

SOUTH CAROLINA,

Plaintiff,

vs.

No. 138

NORTH CAROLINA,

Defendant.

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TELEPHONIC CONFERENCE

BEFORE SPECIAL MASTER KRISTIN MYLES

Friday, September 26, 2008

Reported by:

DANA M. FREED

CSR No. 10602

JOB No. 92262

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SOUTH CAROLINA,  
Plaintiff,  
vs. No. 138  
NORTH CAROLINA,  
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Telephonic Conference before Special  
Master Kristin Myles, beginning at 11:03 a.m. and  
ending at 12:11 p.m. on Friday, September 26, 2008,  
before DANA M. FREED, Certified Shorthand Reporter  
No. 10602.

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Friday, September 26, 2008

9:59 a.m. - 11:20 a.m.

MR. FREDERICK: David Frederick, Rebecca Beynon and Scott Attaway.

MR. BROWNING: This is Chris Browning. And with me are Jim Gulick and Marc Bernstein.

MR. MARTELLA: Special Master Myles, this is Roger Martella with Duke Energy.

MR. BANKS: This is Jim Banks of Hogan & Hartson for the City of Charlotte. And we should have on the phone Mike Boyd from the City Attorney's office and also Parker Thomson from Hogan & Hartson.

MR. COOK: This is Bob Cook and Childs Cantey from South Carolina.

MR. GOLDSTEIN: This is Tom Goldstein for the Catawba River Water Supply project.

MR. SHEEDY: Good morning, Special Master Myles. This is Jim Sheedy for the Catawba River Water Supply project as well.

MS. DRISCOLL: And this is Susan Driscoll for the Catawba River Water Supply project.

SPECIAL MASTER MYLES: Why don't we begin? Did everybody get the order as of yesterday? I think we just sent out a corrected version with a couple of

1       typos in it?

2               MR. BANKS:  Charlotte got those.

3               MR. FREDERICK:  So did South Carolina.

4               MR. BROWNING:  As did North Carolina.

5               (Off the record.)

6               SPECIAL MASTER MYLES:  Are there any -- does  
7 anyone have any questions or need clarification of  
8 anything in the order?  Okay.  I got both status  
9 reports, so maybe we can turn to those next.  I think  
10 that's South Carolina's -- seems to me that the point  
11 about request for admission is correct, unless number  
12 disagrees with that.  That that would fall within  
13 discovery that wouldn't go forward as between parties  
14 and intervenors.  Does that seem -- does anybody have  
15 a different view of that?

16               MR. GOLDSTEIN:  Special Master Myles, this is  
17 Tom Goldstein for Catawba River Water Supply Project.  
18 We're fine with that.  Our only suggestion is that  
19 there may be a request for admission that  
20 South Carolina decides affirmatively that it wants to  
21 answer, because those would moot and help us narrow  
22 the scope of document discovery.

23               So our goal, we understand perfectly the  
24 analogy between request for admission and  
25 interrogatories, but we may be able to work with

1 South Carolina. We don't -- our goal is not to put  
2 them to any unnecessary burdens. And so we may be  
3 able, at the point that we issue a document request,  
4 they may say, well, we're willing to admit that X is  
5 true and to eliminate the need for a document request.  
6 And we can just work with them on that.

7 SPECIAL MASTER MYLES: I don't see any  
8 problem with that at all. Obviously, that would be a  
9 purely voluntary act.

10 MR. GOLDSTEIN: Yes.

11 SPECIAL MASTER MYLES: And nothing in my  
12 order was intended to prohibit a voluntary act. Even  
13 the act of responding to an interrogatory. I would  
14 imagine a person can do that voluntarily whenever they  
15 want. So nothing prevents the parties from reaching  
16 such an agreement in the interim.

17 I should have asked. Are there any other  
18 questions about that order, the number 7 relating to  
19 the procedures pending the interim report?

20 MR. MARTELLA: Special Master, this is Roger  
21 Martella with Duke Energy. We're looking at that  
22 order as, basically, I guess you could say, an interim  
23 case management plan until our status is finalized.  
24 And I think the one point that's important to clarify,  
25 there's no reason to believe that this is the case.

1 But we'd just like to clarify that, assuming our  
2 position as intervenors is finalized, the clock for  
3 our doing discovery has not started to run yet. We're  
4 actually at Duke holding off largely on our  
5 affirmative discovery until our status get finalized.  
6 We think that's the most sufficient thing for  
7 the Court and for the parties. But while we'd want to  
8 be expeditious once the position is finalized, we want  
9 to also have the opportunity to make sure we can  
10 engage in the discovery we think's necessary at that  
11 point.

12 SPECIAL MASTER MYLES: Well, the purpose of  
13 the -- I think it was -- I don't have it in front of  
14 me, but the -- there was a paragraph of the order at  
15 the end that was intended -- I think it was the last  
16 substantive paragraph, was intended to say that --  
17 that there would be, that the parties should try to  
18 agree on somewhat of a catchup plan for the  
19 intervenors. Is that not in there?

20 MR. FREDERICK: Yes, it is. This is David  
21 Frederick.

22 SPECIAL MASTER MYLES: I'll get the order  
23 out. I just didn't have it in front of me. But  
24 go ahead, Mr. Frederick.

25 MR. FREDERICK: I was just going to say,

1 that's how we read paragraph 2F. And we also have a  
2 provision in the case management plan that we  
3 circulated to all of the counsel to address  
4 modifications that were necessitated by this order.  
5 And in that draft, we had left the dates open as to  
6 when various events triggered on the assumption that  
7 the entry of that, you know, more global case  
8 management plan would set out dates.

9 SPECIAL MASTER MYLES: Uh-huh.

10 MR. MARTELLA: This is Roger Martella with  
11 Duke Energy. That's helpful. I think our position  
12 would be your order from September 18th is, we  
13 believe, pretty clear in terms of what the rights of  
14 the parties are during this interim period. We don't  
15 think it's necessary to go forward with another case  
16 management plan at this point. We should be governed  
17 by your order. But we would work with the parties to  
18 finalize the global case management plan, so it's  
19 ready to go once the parties' status is determined.

20 SPECIAL MASTER MYLES: Well, what it says in  
21 paragraph F, now that I have it here, is to the extent  
22 adjustments are made to the impending plan for  
23 discovery in order to accommodate -- wait a minute,  
24 no. Maybe that's not the right paragraph. Wait a  
25 minute.

1           MR. FREDERICK: This is David Frederick. The  
2 part of paragraph 2 before the subparts does suggest  
3 that the parties would contemplate finalizing the case  
4 management plan during the interim period.

5           SPECIAL MASTER MYLES: Right. That's right.

6           MR. FREDERICK: And I would -- I would  
7 further point out that the case management plan has  
8 a lot of detailed provisions that are actually helpful  
9 for everybody in understanding what the rules of the  
10 road are.

11          SPECIAL MASTER MYLES: Yeah.

12          MR. FREDERICK: And we would -- you know, we  
13 are, you know, intending to be reasonable with respect  
14 to time modifications, you know, subject to parties  
15 showing need. But we do think it's important to get  
16 the case management plan finalized as soon as  
17 practical, because of the other provisions in it. So  
18 we would oppose Duke's request to hold that in  
19 abeyance.

20          SPECIAL MASTER MYLES: Well, I think that --  
21 what my intention was, and I think this is consistent  
22 with what both of you are saying. I did think it was  
23 worthwhile to finalize the case management plan, get  
24 something signed that everybody can agree on. And I  
25 think it would behoove the parties to include the

1 intervenors in that discussion, to the extent that can  
2 be done, including the parts of my order that  
3 include -- that do contemplate the document discovery  
4 and/or putting procedures in there to provide for a  
5 change in status. If the parties want to do that.  
6 But either way, I think the case management plan  
7 should be finalized in some form now, so it doesn't --  
8 that should not be left open, I don't think. And  
9 what -- but that obviously if the intervenors' status  
10 as full parties is confirmed, then they will have  
11 catch-up discovery to do. They're now missing out on  
12 affirmative discovery and people are missing out on  
13 certain types of discovery against them.

14 And that's what the last paragraph was meant  
15 to say, is that the parties should work together to  
16 accommodate adjustments to whatever the existing case  
17 management plan ends up being, in order to accommodate  
18 that issue of allowing the intervenors to catch up.  
19 The caveat is just what Mr. Phillips, I think, said on  
20 our last call.

21 I think he agreed that to an extent the  
22 affirmative discovery by Duke is going to overlap with  
23 the affirmative discovery by North Carolina, to some  
24 extent. And possibly by South Carolina. I think he  
25 said that he thought that at least some of the

1 discovery Duke would want would be obtained by the  
2 parties in any event. I think -- I think that was  
3 Mr. Frederick's point and Mr. Phillips at least agreed  
4 with it in a qualified way.

5 MR. MARTELLA: Special Master, this is Roger  
6 Martella. We would agree with the notion that we  
7 should endeavor to engage in nonduplicative discovery  
8 to make sure we are avoiding duplicative requests and  
9 trying to streamline this as much as possible. So I  
10 think, from our perspective, that's non-controversial.

11 SPECIAL MASTER MYLES: Yeah.

12 MR. MARTELLA: One thing that would aid in  
13 that is to make sure that all the parties are served  
14 with all the discovery productions to date. Because  
15 it would be hard for us, when we do engage in our  
16 catch-up, to avoid duplications of issues if we don't  
17 know what's already been served. So part of this is,  
18 I think, a request to South Carolina that we be served  
19 with all the discovery that's being produced.

20 SPECIAL MASTER MYLES: I do think that's  
21 right. I don't see any downside to that being done.  
22 As I said in the order, nobody should be prejudiced  
23 by complying with these interim procedures. And  
24 therefore, I think that it should be the practice to  
25 serve discovery on the intervenors during the interim

1 period. To serve them as though they're parties. I  
2 just thought it was not -- it was more prudent not to  
3 proceed with them in party status for purposes of the  
4 kinds of discovery that clearly relate only to  
5 parties, just because I do expect and hope that the  
6 view in the Court will not drag things out for a long  
7 time.

8 Do you have any objection to that,  
9 Mr. Frederick?

10 MR. FREDERICK: For South Carolina, to the  
11 extent that we're sending North Carolina documents  
12 that are on compact discs and can be readily  
13 replicated, you know, we certainly have no problem  
14 making copies and sending them to the intervenors.

15 We have not yet encountered a situation where  
16 there would be a large volume of paper photocopying.  
17 But I would like to reserve the right to come back to  
18 you, if we do encounter a situation where  
19 South Carolina would incur a large expense for paper  
20 photocopying, simply to make four copies of documents  
21 rather than just one.

22 SPECIAL MASTER MYLES: Can provisions be made  
23 to share the expense?

24 MR. FREDERICK: Well, we would welcome that.

25 MR. MARTELLA: Special Master, this is Roger

1 Martella. We don't mean to suggest we'd want to  
2 impose unreasonable burdens on South Carolina. As  
3 pointed out, I think we have avoided that so far. I  
4 think our overriding theme is on the assumption our  
5 intervention will be confirmed, we will have to play  
6 catch-up. The most sufficient thing would be to make  
7 sure we had all the discovery in hand, so we could  
8 avoid duplicating what's already be done and we're as  
9 up to speed as fully as possible. I would hope there  
10 doesn't become an overly burdensome situation, that we  
11 would work that out among ourselves in terms of --

12 SPECIAL MASTER MYLES: I would think so. And  
13 the think the default should be that the discovery is  
14 shared. I think that should be the default. And if  
15 there's a need to seek relief from that, then we can  
16 discuss that. Does any other party have an issue with  
17 that?

18 MR. BANKS: Special Master Myles. This is  
19 Jim Banks for Charlotte. I'd just like to make a  
20 couple points. We, by and large, are in agreement  
21 with what Duke has said. In terms of a catch-up  
22 provision, we certainly don't want to be in a position  
23 of having to demonstrate prejudice or justify time  
24 frames for catch-up discovery that are commensurate  
25 with what South Carolina has enjoyed in our absence.

1           So when we get to the catch-up, we certainly  
2 expect to be treated equitably and be given the amount  
3 of time necessary to engage in discovery and undertake  
4 the preparation of expert reports based on that  
5 discovery, which is going to be time-consuming and  
6 can't start now. Can't start until we actually can  
7 get the product with some discovery. We wouldn't  
8 expect to have any of that, either the expert reports  
9 or the discovery, be duplicative, but we would want  
10 sufficient time to take advantage of our rights as  
11 parties once confirmed.

12           The second point is that, I think we all  
13 should bear in mind that the Court is not necessarily  
14 going to review the interim report, take objections  
15 and decide the issue. And it's -- even if it does,  
16 it's not necessarily going to do that promptly. And  
17 so, as -- as time drags on, if we do not have that  
18 resolution on the schedule, we may have to revisit  
19 this whole set of decisions because this case is going  
20 to get ground to a halt if we're simply waiting for  
21 something that's not happening at the court level.

22           SPECIAL MASTER MYLES: Yeah. I think both of  
23 those are fair points. I'm not sure there's anything  
24 we can do about either of the points now. But I think  
25 they're both accurate, fair points.

1 MR. FREDERICK: Special Master Myles. For  
2 South Carolina, David Frederick. There is a point of  
3 contention about the right of intervenors, even if  
4 they are permitted to be in the lawsuit. Each having  
5 multiple expert reports. And we have communicated to  
6 the intervenors that we have a problem with that and  
7 that it caused the state to incur pretty dramatically  
8 increased costs. If we have four sets of expert  
9 reports that we are going to have to deal with. We  
10 have agreed, or at least we have proposed to the  
11 intervenors to table that issue for now. But I do  
12 want to put on the record that we do not agree with  
13 Mr. Banks' representations for Charlotte that there  
14 would even necessarily be a right for the intervenors  
15 to have full expert report rights.

16 SPECIAL MASTER MYLES: That's a fair point  
17 also. I mean, that is also, I think, a reasonable  
18 qualification. I didn't view there being a  
19 concession, that -- about expert reports. I don't  
20 think that has really been addressed to date.  
21 At least not by me. What rights -- you know, what  
22 rights there would be for expert discovery, expert  
23 reports. But we can hold that open. Right?

24 MR. FREDERICK: This is David Frederick.  
25 Yes, that's what we propose to the intervenors in the

1 redline markup that we sent around the other day.  
2 That attempted to make the necessary modifications in  
3 light of your case management order number 7.

4 SPECIAL MASTER MYLES: Uh-huh.

5 MR. MARTELLA: Special Master, this is Roger  
6 Martella. We are comfortable not addressing this  
7 today and addressing it for a later day. But for the  
8 record, we'd just like to state that we strongly  
9 disagree with South Carolina's position. And we  
10 believe, given the intervenors would keep to the theme  
11 of nonduplicative discovery, we would all have the  
12 right to have nonduplicative expert reports that  
13 addresses each of our unique interests in this case.

14 SPECIAL MASTER MYLES: Right. It doesn't  
15 really -- I don't think you're necessarily disagreeing  
16 because Mr. Frederick uses the word "full expert  
17 report" and you used the word "nonduplicative." So  
18 you may be saying the same thing, I don't know. But  
19 we don't really have to address that at this moment, I  
20 think. It may be that what Mr. Frederick is saying is  
21 he wouldn't mind expert reports directed to the  
22 intervenors' specific interests. I'm not sure,  
23 but....

24 MR. BANKS: Special Master, this is Jim Banks  
25 for Charlotte. I don't think there's any choice at

1 the moment but to defer this question, since we're not  
2 in a position to decide it. But I do want to point  
3 out, for Mr. Frederick's benefit, that if we are later  
4 allowed to have expert reports that are  
5 nonduplicative, it is going to take some time from  
6 that moment, not from this moment, to put that  
7 together. Because we can't be making those  
8 commitments and expenditures now, not knowing whether  
9 we'll be allowed to use them.

10 MR. FREDERICK: This is David Frederick. To  
11 the extent any response is necessary, we said all  
12 along that we would be reasonable in discussing  
13 appropriate extensions that need to be made.

14 SPECIAL MASTER MYLES: I think what everybody  
15 hopes for is quick review of the courts, by the Court,  
16 which, if I understand, at least some of the recent  
17 examples is at least a possibility that they'll move  
18 quickly on it.

19 I will -- just to give you a progress report  
20 on my own schedule, my case finally went to the jury.  
21 I told you, I think on an earlier conference, I  
22 mentioned that I had a rather large trial. Meaning  
23 that I couldn't devote all my time to this case. But  
24 now that that's gone to the jury, I hope to get the  
25 interim report out very soon. It will encompass both

1 the original ruling and the ruling on the  
2 reconsideration clarification motion. So I'll just  
3 try to do my part to get that to the Court as quickly  
4 as possible. And that -- you know, then rely on them  
5 to try to turn it around quickly. How are things  
6 coming along generally? I appreciate the status  
7 report, but just on factual development that we've  
8 talked about time frames? And I didn't see the latest  
9 draft of the case management plan, but are -- are  
10 people still -- are the parties still in the same  
11 position as to estimates of time to trial, et cetera?  
12 Of course, accounting for the uncertainty created by  
13 the intervenor situation? I didn't mean to put you on  
14 the spot or anything, but....

15 MR. FREDERICK: This is David Frederick for  
16 South Carolina. I would say that we expect that that  
17 topic would come up in a meet and confer with the  
18 intervenors on our proposed changes to the case  
19 management plan. And that with respect to document  
20 production, you know, we have exchanged documents and  
21 we have continued to have dialogue with North Carolina  
22 and with Duke with respect to search terms. Charlotte  
23 has asked for a meet and confer. We're in the process  
24 of scheduling that. We've not received any documents  
25 from Charlotte, but I would say that it's, the case is

1 in the, you know, incipient phases of document,  
2 you know, production, review, which, you know, follows  
3 in most litigation. So I would say that we're not  
4 behind, but we're also not ahead either.

5 MR. BROWNING: Special Master Myles, this is  
6 Chris Browning. I would concur with the sentiment  
7 that the parties are making progress. I would also  
8 add that it's clear from being on both the receiving  
9 as well as the giving end on document requests, that  
10 I think everyone's realizing that this is a very large  
11 case and it is very time-consuming and South Carolina,  
12 as well as North Carolina and the intervenors are  
13 recognizing the nature and magnitude of the proceeding.

14 SPECIAL MASTER MYLES: Well, two things that  
15 I want to ask, and we don't have to necessarily  
16 address these now. But I wondered -- I just want to  
17 solicit views and if people think this would be better  
18 addressed through letters or letter reports, that's,  
19 we can do that.

20 But the two questions are, first, whether  
21 there's anything else that can be done to refine and  
22 narrow the issues beyond what we've done already? As  
23 I said in my order of yesterday, I think it's really  
24 important that that be done. I think that the idea  
25 that this is sort of a difficult target to address is

1 a fair one and we've talked about this really since  
2 the beginning.

3 But I, and we've taken, I think, good steps  
4 in the case management order to set up a process by  
5 which South Carolina will clarify its position and the  
6 defenses can also be clarified. But is there anything  
7 else that can be done to refine and narrow the issues  
8 at this point? That's one question.

9 And then the second question, which is  
10 related, is having to do with the general burden of  
11 proof in a case like this. Not the burden of proof,  
12 necessarily, but the standards, legal standards that  
13 would govern ultimately a determination of an  
14 equitable apportionment. I know there's cases out  
15 there, and we've seen some of them quoted in the  
16 briefs.

17 But would it help the process of narrowing  
18 and refining issues, to have part of that process be  
19 looking more closely at what the burden, what South  
20 Carolina's burden would be, what North Carolina's  
21 burden would be, what the trial would look like,  
22 et cetera?

23 One way we have done that at the beginning I  
24 think was to identify issues, which I think was useful  
25 at the beginning. That would be one way of doing it,

1 to identify, okay, what -- what do we see as the  
2 critical legal issues? And to have the parties  
3 address those. So those are my two questions. Or is  
4 everything working out fine? I mean, does everybody  
5 think that there is no need at this point to try to  
6 narrow the case?

7 MR. BROWNING: Special Master Myles, this is  
8 Chris Browning for North Carolina. I think the points  
9 you raised are certainly something that the parties  
10 ought to think very seriously about. And the way  
11 to -- that we can best give you guidance in terms of  
12 what your task will be at the end of the day.

13 I have to plead guilty that neither  
14 Mr. Gulick nor I have had a chance to talk about,  
15 since receiving your order, possible ways to refine  
16 and narrow the issues further. I would suggest that,  
17 over the short run, that we give some thought to it  
18 and talk with South Carolina and then perhaps, to the  
19 extent that we need to raise these issues with you  
20 further, talk about perhaps letter submissions. But I  
21 think it would probably make sense to discuss the  
22 issue between North Carolina and South Carolina, and  
23 explore informally some possibilities that might be  
24 open to both sides.

25 SPECIAL MASTER MYLES: That makes sense to

1 me. What about you, Mr. Frederick?

2 MR. FREDERICK: Well, our position would be  
3 that it's maybe a bit too early to be talking in any  
4 kind of specificity about narrowing the issues too  
5 much. And to be looking at burdens of proof and how  
6 that might be a way to cull the issues down. I mean,  
7 as a practical matter, we've got, you know, a wide  
8 ranging and ongoing internal exploration in  
9 South Carolina that is, is gathering evidence and  
10 we'll be exploring the specifics of the harm that  
11 South Carolina has suffered. But it's -- you know,  
12 basically a month into real document exchange, and it  
13 just seems premature to be talking too specifically  
14 about narrowing the range of possible points of harm  
15 that South Carolina would be presenting either on  
16 summary judgment or at a trial. That's not to say we  
17 won't be doing that in due course, but it just seems  
18 premature to be doing it now.

19 MR. BROWNING: Special Master Myles, this is  
20 Chris Browning. I don't want to begin rehashing some  
21 of the earlier discussions we've had in past  
22 conference calls about South Carolina's complaint and  
23 what position or what they should know at the time  
24 they filed their lawsuit. Let me suggest, as a  
25 practical matter, it might be worthwhile for us to

1 engage in some dialogue with South Carolina on these  
2 issues. And we can raise this on the next conference  
3 call as to whether it would be appropriate to have  
4 letter briefs following that conference call.

5 SPECIAL MASTER MYLES: I do think so. You  
6 are much closer to the ongoing discovery, obviously,  
7 than I am. My instinct, though, is that it seems like  
8 there, having done a lot of discovery myself, I know  
9 that you can get very bogged down in the breadth of  
10 a huge document production and having some limiting  
11 principles can be very helpful for -- rather than sort  
12 of the bulldozer a approach to document production,  
13 which is to get everything and then begin to narrow  
14 it. So I'm not going to dictate how things happen in  
15 that way, unless something's presented me. But my  
16 instinct is that some narrowing principles may be  
17 useful. And if that's something that is more of a  
18 legal nature that doesn't require processing the  
19 discovery that's been done, but simply is looking at  
20 it from a -- either a legal perspective or a  
21 categorical perspective.

22 MR. FREDERICK: Special Master Myles, David  
23 Frederick for South Carolina. I just think, you know,  
24 we can have another round of letter briefs in a month,  
25 if North Carolina thinks that's a productive use of

1 public resources after having done that a couple of  
2 months ago. But the reality is that we have agreed to  
3 give North Carolina a pretty substantial amount of  
4 time. And if the end result of a process of  
5 truncating our ability to investigate and do discovery  
6 on our case, we will insist on a prompt trial date,  
7 because there is no reason to have the long extensions  
8 that North Carolina has requested in light of any  
9 effort to truncate our ability to put on proof for our  
10 case.

11 So I think that the tradeoff that  
12 North Carolina should be considering is going to be a  
13 clear one, which is the more aggressively they push to  
14 narrow the case this early in the discovery process  
15 will be met with a request that you conduct a trial in  
16 a pretty prompt way, so that we can get on with it.

17 SPECIAL MASTER MYLES: Well, I mean, I think  
18 that's -- isn't that a good thing?

19 MR. FREDERICK: Yeah. No, I mean, we're  
20 not --

21 SPECIAL MASTER MYLES: I think both narrowing  
22 the issues and a prompt trial are both desirable  
23 outcomes.

24 MR. FREDERICK: It's just that North Carolina  
25 has taken the opposite view, which is that it wants to

1 narrow the issue and then put this off for  
2 three years. And we object to that.

3 SPECIAL MASTER MYLES: Well, obviously, if  
4 that's the case, then that's something we can resolve.  
5 If it comes up to me in the form of some cognizable  
6 motion or request, I understand your point, but if  
7 there's a problem with the speed of discovery, then  
8 you should press the point and bring a motion. Motion  
9 to compel. Or whatever it may be, to ensure that  
10 discovery is done promptly. Obviously, people should  
11 work things out. But if there's a -- if there's a  
12 fundamental disagreement over something like that,  
13 then that can be resolved. That shouldn't be a reason  
14 to make other decisions that, you know, that would  
15 delay things.

16 MR. BROWNING: Your Honor, this is Chris  
17 Browning. Again, I don't want to digress to some of  
18 the conversations we've had in the past in terms of  
19 the parties' respective positions. But there is no  
20 question in my mind that North Carolina is proceeding  
21 extremely quickly with trying to produce documents to  
22 South Carolina. I think we have been as responsive as  
23 possible. And I think Mr. Frederick, even though he  
24 might be implying it, is intending to state we've done  
25 otherwise. But it does, going back to your original

1 point, Your Honor, I think what you're asking is, is  
2 there a way to continue to look at focusing things so  
3 the parties aren't floundering as they're going  
4 through costly discovery, and that costly discovery  
5 includes depositions and experts as well.

6 As you know, that's been a point that we've  
7 raised from the outset of this proceeding. I do think  
8 it would be worthwhile for us to have further  
9 conversations with South Carolina along those lines.

10 SPECIAL MASTER MYLES: Yeah, I mean, one  
11 example, one possible example is a factual one. And  
12 that is I sort of alluded to this in the order. But  
13 this is simply a factual example. It's not meant to  
14 the primary example, because there may be legal issues  
15 that narrow things, too. But the, is -- you know,  
16 that's sort of the point that North Carolina had asked  
17 about was what portion of the river is South Carolina  
18 claiming harm for.

19 So as I look at the river maps that you all  
20 have given me, you know, there's, there's the Catawba  
21 river, there's the Catawba River basin, then there's  
22 other rivers downstream that have different names.  
23 The Santee River is one, and then there's the Wateree  
24 River. And then ultimately -- ultimately it extends  
25 out to the Atlantic Ocean.

1           So it's a fair question. What portion of  
2 that is at issue? Now, I resolve that in part in this  
3 order, because of the way the complaint was framed.  
4 But I did note in the footnote that South Carolina in  
5 its papers seemed to be saying that, looked on the map  
6 anyway like other rivers are at issue. And I don't  
7 know if that is something South Carolina is currently  
8 conducting discovery on or not. So it may not be a  
9 live issue.

10           MR. BROWNING: Your Honor, it is very much  
11 a live issue. South Carolina has defined the basin  
12 extremely broadly and we have been trying to produce  
13 documents that are responsive based upon that. And it  
14 has caused us to look at basins other than Catawba  
15 River basin in responding to the document request.

16           SPECIAL MASTER MYLES: Yes. I mean, at some  
17 point the logic of the order that I issued falls away,  
18 because what South Carolina requested was an equitable  
19 apportionment of the Catawba River. Now, that doesn't  
20 necessarily mean that downstream effects are  
21 irrelevant to an equitable apportionment of an  
22 upstream river. But the harms that are alleged refer  
23 to the Catawba River basin. So I don't -- which,  
24 you know, on the maps you all have given  
25 me don't extend too far south.

1 MR. FREDERICK: Special Master Myles. This  
2 is David Frederick. If I can just interject for a  
3 second. I'm a little puzzled that this issue is being  
4 framed now at this time. But I would commit to  
5 the Court that by the time of our November call, we  
6 would define how far downstream South Carolina would  
7 expect to prove harms in the case. And that we don't  
8 expect that North Carolina has any significant  
9 documents of South Carolina harm. So I'm a little  
10 puzzled by Mr. Browning's objection to documents in  
11 North Carolina's governmental possession about the  
12 Santee River, for instance.

13 But be that as it may, I would like to  
14 represent that we would expect to have back from our  
15 experts, you know, at least a sufficient analysis to  
16 be able to advise the Court that we would limit the  
17 scope of the harms presented to a particular part of  
18 the river basin by the November call, if that would be  
19 satisfactory.

20 SPECIAL MASTER MYLES: That would be useful.  
21 I think that would be very useful, whether there's  
22 documents in North Carolina on the lower portion or  
23 not, they need to frame their discovery toward  
24 South Carolina. So I think whether that portion of  
25 the river -- well, whether that river, because I

1 gather it's a separate river, is at issue is,  
2 you know, a fair question.

3 MR. FREDERICK: Well, it's a continuation of  
4 the river but it is -- it's a confluence of another  
5 river as well. And so how one defines river is  
6 actually more than just a metaphysical question for  
7 this purpose. But I understand your point.

8 MR. GULICK: Your Honor, this is Jim Gulick  
9 from the North Carolina Attorney General's office.  
10 I'm glad to hear that South Carolina will be in a  
11 position to do that. One of the -- and this is not,  
12 this is only to point out the significance of this for  
13 purposes of discovery. If South Carolina's claims of  
14 harm go below the confluence of the Catawba River  
15 itself, the Catawba/Santee, and the Congaree River  
16 which comes in from the west.

17 It does raise questions when you're looking  
18 at a question of availability of water issues, about  
19 the availability in South Carolina of water coming  
20 down the Congaree.

21 SPECIAL MASTER MYLES: Yes.

22 MR. GULICK: And their availability of water  
23 has no place with regard to North Carolina.

24 SPECIAL MASTER MYLES: Right. It opens up  
25 entirely new factual areas. And that's why I think

1 it's very important that that be resolved sooner  
2 rather than later, because -- because it involves  
3 considerations of water coming in from other sources.

4 MR. GULICK: Yes.

5 MR. FREDERICK: We're keenly aware of that,  
6 Special Master Myles. And that's why I would like to  
7 give our experts at least more than, you know, a very  
8 short number of weeks in which to make some  
9 assessments that we can base our case decisions on.  
10 And that's why I have been resistant to this narrowing  
11 in such an early stage of the litigation, because the  
12 experts are only now beginning to get some documents  
13 from these other sources. And it seems to me to be  
14 premature to be asking the experts to be making such  
15 important decisions that are going to drive critical  
16 case decisions this early in the process.

17 SPECIAL MASTER MYLES: Yeah, well, it needs  
18 to be an informed decision. I think it's also, to  
19 some extent, though, I mean, I think it may also be,  
20 to some extent, a pleading issue. Because as far as  
21 that's what I was meaning to allude to in the order,  
22 is that South Carolina has pled harm in the Catawba  
23 River basin. It hasn't pled harm, I don't think, in  
24 the Catawba River basin and beyond. So there may be a  
25 pleading issue. I'm not saying how it would come out,

1 but I think it's not just a factual issue.

2 MR. GULICK: Your Honor, this is Jim Gulick.  
3 Again, and I don't mean to belabor this or to have it  
4 resolved here, other than it does show the importance  
5 of these. North Carolina, on the assumption that --  
6 that South Carolina has retaining authority to -- to  
7 pursue claims with respect to the entire basin all the  
8 way to the Atlantic Ocean is interested -- and this is  
9 why it's important.

10 If South Carolina claims harms to itself as a  
11 result of actions in North Carolina in the Catawba  
12 River Basin, relating to the amount of water, or even  
13 potentially, among other things, it's going to become  
14 an issue of what kind of water is available in  
15 South Carolina that is not available to North Carolina  
16 in those lower portions. And that may be coming from  
17 other river basins if South Carolina is not claiming  
18 harm from there.

19 And at this stage, at least, South Carolina  
20 has resisted providing any discovery with regard to  
21 those other river basins and the availability of  
22 water. If they claim no harm below the confluence of  
23 the Congaree and the -- and the Catawba/Santee, then  
24 of course it may make no difference and there would be  
25 no need for that.

1           SPECIAL MASTER MYLES: Right.

2           MR. GULICK: But if, on the other hand, there  
3 are harms claimed below there, then if they become  
4 very important to North Carolina and we may need to do  
5 catch-up discovery with regard to those things.  
6 That's why it would be very useful to know. And I  
7 don't mean to have that answer today. I'm just  
8 pointing out the significance of it. Thank you.

9           MR. BROWNING: And this is Chris Browning.  
10 I would also add that we are appreciative of  
11 Mr. Frederick's statement that he will be providing  
12 some greater detail by the November conference call.

13           SPECIAL MASTER MYLES: Yeah, it's very, very  
14 helpful if that can be done. It is -- it is a case  
15 defining type of issue. That's the sort of thing that  
16 I had in mind when I asked whether we could resolve  
17 some things early on.

18           MR. SHEEDY: Special Master Myles, this is  
19 Jim Sheedy for CRWSP. And, of course, to the extent  
20 that there are these kind of discussions attempting to  
21 refine or further define the scope of the issues in  
22 this case and particularly if the topic involves the  
23 confluence of the two rivers which would be downstream  
24 from our raw water intake, we would ask that we be  
25 allowed to participate in that dialogue so we at least

1 know for purposes of Phase 1 exactly what the  
2 inequitable consumption for us or lodged against us  
3 may include.

4 SPECIAL MASTER MYLES: I guess that's an  
5 issue we can address when it arises. That's sort of a  
6 subsidiary issue, but we can -- certainly that's a  
7 legitimate issue.

8 The other maybe one quick way of getting to  
9 the legal side, without -- I don't want to put people  
10 to a lot of expense. But one thing that may get  
11 quickly to the legal side without doing that is -- and  
12 again, this is something you all can just consider in  
13 the discussions you're going to have on refining the  
14 issues, is whether it would make sense to just submit  
15 a short list, four to six cases, that each side thinks  
16 are the kind of mantra for equitable apportionment,  
17 which again, that would avoid the necessity of letter  
18 briefs which are awfully costly and at this stage may  
19 not be called for.

20 But it may help to guide, you know, further  
21 discussions about Phase 1, Phase 2, et cetera, to have  
22 what the parties think anyway are the governing  
23 standards for the case. Does that make sense?

24 MR. FREDERICK: Special Master Myles, this is  
25 David Frederick. I think we've actually briefed a lot

1 of these issues and presented these cases and I know  
2 that they will be briefed more fully at summary  
3 judgment where the particular distinctions between  
4 cases and the applications of which ones are most  
5 relevant are going to be debated, I would assume,  
6 between the parties.

7 You know, to the extent that identifying  
8 those cases is helpful to you, we're happy to do that,  
9 but we, you know, we wonder about the utility of  
10 getting too far down into issues about burden of proof  
11 where we probably aren't going to brief this for quite  
12 some time on summary judgment.

13 SPECIAL MASTER MYLES: Well, I'm not going to  
14 say what ought to happen in that regard. I wasn't  
15 really suggesting we get into the nitty gritty of the  
16 precise parameters of burden of proof. It was more  
17 general standards. The case that I cited in the order  
18 is a useful case but it's sort of okay, you know, you  
19 consider all these factors.

20 We've had a lot of discussions in the case  
21 management process about what should be part of Phase  
22 1 and Phase 2. And I don't know if those debates are  
23 still continuing. If not, maybe this is not a useful  
24 exercise. But why don't we just say that if anybody  
25 wants to throw me some cases, that's fine. No one has

1 to. How's that? Because I actually think it's useful  
2 to have a framework for whatever discovery disputes  
3 may arise on the Phase 1, Phase 2 especially.

4 MR. GOLDSTEIN: Special Master Myles, this is  
5 Tom Goldstein. That seems like something that the  
6 party can easily do and probably do by consensus,  
7 there's a limited universe to cases that are relevant  
8 to equitable apportionment. I think we could either  
9 separately or together come up with the cases that lay  
10 out the framework and the existing case laws.

11 SPECIAL MASTER MYLES: I think it would be  
12 helpful. I've probably seen all of them. Because,  
13 like Mr. Frederick said, I think they've mostly been  
14 cited at one point or another in these proceedings.  
15 But that's why I didn't think it would be that much  
16 work to come up with the list.

17 MR. GOLDSTEIN: Right.

18 SPECIAL MASTER MYLES: And I certainly don't  
19 need briefings on it. But I just want to make sure  
20 I'm not missing like a key case that's out there that  
21 is, you know, provides governing standards.

22 MR. GOLDSTEIN: I think Catawba River Water  
23 Supply Project, just to facilitate this, can probably  
24 generate a list of the cases that it thinks have been  
25 cited by all the parties. I would be surprised if it

1 got above 20. And then we can circulate that list if  
2 anybody wants to add anything on, anything that is  
3 particularly relevant and we may have a common  
4 framework of case law to offer it off of.

5 SPECIAL MASTER MYLES: I think that's fine.  
6 I think that's a useful thing to have, going forward.  
7 And it doesn't have to be on an adversary basis.

8 MR. GOLDSTEIN: Right.

9 SPECIAL MASTER MYLES: Okay. Are there any  
10 other issues we need to talk about today?

11 MR. SHEEDY: Special Master Myles, this is  
12 Jim Sheedy again for CRWSP. One, I guess, would be  
13 this banter about inadvertent disclosure. And let me  
14 say, as far as CRWSP is concerned, it is fine with  
15 Mr. Frederick's language in that proposed CMP that  
16 deals with inadvertent disclosure.

17 MR. MARTELLA: This is Roger Martella for  
18 Duke. And we would take the same position.

19 MR. BANKS: This is Jim Banks for Charlotte.  
20 We agree with that.

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

22 MR. FREDERICK: And this was language that we  
23 had discussed at some length with North Carolina. So  
24 I hope North Carolina continues to take that position  
25 as well.

1 MR. BROWNING: Yes. I think it's language we  
2 drafted. I did notice -- and again, we haven't gotten  
3 your document until a couple days ago, but there are a  
4 couple of typos and some other things that need to be  
5 cleaned up in it.

6 (Off the record.)

7 SPECIAL MASTER MYLES: So it sounds like  
8 you're nearing an agreement on that issue.

9 MR. BROWNING: Yes, Your Honor. Chris  
10 Browning here.

11 SPECIAL MASTER MYLES: If that issue were to  
12 resolve, how close would we be to finalizing the case  
13 management order?

14 MR. BROWNING: Your Honor, from North  
15 Carolina's perspective, I think we're pretty close.  
16 We certainly want to look over the last version with a  
17 little bit closer read and I'm sure the intervenors  
18 probably are going to do the same. But I think we're  
19 getting pretty close on the case management order.

20 MR. MARTELLA: Your Honor, this is Roger  
21 Martella for Duke. There is some detail, I think, we  
22 want to work out which we probably could. The one  
23 issue that continues to stand out is the issue about  
24 experts. If South Carolina is not objecting to  
25 nonduplicative experts by the intervenors, we probably

1 can -- at least from Duke's perspective, come to  
2 agreement. It's unclear whether South Carolina is  
3 objecting to all experts or nonduplicative experts.

4 MR. FREDERICK: The way we drafted this for  
5 discussion purposes, Special Master Myles, was simply  
6 to put a footnote that was a place holder for this  
7 issue. And I think that we can resolve the case  
8 management plan and leave that place holder for  
9 another day. It is not entirely clear to me what  
10 nonduplicative expert reports mean when you've got  
11 four defendants who are all professing an interest in  
12 disproving that South Carolina has sustained harm.

13 So that concept is one that alludes me right  
14 now. But I'm certainly happy to hear from the  
15 intervenors and get more specificity on what it means  
16 to be -- to have nonduplicative expert reports. But  
17 we have not had an opportunity to meet and confer on  
18 that issue. And I don't think that the case  
19 management plan needs to be held up pending a  
20 resolution of that, because that can be the subject of  
21 a subsequent order.

22 SPECIAL MASTER MYLES: Right. That's  
23 something I can resolve as to what nonduplicative  
24 means, as long as you all agree on the concept. I  
25 think that's right. Okay.

1 MR. BROWNING: I do want to say, Special  
2 Master Myles, just so that the record is clear.  
3 I would like to consult with my client on this,  
4 because we have -- we have instructions with respect  
5 to expert reports from the intervenors because of the  
6 costs. We do not necessarily agree with the idea of  
7 any kind of nonduplicative, whatever that means,  
8 expert reports. Because the more expert reports we  
9 have to respond to, the far greater the costs that the  
10 state is going to have to incur. And our position on  
11 the intervention position and the adequate  
12 representation issue is I think -- you know, has been  
13 put out there. So I don't want my silence to be an  
14 indication that we assent to the idea of  
15 nonduplicative, whatever that means, expert reports.

16 MR. GOLDSTEIN: Special Master Myles, this is  
17 Tom Goldstein for Catawba River Water Supply. It  
18 would be very surprising if we go through all this  
19 effort and then the Supreme Court agrees with you and  
20 disagrees with Mr. Frederick that the intervenors are  
21 properly parties in the case. And have a distinct  
22 interest. Say, to illustrate that the Catawba River  
23 Water Supply Project, establishing that its use is not  
24 inequitable doesn't cause South Carolina harm and is  
25 appropriate, that it could somehow be forbidden from

1 putting on expert testimony. But that South Carolina  
2 could put on expert testimony to prove a good side of  
3 the case. And having launched the case and the  
4 Supreme Court having said the Catawba River Water  
5 Supply project was properly a party to the case as an  
6 intervenor would be disabled from having  
7 nonduplicative expert testimony in its defense.

8 I recognize it's more expensive, but it's a  
9 lawsuit that South Carolina started and it initiated  
10 and those are costs that it has brought upon itself.  
11 And so it's fine to table it, but I don't generally  
12 see -- I see the real debate and the real question  
13 being the parties working together to make sure that  
14 nobody is imposing unnecessary costs on each other in  
15 the form of what's unnecessarily duplicative. Not  
16 somehow the sort of constant rearguard action to treat  
17 the intervenors as less than parties with a full  
18 interest in the case.

19 MR. FREDERICK: Well, if I could respond to  
20 that, Special Master Myles. Mr. Goldstein represented  
21 in Richmond that his client had a very limited  
22 interest, as did the other intervenors. And every  
23 time Mr. Goldstein talks about this kind of discovery,  
24 he talks about Phase 2 equities rather than Phase  
25 1 proof of harm. And what the intervenors have never

1 discussed on the record or in private with us in  
2 meet-and-confer sessions is how they're not being  
3 adequately represented with respect to the first phase  
4 of the case which is whether or not South Carolina has  
5 sustained harm. And I think that the burden is on the  
6 intervenors to show what their distinctive interest is  
7 in putting South Carolina to the cost of responding to  
8 expert reports that seek to do exactly what  
9 North Carolina is going to do, which is to try to  
10 disprove that South Carolina has suffered any harm.

11 SPECIAL MASTER MYLES: All these arguments,  
12 Mr. Frederick, are the ones that you're making to the  
13 Supreme Court on why my order either should be  
14 clarified or reversed. It's the same argument. And  
15 if you're wrong about those arguments, then we deal  
16 with that situation. If you're right, we deal with  
17 that situation. Either way, the ultimate question,  
18 because we're not dealing with expert reports at this  
19 point, I don't think.

20 So the only question is whether there's a  
21 provision in the case management order, and I think --  
22 at least I intended that the paragraph that said  
23 without prejudice would apply to such a provision.  
24 If -- and you raise a good point that you shouldn't be  
25 prejudiced in your position before the Court on the

1 intervention, the merits of the intervention by  
2 agreeing to nonduplicative expert discovery. I don't  
3 think that you will be prejudiced, because that's what  
4 I intended to -- I didn't want there to be a whole lot  
5 of argument over, okay, now I'm forced to this choice  
6 of either cooperating on the -- this interim order  
7 number 7 or -- but being prejudiced and doing so. So  
8 I'm trying to make clear that no one is going to be  
9 prejudiced if they comply with order number 7 in their  
10 position on intervention.

11 MR. FREDERICK: Thank you for that  
12 clarification, which I must -- I misunderstood,  
13 Special Master Myles, from Mr. Goldstein's remark. I  
14 just think that it's important to keep focused on what  
15 Phase 1 is about. And when the intervenors talk about  
16 the equities of their own consumption of water or  
17 their own diversion of water, they're talking about  
18 Phase 2 issues that are years down the line.

19 SPECIAL MASTER MYLES: Well, this is why I  
20 wanted case law, because I don't know what Phase 1 and  
21 Phase 2 are supposed to be. You tell me phase 1 is  
22 only about the harm to South Carolina. What authority  
23 is there for that? What case law says that? That is  
24 what -- I mean, obviously, it's an issue the parties  
25 can resolve themselves, but it would help me to have

1 law that says in a case like this, here's how it's  
2 supposed to work. Because I think that if it's a  
3 question of how the parties structure it, then it has  
4 to be by agreement of the parties. And that's fine.  
5 Nothing prevents the parties from agreeing on what the  
6 structure of the phases are going to be, provided it  
7 doesn't -- it isn't wasteful. But if there's legal  
8 precedence for one view or the other, that would be  
9 useful to have.

10 Because you've said that many times, that  
11 that's what Phase 1 is. But I -- I've never known  
12 really where that came from. I'm not saying it's  
13 wrong. But -- but I don't know where it comes from.

14 MR. FREDERICK: It is --

15 SPECIAL MASTER MYLES: You know, I think one  
16 of the points that was raised before on one of the  
17 calls, I think, and possibly in the papers, was that  
18 there's been discovery going to both phases that I  
19 thought maybe South Carolina even had agreed that  
20 discovery could extend to Phase 2 issues. So if  
21 that's the case, then, then that further complicates  
22 the effort to divide things neatly into the two  
23 phases.

24 MR. FREDERICK: This is David Frederick. Let  
25 me try to address that in this way. The parties

1 agreed to focus on the first part of the equitable  
2 apportionment analysis in Phase 1. And that is  
3 whether or not the downstream state suffers harm. And  
4 in our briefing on the issues earlier this year, we  
5 laid out what we thought was the relevant authority  
6 for the needs that the downstream state had to show.  
7 It had to show, first, that it was harmed. And  
8 second, that the amount of water being taken out by  
9 the upstream state was inequitable in looking at the  
10 range of factors.

11 And we set all that out in briefing and had  
12 agreed, I thought, with North Carolina that the first  
13 phase of the case would be the threshold showing that  
14 South Carolina had that it was being harmed by the  
15 state of the water and the causes from North Carolina  
16 to that shortage of water.

17 SPECIAL MASTER MYLES: But that's where we  
18 got into difficulties was harmed by what? And I think  
19 everybody agreed that it was harmed by uses in  
20 North Carolina, right, which is what you just said?

21 MR. FREDERICK: Yes, that's correct. And the  
22 point about the discovery was that we recognized that  
23 in the course of exchanging documents, that it's  
24 invariable that there will be documents that go to  
25 equitable points. Our aim was not, was to be

1 efficient in the collection of documents and my point  
2 was simply that to the extent that there are documents  
3 that overlap or that concern Phase 2 issues, and it's  
4 efficient to go ahead and produce them, that there  
5 would be no harm in great efficiencies for the parties  
6 to do that.

7           That was my only point in saying that this  
8 kind of case which we don't think has a precedent in  
9 terms of the structure this way. We propose this  
10 structure as a way of speeding it up, because most of  
11 the equitable apportionment cases with which we're  
12 familiar have taken so long that we thought that it  
13 would be prudent to focus the issues first on the harm  
14 in South Carolina and then in the equitable  
15 apportionment phase the relative equities of each  
16 stakeholders' consumption or uses of the water and  
17 that's what we have been trying -- and I thought we  
18 had agreed with North Carolina to do it that way.

19           But that was what our aim was, because we  
20 thought that that would be a more efficient and faster  
21 way to solve the issues.

22           MR. GOLDSTEIN: Special Master Myles, can I  
23 just jump in for one second? This is Tom Goldstein.

24           SPECIAL MASTER MYLES: I should warn you, I'm  
25 going to have to terminate the call in about

1 10 minutes.

2 MR. GOLDSTEIN: Sure. This is a fairly  
3 straightforward point. I think it just points out the  
4 gap in the point that Mr. Frederick is trying to make.  
5 He complains, you know, each time that the intervenors  
6 have not pointed out why it is that they have a role  
7 in Phase 1. And the way he does that is to say that  
8 Phase 1 is about the harm to South Carolina.

9 But it's not until pressed by you and later  
10 that he recognizes that no one is harmed in the  
11 abstract. They have to be harmed by something. And  
12 when you have in the complaint a specific allegation  
13 that the interbasin transfer involving Catawba River  
14 Water Supply project is inequitable, when you divide  
15 that into Phase 1, he is making the point --

16 SPECIAL MASTER MYLES: Whether it's  
17 inequitable or not, it's harmful.

18 MR. GOLDSTEIN: It's harmful. But the point  
19 is precisely that. He is saying that he is harmed by  
20 Catawba River Water Supply's project interbasin  
21 transfer. And that is something that we have a unique  
22 interest with respect to. And that is something that  
23 we, quite logically, would have expert testimony  
24 about. And it's something that is -- and this is the  
25 debate that will go to the Supreme Court, something

1 which we have a unique and distinct interest that  
2 justifies our intervening for it.

3 But it's just not the case. Each time  
4 Mr. Frederick says it, we make this point. The  
5 intervenors have a direct Phase 1 interest, because  
6 the complaint has to allege not that they're harmed in  
7 the abstract but that they're harmed by particular  
8 water uses including the water use of the Catawba  
9 River Water Supply Project's interbasin transfer.

10 MR. MARTELLA: Special Master, this is  
11 Roger Martella for Duke. And just picking up on that  
12 point briefly. When we look at the discovery  
13 South Carolina has served, it's served significant  
14 requests on Duke for document production that I assume  
15 the other intervenors produced and were producing  
16 significant documents.

17 Presumably, this will be used by  
18 South Carolina in meeting its burden, including with  
19 experts, to show that Duke is actually harming  
20 South Carolina. And again, it reinforces our point  
21 that if Duke -- if South Carolina is going to be doing  
22 that, that clearly the intervenors are entitled to  
23 expert rebuttal or expert perspectives on that. Not  
24 in a way that duplicates what North Carolina is doing,  
25 but specifically addresses Duke's unique interest in

1 the way South Carolina is specifically arguing that  
2 Duke is harming it at this Phase 1 stage.

3 MR. BROWNING: Special Master Myles, this is  
4 Chris Browning. It's clear that none of these issues  
5 are going to be resolved in the next 10 minutes. And  
6 being respectful of your time, shall we go ahead and  
7 proceed to set a schedule for the conference call for  
8 November, I believe?

9 SPECIAL MASTER MYLES: Yeah, we should do  
10 that. The only other -- yeah, I agree. We're not  
11 going to resolve this issue. They're all very  
12 legitimate points. And it is right in, right at the  
13 core of what I had, what I had alluded to before which  
14 is trying to resolve some of these issues, you know,  
15 and key these issues up for resolution soon. I agree  
16 we can't resolve them at this moment. Some of them  
17 may be further clarified when the Supreme Court rules.  
18 In the meantime, we have to just proceed forward. If  
19 additional issues arise in the interim that can be  
20 resolved in the interim, then we should do that. It  
21 doesn't have to even await the next conference, just  
22 we can resolve it on paper if necessary.

23 But we have tried to separate issues that,  
24 you know, are going to need to wait -- can and should  
25 await resolution of the Supreme Court issue versus

1 issues that must be resolved in the interim. And with  
2 that framework, I'm sure we can get -- go forward with  
3 whatever needs to be done.

4 Conferencewise, the next conference we have  
5 is October -- I have it here.

6 MR. FREDERICK: 24.

7 SPECIAL MASTER MYLES: Friday, October 24th  
8 at 11:00. And then we have Thanksgiving is when?

9 MR. FREDERICK: 27th.

10 SPECIAL MASTER MYLES: What we should -- try  
11 to do it Friday the 21st. Would that work? Or is  
12 that too soon? We can do it the week after  
13 Thanksgiving also.

14 Mr. Frederick has committed to this  
15 clarification on the geography. I think it would be  
16 helpful to have a conference at a time when you can  
17 fulfill that, that goal.

18 MR. FREDERICK: If it would be possible to do  
19 the conference, say, the beginning of December.

20 SPECIAL MASTER MYLES: Uh-huh.

21 MR. FREDERICK: Like the 5th of December, if  
22 that's convenient for you and the others.

23 MR. BROWNING: Your Honor, this is Chris  
24 Browning. December 5th does not work for me, but  
25 Mr. Gulick indicates that he can be available that

1 day.

2 SPECIAL MASTER MYLES: December 5th is fine  
3 with me.

4 MR. GULICK: What time, Special Master? This  
5 is Jim Gulick.

6 SPECIAL MASTER MYLES: Want to do 11:00  
7 o'clock again, my time?

8 MR. GULICK: That works fine.

9 SPECIAL MASTER MYLES: 2:00 your time.

10 MR. FREDERICK: Yes.

11 SPECIAL MASTER MYLES: Okay. That sounds  
12 good. And then the final administrative item, partly  
13 also a product of my trial, I have not submitted an  
14 invoice to the Court. I think I need to do that. And  
15 now is probably a good time, because we've had a long  
16 phase. And now we're going into -- the interim report  
17 will be coming out so I'll probably do it in  
18 connection with that. Some allocation is going to  
19 need to be done. And I think the practice should be  
20 that I would make a recommendation as to the  
21 allocation as regards, for example, intervenors.

22 So I'm going to make a recommendation on that  
23 as part of my submission. Unless anyone has  
24 objections or comments on that. Okay. That's all I  
25 have today.

1 MR. FREDERICK: Thank you, Special Master  
2 Myles.

3 MR. BROWNING: Thank you, Your Honor.

4 MR. GULICK: Thank you.

5 SPECIAL MASTER MYLES: Thank you.

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

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

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review of  
15 the transcript [ ] was [ ] was not requested.

16 I further certify that I am neither  
17 financially interested in the action nor a relative or  
18 employee of any attorney or party to this action.

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

21  
22 Dated:

23  
24 \_\_\_\_\_  
25 DANA FREED  
CSR No. 10602