IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

REPLY OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION OF MAY 27, 2008 ORDER GRANTING LIMITED INTERVENTION

In the May 27, 2008 Order ("Order"), the Special Master granted leave to intervene to (1) the City of Charlotte "for the limited purpose of protecting its interest in defending the current inter-basin transfer regime, and its own permit in particular," Order at 9-10; (2) the Catawba River Water Supply Project ("CRWSP") for the "limited purpose" of "defending its ability to execute" its "North Carolina authorized transfer," *id.* at 10-11; and (3) Duke Energy Carolinas LLC ("Duke") "for the limited purposes" of "defending the terms of its current license and the CRA" and avoiding any "conflicting obligations if the Court apportions the river in a way

that conflicts with the terms of its license," *id.* at 11-12.[1] In their responses to South Carolina's motion, none of the intervenors advances a coherent explanation of how those limited purposes will be directly advanced by their participation in Phase One of this litigation.

Indeed, the intervenors cannot dispute that the questions whether Charlotte's or CRWSP's interbasin transfers are equitable uses, or should instead be enjoined, are solely Phase Two questions. Nor do they dispute that whether a decree from this Court may conflict with the CRA or Duke's current license likewise will be presented (if at all) only in Phase Two of this litigation. By definition, the intervenors' permits or licenses cannot conceivably be affected unless the Court arrives at the equitable apportionment phase of the case, in Phase Two. Instead, in seeking to participate in Phase One, the intervenors assert only the indirect and generalized interest in disproving that South Carolina has been harmed at all. Such a tenuous interest is no basis for the intervenors' participation in Phase One; that Phase concerns only South Carolina's injury, not any adverse impact upon permits issued either by the States of North or South Carolina or by the FERC license issued by the federal government. *Cf. Diamond v. Charles*, 476 U.S. 54 (1986) (intervenor must possess requisite Article III standing). Their theory is that, if South Carolina does not make it past Phase One of the case, then (as an incidental result) their transfers or, in the case of Duke, licenses will not be affected

[1] South Carolina views the two purposes for which the Special Master permitted Duke to intervene as two sides of the same coin — Duke purports to defend its license against a conflicting decree from this Court.

by any decree (because there will be no decree). But, on that theory, their intervention is not "limited" at all. Nor is there any way in which the intervenors' interest in defeating South Carolina's showing of harm is distinct from North Carolina's. And nowhere do the intervenors establish that North Carolina cannot adequately represent their interests in trying to disprove the harms to South Carolina that will be at issue in Phase One.

The only limits on their participation that the intervenors acknowledge are the limits of their own inclinations. *See*, *e.g.*, Duke Br. 8 ("Duke seeks the right to determine for itself the extent to which its . . . interests require participation in discovery"). The Order, however, gives no indication that the Special Master intended to give the intervenors free reign over when and how they may participate. The Special Master should make clear that the limited purposes specified in the Order — to protect interests that will come into play only in Phase Two of this matter — will be enforced. If, on the other hand and notwithstanding the Order's multiple and specific references to the "limited purposes" to be protected by interventions, the Special Master intended to allow the intervenors "unfettered" participation, *see* Charlotte's Response to Brief of South Carolina Concerning Phase One and Phase Two Issues and Timing at 7 (June 23, 2008), then that decision should be reconsidered and reversed.[2]

[2] Contrary to the contentions of CRWSP (at 2-4), South Carolina's motion is not procedurally improper. South Carolina's motion is not a petition for rehearing subject to Supreme Court Rule 44 (the Supreme Court having issued no decision in this case yet), nor is it a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) (the Court having issued no judgment in this case yet). South

I. The Intervenors Fail To Explain How The Limited Purposes For Which They Were Permitted To Intervene Support Participation In Phase One

1. As the party States have agreed (and the intervenors do not dispute in their proposed revisions to the Case Management Plan), Phase One of this litigation will *not* involve consideration of whether particular water uses in North Carolina or South Carolina are equitable ones. Rather, that inquiry will take place only in Phase Two. The separation of equitable considerations from South Carolina's factual showing of harm and expert showing on causation is precisely the purpose of bifurcating these proceedings. In opposing South Carolina's motion, however, the intervenors ignore this basic premise of bifurcation.

CRWSP, for example, contends that it "has a right to defend itself" by "respon[ding] to any allegations by South Carolina that CRWSP's or Union County's North Carolina consumption is *inequitable*" or by arguing "the *equities* supporting the protection of existing economies." CRWSP Br. 5-6 (internal quotation marks omitted; emphasis added). In this regard, CRWSP points out that the Special

---

Carolina promptly made its motion as soon as the intervenors made clear they had no intention of abiding by the limits of their authorized intervention (*see* Mot. 5), and it seeks an order precluding the intervenors from participating in Phase One of this case. Notably, CRWSP itself acknowledges (at 6) that it is procedurally proper for South Carolina to seek limitations on intervenors' participation — "[i]f South Carolina believes that CRWSP's participation during any particular portion of Phase One imposes an undue burden on South Carolina, CRWSP believes that South Carolina can raise a specific objection at that time." CRWSP's procedural arguments appear to be aimed at South Carolina's alternative request that leave to intervene be reconsidered and reversed, but that request is made only in the event the Special Master decides, in what would effectively be a new order, to eliminate (by interpretation or otherwise) the clear limits on the intervenors' participation set forth in the Order.

Master queried at the Richmond hearing, "[a]ssuming two things; one, overuse and two, injury, doesn't that necessarily encompass Charlotte[] and [CRWSP] that their uses are equitable[?]" 3/28/08 Tr. 86. But those questions were posed prior to the States formally agreeing to bifurcation and agreeing in concept to what Phase One would address. Similarly, Duke attempts (at 6-7) to support its participation in Phase One by noting that, "if a particular withdrawal of water supports a long-established and beneficial use, . . . then any resulting harm may be *warranted*" — that is, equitable. These considerations raise purely Phase Two issues and cannot justify participation in Phase One.

Charlotte claims a right to dispute South Carolina's experts' showing that various uses and activities in North Carolina, including but not limited to Charlotte's, have caused the harms South Carolina has identified. Charlotte Br. 7-8. Charlotte apparently envisions filing its own expert reports on causation — addressing, among other things, whether sewage spills, "after undergoing biological degradation" and "travel[ing] the requisite distance downstream," could "cause the type and degree of harm" in South Carolina that South Carolina alleges. *Id.* But such expert reports would be based on the same record material and would cover the same array of factors as North Carolina's expert reports. North Carolina's experts can be presumed capable of handling the responsive case regarding causation on behalf of all users in North Carolina; there is no reason to let others pile on or to open up the possibility that North Carolina's and Charlotte's experts will disagree on causation, requiring the Court to resolve such "intramural"

disputes. Indeed, in the initial intervention briefing even North Carolina disputed Charlotte's contention that the State would not adequately represent the City, and Charlotte nowhere here disputes the fundamental proposition recognized by this Court that a State is able generally to represent the interests of its political subdivisions and citizens. *See New Jersey v. New York*, 345 U.S. 369, 372 (1953) (per curiam) (recognizing that a State, "when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens") (internal quotation marks omitted).

Unable to point to "concrete consideration[s]" that justify their participation in Phase One, *see id.* at 374, the intervenors offer a series of conclusory assertions that their Phase Two interests are somehow "inextricably intertwined" with participation in Phase One. Duke Br. 2. Duke contends, for example, that it cannot protect its interest in "the outcome of any equitable apportionment" "unless it participates in the litigation that determines whether there should be an equitable apportionment," *id.* at 5; Charlotte likewise argues, without analysis, that "*[s]urely* [its] interest in protecting its IBT Certificate includes an interest in debunking South Carolina's claim" of harm caused by consumption in North Carolina, Charlotte Br. 4 (emphasis added). These arguments are directly contrary to the agreement of the party States that these proceedings will be bifurcated. The two component Phases are not inextricable; the parties have agreed to separate them. The specific interests the intervenors were admitted to protect simply do not come into play until Phase Two.

Finally, Duke apparently misapprehends the nature of South Carolina's motion. South Carolina does not contend that Duke should be allowed to participate in this case only "after the outcome is determined," as Duke suggests (at 5). *See also id.* ("Once relief is awarded, it will be too late for Duke to argue that the equitable apportionment has failed to take its uses and interests and federal licenses into account in determining whether apportionment was warranted and, if so, what that apportionment should be."). Phase One will decide whether the Court should proceed with an equitable apportionment analysis, which, as CRWSP points out (at 6), rests on consideration of a host of factors. At the outset of Phase Two, the outcome will by no means be "determined," nor will it be "too late" for Duke to ensure that the Court may "take its uses and interests and federal licenses into account." Duke's unjustified fear that it will be left out of the case until the outcome is a foregone conclusion misapprehends the bifurcated nature of this proceeding and fails to support Duke's participation in Phase One.[3]

2. Charlotte is even more candid in expressing its desire to participate as a full-fledged party in Phase One — "if Charlotte succeeds in Phase I, South Carolina cannot obtain any relief affecting Charlotte's interests, and Charlotte need not justify or support the importance of its water uses relative to South Carolina's injury." Charlotte Br. 5-6; *see also id.* at 5 ("Charlotte's defense against the relief

[3] Duke suggests (at 7-8) that South Carolina's discovery requests reveal that "Duke's activities are the focus of this litigation" and thus justify Duke's participation in Phase One. South Carolina's discovery requests, however, focus on the CHEOPS model prepared by Duke primarily because that is the model upon which North Carolina has relied in approving IBTs from the Catawba River, not because of "Duke's activities."

sought vis-a-vis Charlotte includes an effort to show that South Carolina is entitled to no relief"). As a practical matter, Charlotte is correct — if South Carolina's case fails at Phase One, Charlotte's existing uses will not be disturbed. But, under Charlotte's theory, its participation on that basis is not limited in *any respect*, contrary to the express terms of the Order. Nor can Charlotte show that it would offer any defense not necessarily subsumed by North Carolina's defense.

Duke and CRWSP similarly fail to acknowledge *any* functional limitation on their participation. Indeed, Duke remarkably "seeks the right to determine for itself" the extent of its participation. Duke Br. 8. Although CRWSP suggests that the Special Master might limit its participation at some point in the future if South Carolina can show an "undue burden," for the time being, CRWSP claims without qualification "a strong interest in participating in the discovery process of Phase One." CRWSP Br. 6. But the Special Master's grant of intervention for "limited purposes" must mean *something* more than that the intervenors can participate as they see fit. As South Carolina's opening brief makes clear, and the intervenors' opposition briefs lay bare, the intervenors' interests in this litigation (to the extent they support intervention at all) arise only in Phase Two, when the Court will weigh the equities of particular water uses and consider what type of decree (if any) is appropriate. Until that point, the intervenors' interests in maintaining their current uses or operations are adequately represented by North Carolina and thus cannot support their participation in Phase One.

For these reasons, and those set forth in South Carolina's opening brief, the Special Master should issue an order clarifying that the limited purposes for which Charlotte, CRWSP, and Duke were permitted to intervene do not justify their participation in Phase One of this case (except in responding or objecting to discovery requested of them).

II. In The Alternative, The Decision To Permit Intervention Should Be Reconsidered And Reversed

In the event the Special Master concludes that the intervenors' participation is effectively unlimited (as the intervenors propose) and that the uses of the phrase "limited purposes" in the Order did not, in fact, impose meaningful limits on their participation, South Carolina respectfully submits that the Order granting intervention should be reconsidered and reversed. South Carolina has set out the bases for this argument in its opening brief and does not repeat them here. A few points in response to the intervenors' opposition briefs, however, warrant emphasis.

First, it is important to recognize that the intervenors effectively seek to turn a dispute between two States pursuant to the Court's original jurisdiction into collateral proceedings whose primary emphasis is that of review of administrative licenses and permits issued by the FERC and the two States' permitting authorities. The Supreme Court's original jurisdiction is not the appropriate forum for such collateral proceedings.

Second, Charlotte and CRWSP fail to explain how their interests are not adequately represented by North Carolina. CRWSP, for its part, refers back (at 8-9) to the argument that its use of water in both North Carolina and South Carolina

"places CRWSP at odds with both states." But the Special Master has already rejected this argument, noting that "the fact that its participants are citizens of both of the competing party states" does not provide CRWSP "with a sufficiently compelling basis to intervene." Order at 11.

Charlotte avoids the issue by merely summarizing the Order in this regard. Charlotte Br. 11. But the Order did not require a would-be intervenor to meet the requirement of showing an interest that "is not properly represented by the state," *New Jersey*, 345 U.S. at 373, in any case in which that would-be intervenor can show that its conduct is "the subject of [the plaintiff's] claim for relief." Order at 11. As South Carolina emphasized in its opening brief, the Order finds "no indication that the Court intended [to require] . . . that the state must be incapable of representing the proposed intervenor's interests, such as because their interests are in conflict." *Id.* at 8-9. But having relieved intervenors of an obligation even they plainly understood to be their burden, *see*, *e.g.*, Charlotte Mot. To Intervene at 17-20 (Feb. 13, 2008) (attempting to point out "two material differences between Charlotte's interest and North Carolina's"), the Order does not provide a constraint in its place. None of the intervenors attempts to fill this gap in the Order's reasoning.

The Order thus amounts to a rule that a particularly large water user supporting a defendant State will routinely be allowed to intervene in an equitable apportionment action. A large user's water use will always be threatened by an apportionment action, given that the user's rights "'can rise no higher than those of

[the party state].'" Order at 11 (quoting *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935)) (alteration in Order). That position, however, creates an asymmetry, because an intervenor on the side of the plaintiff State will not be permitted to intervene. *New Jersey v. New York*, *supra*. The Order does not provide any doctrinal, logical, or practical basis for such a rule. Indeed, aggrieved water users in the downstream State are likely to be just as individually and particularly harmed by deprivations of water as any upstream water user might be by an adverse decree. Rather, the basis for the distinction in *New Jersey v. New York* between the City of New York (the upstream defendant) and the City of Philadelphia (the downstream would-be intervenor) was procedural in nature — New York City had been "forcibly" haled into court by the plaintiff, whereas Philadelphia sought leave to intervene as a matter of discretion. 345 U.S. at 374-75. In a related context, the Court has emphasized that the plaintiff is the "master of the complaint" and that the plaintiff's choices about which defendants it wants to sue (or not sue) are entitled to respect. *See*, *e.g.*, *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91, 93 (2005).

That distinction accounts for the Court's historical practice of allowing (without analysis) non-state parties to remain as defendants in original actions, while having never allowed *intervention* on the "agent of injury" theory adopted in the Order.[4] Notably, CRWSP erroneously argues that South Carolina "fails to

[4] As explained in South Carolina's opening brief (at 12 n.3), *Kentucky v. Indiana*, 281 U.S. 163 (1930), is not to the contrary, as the Court in that case

account for the many precedents in which the Court allowed non-state entities to intervene in original actions when they were 'accused of being the agent of injury or executing the policy to which the complaining state objections.'" CRWSP Br. 11 (quoting Order at 4). But, other than this case, there are no such cases. Indeed, as the Order acknowledges, the cases it cited on this score "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." Order at 4-5. Respectfully, South Carolina submits that the rule of intervention developed by the Special Master in the Order is contrary to the Supreme Court's precedents and should be reversed. In particular, Charlotte and CRWSP have made an insufficient showing that their interests are not adequately represented by North Carolina.

Third, Duke continues to disclaim (at 9 n.4) that its participation in this matter is motivated by its desire to protect its interests as a water consumer, rather than its interests in avoiding conflicting obligations with those set forth in the CRA and its license. South Carolina's opening brief, however, made clear that South Carolina's goal is not to challenge Duke's license or the CRA (which Duke cannot deny expressly disclaims coverage of water rights). Rather, South Carolina seeks to reduce North Carolina's consumption of water. If Duke viewed this dispute purely in terms of protecting its license obligations, the availability of additional water in the system would make it easier, not harder, for Duke to manage the flow of the

---

dismissed the individual defendants only after concluding that the injunction Kentucky sought against them was not needed.

Catawba River and to meet any obligations it has in its licenses or in the CRA. Duke's positions in this case, however, strongly suggest that Duke is interested in this case in its role as a consumer of water, not in its role as a FERC licensee.

In particular, Duke suggests (at 9) that it does not know whether "South Carolina is claiming that it will suffer substantial harm . . . if the CRA is approved by FERC," but that "[t]he logical inference . . . is that South Carolina believes that it will suffer substantial harm even under an approved CRA," which "places South Carolina directly in opposition to legitimate interests of Duke identified by the Special Master." Again, Duke either misunderstands the nature of South Carolina's complaint or is participating here only to protect its water consumption interests. Duke is not responsible for administering or authorizing any of the interbasin transfers that North Carolina's interbasin transfer statue permits, nor does it authorize other water uses or activities involving the Catawba River Basin in North Carolina. Duke itself has explained that, "'[w]hile Duke Energy manages the lakes, it is the State of North Carolina or the State of South Carolina that makes the decisions on whether to grant [interbasin transfer] certifications.'" SC Reply Br. in Support of Its Motion for Leave To File Complaint at 4 (Aug. 22, 2007) (quoting Letter from Ernest M. Oakley, Duke Energy, to Magalie R. Salas, FERC, Attach. at 2 (Jan. 22, 2007)) (alterations added in brief). South Carolina thus may suffer harm as a result of consumption in North Carolina (including Duke's) pursuant to (or in violation of) North Carolina law regardless of Duke's operations or the CRA. (In addition, under the Federal Power Act, exclusive jurisdiction to review an order

of the FERC in the first instance lies with the courts of appeals, *see* 16 U.S.C. § 825*l*(b), not the Supreme Court.) Thus Duke's "defense" of the CRA (and its current license) is entirely collateral to these proceedings, where no collateral attack is available. As South Carolina has explained, Duke could protect its interests in avoiding inconsistent obligations between its FERC license and a decree in this case by means short of full party status. *See* SC Opp. to Duke Mot. To Intervene at 13-14 (Dec. 11, 2007). The Order does not explain why that more limited role is insufficient to protect Duke's stated interests in participating in the lawsuit.

CONCLUSION

For the foregoing reasons, the Special Master should issue an order clarifying that Duke, Charlotte, and CRWSP may participate as intervenor parties only in Phase Two of this litigation. In the alternative, the decision to permit intervention should be reconsidered, and Duke, Charlotte, and CRWSP should be denied permission to intervene.

Respectfully submitted,

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
W. DAVID SARRATT
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

July 15, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On July 15, 2008, I caused copies of the Reply of South Carolina in Support of Its Motion for Clarification or, in the Alternative, for Reconsideration of May 27, 2008 Order Granting Limited Intervention to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.

David C. Frederick
Special Counsel to the
State of South Carolina

SERVICE LIST

Christopher G. Browning, Jr.
(cbrowning@ncdoj.gov)
James C. Gulick
(jgulick@ncdoj.gov)
Marc D. Bernstein
(mbernstein@ncdoj.gov)
J. Allen Jernigan
(ajern@ncdoj.gov)
Jennie W. Hauser
(jhauser@ncdoj.gov)
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
(919) 716-6900

Counsel for the State of North Carolina

Thomas C. Goldstein
(tgoldstein@akingump.com)
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 887-4000

Jim Sheedy
(jimsheedy@driscollsheedy.com)
Susan Driscoll
(sdriscoll@driscollsheedy.com)
Driscoll Sheedy, P.A.
11520 North Community House Road
Building 2, Suite 200
Charlotte, North Carolina 28277
(704) 341-2101

Counsel for the Catawba River Water Supply Project

James T. Banks
(jtbanks@hhlaw.com)
H. Christopher Bartolomucci
(hcbartolomucci@hhlaw.com)
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

DeWitt F. McCarley
(dmccarley@ci.charlotte.nc.us)
City Attorney
Office of the City Attorney
600 East Fourth Street
Charlotte, North Carolina 28202
(704) 336-2254

H. Michael Boyd
(hmboyd@ci.charlotte.nc.us)
Senior Assistant City Attorney
Charlotte-Mecklenburg Utilities
5100 Brookshire Boulevard
Charlotte, North Carolina 28216
(704) 391-5110

Counsel for City of Charlotte, North Carolina

Carter G. Phillips
(cphillips@sidley.com)
Virginia A. Seitz
(vseitz@sidley.com)
Ileana M. Ciobanu
(iciobanu@sidley.com)
Sidley & Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8270

Garry S. Rice
(gsrice@duke-energy.com)
Associate General Counsel
Duke Energy Corp.
Legal Affairs – EC03T
P.O. Box 1006
Charlotte, North Carolina 28201-1006
(704) 382-8111

Counsel for Duke Energy Carolinas, LLC