No. 138, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff

v.

STATE OF NORTH CAROLINA,

Defendant

OFFICE OF THE SPECIAL MASTER

Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC

May 27, 2008

The Catawba River originates in the Blue Ridge Mountains in North Carolina and flows through a series of lakes and hydroelectric reservoirs until it enters South Carolina at Lake Wylie. Thereafter, the Catawba is joined by a series of creeks, and then meets Big Wateree Creek to form the Wateree River. The Wateree flows generally southward and joins the Congaree River to form the Santee River southeast of Columbia; the Santee then flows southeast and empties into the Atlantic Ocean south of Georgetown.

In this original action, South Carolina seeks an equitable apportionment of the Catawba, and also seeks to enjoin the State of North Carolina from authorizing or executing interbasin transfers from the Catawba in a manner inconsistent with that apportionment. Three non-state-entities—the City of Charlotte, North Carolina ("Charlotte"), the Catawba River Water Supply Project ("CRWSP"), and Duke Energy Carolinas, LLC ("Duke")—have moved for leave to intervene as defendants in the action. South Carolina opposes all three motions. North Carolina takes no position on the motions but has submitted a statement responding to certain assertions by Charlotte. For the reasons stated herein, all three motions are granted.

I.

The Catawba River serves a wide variety of beneficial uses in both North Carolina and South Carolina, including irrigation and the generation of hydroelectric power. The Catawba is subject to periodic fluctuations in water levels that significantly affect its volume and flow. In its Complaint, South Carolina alleges that it has suffered various harms resulting from a reduced flow of waters in the Catawba as it flows from North Carolina, and claims that these harms have been exacerbated by a North Carolina statute, enacted in 1991, that governs the inter-basin transfers of water—that is, the "withdrawal, diversion, of pumping of surface water from one river basin and discharge of all or any part of the water in a[nother] river basin." *See* N.C. Gen. Stat. Ann. § 143-215.22G(3).

The North Carolina statute applies to a number of enumerated rivers, including the Catawba. *See id.* § 143-215.22G(1)(h). It provides that any "person" wishing to "transfer . . . 2,000,000 gallons of water or more per day" from a river basin must obtain a permit from the North Carolina Environmental Management Commission ("EMC"). *See id.* § 143-215.22I(a)(1)-(2). The statute also grandfathers both previously approved certificates for transfers and pre-existing water-transfer facilities. *See id.* § 143-215.22I(b), (i). South Carolina further alleges that the statute implicitly allows transfers of less than 2 million gallons per day from the Catawba, without approval by the EMC.

South Carolina identifies two specific permits under § 143-215.22I that it claims have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River: (1) a March 2002 permit allowing Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day and (2) a January 2007 permit allowing the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day. South Carolina identifies a third transfer from the Catawba River that was grandfathered in

under the statute: Union County has authority to transfer up to 5 million gallons of water per day from the Catawba. South Carolina estimates that these specific transfers, together with other transfers that do not require a permit, have resulted in the transfer of approximately 48 million gallons per day from the Catawba River Basin—an amount that, according to South Carolina, exceeds North Carolina's equitable share.

The three proposed intervenors contend that they have substantial interests in this dispute and should be allowed to intervene. Two of the proposed intervenors are entities authorized to carry out the inter-basins transfers to which South Carolina objects. Charlotte is the largest municipality on the Catawba River and is the beneficiary of the March 2002 permit, described above, allowing Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day.[1] CRWSP is a joint venture between units of government of North Carolina and South Carolina. One of its two participants is Union County, North Carolina, which, as noted above, is authorized under the North Carolina General Statutes, § 143-215.22I(a)(2), to transfer up to 5 million gallons per day from the Catawba. This transfer is effectuated through CRWSP.

Duke, the third proposed intervenor, owns and operates a system of 11 reservoirs in both States to provide hydroelectric power to the region, pursuant to a 50-year license issued by the Federal Power Commission ("FPC"). Duke contends that the impounding of water in its reservoirs and its releases of that impounded water play a substantial role in determining the flow of the Catawba River. Duke's current FPC license expires in August 2008. Duke has submitted an application for a new license to the Federal Energy Regulatory Commission ("FERC"), the successor to the FPC, supported by a Comprehensive Relicensing Agreement ("CRA") that, according to Duke, was negotiated by 70 parties including public agencies in both North Carolina and South Carolina. Duke contends that the terms of its current and future licenses are crucial to any consideration by this Court of whether and how equitably to apportion the Catawba River. Duke contends that its interests are not aligned with those of either State, but that it has a strong and unique interest in defending the conditions set forth in the CRA and also can provide an essential link to the ongoing licensing proceedings before FERC.

II.

Article III, § 2 of the Constitution gives the Court original jurisdiction of cases "in which a State shall be a party." "This jurisdiction is self-executing and needs no legislative implementation." *California* v. *Arizona*, 440 U.S. 59, 65 (1979). Congress has expanded upon the original jurisdiction clause of Article III by providing in Section 1251(a) of Title 28 that the Court has "original and exclusive" jurisdiction of "all controversies between two or more States." 28 U.S.C. § 1251(a).

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[1] *See* Motion for Leave to Intervene of the City of Charlotte, North Carolina, and Brief in Support of Motion, Ex. 2 (North Carolina Environmental Management Commission, Certificate Authorizing the Charlotte-Mecklenburg Utilities to Increase Their Transfer of Water from the Catawba River basin to the Rocky River basin under the Provisions of G.S. 143-215.22I (Mar. 14, 2002)).

A state invokes the Court's original jurisdiction "as *parens patriae*, trustee, guardian, or representative of all or a considerable portion if its citizens," and may take actions to protect its citizens from injury to their property, health, and comfort. *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902). The *parens patriae* doctrine "is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey* v. *New York*, 345 U.S. 369, 372 (1953). This principle is not only "a necessary recognition of sovereign dignity," but also "a working rule for good judicial administration." *Id.* at 373. "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*

These general principles apply in actions between states to apportion waters from interstate rivers. Because states represent the interests of their citizens in equitable apportionment and other original actions, the citizens of a state that is a party to an original action are bound by the results of that action. Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska* v. *Wyoming*, 515 U.S. 1, 22 (1995); *see also Wyoming* v. *Colorado*, 286 U.S. 494, 508-09 (1932) (water claimants were "represented by their respective states and [were] bound by the decree").

These general principles, taken to their conclusion, logically could have produced a rule stating that only states—and not municipalities, private companies, or other interested entities—may be parties to an original action brought pursuant to Article III, § 2 of the Constitution and Section 1251(a) of Title 28. Nonetheless, neither text contains any express limitation to this effect, and the Court's practice has been to allow non-state entities in appropriate circumstances to join, or be joined in, an original action, even if the entity is a citizen of one of the state parties and thus would be bound by the resulting judgment under the authorities discussed above.

The Court considered this issue—and the appropriate standard for a motion by such an entity to intervene in an original action—in *New Jersey* v. *New York*, 345 U.S. at 369. That case involved a motion by the City of Philadelphia for leave to intervene in a case brought by the State of New Jersey against the State of New York and the City of New York to enjoin a proposed diversion of the Delaware River to the City of New York. At the outset of the case, the Commonwealth of Pennsylvania successfully petitioned the Court for leave to intervene. *Id.* at 371. More than two decades later, after the City of New York moved to modify the decree that had been entered in the case, Philadelphia filed its own motion for leave to intervene. *Id.*

In denying Philadelphia's motion, which all parties opposed, the Court found that "Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *New Jersey* v. *New York*, 345 U.S. at 373. The Court stated that if it "evaluate[d] all the separate interests within Pennsylvania," it could "be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* The Court also noted that

if Philadelphia were allowed to intervene, other cities and private entities along the river would seek to do the same. *Id.* To prevent the Court's original jurisdiction from being "expanded to the dimensions of ordinary class actions," the Court held that a proposed intervenor such as Philadelphia must show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. Because Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," the Court denied the motion. *Id.* at 374.

The Court did not expand upon the types of interests that might be considered sufficiently compelling to warrant intervention. It did, however, distinguish the position of Philadelphia from that of the City of New York, which already was a party to the case; as the Court explained, the City of New York "was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *New Jersey* v. *New York*, 345 U.S. at 375. Unlike Philadelphia, which claimed an interest in the dispute solely as a *user* of water, the City of New York was the "authorized agent" of injury and one of the parties against which coercive relief was sought. *Id.* Whereas Philadelphia was situated similarly to numerous other water users, both political subdivisions and private entities, the City of New York stood alone with the State of New York as being named by the plaintiff as the instrument of injury—*i.e.*, as an entity that "was planning the actual diversion of the water for its use." *Id.* at 370-71.

On other occasions the Court similarly has allowed non-state entities such as municipalities to be named as defendants in original actions involving water disputes between two states where the municipality or other non-state entity is accused of being the agent of injury or executing the policy to which the complaining state objects. For example, the Court allowed an action by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to enjoin the latter's discharge of sewage into the Chicago River and from there to the Mississippi River. *Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901). Similarly, the Court allowed the State of Arizona to file an action for an apportionment of the waters of the Colorado River, naming as defendants the State of California and seven of its public agencies, which were accused of improperly diverting water from the river. *Arizona* v. *California*, 373 U.S. 546, 551 (1963); *see also Arizona v. California*, Bill of Complaint, pp. 16-19 (1952). In a case primarily brought against the State of Colorado, the Court allowed the State of Kansas to name as defendants "a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river." *Colorado* v. *Kansas*, 206 U.S. 46, 49 (1907). In another case brought by Colorado against Kansas to determine rights to the Arkansas River, the Court allowed Colorado to name as a defendant the Finney County Water Users' Association, a Kansas organization. *Colorado* v. *Kansas*, 320 U.S. 383 (1943). The Court ultimately granted Colorado's request for an order enjoining Finney from prosecuting certain pending actions against Colorado water users. *Id.* at 388-391.

To be sure, the cases discussed in the foregoing paragraph involved situations in which the non-state entities had been named as defendants by the complaining state, and

thus did not voluntarily seek the Court's permission to intervene. The Court made this point in *New Jersey* v. *New York*, noting that the City of New York, unlike the City of Philadelphia, had been "forcibly joined" in the action. 345 U.S. at 375. But the cases also clearly illustrate the Court's consistent practice of extending party status to non-state entities that have a legitimate and logical place in the controversy, including as the agent or instrumentality of the wrongdoing alleged by the complaining state. Both types of cases—those in which a non-state entity is named as a defendant as an original matter, and those in which such an entity seeks to intervene as a defendant—implicate concerns over the purposes of the Court's original jurisdiction, and the need correspondingly to limit the parties that may participate in original actions. But in both types of cases, the Court has allowed non-state entities to become parties in appropriate circumstances, including in water apportionment actions. Such circumstances include, as the above cases show, those in which the non-state entity is the "authorized agent" for a transfer or diversion of water challenged by the complaining state. *See, e.g.*, *id.*, 345 U.S. at 375.

The maxim that the plaintiff is the "master of its complaint" has less force in cases falling under the Court's original jurisdiction, because it is the Court—and not the complaining state—that ultimately decides whether and in what form the Court's original jurisdiction will be exercised. Even in cases between states, the Court may limit its original jurisdiction or decline to exercise such jurisdiction altogether. *See, e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 76-77 (1992); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992). *See also* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185 (1993). If a case does not "sufficiently implicate the unique concerns of federalism" underlying the grant of original jurisdiction, *Maryland* v. *Louisiana*, 451 U.S. 725, 743 (1981), the Court may deny leave to file a bill of complaint. A state seeking to initiate litigation in the Supreme Court many not simply file a complaint, but must file a motion seeking leave, Sup. Ct. R. 17, which will be granted only in "appropriate cases." *Wyoming* v. *Oklahoma*, 502 U.S. at 451. Among the factors the Court will consider is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted). Thus, if the plaintiff state seeks leave to file a complaint that unnecessarily names non-state parties, the Court may either deny the plaintiff leave to file the Complaint or dismiss the non-state parties.

Indeed, the Court has dismissed non-state parties that were named as defendants by the complaining state where the Court found that their interests would be represented sufficiently by the defendant state. In *Kentucky* v. *Indiana*, for example, the Court made clear that party states are deemed to represent the interests of all of their citizens unless "relief is properly sought as against" the individual citizen. 281 U.S. 163, 173 (1930). That case involved an interstate compact between the party states to build a bridge across the Ohio River. Indiana citizens brought actions in state court to enjoin the construction of the bridge, and the resulting delay caused Indiana to breach the compact. Kentucky sought leave to file a bill of complaint in this Court against (1) Indiana, to compel specific performance of the contract and (2) the individuals who were plaintiffs in the state court action, to enjoin prosecution of that action. The Court granted leave to file the complaint, but later dismissed it as to the individual defendants. The Court held that the

individual defendants had no "interest whatever with respect to the contract and its performance other than that of the citizens and taxpayers, generally, of Indiana, an interest which that state in this suit fully represents." *Id.* at 174.

In its opinion in *Kentucky* v. *Indiana*, the Court expressly noted that "[a]n individual citizen may be a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief against him individually should not be granted." 281 U.S. at 173-74. But where the relief sought is "merely incidental to the complete relief to which the complainant would be entitled if it should prevail as against the defendant state"—such as the injunction against the prosecution of the individual defendants' state court suit—"the individual has no standing to litigate on his own behalf the merits of a controversy which, properly viewed, lies solely between the two states." *Id.* In other words, consistent with *New Jersey* v. *New York*, *Missouri* v. *Illinois*, *Arizona* v. *California*, and *Colorado* v. *Kansas*, one circumstance in which a citizen of a party-state may properly become a party in an original action is where non-incidental relief is sought against it by the plaintiff. *Cf. Texas* v. *New Jersey*, 379 U.S. 674 (1965) (private company allowed as a party in original action by Texas for an injunction and declaration of rights to settle a controversy over which state had jurisdiction to take title to certain abandoned property of the company).

The Court also has stated that non-state entities may be parties in original actions where they have a "direct stake" in the action, although the Court has provided little guidance as to what type of "direct stake" will suffice. In *Maryland* v. *Louisiana*, for example, eight states filed an original action against Louisiana, asserting that a tax it was imposing on natural gas brought into the state was invalid. 451 U.S. at 734. The Court allowed intervention by 17 natural gas pipeline companies, which the Court found had a "direct stake in this controversy" because the tax most frequently fell on such entities as owners of the gas; the Court also noted that participation by the pipeline companies would assist in "a full exploration of the issues" and that it is "not unusual to permit intervention of private parties in original actions." *Id.* at 745 n.21. Thus, the Court allowed intervention even though the states challenging the tax could have been deemed to represent the pipelines' interests. The deciding factor appeared to be that the effect of the tax fell directly on the pipelines, making their interest more compelling than that of any average citizen of an affected state and making their expertise and knowledge valuable to a "full exposition" of the issues. *Id.*

The Court also has allowed proposed parties to intervene where they have property interests at stake. For example, *Texas* v. *Louisiana* involved various boundary disputes between and among Texas, Louisiana and the United States, including the determination of the lateral seaward boundary between Texas and the United States extending into the Gulf of Mexico. 426 U.S. 465, 466 (1976). In connection with this particular issue, the United States claimed title to islands in the Sabine River. *Id.* The City of Port Arthur, Texas filed a motion to intervene, and the Court granted the motion. *Texas* v. *Louisiana*, 416 U.S. 965 (1974). The Court later explained that Port Arthur "was permitted to intervene for the purposes of protecting its interests in the island claims of the United States." *Texas* v. *Louisiana*, 426 U.S. at 466. The issue at stake for Port

Arthur was the protection of its interest in real property. Similarly, in *Texas* v. *New Jersey*, 379 U.S. at 677, a dispute over which state had jurisdiction to escheat intangible personal property, the Court allowed the State of Florida to intervene because it asserted a right to escheat a portion of the property in dispute. The Court denied the motion of the State of Illinois to intervene because Illinois "claim[ed] no interest in the property involved in this case." *Id.* at 677 n.6.

Finally, in *Arizona* v. *California*, 460 U.S. 605 (1983), a number of Indian tribes moved to intervene in a dispute between several southwestern States regarding the apportionment of the Colorado River. The Court found that intervention was proper because the tribes had a direct interest in the apportionment of the water: "The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation." *Id.* at 615. The Court's decision turned largely on the sovereign status of the tribes and their entitlement to "take their place as independent qualified members of the modern body politic." *Id.* (citations omitted).

From these authorities may be distilled the following rule that governs the motions here: Although the Court's original jurisdiction presumptively is reserved for disputes between sovereign states over sovereign matters, non-state entities may become parties to such original disputes in appropriate and compelling circumstances, such as where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, where the non-state entity has an independent property interest that is directly implicated by the original dispute, or where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above.

III.

Charlotte argues that, as the largest municipality and provider of water supply and wastewater treatment services in the Catawba River basin, it should be allowed to intervene in this action. Charlotte contends that its inter-basin transfers and water supply services are the primary targets of South Carolina's Complaint. It is undisputed that Charlotte is the government entity in North Carolina vested with the legal authority to carry out the large majority of the inter-basin transfers to which South Carolina objects. This, according to Charlotte, places her in a class by herself and provides the basis for her request to intervene.

Although Charlotte may not be in a class by herself, her company certainly is limited. In the Complaint, South Carolina objects by name to three specific inter-basin authorizations for the transfer of water from the Catawba River—those granted to Charlotte Mecklenburg Utilities, Concord and Kannapolis, and Union County—complaining that these transfers improperly reduce the flow of water into South Carolina. Such transfers, South Carolina says, exacerbate the existing natural flow conditions and droughts that contribute to low flow conditions, thereby causing harm to South Carolina. As to the Charlotte transfer in particular, South Carolina states:

> In March 2002, the [North Carolina Environmental Management Commission] granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

Compl. ¶ 20(a).

Much of South Carolina's Complaint is directed toward the North Carolina inter-basin transfer statute and the transfers from the Catawba River authorized under that statute. In this respect, Charlotte's claimed interest in this case is not merely that of a user of water—a type of interest that the Court generally has not considered sufficiently "compelling" to justify intervention. *See New Jersey* v. *New York*, 345 U.S. at 373. Charlotte, as a user of water, represents only a part of the citizens of North Carolina who reside along the Catawba River and depend upon its waters. If every user of water from the Catawba were allowed to intervene, the Court would be drawn into an "intramural dispute over the distribution of water" that the Court in *New Jersey* v. *New York* said should be avoided. *Id.*

What separates Charlotte from other persons and entities that might claim an interest as a user of water from the Catawba—and what makes Charlotte's interest in this case compelling—is that South Carolina has focused its claims on a small number of permits granted by North Carolina for transfers from the Catawba, including the one held by Charlotte. In that regard, Charlotte—which, like the City of New York in *New Jersey* v. *New York*, is the entity effectuating the "actual diversion of the water for its use," 345 U.S. at 370-71—is the "authorized agent" of a significant part of South Carolina's claimed injury. *Id.* at 375. Indeed, Charlotte is the entity vested with legal authority to carry out the largest of the inter-basin transfers from the Catawba River that are the focus of South Carolina's complaint.

As a result, Charlotte has a direct stake in the present controversy. Charlotte has a unique interest in protecting its inter-basin transfer permit. Because an injunction invalidating all or a portion of North Carolina's inter-basin transfer statute or the certificates granted under it would affect Charlotte in a direct and substantial way, its interests in this case are separate from those of all other citizens and creatures of North Carolina.

Against this backdrop, the fact that North Carolina is a party does not foreclose Charlotte's intervention. In *New Jersey* v. *New York* the Court said that intervention may be permissible where the compelling interest demonstrated by the proposed intervenor is "not *properly* represented by the state." 345 U.S. at 373 (emphasis added). There is no

indication the Court intended this to mean that the state must be incapable of representing the proposed intervenor's interests, such as because their interests are in conflict.

The Court has permitted a municipality to intervene in an original action where its state already was a party and there was no indication that the state could not have represented the municipality's interests. As discussed above, the Court allowed the City of Port Arthur, Texas to intervene in a case involving a boundary dispute between Texas, Louisiana and the United States. *Texas* v. *Louisiana*, 416 U.S. 965. Boundary disputes between states, like other original actions, implicate core sovereign interests. Although Texas presumably could have represented the interests of Port Arthur in the suit, the Court allowed Port Arthur to intervene for the "purposes of protecting its interests in [certain real property]." *Texas* v. *Louisiana*, 426 U.S. at 466.

Similarly, Charlotte has a special interest that sets it apart from the other citizens and creatures of the state whom North Carolina represents as *parens patriae*. Notably, North Carolina has not objected to Charlotte's proposed intervention, although it did file a responsive brief disputing Charlotte's suggestion that North Carolina would not represent Charlotte's interests. Despite this assurance, Charlotte has a sufficiently compelling interest to intervene in the action. Even though Charlotte has not been named by South Carolina as a defendant, for practical purposes non-incidental relief is sought against it, and it therefore "should have suitable opportunity to show the nature of [its] interest and why the relief against [it] individually should not be granted." *Kentucky* v. *Indiana*, 281 U.S. at 173-74.

South Carolina objects that the Court never has permitted a private person or non-sovereign entity, including a municipality, to intervene in an original equitable apportionment action. South Carolina frames the issue too narrowly: There is no special rule applicable only to equitable apportionment cases that precludes intervention by non-sovereigns. To the contrary, all original actions implicate sovereign interests and the Court's precedents firmly establish that non-state entities may participate in original actions in appropriate circumstances. As noted above, the Court has allowed non-sovereigns to intervene in other types of original actions. *See Texas* v. *Louisiana*, 426 U.S. at 466; *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922); *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The Court has allowed intervention in water disputes between states, albeit by third-party states or other sovereigns. *See Arizona* v. *California*, 460 U.S. at 614-15 (allowing Indian tribes to intervene); *New Jersey* v. *New York*, 280 U.S. at 528 (allowing state to intervene). The Court has allowed plaintiff states to join non-sovereigns in original actions involving water disputes between states. *See New Jersey* v. *New York*, 283 U.S. 336 (1931); *Missouri* v. *Illinois*, 180 U.S. at 242; *Arizona* v. *California*, 373 U.S. at 551. Moreover, the Court has explicitly recognized that there are situations where the intervention of a citizen of a party state in an equitable apportionment action may be appropriate. *See New Jersey* v. *New York*, 345 U.S. at 373.

Charlotte's entitlement to intervene thus should not turn on whether a municipality previously has been allowed to intervene in this particular type of original action. For the reasons set out above, Charlotte has presented an interest sufficiently compelling and concrete to warrant intervention for the limited purpose of protecting its

interest in defending the current inter-basin transfer regime, and its own permit in particular. *See Kentucky* v. *Indiana*, 281 U.S. at 174. Because Charlotte's right to intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint, there is a "practical limitation" on the number of similarly situated entities that would be entitled to be made parties. *New Jersey* v. *New York*, 345 U.S. at 373.

IV.

CRWSP describes itself as a joint venture of units of government of North Carolina and South Carolina. The two participants in the joint venture are Lancaster County Water and Sewer District ("Lancaster") and Union County. Lancaster is a special purpose district organized under the laws of South Carolina to furnish retail water and sewer services within Lancaster County, South Carolina. Union County is a North Carolina county that supplies water and sewer services within its borders. Union County is authorized under the North Carolina inter-basin transfer statute to transfer up to 5 million galls per day from the Catawba River Basin.

Under the joint venture, Union County and Lancaster own a water plant, site piping, and other appurtenances as tenants in common; they also own jointly all other real and personal property of CRWSP. The CRWSP plant is located in Lancaster County, South Carolina, which is where the entirety of CRWSP's intake from the Catawba River occurs, including the water that Union County is permitted to withdraw under North Carolina law. In total, CRWSP is permitted to draw 36 million gallons of water per day from the Catawba River, and 5 of these 36 millions gallons represent the Union County transfer about which South Carolina complains. Counsel for CRWSP explained CRWSP's water intake process as follows: "[T]he water comes across the state line, down the river into South Carolina to the water treatment plant. It's withdrawn and treated there in the state of South Carolina and then it is used in South Carolina, but it is also shipped to customers, to Union County's customers, back up in North Carolina." Hearing Transcript March 28, 2008 ("Transcript") at 28. This is the only process through which Union County receives water from the Catawba River.

South Carolina correctly observes that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party states as between each other and not among individual users within those states. CRWSP is not seeking to intervene as a mere user of water, however, but as an entity carrying out the "actual diversion of water" that has been challenged by the plaintiff state. *New Jersey* v. *New York*, 345 U.S. at 375. Analytically, CRWSP is in a similar position to Charlotte and to the City of New York in *New Jersey* v. *New York*. Although the size of its North-Carolina authorized transfer is smaller than Charlotte's, it still executes one of the three transfers targeted by South Carolina in the Complaint. Like Charlotte, it is the "authorized agent for the execution of the sovereign policy which threaten[s] injury to the citizens of [South Carolina]." *Id.* at 375.

CRWSP asserts that neither North or South Carolina can represent its interests fully because of its interstate nature. It contends that neither state has the exclusive legal

ability to treat it as one of its citizens and that both states treat it as an independent and competitive third-party user of the Catawba River. This argument is not compelling, standing alone, as a basis for intervention. If CRWSP were an ordinary user of water—and not an "authorized agent" of injury with a direct stake in defending its North Carolina authorized transfer—the fact that its participants are citizens of both of the competing party states likely would not provide it with a sufficiently compelling basis to intervene in an original action. If neither participant in the venture could intervene in its own right, it is hard to see a basis for allowing them to intervene together simply by joining forces. As South Carolina argues, municipalities cannot combine to form a sovereign. Rather, municipalities are creatures of state law, and any rights they enjoy "can rise no higher than those of [the party state.]" *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935).

Entirely apart from CRWSP's dual citizenship status, it, like Charlotte, has demonstrated a "compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest in not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. at 373-74. For the same reasons as with Charlotte, it is appropriate to allow CRWSP to appear separately in this action in order to defend its transfer, which is the subject of South Carolina's claim for relief. CRWSP has a compelling interest in defending its ability to execute the transfer challenged by South Carolina and may intervene for that limited purpose. *See* Transcript at 31.

V.

Duke, the third proposed intervenor, is positioned differently from Charlotte and CRWSP. It does not execute the inter-basin transfers about which South Carolina complains. Nonetheless, Duke has a unique and compelling interest in defending the terms of its current license and the CRA negotiated by numerous stakeholders in both States, and for this reason is unlike any other private user of water along the Catawba River. For fifty years, Duke has operated reservoirs along the Catawba in North and South Carolina under its FPC license. These reservoirs allow Duke to generate hydroelectric power and supply cooling water for its nuclear power and coal-fired plants in the Catawba River basin. Duke asserts—and South Carolina does not dispute—that Duke's hydroelectric plants effectively control the flow of the Catawba.

As noted above, Duke's current 50-year license expires in August 2008. In 2003, Duke began preparations to apply to FERC for a new license. In 2006, after three years of negotiations, the CRA was signed by 70 stakeholders in the Catawba River basin, including public agencies from North and South Carolina, and was submitted in support of Duke's applications for a new 50-year license. Duke has applied to FERC for a new license under the terms and conditions set forth in the CRA. FERC has not yet ruled on Duke's application.

Duke's current license requires Duke to maintain certain flow rates into South Carolina. The CRA would require Duke to establish and maintain increased flow rates during times of normal rainfall and times of drought. Duke contends that if a new license

is granted, the issues of equitable apportionment raised by this original action will have to be addressed in the context of the new minimum daily flow and other requirements.

Duke has a "direct stake in this controversy"—specifically, an interest in preserving the terms set out in the CRA. *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21. The outcome of this action will affect Duke directly because Duke has significant control over the flow of the river, and will be affected by any change in flow. In addition, as Duke notes, South Carolina is seeking the apportionment not of the natural flow of the Catawba River, but of waters available solely or primarily because they have been impounded by Duke. Because Duke controls the flow of the Catawba River, it is likely that any Court-ordered alteration of the flow would be carried out by Duke and thus would have a direct effect on its operations.

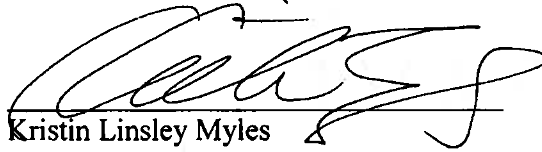
Duke further suggests that it is charged with protecting public interests recognized by federal law and protected by Duke's license under the Federal Power Act. Duke cites a host of statutory provisions that govern FERC's own duties and the requirements for licenses issued by FERC. *See, e.g.*, 16 U.S.C. § 797(e) (FERC must take into account certain considerations in issuing licenses); 16 U.S.C. § 803(a)(1) (setting forth conditions for licenses). But none of these provisions and regulations cited by Duke demonstrates that Duke itself must determine and act upon the public interest, except indirectly by complying with the terms and conditions of its license as established by FERC through its own public interest obligations under the governing statutes and regulations.

Nonetheless, Duke has shown that it does represent other important interests in its defense of the CRA and of its own license application to FERC. The negotiation of the CRA alone involved the participation and approval of multiple entities including state natural resources departments, other state agencies, public water suppliers, local governments, and interest groups, among others. Duke has shown that it has a direct interest in defending this negotiated agreement, as well as its current and future licenses, and also has shown that it could be subject to conflicting obligations if the Court apportions the river in a way that conflicts with the terms of its license. In sum, Duke has shown that it has a unique and compelling interest in the outcome of this original case, sufficient to warrant intervention for the limited purposes discussed above.

VI.

For the reasons stated above, the motions for leave to intervene filed by Charlotte, CRWSP, and Duke are GRANTED.

Dated: May 27, 2008



Kristin Linsley Myles
Special Master

Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Tel: (415) 512-4000
Fax: (415) 512-4077