

Filed 11/30/07

No. 138, Original

**In the
Supreme Court of the United States**

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

ANSWER TO BILL OF COMPLAINT

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.*
James C. Gulick
J. Allen Jernigan
Marc D. Bernstein
Jennie W. Hauser

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

November 2007

*Counsel of Record

The State of North Carolina ["North Carolina"], Defendant, pursuant to the Order of this Court of October 1, 2007, for its answer to the Bill of Complaint ["Complaint"] filed by the State of South Carolina ["South Carolina"], states:

1. North Carolina admits that the Catawba River is an interstate river that originates in the mountains of North Carolina and flows through a series of man-made hydropower impoundments, including Lake Wylie, where water from the Catawba River enters South Carolina. North Carolina admits that there are some unimpounded stretches of the Catawba River. North Carolina admits that the Catawba River extends for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River in South Carolina. North Carolina denies all other averments set forth in Paragraph 1 of the Complaint.

2. North Carolina admits that the flows in the Catawba River fluctuate as a result of several factors, including requirements imposed pursuant to a license issued by the Federal Energy Regulatory Commission ["FERC"] and the operation of hydroelectric generation facilities located on the River. North Carolina admits: that the flow of the Catawba River in both North Carolina and South Carolina has been significantly affected during severe droughts, as has the flow of other rivers in both States; there was a drought that lasted from 1998 through late 2002; and at the time the Complaint was filed both States had issued drought advisory warnings declaring that moderate

drought conditions existed. North Carolina admits that the Catawba River is important for hydropower generation, economic development, commerce, and recreation in both North Carolina and South Carolina. North Carolina denies all other averments set forth in Paragraph 2 of the Complaint for the reason that it lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

3. North Carolina admits that in 1993 its General Assembly enacted North Carolina General Statute § 143-215.22I ("Regulation of surface water transfers"), which prohibited certain large quantity surface water transfers between river basins without first securing permission from the North Carolina Environmental Management Commission ["EMC"]; however, the North Carolina General Assembly enacted North Carolina General Statute § 143-215.22L and repealed § 143-215.22I, effective August 31, 2007. North Carolina admits that it has authorized the transfer of at least 48 million gallons per day ["mgd"] from the Catawba River basin, with the most recent such transfer authorized in January 2007. North Carolina denies all other averments set forth in Paragraph 3 of the Complaint.

4. North Carolina admits that South Carolina requests an equitable apportionment of the Catawba River and that South Carolina requests that North Carolina be enjoined from authorizing future transfers

inconsistent with that prospective apportionment. North Carolina denies that any interbasin transfers exceed North Carolina's equitable share of the Catawba River. North Carolina denies all other averments set forth in Paragraph 4 of the Complaint.

5. North Carolina admits the averments set forth in Paragraph 5 of the Complaint on information and belief.

6. North Carolina admits the averments set forth in Paragraph 6 of the Complaint.

7. North Carolina denies that this Court has jurisdiction in this matter for the reasons set forth more fully in the First Defense, below. North Carolina denies all other averments in Paragraph 7 of the Complaint for the reason that they state legal conclusions for which no response is necessary.

8. North Carolina admits the averments set forth in Paragraph 8 of the Complaint.

9. North Carolina admits that the Catawba River enters South Carolina through Lake Wylie and flows as described in the averments of Paragraph 9 of the Complaint. North Carolina denies all other averments set forth in Paragraph 9 of the Complaint because North Carolina lacks sufficient knowledge or

information upon which to form an opinion as to the truth of the averments.

10. North Carolina admits that, in 2004, the Catawba River basin was the most densely populated river basin in North Carolina. North Carolina admits that the Census Bureau's Annual Estimate of Population for July 1, 2006 for the Charlotte-Gastonia-Concord N.C. – S.C. Metropolitan Statistical Area (which is comprised of Anson, Cabarrus, Gaston, Mecklenburg, and Union Counties, North Carolina and York County, South Carolina) was 1,583,016. North Carolina admits that the Catawba River basin includes portions of York, Chester, Lancaster, Fairfield, Kershaw, Lee, Richland and Sumter Counties in South Carolina; that the Catawba River continues to Lake Wateree; and that downstream of Lake Wateree the Wateree River merges with the Congaree River to form the Santee River. North Carolina denies all other averments in Paragraph 10 of the Complaint because North Carolina lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

11. North Carolina admits that the Catawba River serves a wide variety of water use purposes in North Carolina, including municipal water supply, industrial use, agricultural use, irrigation, electric power production, mining, aquaculture and wastewater assimilation. North Carolina admits that the Catawba

River serves a wide variety of water use purposes in South Carolina, including municipal water supply, industrial use, agricultural use, irrigation, electric power production, mining, and wastewater assimilation. North Carolina denies all other averments in Paragraph 11 of the Complaint because North Carolina lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

12. North Carolina admits that the Forward to the 1995 Catawba River Basinwide Water Quality Management Plan prepared by the then North Carolina Division of Environmental Management Water Quality Section ["1995 Plan"] states in part that the water quality of the seven reservoirs in the Catawba River basin in North Carolina "may be jeopardized by the surrounding growth pressures." North Carolina also admits that the Forward to this same publication states in part: "In regard to the basin's nearly 3100 miles of free-flowing rivers and streams, 16% are considered impaired with 90% of the impairment attributed to nonpoint sources of pollution." North Carolina further admits that the 1995 Plan identified and addressed eight water quality issues in the Catawba River basin, as follows:

1. Nutrient inputs to lakes from both point and nonpoint sources;

2. Sedimentation in streams and lakes from urban runoff, construction and agriculture;
3. Lack of assimilative capacity for oxygen-consuming wastes in streams and lake coves from wastewater treatment plant discharges;
4. Stream water quality impairment from urban stormwater runoff;
5. Health concerns associated with fecal coliform bacteria;
6. Toxicity from heavy metals and its impacts on aquatic life and water supplies;
7. Discharges of colored effluent from wastewater treatment plants;
8. Enforcement of water quality regulations and compliance with discharge permits.

North Carolina denies all other averments set forth in Paragraph 12 of the Complaint.

13. North Carolina admits that the Forward to the 1995 Plan indicated in part that the Plan was created to provide a "framework for cooperative efforts between the various stakeholders in the basin toward a common

goal of protecting the basin's water resources" and also stated, in part:

Solving these problems is beyond the capabilities of any one agency or group. State and federal government regulatory programs will play an important part; but much of the responsibility will rest with industry, agriculture, local governments and the public. Those who live, work and recreate in the basin have the most at stake.

North Carolina denies all other averments set forth in Paragraph 13 of the Complaint.

14. North Carolina admits that stakeholders have been involved for several years in the relicensing of the Catawba-Wateree Project (FERC Docket No. P-2232-522) before FERC and this negotiation process has ultimately led to a Comprehensive Relicensing Agreement ["CRA"] which was signed in 2006 by Duke Energy and many of the stakeholders, including agencies of South Carolina and agencies of North Carolina. (The entirety of the agreement is available at http://www.duke-energy.com/pdfs/comp_relicensing_agreement.pdf.) North Carolina further admits that the stakeholders – including South Carolina, through its Department of Natural Resources – agreed that the minimum continuous flow from Lake Wylie should be 1,100 cubic feet per second ["cfs"]

except during low flow periods, e.g., droughts; during low flow periods flows from Lake Wylie should be reduced in stages commensurate with the severity of the low flow event; and during such events water users in both States must take measures to reduce water demand. North Carolina denies that South Carolina has accurately described the significance and context in the CRA of the 1,100 cfs figure that South Carolina agreed to accept. North Carolina admits that Duke Energy generates hydropower through its impoundments on the Catawba River. North Carolina denies all other averments set forth in Paragraph 14 of the Complaint.

15. North Carolina admits that the flows in the Catawba River fluctuate; that a United States Geological Survey ["USGS"] gauge near Rock Hill, South Carolina (USGS Gauge No. 02146000) has recorded daily flow data almost continuously since 1942; and that the lowest average flow at this gauge for any single day reported by the USGS was 132 cfs, which is approximately 85 mgd, but that this figure is only an estimate and is significantly lower than the relatively consistent actual recorded flows that precede and follow it. North Carolina specifically denies that USGS Gauge No. 02146000 "measure[s] the daily flow of the Catawba River into South Carolina." North Carolina admits that the data set forth by South Carolina at App. 21 accurately reflect data from http://waterdata.usgs.gov/usa/nwis/uv?site_no=02146

000, concerning USGS Gauge No. 02146000. North Carolina denies that the data discussed in the Complaint at Paragraph 15 have been representatively presented or adequately explained. North Carolina further denies any implication that the flows in the Catawba River at USGS Gauge No. 02146000 are routinely below 700 cfs. North Carolina denies all other averments set forth in Paragraph 15 of the Complaint for the reason that it lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

16. North Carolina admits that as part of the Catawba-Wateree Project relicensing stakeholder process, the parties, including South Carolina, agreed to a model to evaluate flows and lake levels in the Catawba River basin under varying conditions. North Carolina admits that under the hypothetical that Duke Energy's Catawba-Wateree Project dams did not exist (and so could not have augmented the natural flow of the river into South Carolina) and that no water from the Catawba River was consumed in North Carolina for any purpose, the model yielded the following academic output: (a) On 903 of the 27,393 days between 1929 and 2003 (inclusive) the hypothetical average daily flow of the Catawba River at the location of the Lake Wylie dam would have been less than 1,100 cfs; (b) The hypothetical average daily flow would have been less than 1,100 cfs on at least one day of the year in 61 of 72 years between 1930 and 2002

(inclusive), and in 17 of the 20 years between 1983 and 2002 (inclusive); and (c) In 2002 the hypothetical flow would have been less than 1,100 cfs on 104 days. North Carolina denies all other averments set forth in Paragraph 16 of the Complaint for the reason that it lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

17. North Carolina admits that the flow of the Catawba River in both North Carolina and South Carolina has been significantly affected by severe droughts, as has the flow in other rivers in both States. North Carolina admits that, according to the USGS, there were seven major droughts in North Carolina in the twentieth century extending from 1925 to 1929, from 1930 to 1934, from 1950 to 1957, from 1966 to 1971, from 1980 to 1982, from 1985 to 1988, and from 1998 to late 2002, with the most prolonged of these droughts being from 1950 to 1957. North Carolina admits that the most recent prior drought lasted from 1998 through late 2002, and that at the time the Complaint was filed both States had issued drought advisory warnings declaring that moderate drought conditions existed. North Carolina admits that Duke Energy reduced electricity generation at its power plants located on the Catawba River and that Duke Energy closed some public access areas within the Catawba-Wateree Project, including boat landings, during the drought that ended in 2002. North Carolina denies all other specific averments set forth in

Paragraph 17 of the Complaint for the reason that it lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments.

18. North Carolina admits that, in general, it requires certification of new transfers of surface water greater than 2 mgd between river basins. North Carolina expressly denies that any harms South Carolina may have suffered were caused by North Carolina or that any harms occurring as a result of reduced flow in the Catawba River "have been exacerbated by the 'interbasin transfer statute.'" North Carolina denies all other averments in Paragraph 18 of the Complaint for the reason that they state legal conclusions for which no response is necessary.

19. North Carolina denies the averments in Paragraph 19 of the Complaint for the reason that they state legal conclusions for which no response is necessary.

20. (a) North Carolina admits that in March 2002, at the conclusion of a process taking several years, the EMC granted a certificate under North Carolina General Statute § 143-215.22I allowing Charlotte-Mecklenburg Utilities ["CMU"] to increase its existing authorization to transfer up to a total of 33 mgd from the Catawba River basin to the Rocky River basin, a sub-basin of the Yadkin River, which also flows into

South Carolina; this amount more than doubled CMU's pre-existing authorization; and this certificate was granted during the drought of 1998-2002. North Carolina denies that the granting of an Interbasin Transfer Certificate ["IBT Certificate"] to CMU exacerbated harms the drought may have been imposing on South Carolina.

(b) North Carolina admits that in January 2007 the EMC granted a certificate under North Carolina General Statute § 143-215.22I allowing the cities of Concord and Kannapolis ["Cities"], two cities severely impacted by the 1998-2002 drought, to transfer up to 10 mgd from the Catawba River basin and 10 mgd from the Yadkin River Basin to the Rocky River basin. North Carolina admits that on October 31, 2006, a letter was sent to the staff of the EMC from the South Carolina Attorney General's Office, which asserted that the environmental impact statement ["EIS"] for the then-proposed interbasin transfer did not mention any effects of the transfer in South Carolina; however, this letter failed to acknowledge an April 8, 2005 communication from South Carolina's Department of Natural Resources to the staff of the EMC stating that

the transfer [was] not large enough to be of concern to us. Besides, we get it back in the [Yadkin-]Pee Dee [River] where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are

sufficiently aggrieved to warrant commenting on the permit application.

(Defendant's Brief in Opposition, Declaration of Tom Fransen, p. 18a ¶43) North Carolina also denies that the EMC's EIS did not consider effects in South Carolina when in fact the EIS concluded that the transfer would be so minor, compared to the volume of the overall river system, that it would not significantly affect water quality or quantity, particularly in and below Lake Wylie. North Carolina specifically denies that any source "stood ready, willing, and able" to provide the entire 10 mgd that the EMC ultimately authorized the Cities to transfer from the Catawba River basin.

North Carolina denies all other averments set forth in Paragraph 20 of the Complaint.

21. North Carolina admits that pursuant to North Carolina General Statute § 143-215.22I(a)(2) Union County is "grandfathered" and, according to Union County's estimates, is allowed to transfer only up to 5 mgd from the Catawba River basin. North Carolina denies the implication that North Carolina alone authorized the interbasin transfer discussed in Paragraph 21 of the Complaint. South Carolina issued a permit in 1989, which remains current, authorizing this interbasin transfer, up to 20 mgd, by Union County, North Carolina and Lancaster County [South

Carolina] Water and Sewer District pursuant to a joint venture between the two entities. North Carolina expressly denies that "pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River basin to the Rocky River Basin." North Carolina denies all other averments set forth in Paragraph 21 of the Complaint.

22. North Carolina denies any implication that there are significant transfers of less than 2 mgd from the Catawba River. North Carolina denies the further averments set forth in Paragraph 22 of the Complaint for the reason that it lacks sufficient knowledge or information upon which to form an opinion as to the truth of the averments about what South Carolina does not know.

23. North Carolina denies the averments set forth in Paragraph 23 of the Complaint for the reason that North Carolina lacks sufficient information or knowledge upon which to form an opinion as to the truth of the factual averments about what South Carolina does not know and for the reason that the remaining averments state legal conclusions for which no response is necessary.

24. North Carolina admits that water that is transferred from the Catawba River basin in North Carolina to another river basin does not flow into

South Carolina via the Catawba River but is mostly returned to South Carolina via other rivers, such as the Yadkin-Pee Dee River system. North Carolina expressly denies that interbasin transfers in North Carolina exacerbate low flow conditions to the detriment of South Carolina. North Carolina denies all other averments set forth in Paragraph 24 of the Complaint.

25. North Carolina denies the averments set forth in Paragraph 25 of the Complaint for the reason that the averments state legal conclusions for which no response is necessary.

26. North Carolina admits that on October 31, 2006, the South Carolina Attorney General's office filed a letter with the staff of the EMC commenting on the then-proposed IBT Certificate for the cities of Concord and Kannapolis and that the letter appears at App. 1-6 of the Complaint. North Carolina denies the assertions contained in this letter. North Carolina denies all other averments set forth in Paragraph 26 of the Complaint.

27. North Carolina admits that on December 19, 2006, South Carolina Attorney General Henry McMaster wrote to North Carolina Attorney General Roy Cooper and that this letter appears at App. 7-8 of the Complaint. North Carolina denies all other averments set forth in Paragraph 27 of the Complaint.

28. North Carolina admits that on January 3, 2007, North Carolina Attorney General Roy Cooper wrote to South Carolina Attorney General Henry McMaster responding to the December 19, 2006 letter and admits that Mr. Cooper's letter appears at App. 9-10 of the Complaint. North Carolina admits that in Mr. Cooper's letter, he indicated that he had forwarded McMaster's letter to North Carolina Governor Mike Easley and to the Secretary of the North Carolina Department of Environment and Natural Resources, Bill Ross, for their consideration and that Mr. Cooper did not mention negotiating an interstate compact or delaying action on the Cities' application. North Carolina admits that the Cities' application was granted in part by the EMC on January 10, 2007. North Carolina denies all other averments set forth in Paragraph 28 of the Complaint.

29. North Carolina admits that the Catawba/Wateree River Basin Bi-State Advisory Commission ["Commission"] includes elected state officials from both North Carolina and South Carolina. North Carolina admits that on January 8, 2007, the Commission filed a letter with the staff of the EMC transmitting a resolution adopted by the Commission. North Carolina admits that the resolution recommended the EMC delay further action on the IBT Certificate for Concord and Kannapolis for "at least six months" so that certain named parties could participate in dialogs and negotiations for "the common

purpose of solving this conflict, and seeking formal procedures and compacts whereby Interstate resolutions to future issues of similar nature [could] be addressed with all participants contributing to the decision-making process." North Carolina admits that, as stated in the minutes of the EMC's January 10, 2007 meeting, prior to approving the IBT Certificate for Concord and Kannapolis, the EMC specifically considered a motion to delay the decision for 120 days; the motion was defeated. North Carolina denies all other averments set forth in Paragraph 29 of the Complaint.

30. North Carolina denies that South Carolina has alleged any facts tending to show that North Carolina has invaded, or imminently threatens to invade South Carolina's interests in the Catawba River. North Carolina denies any and all averments set forth in the Complaint as well as any and all averments set forth in the Prayer for Relief to the extent that such allegations have not been expressly admitted.

DEFENSES

31. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 30 as though fully set forth herein. North Carolina asserts separately and/or alternatively the following defenses.

FIRST DEFENSE

32. (a) South Carolina has not alleged and cannot allege that there is any deficiency of water in the Catawba River basin that is attributable to North Carolina. The harms South Carolina alleges occurred during and because of the most severe drought of record. The low flow conditions that occurred during this drought have been demonstrated, by modeling, supported by South Carolina and other allegedly impacted persons, to be avoidable by revisions to the operational parameters of the several hydroelectric dams that populate the Catawba River. Thus, South Carolina has merely alleged a difference of opinion with the manner in which a FERC-regulated hydroelectric project stores and releases flows. Such allegations do not assert that there is any deficiency of water, only that the timing of the flows is not to South Carolina's liking. South Carolina has failed to allege that North Carolina has caused the flows from the Catawba-Wateree Hydroelectric Project to be less than that to which South Carolina is entitled. South Carolina does not allege a proper claim for equitable apportionment. Therefore, the Court does not have jurisdiction over the subject matter of the Complaint. Fed. R. Civ. P. 12(b)(1).

(b) The Catawba-Wateree Project is owned and operated by Duke Energy under license from the United States. The flow of water into the South

Carolina portion of this bi-state hydropower project is determined largely by the requirements of the current FERC license and the operational needs of Duke Energy. Thus, South Carolina has not properly alleged any claim against North Carolina. For this reason, the Court does not have jurisdiction over this action. *Id.*

(c) The actual harms alleged by South Carolina: (i) occurred only once and only for a brief duration; (ii) were as alleged caused by a severe drought; and (iii) occurred only during the most grave period of the most severe drought of record in the Catawba River basin. Thus, the harms were not and are not of such a serious magnitude as to warrant the exercise of jurisdiction by this Court. *Id.*

SECOND DEFENSE

33. (a) South Carolina has failed to allege any harm to it except during times of drought, and has failed to allege that any harm South Carolina may have suffered during drought was not also suffered, in equal or greater severity, by North Carolina as well. Thus, South Carolina has not alleged that North Carolina has visited harm upon it that is in any way inequitable and therefore has not stated a cause of action for equitable apportionment.

(b) South Carolina has failed to allege that it has been deprived of the reasonable use of the waters of the Catawba River, and, even if it has been so deprived, has failed to allege that any actions by North Carolina so deprived it. The Complaint reveals that the only authorized uses in North Carolina that South Carolina alleges have any nexus to harms in South Carolina are very small compared to the volume of the River. South Carolina has failed to state a claim for equitable apportionment.

(c) South Carolina has failed to allege that any use of water in North Carolina, that is not facilitated by interbasin transfer, has any nexus whatsoever to any harms alleged to have occurred in South Carolina, i.e., South Carolina has not alleged any harms caused by North Carolina with regard to non-interbasin transfer water use. Therefore, South Carolina has failed to state a claim for equitable apportionment with regard to such uses.

(d) Although South Carolina's Complaint references quantities of interbasin transfers that have been *authorized* in North Carolina pursuant to State law, the Complaint is devoid of any allegation of any harm to South Carolina stemming from the *actual* quantities of water transferred out of the Catawba River basin. Thus, South Carolina's Complaint is based on hypothetical harms from potential interbasin transfers, and not *actual* harm from existing transfers.

Such allegations cannot support a claim for equitable apportionment.

(e) South Carolina has failed to allege a cognizable claim regarding the validity or administration of North Carolina's interbasin transfer statute. A claim for equitable apportionment action is one for division of interstate waters. The interbasin transfer statute is merely a regulatory mechanism for North Carolina to apportion internally its lawful share of such waters. To the extent South Carolina seeks to invalidate any portion of the interbasin transfer statute, such a claim is outside the scope of an equitable apportionment action.

(f) South Carolina has alleged harms that occurred only once, during a severe drought, and were caused by the drought. The alleged harms, on their face, are not of the requisite serious magnitude to support a claim for equitable apportionment.

(g) South Carolina has alleged that interbasin transfers in North Carolina inherently exacerbate existing harms in South Carolina and therefore inherently deprive South Carolina of its equitable share of the Catawba River. South Carolina, however, allows interbasin transfers throughout its State, S.C. Code Ann. §§ 49-21-10 to 49-21-80, and should not seek to prevent other States from allowing interbasin transfers. The law of equitable apportionment

recognizes no such prohibition on or bias against interbasin transfers.

(h) South Carolina has not alleged and cannot allege that there is any deficiency of water in the Catawba River basin that is attributable to North Carolina, as described more fully in Paragraph 32(a) of this Answer.

For each of the above reasons, South Carolina has failed to state a legally cognizable claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6).

THIRD DEFENSE

34. Plaintiff's claims are barred, at least in part, by the doctrine of laches. At the time of the filing of South Carolina's Complaint, local governments in North Carolina, in reliance on legislative and regulatory authorizations, had constructed and operated the expensive infrastructure needed to effectuate interbasin transfers from the Catawba River basin. For the many years that these facilities have been operating, Plaintiff had not asserted that it suffered any harm of serious magnitude caused by any interbasin transfer in North Carolina, or authorization thereof, until South Carolina complained of the potential impacts only from the most recent interbasin transfer, which was authorized earlier this year.

35. Plaintiff is also barred by laches from seeking affirmative equitable or legal relief against North Carolina for flow of the Catawba River in regard to the existing dam structures or impoundments of water on the Catawba River in North Carolina, the first of which was completed in 1915 and the last of which was completed in 1963.

FOURTH DEFENSE

36. South Carolina's suit must be dismissed because it has failed to name the United States as a defendant. The United States is an indispensable party to this litigation because of the many federal interests within the Catawba-Wateree-Santee River basin.

(a) FERC has been charged by Congress with administering the Federal Power Act, 16 U.S.C. §§ 791a - 823c, which includes the regulation of hydropower projects, including the quantity and timing of water releases, reservoir water levels, *etc.*, and under which Duke Energy's relicensing petition for the Catawba-Wateree Project is currently pending.

(b) There are two nuclear power plants that draw water from the Catawba River: McGuire Nuclear Power Station on Lake Norman and the Catawba Nuclear Power Station on Lake Wylie. Through the Atomic Energy Act of 1954 and the Energy

Reorganization Act of 1974, Congress has given the Nuclear Regulatory Commission ["NRC"] jurisdiction over the regulation of the civilian use of nuclear energy, including licensing, construction, and operation of nuclear power plants. 42 U.S.C. §§ 2001, *et seq.* The amount of water required to be available for cooling the steam that runs the turbines (to condense steam for reuse), for core cooling, and for fire suppression at each of the generation facilities is contained in the technical specifications that are part of the license application and are specifically incorporated into the NRC license. *See* 10 C.F.R. §§ 50.36 to 50.69. Modifying these technical specifications requires a modification of the license. *See id.* §§ 50.90 and 50.100.

(c) The following National Parks, National Forests, and National Wildlife Refuges, or portions thereof, are within the Catawba-Wateree-Santee River basin: Blue Ridge Parkway; Over Mountain Victory National Historic Trail; Congaree National Park; Pisgah National Forest; Francis Marion and Sumter National Forest; and Santee National Wildlife Refuge.

(d) The Catawba Indian Nation, recognized by the federal government since 1993, has a reservation adjacent to the Catawba River in York County, South Carolina, and a decree in this case in the absence of the United States will have an effect on its fiduciary capacity as trustee of federal lands held for the benefit of the tribe.

(e) Finally, the United States has an interest and right in navigation and navigability of portions of the Catawba-Wateree-Santee basin, including Lake Wylie, Lake Moultrie, and the Santee and Cooper Rivers from the Santee Dam and Pinopolis Dam to the ocean. In addition, the U.S. Army Corps of Engineers owns the redirection canal connecting Lake Moultrie to the Santee River and owns the St. Stephens Dam, a hydroelectric facility operated by the South Carolina Public Service Authority (a/k/a "Santee-Cooper").

Due to these extensive interests, the United States would need to participate in this proceeding in order for any resolution to be final.

FIFTH DEFENSE

37. South Carolina should not be heard to complain about interbasin transfers authorized by North Carolina when South Carolina authorizes interbasin transfers throughout its State. S.C. Code Ann. §§ 49-21-10 to 49-21-80. South Carolina specifically has allowed and continues to allow water to be transferred out of the Catawba River basin.

SIXTH DEFENSE

38. The flow of the Catawba River is governed in substantial part by Duke Energy's existing FERC license, which is subject to renewal in August 2008.

The flow regime mandated by the new license is expected to differ significantly from the existing license, benefitting stakeholders including South Carolina. In particular, the pending FERC relicensing proceeding will determine the minimum flow from the Catawba River to South Carolina and the impacts to South Carolina, if any, cannot be determined until the new flow regime is established. Therefore, (a) the matter is not yet ripe for decision and should be dismissed, or (b) the Court should stay this action regarding equitable apportionment pending the outcome of the FERC relicensing proceeding.

PRAYER FOR RELIEF

WHEREFORE, North Carolina respectfully prays that the Court:

1. Deny any affirmative relief requested by Plaintiff.
2. Dismiss the Complaint with prejudice;
3. Grant such costs and expenses to North Carolina as allowed by law or as the Court deems just and proper; and
4. Grant Defendant any other appropriate relief to which it may be entitled and which this Court may deem just and equitable.

Respectfully submitted,

ROY COOPER

Attorney General of North Carolina

Christopher G. Browning, Jr.*

Solicitor General of North Carolina

James C. Gulick

Senior Deputy Attorney General

J. Allen Jernigan

Special Deputy Attorney General

Marc D. Bernstein

Special Deputy Attorney General

Jennie W. Hauser

Assistant Attorney General

Attorneys for Defendant

