

SUPREME COURT OF THE UNITED STATES

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

No. 138, Original

STATE OF NORTH CAROLINA,

Defendant.

CERTIFIED  
COpy

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TELEPHONIC CONFERENCE  
BEFORE THE SPECIAL MASTER  
HONORABLE KRISTIN L. MYLES  
Wednesday, January 27, 2010

Reported by:  
DANA M. FREED  
CSR No. 10602  
JOB No. 129761

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Telephonic Conference before the  
Special ~~Master~~ Honorable Kristin L. Myles, beginning  
at 10:03 a.m. and ending at 11:47 p.m. on Wednesday,  
January 27, 2010, before DANA M. FREED, Certified  
Shorthand Reporter No. 10602.

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1 Wednesday, January 27, 2010

2 10:03 a.m. - 12:35 p.m.

3  
4 SPECIAL MASTER MYLES: Well, why don't we get  
5 started? I'm happy to hear any issues that were  
6 addressed in the letters. Obviously, there seems  
7 to be an issue about the source code for that  
8 South Carolina wants to talk about or is raised. My  
9 number one issue is just getting the case management  
10 process going again. We had put things on hold. And  
11 I want to get a schedule in place, if we can, which we  
12 had started before but not ever completed.

13 Mr. Frederick indicated in his letter that  
14 perhaps that ought to wait until the source code issue  
15 is resolved. I don't think we need to do that. It  
16 sounds like the source code issue will get resolved.  
17 So I don't think that should preclude us from setting  
18 dates for discovery and expert work and trial, to get  
19 those dates in place. And also, obviously, the issue  
20 of bifurcation is something that needs to be resolved.

21 Do you want to start with those two issues  
22 and then we can move to other agenda items?

23 MR. BROWNING: This is Chris Browning.

24 From North Carolina's perspective, we'll be  
25 glad to. And if you would like for me to, I can

1 go ahead and respond to the issue that Mr. Frederick  
2 has laid out with regard to bifurcation.

3 SPECIAL MASTER MYLES: Sure.

4 MR. BROWNING: I guess from North Carolina's  
5 perspective, we were somewhat floored that  
6 South Carolina has raised the issue of whether the  
7 case should be bifurcated now, and consider the timing  
8 somewhat suspect, given the position that they've  
9 taken with regard to intervention and a limited role  
10 that the intervenor should play in having it limited  
11 to Phase 2. And now we're suddenly saying, this all  
12 needs to be lumped and bifurcation is not appropriate.

13 I am very taken aback that we engaged for  
14 months in negotiating a case management order with  
15 South Carolina. If you will recall, from the issues  
16 the party submitted back in February, yes, there were  
17 some differences with respect to the burden of proof  
18 and various other issues.

19 But when you stand the two documents side by  
20 side with regards to North Carolina's statement of the  
21 issues for Phase 1 and Phase 2 and South Carolina's,  
22 they are remarkably similar in some way.

23 So I just don't understand how we can be this  
24 far in the litigation and South Carolina is now  
25 backtracking saying that bifurcation is not something

1 that they think is beneficial.

2           There has been absolutely no change.  
3 North Carolina has proceeded during this time period  
4 while we knew things would be on hold with regard to  
5 intervention, producing hundreds of thousands of  
6 documents, reviewing millions of documents in reliance  
7 upon that case management order. I think our numbers,  
8 the documents we have produced have been in excess of  
9 800,000 documents. In return -- 800,000 pages of  
10 material.

11           In return, we've received about 84,000 pages  
12 of material from South Carolina, had a nine-month  
13 period where they weren't producing documents. And  
14 now to suddenly be told that they want to rethink the  
15 issue of bifurcation, North Carolina does not believe  
16 is appropriate at all. It is way too late for that in  
17 this process, would totally change the case management  
18 order, the time for discovery.

19           And Mr. Frederick, his only justification is  
20 the subpoenas that we have sent out for third parties.  
21 But the case management order itself has a provision  
22 that if a party views it as being efficient to ask  
23 about issues in Phase 2, simultaneously with Phase 1  
24 discovery, it's appropriate to do so. I believe  
25 that's paragraph 4.1 of the case management order.



1           And we think that is particularly appropriate  
2 when we're subpoenaing third parties to go ahead and  
3 get their documents now, have the third-party receive  
4 a subpoena once as opposed to multiple occasions. And  
5 also, give us the benefit of reserving the documents  
6 now rather than potentially waiting for a substantial  
7 period later to ask the same request for -- the  
8 request for Phase 2 when those documents might be gone  
9 at that point.

10           So from North Carolina's perspective, we are  
11 utterly baffled by Mr. Frederick's letter.

12           MR. FREDERICK: Special Master Myles, I hope  
13 we can carry on in a professional way. I really don't  
14 appreciate the personal invective that Mr. Browning  
15 wants to inject into this proceeding. And let me just  
16 point out for the record that in the transcript,  
17 I think, of our February 2009 call, after we had had  
18 several months of very intensive conversations among  
19 the lawyers for the States and the intervenors, it was  
20 clear to us that everybody had a fairly different  
21 perspective on how best to get to the end of this  
22 process.

23           And in that February I think it was  
24 February '09, but we can look at the transcript  
25 because it's there -- you know, I raised the issue

1 about doubts whether a bifurcation actually was going  
2 to work. And I think, Special Master, you raised a  
3 number of questions that, you know, further raised  
4 doubts in our minds about whether we could do that,  
5 because the States had different perspectives on what  
6 issue should be resolved in Phase 1 versus Phase 2.

7 And--

8 SPECIAL MASTER MYLES: I will interrupt just  
9 to say I don't view Mr. Browning's comments as being  
10 of any kind of personal invective. I think he's just  
11 stating North Carolina's position, so.... I  
12 personally did not -- did not take that as a personal  
13 attack. But go ahead with what you were saying.  
14 I appreciate your thoughts.

15 MR. FREDERICK: Well, with respect  
16 to -- you know, our aim is to try to have this matter  
17 resolved as expeditiously and efficiently as possible.  
18 And we continue to think that, you know, an aggressive  
19 proceeding that might even be coupled with, you know,  
20 mediation on your part, Special Master Myles, might  
21 lead to the end gain of coming as quickly as possible.

22 Let me just address the issue about the  
23 document, because I think that the North Carolina  
24 position doesn't accurately state what we believe has  
25 happened.

1           While it is true that the number of images  
2 through Bates numbering is relatively low, as  
3 reflected in the letter, it's some 84,000 or so, what  
4 Mr. Browning does not mention is that we have provided  
5 56 compact disks with more than 3,000 files and 10  
6 gigabytes of 12,500 native files. We haven't gone  
7 back to do, you know, a precise page count of that  
8 material. We were asked to produce material in native  
9 files. We've endeavored to do so that that would  
10 facilitate the searchability of documents.

11           And what that means, just in practical terms,  
12 is that there might be a Bates number with one number  
13 but have 1,000 or 1500 pages of data or material on  
14 it.

15           So I think that it's important for the record  
16 to show that we've endeavored to produce the  
17 information in this native format, even when we  
18 haven't always gotten it back from the other side in  
19 that format. And that the numbering, I don't think,  
20 accurately conveys the scope of the production.

21           I would further point out that in response to  
22 South Carolina's subpoenas, we've been producing  
23 we've produced the information we've gotten from  
24 third-party subpoena recipients.

25           The letter that North Carolina sent to you

1 yesterday was the first that we had heard that in fact  
2 a number of third-party subpoena recipients had  
3 produced documents to North Carolina, because  
4 North Carolina has not sent us any of the documents  
5 that it's received.

6 So we are in full accord that there has been  
7 a lot of progress made during this interregnum while  
8 the Supreme Court was deciding the intervention issue.  
9 And I would just add to what we said in the letter,  
10 we've gotten productions from Duke and from Catawba.  
11 Charlotte as well.

12 But our central point is that it would be  
13 more efficient, ultimately, if we didn't spend a lot  
14 of time fighting and litigating over what would be in  
15 Phase 1 and we just got the case presented to you.

16 Or, once we have the data, we figured out  
17 what are the real points of fulcrum that actually  
18 might be resolved consensually with the aid of your  
19 office.

20 MR. BROWNING: Special Master Myles, this is  
21 Chris Browning.

22 If I could correct two things for the record  
23 that I think bear a response.

24 SPECIAL MASTER MYLES: Go ahead.

25 MR. BROWNING: First, Mr. Frederick has

1 decided to start speaking about third-party --  
2 subpoenas to third parties and then North Carolina not  
3 giving copies of those documents to South Carolina.

4           What Fred -- Mr. Frederick has failed to  
5 point out is on October 3rd of 2008, South Carolina  
6 served a subpoena on Concord, separate subpoena on  
7 Kannapolis, a separate subpoena on Statesville, a  
8 separate subpoena on Great Wolf Resorts, Inc. And on  
9 October 20, 2008, served a subpoena on the town of  
10 Morrisville.

11           At that time, South Carolina did not produce  
12 copies of those documents to North Carolina. We  
13 obtained copies of what those third parties produced  
14 directly from those third-party recipient of the  
15 subpoena.

16           We had been operating under the practice,  
17 under the theory that that's what would take place, as  
18 long as the party had notice of the subpoena, they  
19 would be making arrangements with the person being  
20 served. That's the way we operated based upon  
21 South Carolina's practice going back from  
22 October 2008.

23           And then it was only on Monday that  
24 South Carolina decided to send us -- Monday of this  
25 week -- they sent us copies of some of their more

1 recent subpoena documents, thereby changing their  
2 historical practice. This, of course, is something  
3 that we can work out with South Carolina off the  
4 record and figure out a way to logistically make sure  
5 that everybody has copies.

6 But for Mr. Frederick to be saying that this  
7 is -- to leave the impression that North Carolina was  
8 somehow trying to hide the ball, if that was his  
9 intention, we were just operating on South Carolina's  
10 historical practice.

11 MR. FREDERICK: That's actually -- that's  
12 actually not accurate. In January of '09, Mr. Sheedy  
13 actually reported to you, Special Master Myles, that  
14 we were producing to the intervenors documents that  
15 we'd received by third-party subpoena. There had been  
16 discussion about this.

17 Again, I wasn't trying to cast aspersions on  
18 North Carolina; I was simply saying that to date we  
19 hadn't received those documents.

20 I accept Mr. Browning's commitment to ensure  
21 that we would get those documents. I think that's an  
22 efficient part of the process. But I don't agree --  
23 I think there may have just been a gap in how this  
24 thing unfolded, because there was a disagreement as to  
25 how we were going to treat documents received.

1           The intervenors had requested that we provide  
2 them. There was discussion about that, and we began  
3 producing those documents pursuant to third-party  
4 subpoena and we supplied them to North Carolina as  
5 well, I believe.

6           And if I'm wrong, I'm sure Mr. Browning will  
7 call me tomorrow after he's checked that and we'll  
8 work this out amicably.

9           I mean, our aim here isn't to litigate and  
10 disagree over every last little dispute, but it's to  
11 try to find a way to work productively in getting the  
12 information that both sides need to construct their  
13 case and to do it in a way that's fair to everybody.

14           SPECIAL MASTER MYLES: Well, I do think that  
15 if materials are produced pursuant to third-party  
16 subpoenas, there should be an agreement in place for  
17 an order that governs that. I thought we had  
18 discussed that on a prior call.

19           Looking through the case management order  
20 that we have in place now, I'm not seeing it as a  
21 provision in here, that -- is it in here? Does anyone  
22 know that documents be provided to the other side?  
23 Nor do I think it's in Order No.7, which governed the  
24 status of third-party subpoenas pending the ruling on  
25 intervention.

1           MR. FREDERICK: Well, Special Master Myles.  
2 This is David Frederick again.

3           I don't recall the orders. I haven't gone  
4 back to reread them in preparation for this session.  
5 But I can say that we reported to you in -- on  
6 December 3rd of 2008, that we would be providing those  
7 documents to the intervenors and to the state that we  
8 had received. And that's what we've endeavored to do.  
9 And we'll continue to endeavor to do that.

10           SPECIAL MASTER MYLES: I think a provision  
11 maybe we should make a provision for that in any  
12 supplemental case management order that we implement.  
13 Just something specific about the provision of  
14 third-party documents to the parties. I don't see any  
15 reason why that ought not to be done. And again, if  
16 you want to agree on a procedure for that, I think  
17 that would be beneficial.

18           MR. FREDERICK: Well, we -- again, this is  
19 David Frederick.

20           The draft case management plan, that I guess  
21 has finalized, does contain a provision for receipt of  
22 all discovery. That's in the first provision, the  
23 first paragraph.

24           SPECIAL MASTER MYLES: The first paragraph of  
25 the current case management plan?



1 MR. FREDERICK: That's how we've interpreted  
2 it, that we would provide all discovery that we got,  
3 you know, and that we thought that was going to happen  
4 for our benefit as well. If it needs to be clarified,  
5 we're happy to work out with the other parties.

6 SPECIAL MASTER MYLES: Which paragraph?

7 MR. FREDERICK: The first one.

8 SPECIAL MASTER MYLES: Paragraph 1 called  
9 "Case Management Orders and Application of Case  
10 Management Plan"?

11 MR. FREDERICK: Right. It says, "Intervenors  
12 shall also receive all discovery, served on parties  
13 and third parties, any documents produced in response  
14 to discovery request unless and until the Supreme  
15 Court issues a rule overturning that status.

16 SPECIAL MASTER MYLES: Oh, yeah, uh-huh.

17 MR. FREDERICK: We've interpreted that to  
18 mean whenever we get something, we've got an  
19 obligation to give it to North Carolina, in addition  
20 to the intervenors.

21 SPECIAL MASTER MYLES: Yes. Okay. Good.  
22 That does cover it. Page 1.

23 MR. FREDERICK: If it needs to be clarified  
24 further, we're happy to agree to that.

25 SPECIAL MASTER MYLES: Has South Carolina yet

1 provided the documents produced in response to the  
2 subpoenas to Concord, Kannapolis, et cetera, that  
3 Mr. Browning was reciting?

4 MR. FREDERICK: I believe we have we have  
5 produced what we've received, we have sent to the  
6 intervenors as well as to North Carolina. Obviously,  
7 it's a rolling production and I can't speak to whether  
8 or not there are some documents being processed right  
9 now. But we've endeavored to continue to do that.

10 SPECIAL MASTER MYLES: Maybe what makes sense  
11 is to go back -- for everyone to go back and make sure  
12 that they've produced all documents received from  
13 third parties to the parties, the other parties.

14 MR. FREDERICK: Special Master Myles, the  
15 point that -- and I anticipate that North Carolina  
16 will produce to us promptly the third-party subpoena  
17 information that they've gotten. We did respond  
18 within two weeks of getting third-party subpoenaed  
19 documents to send them to the parties here.

20 And our statement in our submission to you  
21 was we hadn't received anything from North Carolina.  
22 We trust that that will be forthcoming promptly.

23 SPECIAL MASTER MYLES: Is that right,  
24 Mr. Browning?

25 MR. BROWNING: Yes, Special Master Myles. If

1 that's the way we're going to in light of your  
2 interpretation of Paragraph 1 of the case management  
3 order, we have absolutely no problem providing copies  
4 of what we receive from third parties to  
5 South Carolina.

6 We were operating under the impression that  
7 South Carolina was reading it differently in light of  
8 those original subpoenas to Concord, Kannapolis, and  
9 Statesville where we actually had to go out to those  
10 parties ourselves, get copies of the documents.

11 If Mr. Frederick could check, and if he has  
12 reason to believe that those were produced to us and  
13 Bates numbered separately as required by, I think,  
14 paragraph 11 in the case management order, that would  
15 help clarify this.

16 But as long as, as long as we're operating  
17 under the theory that what is sauce for the goose is  
18 sauce for the gander, we're perfectly fine. We just  
19 had no heads up that South Carolina was reading this  
20 differently until their letter that was sent out on  
21 Monday of this week.

22 And if there was a misunderstanding there,  
23 and a lack of time to communicate and coordinate for  
24 that, I apologize. But I really look at this as a  
25 nonissue. I just wanted to make sure that the record

1 was clear that North Carolina should not be perceived  
2 as dragging its feet at all in this regard.

3 We have been trying to do what we thought was  
4 appropriate under the case management order and  
5 consistent with South Carolina's past practice. If  
6 there is some misunderstanding there, I certainly  
7 apologize on our part.

8 SPECIAL MASTER MYLES: I want to say this.  
9 I think that the -- I think that Paragraph 1 of the  
10 case management order, as it exists now, is not clear  
11 on this point. And I appreciate that Mr. Frederick is  
12 reading it in favor of production. And generally, I  
13 think that's the better practice anyway.

14 So I think what maybe ought to happen, as  
15 long as everyone's in agreement that everyone who's a  
16 party should get third-party documents as they come  
17 in, you know, within, you know, reasonably promptly  
18 after they come in so everybody has the same set of  
19 materials, if everyone's onboard with that concept,  
20 why don't we just memorialize that in a more  
21 definitive provision of a supplemental case management  
22 order?

23 Because I don't read paragraph 1 as being  
24 very clear on the point at all. I think it's an  
25 inference that's probably reasonable, but I don't

1 think it -- I don't think it's explicit.

2 MR. FREDERICK: Special Master Myles, we have  
3 no objection to that at all. I do want to point out  
4 one thing, just so that there is no lack of clarity on  
5 this later. When we have gotten the third-party  
6 documents, we intended to copy them and send them to  
7 the parties as they have been produced to us. And in  
8 some instances, this third-party subpoena recipients  
9 have Bates numbered them and in other instances they  
10 have not.

11 I think it probably is appropriate to develop  
12 offline some protocol with the parties so that it's  
13 clear the source of the documents. This is not  
14 typically my area of practice or expertise, and so I  
15 will defer to others who are better at this than I am.  
16 But I think that that's something that we can work out  
17 with -- with North Carolina, Duke and Catawba going  
18 forward.

19 SPECIAL MASTER MYLES: I agree. I think that  
20 it's not wise to rely on the third parties to  
21 accomplish that. I think what makes sense for  
22 purposes of -- for purposes of organizing and  
23 cataloging third-party -- and party documents, for  
24 that matter, is to come up with a system of numbering  
25 and just use that consistently.

1           Even if the third-party has a different  
2 system, you can overlay your own numbers on it and  
3 I don't know if you all have discussed the idea of an  
4 electronic database for archiving. I think we did  
5 discuss that early on. But that would feed into some  
6 sort of system of organizing the documents so that  
7 they can be accessed. Have you talked about that?

8           MR. FREDERICK: I don't recall, Special  
9 Master Myles, to be honest. I know we've had a number  
10 of conversations with North Carolina. But they have  
11 been farther in the past than I can recall a specific.

12           SPECIAL MASTER MYLES: Well, I just think you  
13 should select a numbering system that will lend itself  
14 to some sort of electronic organization, if that's  
15 ever needed down the road. I don't think that has to  
16 be done immediately, but most -- if the case were to  
17 go to trial, I think you'd want to have a system that  
18 allows electronic access to documents. And the best  
19 way of doing that is to start with a system that  
20 identifies the source and the number. Especially with  
21 this many subpoenas.

22           MR. BROWNING: And actually, paragraph 6 of  
23 the case management order on page 11 deals with the  
24 Bates numbering of documents. And I think it's  
25 probably a good thing for the parties to talk further

1 at this stage, make sure that that's implemented  
2 appropriately and everybody understands

3 SPECIAL MASTER MYLES: Yes.

4 MR. BROWNING: how it should be with  
5 regard to third parties.

6 SPECIAL MASTER MYLES: I agree. Because  
7 paragraph 6 doesn't really deal with the issue of  
8 third-party subpoenas very specifically, does it? It  
9 may be just good to develop a list of what subpoenas  
10 have been issued and develop a code, so that you have  
11 a code for each of the parties that are producing  
12 documents, each of the subpoenaed third parties.

13 MR. BROWNING: You have our assurances we'll  
14 work further with South Carolina on resolving this.

15 SPECIAL MASTER MYLES: Okay. That's good.

16 So let's get back to the issue of  
17 bifurcation, because obviously that's a much bigger  
18 issue. And to some extent, I think both -- both  
19 Mr. Browning and Mr. Frederick have good points on  
20 this. And one of them is that we have been proceeding  
21 on an assumption of bifurcation somewhat from the  
22 beginning. And that was built into the case  
23 management plan as it related to discovery.

24 On the other hand, we put in a big old caveat  
25 in there, because it was understood that there'd be a

1 problem with not wanting to have duplication and to  
2 have a system where one could take discovery on both  
3 phases.

4           And in addition, as Mr. Frederick pointed  
5 out, I think I have been skeptical from the get-go of  
6 the idea of bifurcation, just because it's difficult  
7 to imagine a clean division of issues that won't  
8 involve substantial overlap. To me, that becomes even  
9 more apparent when one thinks about at trial. I have  
10 a hard time imagining a bifurcated trial that could  
11 work as distinguished from bifurcated phases of  
12 discovery.

13           So I want to open up the issue for further  
14 discussion and resolution, if we can. Because I don't  
15 want to proceed further in a way that's prejudicial to  
16 anybody. I don't want to proceed in a way that  
17 changes the rules midway through, but on the other  
18 hand, I don't want to feel like we're stuck in  
19 bifurcation mode if that ultimately isn't the most  
20 efficient way to try the case.

21           And we do have discovery. I mean, we haven't  
22 had -- we haven't had any deposition discovery. We're  
23 in the midst of document discovery. And we're going  
24 to have to look forward to the next phase, which will  
25 involve depositions. It's much more prejudicial, I



1 think, to have to go back and redo depositions than it  
2 is to have to supplement a document production that  
3 was done with one scenario in mind.

4 MR. FREDERICK: Special Master Myles, I have  
5 a proposal to just offer with respect to that. If  
6 North Carolina can come forward with some  
7 demonstration of how it's prejudiced by doing away  
8 with bifurcation, and we can meet on and confer on  
9 that offline. We would certainly be prepared to  
10 accommodate a reasonable adaptation to the schedule to  
11 meet any prejudice that North Carolina can show that  
12 it is suffered through that, the way we've proceeded  
13 so far.

14 Our perception is that there has not been any  
15 prejudice. We haven't taken any depositions. The  
16 document that we've produced have been, you know, full  
17 purpose documents for both phases. We've read their  
18 subpoenas to be asking for both.

19 And so if there is something that is  
20 demonstrable, we're prepared to try to accommodate  
21 that. But we think that that will ultimately be more  
22 efficient than trying to call witnesses for two  
23 different trials, try to figure out what the issues  
24 are for one trial versus a second and the like.

25 SPECIAL MASTER MYLES: Let me speak to that

1 and then I want to hear from Mr. Browning again. But  
2 I do -- I'm happy to have that procedure to identify  
3 potential prejudice. I think what would be more  
4 helpful is for each party and for the intervenors as  
5 well, to consider what the best outcome is in terms of  
6 conducting the trial and then work back from that.

7 Because -- and I also think I need to decide  
8 that if it's disputed, I'm going to decide that based  
9 on what I think is going to be the best procedure.  
10 It's going to be less driven by the parties' views.  
11 It will be driven mostly by what I think is the best  
12 result from the standpoint of efficiency and use of  
13 judicial resources and moving the case along.

14 So I'd like to hear from the parties on that,  
15 if there's a dispute. If everyone agrees on a result,  
16 again, that doesn't necessarily mean that that's going  
17 to be the result. So I'd like to hear what parties  
18 think about it. And in the context of that, prejudice  
19 is certainly one factor. But I don't think it is the  
20 deciding factor.

21 I think the deciding factor is what's going  
22 to work best, given this, the issues that are  
23 presented. And in particular, whether there's a  
24 substantial overlap in issues that would otherwise be  
25 called for if we were to bifurcate.

1 MR. BROWNING: Special Master Myles, this is  
2 Chris Browning.

3 I agree that the issue is not and should not  
4 be an analysis of prejudice. The issue should be what  
5 is the most efficient way to make this case proceed  
6 forward.

7 At the outset, the parties sat down,  
8 considered it, determined that it made sense to have  
9 South Carolina come forward and show -- meet its  
10 initial burden of establishing harm as a result of  
11 conduct by North Carolina.

12 That is a logical distinction and a logical  
13 separation from the issue of what an appropriate  
14 remedy is and whether North Carolina can show that  
15 under a balancing of the equities, the water used in  
16 North Carolina is a better use and outweighs under the  
17 equities how that South Carolina is proposing to use  
18 that water.

19 So the real issue is we need to know from  
20 South Carolina what their case is about, what it is  
21 they're really complaining about, so that we can go  
22 forward. That's been our position throughout this.

23 And quite frankly, I'm very concerned about  
24 North Carolina having gone through the discovery  
25 process, having served our discovery request on

1 South Carolina and Mr. Frederick disputes our count of  
2 his 84,000 documents, but the fact of the matter is  
3 for the last nine months while this case has been  
4 focused on intervention, South Carolina has not  
5 produced any additional documents while North Carolina  
6 has been going forward with our production and has  
7 diligently worked off the initial document request we  
8 received.

9 Suddenly, I'm being told a day before this  
10 conference call with the Special Master that  
11 South Carolina is rethinking that, they want to go  
12 back to ground zero, serve presumably new discovery  
13 requests that will go to all equitable allocation  
14 factors, have North Carolina restart its document  
15 production, restart serving its discovery, restart  
16 this whole case.

17 I have to assume that the reason that we're  
18 even in this discussion is South Carolina has  
19 recognized that they're behind the eight ball on doing  
20 what they should do with regard to their document  
21 production and want to change the ground rules here.  
22 Maybe I'm back to arguing prejudice under these  
23 circumstances.

24 Again, I don't think it's a test, I think the  
25 test should be what's efficient. And I'm not sure

1 that Mr. Frederick has said anything that has changed  
2 our -- the initial discussions between the parties,  
3 multiple calls we've had with you, that we really need  
4 South Carolina to come forward and show a specific  
5 harm as a result of specific conduct and excess water  
6 uses by North Carolina.

7 Now we're being told, well, that's all going  
8 to be lumped in with their -- the trial of the entire  
9 case and equitable apportionment. There's got to be  
10 some mechanism to resolve that issue at the outset to  
11 decide whether we go forward and the tremendous cost  
12 and burden of an equitable apportionment action,  
13 without South Carolina saying anything other than we  
14 want an equitable apportionment.

15 They have got to come forward with the  
16 evidence of their harm and that's really what we're  
17 trying to get to here. That's what we think Phase 1  
18 should be about.

19 SPECIAL MASTER MYLES: Yeah. Well, just a  
20 couple comments on that. I appreciate all the -- all  
21 the things that you said, and I think that should be  
22 part of whatever -- if there is going to be a dispute  
23 on this, whatever get written up on it, is all the  
24 points you just made are valid ones.

25 I think where we floundered a little bit and

1 where the concept of bifurcation was somewhat drawn  
2 into question, was the issue of what is the harm to  
3 South Carolina? I think initially, everyone agreed  
4 that that was a good issue to bifurcate off and to say  
5 what was the harm to South Carolina? And if  
6 South Carolina can't show harm, then we don't need to  
7 move to a next phase.

8 I think one of the issues we ran into was  
9 what does that mean? And we ran into, does the harm  
10 to South Carolina just mean they reduced water flow, a  
11 water flow that's not sufficient? Or does one also  
12 have to look at the uses that South Carolina's  
13 complaining about in North Carolina?

14 Ultimately, I think we thought that it did  
15 have to include an examination of particular uses,  
16 at least I thought that's where we ended up. And that  
17 being said then, one gets into particular uses by  
18 North Carolina and then one also get into particular  
19 uses by South Carolina, which necessarily is part of a  
20 showing of harm.

21 Then you have, okay, now we're looking at all  
22 these uses. Doesn't that somewhat overlap with the  
23 concept of whether the uses are or are not beneficial?  
24 Because there is a somewhat -- there isn't a clear  
25 division between whether harm flows from an obviously

1 beneficial use versus whether harm flows from a use  
2 that is less beneficial.

3 And I hate to confuse and fuzz things  
4 together, but it was never clear what the dividing  
5 line would be there. And that's where I think the  
6 parties didn't agree. And I actually thought  
7 North Carolina wanted to have that line be have  
8 that line drawn in a way that brought more of those  
9 issues into Phase 1.

10 Because North Carolina wanted to be able --  
11 didn't want just to be looked at as how much water is  
12 South Carolina getting? And if it's getting something  
13 it deems to be insufficient, that's harm. So that's  
14 where I remember the issue being discussed.

15 MR. BROWNING: Well, and Special Master Myles,  
16 part of this is one of the things we recognized would  
17 happen with the intervention and this lull, perhaps we  
18 all need to go back and rethink where we're at on  
19 various issues.

20 But as I go back to our letter of  
21 February 3rd, 2009, our eleventh progress report, and  
22 I look at our issues and South Carolina's issues,  
23 which again I don't think are very separate in their  
24 statement. But as I read our issue for Phase 1 and  
25 for South Carolina's as well, that it's focused on the

1 harm that South Carolina is experiencing as being in  
2 the Phase 1 issue and causation. And all of the  
3 balancing is left for Phase 2.

4 And I do think that that makes a lot of  
5 sense. That if we have to do all of the discovery,  
6 all of the trial, one lumped together, it is going to  
7 be a tremendous amount of discovery, dotting all the  
8 Is and crossing all the Ts on the allocation issue.

9 And all of those extra expenses can be  
10 avoided if we're right, that what South Carolina is  
11 really complaining about is not a substantial harm  
12 that is of such magnitude that should allow the case  
13 to go forward.

14 And it's one of these things that we feel  
15 pretty strongly we need to see where South Carolina is  
16 coming from. What is the specific harm that they're  
17 complaining about so we will be in a good position to  
18 defend ourselves fairly.

19 MR. FREDERICK: Causation, Special Master  
20 Myles -- this is David Frederick.

21 Causation, of course, is where the party  
22 could not come to an agreement, because we don't think  
23 it's a tort standard. We think the Supreme Court's  
24 cases are quite clear that the issue of a scarce  
25 resource is one that simply has to be allocated fairly



1 between adjoining states in an interstate waterway.

2 And that causation goes into all the points  
3 of contention that you alluded to, which also go into  
4 the question of what, whether interbasin transfers are  
5 appropriate to take water out of this system, whether  
6 water is, in fact, returning to the system on the  
1 North Carolina side.

8 And it's not simply a question of whether or  
9 not the reservoirs are so low on the South Carolina  
10 side that, you know, commercial and recreational  
11 activities can't occur there. The issue is really, is  
12 the river oversubscribed? And particularly, is it  
13 oversubscribed in periods of drought where I think the  
14 case and the fulcrum of the case is going to turn to.

15 And our position all along has been we  
16 believe that when drought conditions are at a certain  
11 stage, the river is oversubscribed and that the  
18 question of who is taking how much water out in those  
19 periods of low flow are critical to understanding  
20 what's fair for each state to get in terms of its  
21 allocation.

22 Now, whether you want to call that causation  
23 or whether you want to call that conservation, I mean,  
24 that's what the rub of the case is about. It's that  
25 this is a -- this is an endangered river in periods of

1 low flow where drought has caused issues that affect  
2 users on both sides of the river. And the sooner that  
3 we can **get** to a definition of what is low flow, so  
4 that we can figure out what's fair and what needs to  
5 be conserved, the better off for users on both sides  
6 of the river.

7           And if that issue of tortious causation, then  
8 I don't think that we're ever **going** to be able to  
9 resolve. We talked about **it** with North Carolina for  
10 six or eight hours on any number of occasions and we  
11 simply disagree that that is a part of a legal  
12 standard.

13           MR. BROWNING: Special Master Myles, this is  
14 Chris Browning.

15           I'm sitting here looking at South Carolina's  
16 statement of the issues for Phase 1 in their letter to  
17 you from February 3rd, 2009. And **it** reads, "Whether  
18 South Carolina has shown by clear and convincing  
19 evidence some real and substantial injury or damage  
20 caused by water uses in North Carolina, as that  
21 standard has been articulated and applied by the Court  
22 in its equitable apportionment jurisprudence."

23           Now I turn to North Carolina's issue with  
24 regard to Phase 1 from the same date, letter to you of  
25 February 3rd, 2009. "Whether South Carolina has

1 shown, by clear and convincing evidence, that specific  
2 water uses or withdrawals North Carolina have caused  
3 or imminently threatened to cause harm of serious  
4 magnitude to specific uses of the Catawba River in  
5 South Carolina."

6 I just don't see how those are so far apart  
7 that we're now replowing ground that I thought we had  
8 planted long ago. But I think in my mind this is a  
9 distraction that we should not be engaged in at this  
10 point.

11 SPECIAL MASTER MYLES: Well, let me just  
12 respond to that, Mr. Browning.

13 I understand your position. I do think,  
14 though, that this is an issue that just needs to be  
15 decided. And we need to think very hard about what  
16 the right course is and then set out on that course,  
17 including memorializing it in a case management  
18 supplement, which we've discussed at the time of the  
19 case management order. We put all of these issues on  
20 hold.

21 And so I don't think any of them has been  
22 definitively resolved. And -- but I do think it's  
23 urgent that it gets resolved sooner rather than later,  
24 gets memorialized and that way we can all proceed.  
25 Because I don't want people proceeding on assumptions

1 that are not ultimately going to play out.

2 As I said, I don't think it's -- I do think  
3 the party were in absolute agreement at the beginning  
4 of the case, and maybe even later, that bifurcation  
5 was the right course. I think I became skeptical of  
6 that and I think I expressed that a few times on the  
7 record as to whether it was the right course,  
8 ultimately. But I think we just need to decide that.  
9 And there's several interrelated issues that may be  
10 separate issues, but there are -- I see about four  
11 issues that probably need to be part of the  
12 discussion.

13 One is the legal issues, whether you call it  
14 causation or not, that Mr. Frederick has raised.  
15 We've discussed that issue numerous times in the  
16 course of this case. I don't really think that's a  
17 bifurcation issue. I really think it's an underlying  
18 issue of burden of proof in the case as a whole.

19 What -- what does South Carolina have to  
20 prove? And what are the implications of the Supreme  
21 Court precedence? I think we've had debate about --  
22 was it the Kentucky case where Justice Marshall said  
23 that the river was oversubscribed and what does that  
24 mean?

25 Does that case have application here or not?

1 That case was a different factual circumstance. But  
2 that's a set of issues we need to resolve. I think it  
3 relates to bifurcation, but I think it's an  
4 independent set of issues, which is what ultimately  
5 will South Carolina have to prove at trial.

6 The other issue is the fact discovery, okay,  
7 which is what we've been doing mostly, I think.  
8 Right? And there, it would help me to know the extent  
9 of the prejudice that you're talking about and what,  
10 if anything, can be done if we do adopt a different  
11 course. Because I don't know what North Carolina has  
12 been doing in reliance upon the existing structure.

13 In other words, the issue of causation was  
14 always in there. So I don't know what else would need  
15 to be done. And I'm not suggesting there isn't  
16 anything. I just don't know. I don't know what  
17 what lines people have been drawing in conducting fact  
18 discovery.

19 So I think that would be helpful to know.  
20 Because if we were to have unbifurcated discovery,  
21 we'd need to know what that will look like and whether  
22 anyone would be prejudiced.

23 Likewise, with expert discovery, there I can  
24 see a distinction that gets made between Phase 1 and  
25 Phase 2 as we had previously discussed it. But again,

1 I think some hard thought needs to be given as to how  
2 that can be conducted most efficiently. Expert  
3 discovery.

4 And then finally, trial. One could divide  
5 things into a two-phase trial. But one that doesn't  
6 necessarily have discovery in between. You could have  
7 a two phase trial that has remedies as the second  
8 phase. I don't know what you call the first phase,  
9 but the remedial phase would simply be okay, what will  
10 the decree look like? Are we going to have a decree?  
11 And if so, what will it look like? Which would put  
12 more into Phase 1 in terms of whether a decree is  
13 something we'd need to have at all.

14 It may be the same two phases, but you may  
15 just have them at the trial stage rather than  
16 bifurcating the entire case into two pieces with  
17 separate discovery, separate expert discovery, and  
18 then separate trial.

19 MS. SEITZ: Special Master Myles, this is  
20 Virginia Seitz from Duke.

21 There's an intermediate step of motions  
22 practice that I think the parties also would want to  
23 address with respect to bifurcation. And I think it  
24 may make sense to have an earlier motions practice  
25 with respect to Phase 1, for example.

1           SPECIAL MASTER MYLES: Uh-huh. Yeah, that's  
2 true. That may be one way of addressing some of the  
3 concerns that Mr. Browning has raised.

4           If South Carolina can't meet a summary  
5 judgment standard at some point in the case that we  
6 can identify an early motions phase to address that.  
7 That may be one way of making the trial more -- the  
8 whole process more efficient.

9           MR. SHEEDY: Special Master Myles, this is  
10 Jim Sheedy for CRWSP.

11           And I suspect that Ms. Seitz, when she refers  
12 to motions practice, specifically means dispositive  
13 motions practice. For I don't know that we really  
14 need to treat discovery motions in a bifurcated way.

15           And quite honestly, as I've been watching the  
16 parties engage in discovery since the last telephone  
17 call such as this that we've had, it has looked to me  
18 like the parties have been following Section 4.1 of  
19 the case management plan, which envisions that any  
20 party may, for convenience, conduct discovery into  
21 matters relevant to Phase 2 questions during Phase 1.

22           So I don't doubt that some of the discovery  
23 material has strayed into Phase 2 while arguably we  
24 are presently in Phase 1. But it looks like that's  
25 been without objection and that the current provision

1 in Section 4.1 is being followed and may in fact not  
2 need to be tinkered with at this point.

3 MR. FREDERICK: This is David Frederick.

4 If I could just add to that. We certainly  
5 endeavored to do that. I appreciate both comments  
6 from Mr. Sheedy and Ms. Seitz. And we expect there to  
7 be dispositive motions at the appropriate time and in  
8 fact we probably will bring our own motion for summary  
9 judgment, because we think the undisputed facts will  
10 show that South Carolina deserves to be guaranteed an  
11 equitable part of this river, and that the IBTs ought  
12 to be enjoined.

13 But leaving that aside, I do want to come  
14 back to the point about the issues in defining Phase 1  
15 and to put into context the letters of February 3rd,  
16 2009.

17 As you'll recall, Special Master Myles, you  
18 asked the parties to get together with the intervenors  
19 to try to define the issues and to present to you a  
20 shared set of issues that we would articulate. And  
21 that's what those letters were attempting to do. They  
22 were, our letter was an attempt to be a shared  
23 document that we thought, after negotiation, was our  
24 fair representation of what the parties had agreed.

25 Obviously, if we had presented our own view,



1 it would have been a very different kind of  
2 presentation of the issues. That was a share view.

3 But the second thing is, even in  
4 North Carolina's letter, they have a footnote,  
5 Footnote 3 to their letter of February the 3rd, 2009,  
6 that I think really gives lie to the whole problem  
7 here because they say, "What subissues may have to be  
8 litigated in Phase 1 depends in significant part upon  
9 precisely what harm South Carolina proposes to prove  
10 and what may be the causes of those harms."

11 So, you know, I think that it is -- it is  
12 reasonable to suppose that we'll join this issue and  
13 that it actually would be potentially problematic to  
14 try to articulate in a vacuum what the way of  
15 explaining that issue would be without having a  
16 factual presentation.

17 And I think I've said this before, Special  
18 Master Myles, and I don't mean to be repetitive here,  
19 but I'm very concerned about the idea of your office  
20 offering advisory opinions that don't have the full  
21 level of factual presentation when they really get to  
22 core legal issues about what the case is about.

23 And so part of what I have understood your  
24 skepticism to be, and what has caused me to rethink  
25 the whole issue of bifurcation, is that the way these

1 issues have been discussed by the parties leads to a  
2 request, as I understand it, on North Carolina's part,  
3 for you to be offering opinions about the meaning of  
4 Supreme Court cases where we have what could be a  
5 factually different river system and set of facts that  
6 we would want to develop during the course of  
7 demonstrating why the equitable apportionment factors  
8 favor a decree in South Carolina's favor.

9 MR. BROWNING: Special Master Myles, this is  
10 Chris Browning.

11 Mr. Frederick's recollection of what  
12 transpired and led up to the February 3rd, 2009  
13 letters is slightly different from mine. And I know  
14 there are several other people on this conference call  
15 who were involved in those discussions.

16 But my recollection of what took place was  
17 there were many conversations with South Carolina to  
18 work out a single letter, a joint submission with  
19 regard to Phase 1 and to Phase 2. There were many  
20 efforts to do that, but we weren't able to quite reach  
21 the same language.

22 At the end of the day, the parties submitted  
23 separate letters setting out what they thought would  
24 be the issues for Phase 1 and Phase 2. The only  
25 reason you have two different letters on February 3rd

1 is we weren't able to quite reach agreement. But that  
2 is certainly my recollection of why there are two  
3 different letters that are, are submitted.

4 MR. GULICK: Special Master Myles, this is  
5 Jim Gulick.

6 I think that with respect to the issue about  
7 asking you to -- I don't think either party wants you  
8 to make a, some sort of advisory decision about those  
9 things. I think we, North Carolina, as well as  
10 South Carolina, places the actual formulation of the  
11 issue informed by specific facts but -- that are being  
12 presented.

13 We believe that South Carolina has to show  
14 that it has been harmed by clear and convincing  
15 evidence. Precisely what those harms are and how they  
16 mean to show causation, it depends on what they want  
17 to put forward. And we don't know what that is yet.  
18 But I think we're in agreement that that's something  
19 that you would decide when you actually had those --  
20 that presentation put before you.

21 MR. FREDERICK: Special Master Myles, if  
22 I could make two additional points. This is David  
23 Frederick for South Carolina.

24 SPECIAL MASTER MYLES: Sure, yeah. Go ahead.

25 MR. FREDERICK: First, the process of

1 dispositive motions and contention interrogatories  
2 and, you know, the further refinement of issues  
3 through depositions of experts and the like always, in  
4 my experience, has tended to narrow down the focus of  
5 what the case is about. And, of course, having had  
6 interregnum, we aren't there yet.

7           Second thing is I'm very concerned that an  
8 artificial distinction of the matter could discourage  
9 the possibility of settlement as our Attorney General  
10 has proposed to the North Carolina Attorney General,  
11 and that if we continue on doing discovery on both  
12 phases, that if we are able to get more concrete basis  
13 of information about the capacity of the river and  
14 what is sustainable on both sides of the boundary, I  
15 am very confident that we're close to getting all of  
16 data that we need to get -- and we're in the process  
17 of analyzing that data and from Duke's experts -- and  
18 that we could very well come to a consensual  
19 resolution that would be impeded by an artificial  
20 effort to divide up the case, so that there becomes a  
21 kind of litigation gaming advantage one way or the  
22 other.

23           And so my -- my proposal would be to let  
24 North Carolina identify if it's been prejudiced in any  
25 way, we proceed through at the time when parties feel

1 that they have summary judgment motions, they present  
2 those motions and we brief them and we argue them and  
3 you decide them.

4 And we, in the interim, learn as much about  
5 this river system as we can and hope that we could  
6 ultimately implore your office to help mediate and  
7 refine a final resolution that would obviate the need  
8 for a trial.

9 MR. BROWNING: Special Master Myles, this is  
10 Chris Browning.

11 Mr. Frederick just spoke about an artificial  
12 gaming advantage. But I think that's the way we  
13 proceeded -- why we proceeded, and where we're at with  
14 the case management order and the division into phases  
15 is North Carolina's very real concern from the outset  
16 that this complaint was couched in terms of nothing  
17 more than interbasin transfers. And now  
18 South Carolina wants to expand it.

19 And we want to know what the harms are, so  
20 we can defend this case, and we think it's appropriate  
21 as was we thought had been agreed in the division  
22 with this Phase 1 and Phase 2, let's go forward,  
23 present the evidence on the harm and whether that's  
24 sufficient for South Carolina to proceed and have  
25 essentially either a mini-trial of some sort of

1 resolution by summary judgment so that we ultimately  
2 get to the day of whether South Carolina really can  
3 show harm before all of the other cost and expense of  
4 an equitable apportionment action, which as we all  
5 know can be horrendous if we have to go to an  
6 equitable allocation and evaluation of all the uses up  
7 and down the river.

8           We need to know what the harm is that  
9 South Carolina is really complaining about. That's  
10 what we have been lobbying for from day one. That's  
11 why I thought we had been able to break this up into  
12 phases. And the artificial gaming that I'm concerned  
13 about is South Carolina is going to be hiding their  
14 theory until the very end of the day, mixed up with  
15 all of the discovery that has to take place in an  
16 equitable apportionment action.

17           So we -- North Carolina has a very real  
18 interest in seeing what the harms are that  
19 South Carolina is purporting to put at issue so we can  
20 legitimately defend our state.

21           MR. FREDERICK: The harms are actually well  
22 known to North Carolina, because they just agreed to a  
23 settlement to limit the interbasin transfer for  
24 Concord and Kannapolis and to impose conservation  
25 measures when the water level gets to a certain level.

1 I mean, if North Carolina doesn't view that as harm,  
2 then they would never have agreed to the  
3 Concord/Kannapolis settlement.

4 MR. BROWNING: Mr. Frederick, there is no  
5 settlement in place with regard to Concord and  
6 Kannapolis despite the news media report. Moreover,  
7 North Carolina is not a party to that. That was  
8 a proceeding brought by the municipalities like  
9 Broadkill, South Carolina and Hickory, and various  
10 other entities, against Concord and Kannapolis. It  
11 was a proceeding brought against the Environmental  
12 Management Commission.

13 Let me allow Mark Bernstein to clarify this  
14 specific point. But I think that's -- what you're  
15 referring to is a complete nonissue here, but  
16 Mr. Bernstein.

17 MR. BERNSTEIN: Special Master Myles, this is  
18 Mark Bernstein. I represent the Environmental  
19 Management Commission in that proceeding in the  
20 North Carolina Office of Administrative Hearings,  
21 along with Jennie Hauser who is also here.

22 That was a case brought by several  
23 municipalities in North Carolina, including a couple  
24 in South Carolina, against the North Carolina  
25 Environmental Management Commission. The cities

1 Concord and Kannapolis who had been granted the  
2 certificate for an interbasin transfer intervened as  
3 parties respondent in that case.

4 There are there were and are settlement  
5 discussions ongoing and the media reports indicated  
6 that there was a settlement in place. The indications  
7 that have been given to me by the parties is that the  
8 settlement is not final, but there's -- because there  
9 is several municipalities involved, it's a fairly  
10 complicated process getting to a final resolution with  
11 ink dry on the signatures. And that, to my knowledge,  
12 has not happened yet.

13 But the key point is, for this discussion,  
14 Mr. Frederick has indicated that we have made some --  
15 by being involved in that process. In fact, we are a  
16 party respondent, but the settlement as drafted is by  
17 and among the municipalities, the party that's getting  
18 the interbasin transfer, and the petitioners and  
19 specifically does not include the state of  
20 North Carolina.

21 It is a, for lack of a better word, a private  
22 agreement among the parties and would not result in  
23 the amendment of the certificate given to -- given to  
24 Concord, Kannapolis, and would not require the  
25 signature of the state of North Carolina or any of



1 its -- or any state-level entities at all.

2 SPECIAL MASTER MYLES: Okay. I appreciate  
3 that explanation. I do think that this is not a  
4 central issue to what we're needing to decide right  
5 now. But I appreciate the explanation, thank you,  
6 because that was mentioned in the letter.

7 MR. SHEEDY: Special Master Myles, this is  
8 Jim Sheedy again for CRWSP.

9 And apologies to all of this is a duplication  
10 of my earlier words. I just want to make sure that I  
11 achieve clarity for purposes of CRWSP's position.

12 On the overarching question of bifurcation,  
13 about which CRWSP feels strongly, is the notion that  
14 dispositive motions should not be all heard at the  
15 same time, but that it is appropriate in the interest  
16 of efficiency and to avoid confusion in this case, for  
17 the motions which are before Your Honor that address  
18 the legal issues of causation and harm that both  
19 Mr. Frederick and Mr. Browning have discussed here  
20 today be treated separately and heard separately from  
21 the equitable apportionment dispositive motions.

22 And I agree with Mr. Frederick that I would  
23 expect that there will be dispositive motions, that  
24 there are genuine issues of material fact as to all of  
25 the equitable apportionment factors and I certainly am

1 harboring some hope that for purposes of trial, it  
2 won't be a full presentation of every single equitable  
3 apportionment factor that's been articulated in the  
4 Supreme Court cases.

5           So for CRWSP, while it may not be willing to  
6 weigh in on all of the nuances of the bifurcation  
7 topic, CRWSP is certainly interested in seeing that  
8 when dispositive motions are heard by Your Honor, that  
9 we have a segregation and that the harm or causation  
10 or whatever label you want to attach, is heard first  
11 and resolved and then after that point in time, any  
12 motions that may pertain to the equitable  
13 apportionment factors would be heard and resolved.

14           I again apologize if I'm repeating myself.  
15 But I wanted to make sure that the point was not lost  
16 in terms of CRWSP's wishes on this topic.

17           SPECIAL MASTER MYLES: I see. Thank you.  
18 I appreciate that. I don't think that was repetitive.  
19 It's helpful. And I think I tend to agree that much  
20 case management work can be done in phasing the  
21 motion -- the motions.

22           And some of the concerns that Mr. Browning  
23 has raised, which are legitimate concerns in terms  
24 of -- and they are, as he points out, concerns we've  
25 been discussing since the very beginning of the case.

1           What is the scope of the case? And I did  
2 issue an order on that question. I said that if the  
3 case wasn't limited to transfers, although clearly the  
4 complaint focuses on transfers, that the complaint is  
5 opaque on the issue of what other harms are being  
6 complained of. I think we've covered this ground many  
7 times before.

8           And that therefore, it was essential that  
9 South Carolina be receptive to discovery on what the  
10 harms are that it is complaining about both -- on both  
11 sides of the border. That is what particular uses of  
12 North Carolina, South Carolina finds problematic and  
13 how is it being harmed on its side of the border by  
14 those uses.

15           And that is still a question that south, that  
16 can be explored through discovery. And if that needs  
17 to be contention interrogatories, then that's what  
18 should happen and they should be responded to, because  
19 I do think that's a deficiency in the complaint that  
20 needs to be remedied.

21           At the same time, it's -- it may be affected  
22 by the resolution of legal issues such as causation.  
23 I don't want to issue advisory opinions either. I  
24 don't think now is a good time to weigh in on the  
25 ultimate resolution of what South Carolina's precise

1 burden of proof is.

2 But South Carolina can't resist discovery on  
3 the theory that its legal analysis is correct, unless  
4 you're going to key it up for my decision now.

5 Otherwise, you have to proceed on the  
6 assumption that North Carolina's view of the burden of  
7 proof may be correct, that questions about what harms  
8 are being suffered on both sides of the border are  
9 relevant, at least, or at least reasonably --  
10 reasonably calculated to lead to the discovery of  
11 admissible evidence.

12 And if we're going to put off the resolution  
13 of the legal issue for later, then you have to proceed  
14 on producing answers to those questions now, even if  
15 South Carolina's ultimate position will be, "Well,  
16 none of that's relevant, because we just are going to  
17 measure the water on both sides and come up with a  
18 measure that is fair."

19 I think the Court -- I think the Court made  
20 it somewhat clear that uses have to be taken into  
21 account anyway. The Court did speak to that issue a  
22 little bit, that it isn't just going to be measuring  
23 the water and dividing it in half or some other way of  
24 doing it. Obviously, that's not what gets done,  
25 so . . . .

1           But -- and then so a lot, it seems to me, can  
2 be resolved through discovery. I think North Carolina  
3 is absolutely entitled to know what South Carolina is  
4 complaining about, precisely so it can defend itself,  
5 as Mr. Browning said. I don't think that necessarily  
6 means we have to have a bifurcated trial.

7           I also think Ms. Seitz and Mr. Sheedy are  
8 right, that using the motion practice in an  
9 intelligent way can allow us to accomplish some of the  
10 benefits of bifurcation -- bifurcation, without  
11 necessarily having it, although I don't know that that  
12 was Ms. Seitz's exact point.

13           But the take-away point for me is that you  
14 could use the motion practice in a calculated way to  
15 try to resolve some of these same issues without  
16 having to have a trial on everything.

17           So all of this being said, does it make sense  
18 for the parties to go back and discuss these issues?  
19 Try to come up with a resolution? If not, to present  
20 it for the next status conference that we have?

21           MR. BROWNING: This is Chris Browning.

22           I think the makes sense for the parties to  
23 talk if nothing more than we could certainly talk to  
24 these issues, but we also have the issue of the  
25 inclusion of the intervenors in the process and the

1 changes that would be necessitated to the case  
2 management order. So my working assumption would be  
3 that -- has been that the party will need meet shortly  
4 after this status conference.

5 MR. SHEEDY: Special Master Myles, this is  
6 Jim Sheedy again.

7 Yes, I agree wholeheartedly -- yes, I agree  
8 that a meet and confer would be advisable among the  
9 party states and the two intervenors. And I would  
10 supplement that by saying that the meet and confer  
11 probably needs to encompass more than just  
12 bifurcation.

13 We need to talk globally about hopefully  
14 presenting to Your Honor a supplemental case  
15 management plan that would cover a variety of issues  
16 that Your Honor raised in her email of yesterday. And  
17 also issues that were left unanswered in the case  
18 management plan that was entered or adopted as a part  
19 of Case Management Order No.9.

20 MR. FREDERICK: This is David Frederick for  
21 South Carolina.

22 We're happy to meet and confer with the  
23 parties and, you know, try to help deal with some of  
24 these housekeeping matters. I'm a little unclear,  
25 Special Master Myles, on the issue about bifurcation

1 and the tenor of how you want us to try to resolve  
2 that issue with North Carolina.

3 I haven't heard anything today that suggests  
4 the parties are going to be able to resolve that  
5 issue. And so I just would like to get additional  
6 ideas on how you want to us work together to,  
7 you know, to present to you what will be helpful to  
8 you.

9 SPECIAL MASTER MYLES: Yeah, I don't have a  
10 high level of confidence, either, that the parties are  
11 going to agree. I do think some of the concerns  
12 Mr. Browning raised may be possibly addressed in other  
13 ways. And so I think I'd like to -- if the parties  
14 think it's useful to discuss those ways, I think that  
15 would be helpful. Otherwise, I think what ought to  
16 happen is that the parties can present their positions  
17 in writing for resolution, by way of a motion.

18 And so I guess you're asking me how that  
19 should be structured. I think we could do  
20 simultaneous briefing, since I don't think we need to  
21 do, I think it's probably fair to have each party  
22 allowed two sets of briefs, if you will.

23 Those favoring bifurcation would be first and  
24 lay those -- lay their position out. Actually, I'm  
25 sorry. Those -- I think we'd have briefs on the

1 same -- at the same time, both in favor of and  
2 against. But people just would state their positions  
3 and then lay things out. It may not be in favor or  
4 against. It may be some modified version of  
5 bifurcation or divided trial. It can be anything.  
6 Whatever people think is the right solution.

7 And then we'll have a reply date when people  
8 can reply to other people's -- other parties'  
9 suggestions in advance of the next call that we have.  
10 Does that make sense to have a simultaneous briefing?

11 MR. FREDERICK: Sure. That's fine with us.  
12 And we can, we can meet and confer with North Carolina  
13 this week and the intervenors to come up with a  
14 schedule.

15 SPECIAL MASTER MYLES: Okay. And I don't  
16 mean to suggest that people can resolve it. It may  
17 not be resolvable without a decision. I just thought  
18 it might be possible, so there is no harm in trying, I  
19 guess. But short of that, yes, a schedule. Let's  
20 agree on a schedule, is a great thing.

21 And I also agree there are other case  
22 management issues to be resolved which we can discuss  
23 now. That is to say, what needs to be done to catch  
24 up intervenors on what they've missed. We need to  
25 figure out what the next phases are going to be, so a



1 schedule for beginning, say, deposition discovery,  
2 what we need in order to do that. Just generally, the  
3 balance of the discovery schedule taking into account  
4 any need for catchup.

5 MR. BROWNING: Special Master Myles, this is  
6 Chris Browning.

7 From our perspective, of course, all of this  
8 will hinge on whether we're talking about a bifurcated  
9 proceeding or a one-month proceeding, because I think  
10 not only will the intervenors be doing catchup,  
11 party states will be doing catchup, document requests.  
12 If we're suddenly talking about an equitable  
13 allocation being part of a single phase.

14 But the other issue that we need to consider  
15 is how long the parties will take to complete document  
16 discovery. As I said, there was a nine-month period  
17 we didn't get any documents from South Carolina. So  
18 we're assuming that they have additional document  
19 production to do to us.

20 And as we've indicated in our letter, we're  
21 on a rolling production of documents to  
22 South Carolina. But perhaps all that can be discussed  
23 in the meet and confer between the parties and the  
24 intervenors.

25 SPECIAL MASTER MYLES: I think that we should

1 have that discussion. And perhaps with two scenarios  
2 of bifurcation or not. But yes, I think we need to  
3 figure out how much longer the discovery phase will  
4 take, the document phase, how long the deposition  
5 phase will take.

6 And I think sometime the best incentive to  
7 concluding document discovery phases is to have  
8 consequences that would just set a deadline and then  
9 have a burden of proof imposed for introducing  
10 documents that weren't produced in that -- prior to  
11 that deadline. I think you just need to impose some  
12 discipline on the process and that tends to make  
13 things happen.

14 So probably what we ought to do is come up  
15 with a realistic deadline and then stick to it.

16 MR. GULICK: Special Master Myles, this is  
17 Jim Gulick for North Carolina.

18 I just wanted to point out one example in an  
19 area that North Carolina stopped actually doing  
20 document discovery -- I wanted to point out one  
21 example of an issue relating to, for example,  
22 discovery and document discovery that North Carolina  
23 had not been pursuing on the assumption that we were  
24 bifurcating.

25 And that has to do with, for example, with

1 benefits that may accrue to South Carolina users in  
2 the Yadkin from the interbasin transfers about which  
3 we know South Carolina is complaining which is taking  
4 water out of the Catawba and put it into the Yadkin.

5 Since that clearly would involve a balancing  
6 issue, North Carolina agreed that would be a Phase 2  
7 kind of thing. But that's something we have not  
8 pursued. It would have to go back into discovery mode  
9 with regard to getting documents relating to that.

10 SPECIAL MASTER MYLES: Fair enough. That's a  
11 good point.

12 MR. GULICK: Both from third parties and from  
13 South Carolina.

14 MR. FREDERICK: Yeah, except they've got to  
15 have a legal basis for that. And that's the thing  
16 that the Supreme Court has never said that those kinds  
17 of interbasin transfers are to be relevant in an  
18 equitable--

19 MR. GULICK: I completely disagree. There is  
20 very strong case law that -- and I'm sorry I can't  
21 cite the specific case, but we can talk about this.  
22 There is very --

23 MR. FREDERICK: Sure. Write us a letter.

24 MR. GULICK: very strong case law that the  
25 benefits have to be taken into account of a transfer

1 such as that. And I will be glad to brief that to the  
2 Special Master if there's any disagreement.

3 MR. FREDERICK: Well, just send us a letter  
4 and explain the basis of going into what is a real  
5 additional issue where there's arguable only a  
6 tangential issue that's relevant to the equitable  
7 apportionment of the Catawba and we'll be happy to  
8 take that into account.

9 Furthermore, with respect to the documents,  
10 Special Master Myles, I want it to be on the record  
11 that this business about the nine-month gap has --  
12 there has not been any complaint by North Carolina  
13 about any specific lack of production.

14 We got our production out, we also have  
15 letters from January of 2009 where we promptly gave to  
16 North Carolina the inter- the third-party documents  
17 from the very cities that Mr. Browning complained  
18 about earlier in this call. Those letters were  
19 addressed to his colleague Ms. Hauser.

20 So I think that it's important for the record  
21 to show we've endeavored very expeditiously to get our  
22 documents out and North Carolina hasn't complained  
23 about any deficiencies so far.

24 MR. BROWNING: Mr. Frederick, if you are  
25 saying that South Carolina is complete with their

1 document production and you will go on record with  
2 that, that is fine. But it's been our impression,  
3 based upon our last communication with your office  
4 with regard to electronic search terms, that  
5 South Carolina hasn't even engaged in that process of  
6 searching for their documents. Perhaps all of this is  
7 a conversation best offline. Now--

8 MR. FREDERICK: We're happy to take that up  
9 offline with you Mr. Browning because --

10 MR. BROWNING: I think with regard to  
11 equitable apportionment

12 MR. FREDERICK: I would like to have a  
13 discussion offline, so that we can resolve the issues  
14 rather than bringing them up in this kind of approach.

15 But I think it's important for the Special  
16 Master to understand when you haven't accurately  
17 represented the record and you say that there are  
18 documents from Morris Bill and these other towns that  
19 were never given to North Carolina, and that's just  
20 false, because the documentation has correspondence  
21 from our office to your office transmitting those  
22 documents, and the intervenors' report to the Special  
23 Master that they've received them. I think this  
24 proceeding is going to go a lot better if  
25 representations are accurate. That's all I'm saying.

1           MR. BROWNING: And Mr. Frederick, if you view  
2 me of having said anything inaccurate, I would  
3 appreciate you making me aware of that. And I will  
4 correct myself if I'm wrong.

5           MR. FREDERICK: I just did.

6           SPECIAL MASTER MYLES: I just think we should  
7 again get back to the idea that we now have a clear  
8 understanding that third-party subpoenaed documents  
9 will be produced to other parties in the case  
10 promptly. And that will be memorialized in the case  
11 management order.

12           I don't think I need to hear particulars  
13 right now about whether such documents were or were  
14 not provided. It may become relevant to what we need  
15 to do going forward. But I don't see a high level of  
16 relevance on that subject. I think we need to get  
17 information about what needs to be done going forward,  
18 come up with a realistic deadline for document  
19 discovery, put it in place, and then we can resolve  
20 disputes over discovery as they come up.

21           The one about transfers and flowing into  
22 another river system is a kind of dispute that if that  
23 is something that the parties are disagreeing on, the  
24 scope of that kind of discovery, that you can bring up  
25 at this specific instance that we can resolve.

1           But, you know, that -- it sounds to me like  
2 that's an area that if North Carolina hasn't pursued  
3 it and wants to pursue it, then you need to go forward  
4 and do that. And if there's a dispute that arises, we  
5 can resolve it. It's a good example of the sort that  
6 I was looking for as to what you haven't done that you  
7 would have done had things been different.

8           MR. BROWNING: And that is an example of  
9 that. And we would probably propose not to do it yet  
10 unless, of course, it's decided that we're going to do  
11 all of our discovery first and proceed in an  
12 unbifurcated fashion. But I just wanted to have a  
13 specific example of a place where it would not have  
14 been efficient for us to pursue that now and have --  
15 go through this dispute now, if we were just going to  
16 proceed on the basis of first deciding what had, what  
17 we were looking at in Phase 1. Because it would not  
18 be necessary.

19           On the other hand, if we're going to go into  
20 a second phase and actually be doing that discovery  
21 now, then that's something that we have to do now.  
22 That was my point on it.

23           SPECIAL MASTER MYLES: Uh-huh. Yeah, fair  
24 enough. I take your point.

25           MR. FREDERICK: And, of course, the question

1 of whether it's legally relevant would be the subject  
2 of a motion for quash or a motion to compel.

3 SPECIAL MASTER MYLES: Correct. Then you're  
4 going to have to -- you know, you're going to have to  
5 contend with -- you're going to have to put up with  
6 some limited ruling on the issue of relevance. It's  
7 one of these situations where if people want to  
8 forestall what might otherwise be an advisory opinion,  
9 they have to view the scope of discovery being very  
10 broad.

11 If you want to have a discovery dispute, that  
12 may end up bringing into play at least some aspect of  
13 what's relevant, which will bring into play some  
14 aspect of what the legal standard is. Obviously, the  
15 full scope of that issue will probably be put off  
16 until motion practice, but -- you can't maintain a  
17 legal position that something is legally irrelevant  
18 and then -- but say that the legal, the scope of legal  
19 relevance can't be decided until later. If it's  
20 disputed, which I think it is.

21 MR. SHEEDY: Special Master Myles, this is  
22 Jim Sheedy again for CRWSP.

23 Returning to your Honor's question about a  
24 discovery schedule. I certainly am open to a meet and  
25 confer with attorneys for the party states and for



1 Duke in an effort to divide the discovery tasks up  
2 meaningfully in a proposed case management order to  
3 the Court.

4 I understand, not just from this call but  
5 from prior calls, your Honor's desire to have some  
6 schedules for the parties. I would observe that  
7 certainly a typical trial practice in the Federal  
8 Court would include, under Rule 16, that there's a  
9 good cause requirement for purposes of extending  
10 deadlines.

11 Should there be a dispute over bifurcation  
12 and the applicability of bifurcation to the various  
13 stages of this case, should there be a dispute over  
14 whether a return of flow into a different basin should  
15 be included in the benefit factor that goes into the  
16 calculation of harm and whether that is relevant or is  
17 likely to lead to the discovery of admissible evidence  
18 under Rule 26 standard, then, of course, the parties  
19 could return to Your Honor and say that that  
20 constituted good cause for extending discovery  
21 deadlines or modifying the case management order that  
22 contained such deadlines.

23 So on behalf of CRWSP, I would say that I  
24 don't know that I think that it's necessarily  
25 efficient for the litigants to tie up your Honor's

1 time this afternoon tediously going through what would  
2 be appropriate catchup discovery, fact discovery,  
3 expert reports, expert discovery, briefing on  
4 dispositive motions.

5 I hope I'm not being Pollyanna when I say  
6 that I still cling dearly to the idea that we ought to  
7 be able to come to Your Honor if we don't have a  
8 complete agreement on all of these kinds of issues, we  
9 ought to be able to at least streamline the need for  
10 your Honor's time to resolve some of these matters.

11 SPECIAL MASTER MYLES: Yeah, I agree with  
12 that. We actually did go through a lot of these same  
13 issues back early on in the case. And I think that  
14 what you ought to do I do agree we shouldn't spend  
15 much more time on this call. What we ought to do is  
16 have the parties meet and confer on deadlines, what is  
17 needed, what the structure ought to look like in a new  
18 case management order, what the intervenors' time will  
19 be, and work all those issues out.

20 And then we don't need to agree on  
21 everything. Just put whatever's not agreed to in  
22 separate presentations and why that resolution is  
23 right. Then we can try to tee the whole thing up for  
24 the next call, which is what I'd like to do.

25 And bearing in mind that if we tee up

1 bifurcation for the next call, we may not resolve  
2 everything case management wise on the next call,  
3 because we have to resolve bifurcation. But we can  
4 have two scenarios laid out and then we can try to  
5 resolve the case management as soon as we can after  
6 the bifurcation is resolved.

7 So shall we just then put these issues aside  
8 for today's call as things that will be swept into  
9 that meet-and-confer process?

10 MR. FREDERICK: That would be fine from  
11 South Carolina's perspective.

12 MR. BROWNING: Same for North Carolina.

13 SPECIAL MASTER MYLES: All right.

14 MR. SHEEDY: Agreed as to CRWSP. For the  
15 record, this is Jim Sheedy again.

16 SPECIAL MASTER MYLES: Okay.

17 MS. SEITZ: Virginia Seitz agrees for Duke.

18 SPECIAL MASTER MYLES: Okay. So are there  
19 other issues on this? There's one other issue  
20 I thought I'd raise, but are there other issues that  
21 parties have?

22 MR. SHEEDY: Well, very quickly for the  
23 record. Again, Jim Sheedy for CRWSP.

24 I think Mr. Browning and Mr. Frederick both  
25 shared with Your Honor earlier in this call about

1 South Carolina's desire to resolve the confidentiality  
2 order pertaining to BDR. And CRWSP has no desire to  
3 hold up that process.

4 I just want to make **it** clear for the record,  
5 though, that as of early December, CRWSP had had a  
6 chance to review that proposed confidentiality order  
7 and was fine with **it**. But I think there have been  
8 some changes to **it** since then and we've resolved,  
9 at least as far as I know, any issues about **making**  
10 sure that everything is shared and served as  
11 appropriate on the parties in this case.

12 And as soon as CRWSP sees the last set of  
13 changes with respect to that confidentiality order, we  
14 represent to the Court we will turn that back around  
15 pretty quickly. But we've been out of that loop, I  
16 think, for maybe six or seven weeks now and we would  
17 welcome the opportunity to come back into that loop **if**  
18 someone would just send us the last version of that  
19 order.

20 SPECIAL MASTER MYLES: Does anyone else want  
21 to speak to that?

22 MR. FREDERICK: This is David Frederick.

23 MS. SEITZ: Special Master Myles, this is  
24 Virginia Seitz **again**.

25 We too would like to **get** back into that loop.

1           MR. FREDERICK: This is David Frederick for  
2 South Carolina.

3           I think the ball's in North Carolina's court.  
4 My colleague Mr. Attaway provided comment and I think  
5 we're just waiting on North Carolina before we can  
6 finalize.

7           Special Master Myles, can you hear me? There  
8 was an interruption on the line.

9           SPECIAL MASTER MYLES: I can, yes.

10          MR. FREDERICK: Okay. The -- our  
11 understanding is just if North Carolina has the  
12 document, that we should be able to finalize it, we  
13 hope. And that before the next conference, we would  
14 propose to submit that to you for entry so that we can  
15 proceed with the HDR review.

16          MR. SHEEDY: Special Master Myles, this is  
17 Jim Sheedy again.

18          And I certainly hope that Mr. Frederick did  
19 not hear me suggesting that it was anyone's fault or  
20 that there was anything accusatory about my  
21 description of CRWSP's status on this issue. CRWSP  
22 just wants to see the last version, and we do  
23 represent to the Court we'll review it as promptly as  
24 we can and if we have any concerns about any of the  
25 new language, we'll share that with both Mr. Frederick

1 and Mr. Browning in an effort to build consensus.

2 MR. FREDERICK: My comment was not directed  
3 at any deficiencies by anybody, but simply to express  
4 the hope, Special Master Myles, that you might enter  
5 that defer offline before we have our next telephone  
6 conference, as soon as everybody signs off on the  
7 document.

8 SPECIAL MASTER MYLES: If it's submitted with  
9 everyone's sign up, I'm happy to do that.

10 Okay. I guess my final question that I had  
11 was what I indicated in my email, "Implementation of  
12 Court's order re participation by Duke and CRWSP and  
13 continuing role, if any, for Charlotte."

14 I just wanted to raise the issue whether any  
15 parties had issues of clarification from the Supreme  
16 Court ruling, whether Charlotte had anything to say.  
17 There were discussions in the past of two issues that  
18 come to mind. One was the nature of intervenor  
19 participation and this is something that I don't know  
20 that we need to resolve now.

21 It is something that the Chief Justice raised  
22 in dissent, which is, "What is the scope of intervenor  
23 participation?" And it's something the Court  
24 didn't -- I don't read it as really having addressed,  
25 but it was in my original report on page -- on page,

1 let me see, 34 of my report. Just talked about we had  
2 had a discussion about intervenors' participation  
3 being something that would relate to the intervenors'  
4 interest. It may be that something that ultimately  
5 goes mostly to what the remedy is and -- but the  
6 Chief, for example, raised the issue of settlement.

7 So I don't mean to throw a wrench into the  
8 discussion and raise a much more complicated issue,  
9 but I did want to make sure that we were all clear,  
10 going forward, on what the intervenors' role is. It  
11 came up at the argument back in March of '08, I guess  
12 it was, when we talked about that the intervenors  
13 wouldn't expect to be treated as, you know, parties  
14 with all the rights of a state.

15 But we never did discuss that specifically  
16 what that would mean. And it may not matter at the  
17 present moment. I don't think it has a huge impact on  
18 discovery, frankly. We already kind of covered that  
19 in the whole Phase 1/Phase 2 dispute.

20 So I throw it out there as an issue. I'm not  
21 really asking for answers to it right now. But I  
22 don't think it was really resolved by what the Supreme  
23 Court did. And if I'm wrong about that, someone  
24 should tell me.

25 MR. FREDERICK: Special Master Myles, this is

1 David Frederick.

2 I think that the representations by the  
3 intervenors in the hearing before you in Richmond  
4 probably are still applicable, which is that they  
5 intervened for the limited purpose of protecting their  
6 interests.

7 SPECIAL MASTER MYLES: Yes. I'm kind of  
8 posing the question to them. And I don't mean to pull  
9 the you, Ms. Seitz, on the spot, or Mr. Sheedy on the  
10 spot. But at some point, I think, you know, we need  
11 to -- I would like to know that. Again, it doesn't  
12 have any immediate impact, I don't think, on discovery  
13 rights, and I don't want to get into all sorts of  
14 disputes about that.

15 I think it may be more efficient just to  
16 proceed with discovery without addressing that issue.  
17 But ultimately, it may be an issue for trial and for  
18 settlement.

19 MS. SEITZ: This is Virginia Seitz for Duke.

20 I do think the question of the scope of our  
21 interests and whether it leads to us having certain  
22 rights will come up in concrete context, for example,  
23 as we're discussing now discovery going forward. And  
24 I agree with you that it shouldn't be relevant to the  
25 role we'll play in discovery, largely.



1 I think -- you know, I'm happy to think about  
2 it and provide you with some thoughts about it, if you  
3 want to. But I also think it might be more efficient  
4 to wait until the question comes up in a concrete  
5 setting.

6 SPECIAL MASTER MYLES: I'm totally  
7 comfortable with that solution, and I appreciate it.  
8 I just want to raise the issue, so we don't proceed on  
9 any assumptions that aren't -- that aren't stated.  
10 I'd be proceeding on the assumption that that's an  
11 open question to be resolved in a concrete setting.

12 MS. SEITZ: Virginia Seitz again.

13 I agree with you that the Court did not  
14 resolve that.

15 SPECIAL MASTER MYLES: Mr. Sheedy, do you  
16 want to talk at all about that?

17 MR. SHEEDY: Yes. For the record again,  
18 Jim Sheedy for CRWSP.

19 I wholeheartedly agree with the exchange  
20 between Your Honor and Ms. Seitz. But also, I do not  
21 disagree with Mr. Frederick's characterization of  
22 CRWSP's representations to the Court in Richmond.

23 It is not the intention of CRWSP to  
24 participate in this case on a wide range of issues  
25 that are neither relevant nor likely to lead to

1 anything admissible that could conceivably pertain to  
2 CRWSP. That's not efficient, that's not  
3 cost-effective, and it's really never been the desire  
4 of CRWSP.

5 In the same breath, though, in order to  
6 protect CRWSP, for purposes of this case, I do  
7 anticipate, and I say this in the continued spirit of  
8 full disclosure, that the full panoply of discovery  
9 devices available to CRWSP under the case management  
10 plan as it may be supplemented which we all anticipate  
11 based on this call may in fact be utilized by CRWSP in  
12 order to protect it's various interests in this case.

13 And maybe that's viewed as kind of a mixed  
14 response, but in my mind, that's supportive of  
15 Ms. Seitz's point that the question of participation  
16 is probably best considered in a particular context as  
17 opposed to in the abstract.

18 SPECIAL MASTER MYLES: Yes, I agree.

19 MR. SHEEDY: I do want to provide the  
20 assurance to the Court and to the party states that  
21 CRWSP does not purport to be a sovereign, it doesn't  
22 claim that it can invoke original jurisdiction, it  
23 isn't saying that all of the issues that could be  
24 raised in this case, whether it's a phased case or no  
25 longer a phased case, would be something that CRWSP

1 would be vigorously pursuing. I don't envision that.

2 SPECIAL MASTER MYLES: Okay. Well, that's  
3 helpful. And I think that what we want to do then is  
4 leave it as an open issue, put it off until a  
5 concrete, a concrete issue arises that needs to be  
6 resolved.

7 And in the meantime, I think obviously  
8 discovery needs to be tailored to avoid duplication.  
9 I don't think we should have people being deposed  
10 twice, obviously. You know, we need to streamline the  
11 discovery so that it allows intervenor discovery in a  
12 way that doesn't double or triple the discovery that  
13 needs to take place.

14 There is no reason why that should happen.  
15 And I just want to make sure that we have built in  
16 protections against that happening. If a person's  
17 going to be deposed, for example, the assumption  
18 should be that person will be deposed once, not twice  
19 or three times.

20 MS. SEITZ: This is Virginia Seitz for Duke.  
21 We will make that happen.

22 MR. SHEEDY: This is Jim Sheedy for CRWSP.

23 The existing covenant in the case management  
24 plan that imposes a limitation of the intervenors not  
25 to engage in duplicative discovery, CRWSP does not

1 object to that same concept being embodied in any  
2 supplemental case management order.

3 SPECIAL MASTER MYLES: Okay. Great.

4 All right. This is good.

5 And then the final issue, I guess, that I  
6 had, was what about Charlotte?

7 MR. BANKS: Yes, Special Master Myles. This  
8 is Jim Banks for the City of Charlotte.

9 Charlotte had a very strong interest in  
10 continuing to play a role as amicus in the case as  
11 the Court suggested in its recent decision. We think  
12 we can be helpful to the Special Master. And would  
13 like to do that, as you see fit, going forward. We  
14 don't have

15 SPECIAL MASTER MYLES: No, you go ahead. I'm  
16 sorry. I thought you were finished.

17 MR. BANKS: I was going to add that we don't  
18 have a sort of generic proposal as to how we might do  
19 that or what it would entail at any time in the case.  
20 We would see it sort of evolving and developing as  
21 time goes on and as specific needs arise.

22 Couple of things we do think would be very  
23 helpful to enable Charlotte to be in a position to  
24 assist. And one would be we would like to be served  
25 with whatever the parties serve on each other, so that

1 we can monitor the case and if the parties are going  
2 to agree to provide documents produced in response to  
3 third-party subpoenas and the like, we would like to  
4 be copied on those if it's not too burdensome.

5 And I guess finally, we'd like to be able to  
6 participate in these conference calls just to monitor  
7 the progress of the case, if that would be  
8 permissible.

9 MR. FREDERICK: We object to that. We object  
10 to virtually all of that, Special Master Myles.

11 I don't think the nine justices could have  
12 been clearer that Charlotte is not a party and that  
13 North Carolina, as parens patriae, represent their  
14 interests. That doesn't entitle them to getting  
15 documents. If they want to get documents, they should  
16 refer to the North Carolina Attorney General's office.  
17 And it certainly doesn't entitle them to be  
18 participating. And I don't even think that they've  
19 got a right to be an amicus in the case.

20 SPECIAL MASTER MYLES: Okay. Well, here's  
21 what I'd like to do then. Why don't you -- why  
22 doesn't Charlotte make a motion to be permitted  
23 amicus curiae status for purposes of the case. I  
24 don't think this needs to be a lengthy motion. But  
25 just put it in a motion form, and put in some

1 specifics about what it would entail, more or less  
2 along the lines of what you just said, and with any  
3 other support you want to have, precedents or  
4 otherwise. And then South Carolina can oppose it and  
5 Charlotte can have a reply.

6 So we can set out a -- we could set out a  
7 briefing schedule for that. I don't think there needs  
8 to be extensive briefing, but if you can agree upon  
9 a briefing schedule and tee that up for resolution at  
10 the next conference, if that's doable. And we need to  
11 set a next conference date, of course. But that's how  
12 I'd like to proceed on that, because obviously it's  
13 disputed, so....

14 MR. BANKS: This is Jim Banks for Charlotte.  
15 That would be fine with Charlotte.

16 MR. FREDERICK: Special Master Myles, in  
17 light of all of the stuff that's on our plate, can  
18 I propose that we have a conference in a bit longer  
19 time frame?

20 SPECIAL MASTER MYLES: I think that makes  
21 sense, Mr. Frederick, yes. Let's do that. Today is  
22 the 27th of January. Next month is a short month  
23 anyway. We can have it early in March, if that would  
24 make sense with people. The first couple of weeks of  
25 March?

1 MR. FREDERICK: I was going to suggest early  
2 April. I've got two arguments in the Supreme Court.

3 SPECIAL MASTER MYLES: In March?

4 MR. FREDERICK: And there's a lot of briefing  
5 that it looks like we're going to have to be doing  
6 between now and then.

7 SPECIAL MASTER MYLES: I hate to put it off  
8 until April. When are your arguments?

9 MR. FREDERICK: March 3rd and March 20th --  
10 the Wednesday, March 3rd or 4th, and then March 24th.

11 SPECIAL MASTER MYLES: Well, you have other  
12 people in your office, though.

13 MR. FREDERICK: That's correct. But I  
14 will -- I have got kind of superintendent over this  
15 file.

16 SPECIAL MASTER MYLES: What if we said  
17 what if we set -- I was going to say what if we said  
18 the 19th, which would give a fair amount of time after  
19 your argument on the 3rd. But it's in advance of your  
20 argument on the 24th.

21 MR. FREDERICK: That's certainly fine,  
22 Special Master Myles. I don't want to hold up this  
23 matter. I appreciate you accommodating my schedule.

24 SPECIAL MASTER MYLES: Okay. So why don't we  
25 say, would 11 o'clock on the 19th? 11 o'clock my

1 time, that is, work for people? Or 10 o'clock.

2 Either one is fine.

3 MR. GOLDSTEIN: Special Master Myles, this is  
4 Tom Goldstein.

5 I do happen to have a call at 11 o'clock your  
6 time that day. So if 10 o'clock happened to work for  
7 other folks.

8 SPECIAL MASTER MYLES: 10 o'clock might  
9 that one hour might not be enough time, though.

10 MR. GOLDSTEIN: All right, then. Would it be  
11 possible to do it at 11:30 your time and I can --

12 SPECIAL MASTER MYLES: That's fine with me,  
13 yes. So that would be 2:30 Eastern? Does that work  
14 with other people, 2:30 Eastern?

15 MR. BANKS: This is Jim Banks for Charlotte.  
16 That works for us just fine.

17 SPECIAL MASTER MYLES: All right. I'm going  
18 to put that in. We'll have the usual -- well, why  
19 don't you all propose a briefing schedule for the  
20 various things we've talked about? We have two  
21 different briefing schedules going on here. One's a  
22 three-way on the amicus issue for Charlotte. And on  
23 bifurcation, we have a simultaneous briefing schedule.  
24 And then separately from that, we have the case  
25 management issues.



1           So why don't we, why don't you propose a  
2 briefing schedule for all of those things that gives  
3 enough time in advance to consider them all and to  
4 submit that and I can try to issue a case management  
5 order on the briefing schedule just offline.

6           Does that work for everybody?

7           Mr. Frederick, can you kind of orchestrate  
8 the process of getting that in place?

9           MR. FREDERICK: I'll be glad to.

10          SPECIAL MASTER MYLES: Okay. I think that's  
11 everything then for today.

12          MR. FREDERICK: Thank you very much.

13          SPECIAL MASTER MYLES: We'll send you notice  
14 of conference call. I don't think we've done that  
15 very much in the past, but it may be a good idea.  
16 We'll send a notice of conference call just for that,  
17 because it's a ways out. For 11:30 on the 19th of  
18 March. Thank you.

19          MR. BROWNING: Thank you.

20          MR. FREDERICK: Thank you.

21          MS. SEITZ: Thank you.

22 //

23 //

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

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

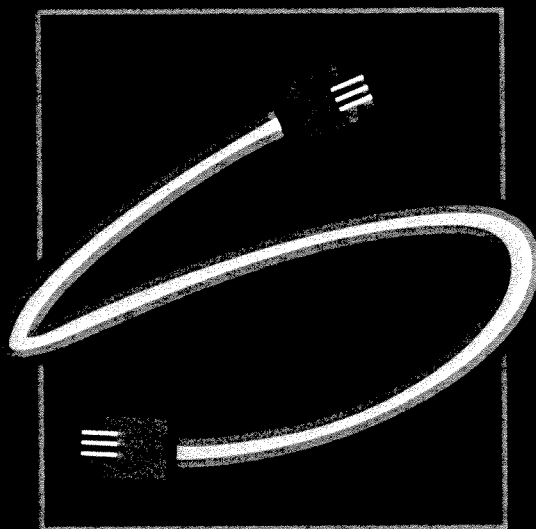
11 Further, that if the foregoing pertains to  
12 the original transcript in a Federal Case, before  
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15 changes made by the deponent and provided to the  
16 reporter during the period allowed are appended hereto.

17 I further certify I am neither financially  
18 interested in the action nor a relative or employee  
19 of any attorney or any of the parties.

20 IN WITNESS WHEREOF, I have this date  
21 subscribed my name.

22  
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