn't make a whole lot of sense because North  
15 Carolina is not the guardian of Charlotte. If they're going  
16 to be an amicus, they have their own status. So they would  
17 be granted leave to participate as an amicus, not subject to  
18 the supervision or guidance of North Carolina. They would be  
19 participating in their own right.

20           Mr. Frederick:    But they are---

21           The Court:        (interposing) So the third option  
22 would be simply to create two service lists, one of which  
23 will be for nonconfidential materials, which could go on the  
24 web site and also--again, it wouldn't be to the web site for  
25 discovery materials but for other materials, and then--so you

1 could have a nonconfidential discovery related service list  
2 and then another confidential service list. That would be  
3 another way to do it.

4 Mr. Frederick: The third approach that you apply  
5 I don't think would be consistent with the limited amicus  
6 participations in either the Alaska case or the Nebraska case  
7 because a good cause standard was imposed in *Nebraska* and a  
8 does it facilitate the understanding of the Court standard  
9 was used in *Alaska*. Now---

10 The Court: (interposing) So for each brief  
11 when it was said that--in other words, are you saying in  
12 neither case was there a provision that said that the party  
13 would get copies of materials?

14 Mr. Frederick: We're not aware that they had the  
15 kind of participation of the sweeping nature that Charlotte  
16 has had. Charlotte is asking to be treated as a quasi-party  
17 after all nine justices rejected that participation. And to  
18 be served with all documents in the case is the quintessence  
19 of being treated as a party, to be able to participate in  
20 hearings, to participate in monthly telephone calls, and the  
21 like.

22 We have no objection to a limited participation of  
23 a true amicus nature that fits the normal standards for  
24 amicus participation. But they were denied intervention  
25 status by all nine justices because North Carolina can

1 adequately represent them.

2           And for North Carolina to now say that they can't  
3 superintend one of their own cities with respect to the  
4 dissemination of documents is not a position that should be  
5 taken I think to the point of inconveniencing as an  
6 administrative matter South Carolina and imposing on us the  
7 risks of disclosures of information by somebody who may  
8 happen to use the wrong listserv inadvertently in the  
9 dissemination of documents that have taken us six to nine  
10 months of hard negotiations in order to get access to them  
11 because they are critical to the case.

12           I just would like to protect our team from that  
13 kind of risk of inadvertence even if it's a separate listserv  
14 because I understand the sensitivity that Duke's consultant  
15 is applying to this matter.

16           The Court:           Okay. I'm not sure I see the  
17 difference. I'm just having a hard time seeing---

18           Mr. Frederick:   (interposing) North Carolina  
19 bears the risk of an inadvertent disclosure if North Carolina  
20 has the duty to give Charlotte documents. That's not a duty  
21 or a burden or an imposition or a risk that South Carolina  
22 and its counsel have to assume.

23           The Court:           Well, couldn't we just have two  
24 listservs, though, one for---

25           Mr. Frederick:   (interposing) Yes.



1                   The Court:            You're just afraid someone will  
2 press the wrong button.

3                   Mr. Frederick:    It has happened in many litiga-  
4 tions of which I've been a part where somebody puts the wrong  
5 listserv in the "To" column of an e-mail.

6                   The Court:            Uh-huh. Okay. Well, I should be  
7 able to--unless there's other comments or--I should be able  
8 to get something out on this issue very soon on the amicus,  
9 and then obviously we'll take the bifurcation under  
10 submission as well. So both matters are under submission.  
11 And we'll reconvene--we should probably maybe go off record  
12 and set up a time for or talk about resuming conference  
13 calls.

14                                   (The hearing was closed at 12:23 p.m.)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

C E R T I F I C A T E

I, Kay K. McGovern, do hereby certify that the foregoing pages 4 through 129 represent a true and accurate transcript of the proceedings held at the United States Bankruptcy Court for the Eastern District of North Carolina on Friday, April 13, 2010.

I do further certify that I am not counsel for or employed by any party to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto set my hand this 5th day of May, 2010.

---

Kay K. McGovern, CVR-CM