No. 06A1150

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Applicant,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Motion for Leave to File Bill of Complaint

RESPONSE OF THE STATE OF NORTH CAROLINA TO SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

STATEMENT

On June 7, 2007, South Carolina filed a motion for leave to file a Bill of Complaint against North Carolina to have this Court equitably apportion the Catawba River. *See* Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 14. At the same time, South Carolina also filed an application for a preliminary injunction. In the application, South Carolina asserts that the Catawba River is subject to "'inadequate water volume at ordinary stages.'" Application for Prelim. Inj., p. 2. [hereinafter "Application"] (quoting *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd mem.*, 672 F.2d 910 (4th Cir. 1981)).[1] South Carolina requests that North

[1] In *Jones*, the district court considered whether the Catawba River constitutes a navigable river, thereby giving rise to admiralty jurisdiction. The use of the phrase

Carolina be preliminarily enjoined from authorizing any interbasin transfers of water from the Catawba River in excess of those transfers that had been authorized by North Carolina as of June 7, 2007. Application, p. 1.

North Carolina law requires a permit for the transfer of more than two million gallons of water per day from one river basin to another. N.C. Gen. Stat. § 143-215.22I(a)(1) (2005).[2] In determining whether a permit should be granted, the North Carolina Environmental Management Commission [hereinafter "NC EMC"] must consider the reasonableness of the transfer, present and future detrimental effect on the river basins and whether reasonable alternatives exist to the proposed transfer. N.C. Gen. Stat. § 143-215.22I(f) (2005).

South Carolina's motion for leave to file a Bill of Complaint was apparently precipitated in part by the NC EMC issuing a permit to the cities of Concord, N.C. and Kannapolis, N.C. to transfer no more than 10 million gallons per day from the Catawba River basin to the Rocky River sub-basin. *See* Mot. for Leave to File Bill of Compl., app. 7-8 [hereinafter "Compl. Mot."] (letter from Attorney General McMaster to Attorney General Cooper). Even if Concord and Kannapolis were to transfer the

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"inadequate water volume" by the *Jones* court is in the context of summarizing three reports prepared by the Army Corps of Engineers dated 1875, 1880 and 1887. Those reports address whether the Catawba River is potentially navigable and pre-date the construction of Duke Energy's dams on the Catawba River. Moreover, neither these reports nor the *Jones* decision addresses whether the Catawba River has adequate water volume for public water supplies and other consumptive uses.

[2] On August 2, 2007, the North Carolina General Assembly ratified House Bill 820. The bill repeals N.C. Gen. Stat. § 143-215.22I, the existing statute governing interbasin transfers, replacing it with a new N.C. Gen. Stat. § 143-215.22L. While the new statute retains many features of the existing regulatory scheme, it places additional requirements on applicants for interbasin transfers. As of the date of the filing of North Carolina's brief in this matter, the Governor had not signed the bill; therefore, it is not yet effective. However, the bill will become law, unless vetoed. N.C. Const. art. II, § 22, pt. 7.

maximum quantity allowed under this permit, the transfer would constitute less than 0.4% of the average daily flow of the river into South Carolina. Although the Concord/Kannapolis interbasin transfer apparently triggered the filing of the present action, South Carolina is not seeking to enjoin the Concord/Kannapolis transfer in its Application. The permit to Concord and Kannapolis was issued on January 10, 2007; however, in the Application, South Carolina seeks only to preliminarily enjoin the issuance of new permits approved after June 7, 2007. *See* Bill of Compl. ¶ 28 (Concord/Kannapolis permit issued January 10, 2007); Application, p. 1 (requesting North Carolina be prohibited from authorizing interbasin transfers "in excess of those authorized as of the date of this application").

The process for obtaining an interbasin transfer permit from the NC EMC is lengthy, complex and expensive. Decl. of Morris, app. 50a. The State's statutes provide for a period to receive public comments, the submission of detailed technical information, and thorough review by both the staff of the North Carolina Department of Environment and Natural Resources [hereinafter "NC DENR"] and the NC EMC. *See* N.C. Gen. Stat. § 143-215.22I(c), (d), (f1) (2005). Accordingly, the process generally requires a minimum of two years from submission of a petition to the issuance of an interbasin transfer permit. In the case of Concord and Kannapolis, for example, the time period between submission of a petition until issuance of a permit was over two years. Decl. of Morris, app. 50a.

Currently, there are no pending petitions with the NC EMC for an interbasin transfer from the Catawba River. Decl. of Fransen, app. 3a. Although Union County, N.C. forwarded a preliminary Environmental Impact Statement to the NC EMC concerning a potential petition for an interbasin transfer, Union County has not taken further steps to pursue an interbasin transfer and has not tendered a petition to the

NC EMC.[3] *Id.* In fact, NC DENR has been informed by Union County that it is exploring options other than applying for a certificate for an interbasin transfer from the Catawba River basin. *Id.*

Further background relating to this dispute is set out in North Carolina's brief in opposition to the motion for leave to file a Bill of Complaint. That brief is being filed contemporaneously with the present response to the Application.[4]

ARGUMENT

In *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), this Court recognized the fundamental principle that "an injunction is an equitable remedy that does not issue as of course." As this Court has long recognized, the burden upon a State seeking a preliminary injunction in an original jurisdiction action "is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

In considering South Carolina's motion, this Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 542; *accord Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). This balancing should generally include an analysis of the public interest. *See Weinberger*, 456 U.S. at 312-13, 320. Additionally, whether the plaintiff is likely to succeed on the merits constitutes a substantial factor in determining the appropriateness of a preliminary

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[3] South Carolina's Application erroneously refers to an application pending before the NC EMC by Union County for an interbasin transfer from the Catawba River. Application, pp. 1-2.

[4] The declarations cited herein are contained in the appendix to the brief of North Carolina in opposition to South Carolina's motion for leave to file a Bill of Complaint.

injunction. *See Sole v. Wyner*, 127 S. Ct. 2188, 2195 (2007); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Consideration of these factors demonstrates that South Carolina's motion should be denied. Moreover, the motion is premature at this stage of the proceedings.

I. SOUTH CAROLINA WILL SUFFER NO IRREPARABLE HARM IF ITS APPLICATION FOR A PRELIMINARY INJUNCTION IS DENIED.

South Carolina will suffer no irreparable harm if the Application is denied. In fact, the status quo will be maintained for at least the next two years if this Court were to take no action on the Application.

The scope of the preliminary injunction requested by South Carolina is limited. South Carolina only seeks an injunction "prohibiting North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application." Application, p. 1. Thus, the Application prays that North Carolina be preliminarily enjoined from issuing any additional interbasin transfer permits.[5] Currently, no petitions for interbasin transfer permits for the Catawba River, its lakes or tributaries are pending before the NC EMC.[6] Even if such a petition were filed

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[5] South Carolina's Application uses the words "transfer" and "interbasin transfer" interchangeably. From the context of the Application, it is clear that South Carolina intends the word "transfer" to refer to removing water from one river basin and transferring it to another river basin. If, however, this Court were to read South Carolina's application as seeking to prohibit any additional consumption of water within the Catawba River basin by North Carolina residents (as opposed to the transfer of water from the Catawba River to another basin), North Carolina would suffer substantial and immediate harm if such an injunction were issued.

[6] The North Carolina statute does authorize the Secretary of NC DENR to approve a temporary interbasin transfer under emergency situations. N.C. Gen. Stat. § 143-215.22I(j) (2005). Even under emergency conditions, the Secretary is required to consult with potentially impacted parties. *Id.* The Secretary's authority to approve an emergency transfer has only been exercised once in the 15 years this statute has been in existence. *See* Decl. of Fransen, app. 3a-4a. That emergency authorization did not involve the Catawba River basin. *Id.*

tomorrow, the evaluation process would take approximately two years. Accordingly, should the Court decline to issue a preliminary injunction and should a petition for an interbasin transfer relating to the Catawba River be filed with the NC EMC in the future, South Carolina will have ample opportunity to renew its motion at that time. Thus, South Carolina simply cannot show that it faces any immediate, irreparable harm. This Court should not issue an injunction based upon the possibility of indefinite, future injury. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945).

Not only is South Carolina unable to point to any pending petition for an interbasin transfer from the Catawba River, South Carolina also cannot show that it would be harmed should such a hypothetical petition be approved by the NC EMC in the future. In support of its motion for leave to file a Bill of Complaint, South Carolina relies upon the affidavit of A.W. Badr. In this affidavit, Badr testifies: "Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina . . . ." Compl. Mot., app. 14a (affidavit of A.W. Badr). Thus, South Carolina cannot claim that it will be harmed by any and all interbasin transfers, regardless of the quantity, duration or permit conditions of such transfers. Accordingly, South Carolina's blanket request that this Court preclude all additional interbasin transfers from the Catawba River should be summarily rejected. Moreover, whether any specific interbasin transfer will have a detrimental effect upon the basin should be entrusted, in the first instance, to the agency (i.e., NC EMC) with the technical expertise to evaluate and weigh those potential effects. If South Carolina disagrees with any such determination, its remedy is to request a preliminary injunction at that time – not to preclude North Carolina from making beneficial use of the waters of the Catawba River through interbasin transfers under all circumstances. This is particularly true given that the Catawba River basin is not currently experiencing extreme or prolonged drought.

In its request to enjoin North Carolina from authorizing any further interbasin transfers, South Carolina ignores the fact that it previously agreed that there is more than enough water in the Catawba River to support all of the interbasin transfers that are the subject of South Carolina's Bill of Complaint. During the current relicensing of the Duke Energy dams on the Catawba River, South Carolina (through its various agencies), North Carolina, Duke Energy and various stakeholders entered into a Comprehensive Relicensing Agreement [hereinafter "CRA"] that has been submitted to the Federal Energy Regulatory Commission [hereinafter "FERC"]. In this document, South Carolina acknowledged that even if North Carolina were to transfer 85 million gallons per day out of the Catawba River basin, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). The total of all existing interbasin transfers approved by the NC EMC is clearly less than 85 million gallons per day. Having executed a settlement agreement before FERC in which South Carolina acknowledges that the flow of the river is sufficient to support additional interbasin transfers over and above all currently authorized transfers, South Carolina can hardly argue to this Court that it will be irreparably harmed if any interbasin transfer is approved by North Carolina in the future.

South Carolina has not shown that it will suffer any irreparable harm should its application be denied. An injunction should only be issued "to prevent existing or presently threatened injuries." *Connecticut v. Massachusetts*, 282 U.S. at 674. An injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Id.*

II. NORTH CAROLINA WILL SUFFER HARM IF A PRELIMINARY INJUNCTION IS GRANTED.

A preliminary injunction would effectively preclude applicants from submitting a petition to the NC EMC, even if an interbasin transfer were the only feasible option for responding to the water needs of a community or business. The fact that a petition for an interbasin transfer is not pending currently does not mean that issuance of a preliminary injunction would not harm North Carolina. The process by which the NC EMC determines whether to grant a petition for an interbasin transfer is complex and lengthy. Accordingly, if a need for such interbasin transfer arises, any delay in beginning the lengthy and arduous process of obtaining authorization for an interbasin transfer could present a very real harm for the community needing water from the Catawba River.

This Court should not preclude the NC EMC from taking appropriate action should other communities and businesses outside of the Catawba River basin demonstrate a need to draw water from the basin in order to alleviate real and substantial hardships.[7] If other interbasin transfer requests are filed with the NC EMC, South Carolina will have sufficient time to refile a request for a preliminary injunction raising the specific concerns it has with those requests, before any action is taken by the NC EMC. A blanket prohibition precluding the issuance of any interbasin

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[7] The NC EMC has been faithfully fulfilling its statutory obligation to consider harm to both the basin where the water is being withdrawn and the basin to where the water is delivered. In the case of the request by Concord and Kannapolis, for example, the NC EMC considered impacts to flows from and lake levels of all reservoirs along the Catawba River, including those in South Carolina, and concluded that the impacts in both States would be insignificant. Nonetheless, the NC EMC reduced the transfer from the Catawba River from the requested amount of 36 million gallons per day to 10 million gallons per day based on the NC EMC's determination of the cities' need for the water. To the extent South Carolina implies that the NC EMC is not fulfilling its obligation to protect all downstream users on the Catawba River (including users in South Carolina), South Carolina is mistaken.

transfer from the Catawba River during the several years this original jurisdiction action may be before the Court clearly harms North Carolina.[8] Moreover, the blanket prohibition requested by South Carolina would deprive this Court of the opportunity to consider a factual record with respect to specific interbasin transfers.

III. SOUTH CAROLINA IS NOT LIKELY TO SUCCEED ON THE MERITS.

South Carolina is not likely to succeed on the merits for three reasons. First, the present claim is not an appropriate case for the exercise of original jurisdiction by this Court. Second, the material filed by South Carolina in support of its application does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. Third, South Carolina's arguments are incorrectly premised upon an assumption that interbasin transfers should be presumed to be harmful.

1. The Court should refrain from granting South Carolina leave to file a Bill of Complaint given the pendency of proceedings currently before FERC that will substantially, if not entirely, resolve the present dispute. The present action does not constitute an appropriate case for the exercise of original jurisdiction because an adequate forum exists for the resolution of the issues raised by South Carolina. Accordingly, for the reasons set out in North Carolina's Brief in Opposition to South

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[8] For example, the State of North Carolina would have incurred substantial harm if a preliminary injunction had been in place at the time of application by Concord and Kannapolis. Because these cities lie at the uppermost portion of the Rocky River watershed, very limited yield can be obtained by that watershed. Concord and Kannapolis therefore had no viable option to meet their water needs other than transfers from other river basins. As set out in the declarations of Hiatt and Legg, Concord and Kannapolis would have suffered substantial harm if an interbasin transfer had not been authorized. Decl. of Hiatt, app. 22a-29a; Decl. of Legg, app. 30a-37a.

Carolina's Motion to File a Bill of Complaint, this Court need not, and should not, exercise its original jurisdiction of the complaint.

2. This Court should not exercise "its extraordinary power under the Constitution to control the conduct of one State at the suit of another" unless the threatened invasion of rights is of serious magnitude and is "established by clear and convincing evidence." *Washington v. Oregon*, 297 U.S. 517, 522 (1936) (internal quotations omitted); *accord Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). The material submitted by South Carolina in support of its motion does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. As explained in the declaration of Thomas Fransen, the report of A.W. Badr, upon which South Carolina's motion is founded, does not adequately and properly analyze the flow of the Catawba River. Decl. of Fransen, app. 12a-15a. Accordingly, South Carolina has failed to establish that it is being deprived of its fair share of the Catawba River.

3. South Carolina's argument is premised upon an inappropriate assumption that interbasin transfers should be presumed to be harmful. Specifically, South Carolina asks this Court to "enter a decree . . . declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River." Compl. Mot. 9.

As this Court has long recognized, the "removal of water to a different watershed obviously must be allowed at times" and "has been allowed repeatedly" by this Court. *New Jersey v. New York*, 283 U.S. 336, 343 (1931); *see also Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (allowing Massachusetts to transfer water out of the Connecticut River watershed).

In fact, South Carolina law allows for interbasin transfers. S.C. Code Ann. §§ 49-21-10 to -80 (Supp. 2006). Moreover, South Carolina has authorized interbasin

transfers from the Catawba River basin. Nevertheless, South Carolina argues to this Court that North Carolina's interbasin transfer statute should be declared invalid. Such an argument was rejected by this Court 85 years ago. In *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957), Wyoming argued that Colorado should be precluded from diverting water from the Laramie River to another watershed "from which [Wyoming] can receive no benefit" because the diverted water would not flow into Wyoming. *Id.* at 466. This Court rejected Wyoming's position as "untenable," concluding that diversion of water from one watershed to another "does not in itself constitute a ground for condemning it." *Id.* This reasoning holds particularly true here because, unlike the situation in *Wyoming v. Colorado,* any interbasin transfer authorized by the NC EMC ultimately flows to South Carolina in another watershed. In the case of the Concord and Kannapolis interbasin transfer, for example, the South Carolina Department of Natural Resources [hereinafter "SC DNR"] concluded that the interbasin transfer would merely divert water to the Pee Dee River basin "where we may need it more anyway." Decl. of Fransen, app. 18a (quoting SC DNR e-mail).

South Carolina cannot establish that it is likely to succeed on the merits.[9]

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING THE MOTION.

As set out above, South Carolina will suffer no harm should its application be denied. In contrast, North Carolina has demonstrated that its citizens may incur harm if a preliminary injunction is granted. Because both States are acting in their capacity

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[9] Moreover, a preliminary injunction barring North Carolina from transferring water from the Catawba River would be inconsistent with South Carolina's request for equitable apportionment. Equitable apportionment only addresses each State's entitlement to a portion of the flow of the river and leaves to each State the right to determine the most beneficial use of that water. Thus, the Application inappropriately intrudes upon the sovereign prerogatives of a sister State.

as parens patriae, the balancing of the harms also determines the impact upon the public interest. *See United States v. Nevada*, 412 U.S. 534, 539 (1973) (recognizing that State may act as parens patriae with respect to water resources). Here, the public interest weighs in favor of denying the motion.

V. A RULING UPON SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION WOULD BE PREMATURE AT THIS STAGE OF THE PROCEEDINGS.

In the event the Court grants South Carolina leave to file a Bill of Complaint, the matter should be referred to a Special Master. A preliminary injunction should not be issued based upon the conclusory affidavits submitted by South Carolina, particularly when the affiants have not been subjected to cross-examination.

South Carolina's argument that it is not receiving its fair share of the waters of the Catawba River rests primarily upon the affidavit of A.W. Badr. North Carolina, however, has not had the opportunity to cross-examine Badr about his prior inconsistent statements. When Badr originally examined the proposed Concord/Kannapolis interbasin transfer, he concluded that such a transfer would have no detrimental impact upon South Carolina. In an e-mail of August 5, 2005, Danny Johnson of the SC DNR informed Thomas Fransen of the NC DENR's Division of Water Resources that Badr had concluded the proposed transfer was not large enough to affect South Carolina:

> As follow-up to our recent conversation . . . regarding the subject IBT [i.e., interbasin transfer], I've re-discussed the matter with [A.W. Badr] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee 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. Thanks for the info on it.

Decl. of Fransen, app. 18a (quoting SC DNR e-mail). Importantly, at the time that Badr came to this conclusion, Concord and Kannapolis were proposing to transfer a maximum of 38 million gallons per day from the Catawba River basin – substantially

more than the 10 million gallons per day that was ultimately approved by the NC EMC. *See id.* at 18a-19a. Thus, according to the e-mail, Badr and Johnson had concluded that even if Concord and Kannapolis transferred 28 million gallons per day more than the final authorized transfer amount, it would not even "warrant commenting" by South Carolina.

North Carolina has also not had an opportunity to cross-examine Badr concerning serious deficiencies of the report he has filed with this Court. As explained in the declaration of Thomas Fransen, Badr's analysis of the Catawba River assumes that there are no reservoirs on the river and that North Carolina consumes no water from the river. Consequently, given such artificial and unrealistic assumptions, Badr's report provides virtually no assistance to the Court in determining if South Carolina is being deprived of its fair share of water. Moreover, North Carolina has not had an opportunity to cross-examine South Carolina officials about South Carolina's acknowledgment in the CRA that even if North Carolina were to make interbasin transfers of 85 million gallons per day from the Catawba River, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). If the court determines to invoke its exclusive original jurisdiction, a preliminary injunction should only be considered after the Special Master directs discovery to proceed and considers the scientific evidence with respect to water flow and usage of the Catawba River.

CONCLUSION

South Carolina's application for a preliminary injunction should be denied.

Respectfully submitted,

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No. 138, ORIGINAL

In the

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BRIEF OF THE STATE OF NORTH CAROLINA IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant South Carolina leave to file a Bill of Complaint seeking equitable apportionment of the waters of the Catawba River given that: (1) the flow of the Catawba River into South Carolina is currently being addressed in proceedings before the Federal Energy Regulatory Commission and (2) the Bill of Complaint does not identify any threatened invasion of South Carolina's rights.

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JURISDICTION

South Carolina invokes this Court's original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (2000). *See* Bill of Compl. ¶ 7.

STATEMENT

Introduction

South Carolina seeks leave to file a Bill of Complaint against North Carolina to have this Court equitably apportion the Catawba River. Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 14. South Carolina further seeks to enjoin interbasin transfers of water from the Catawba River. Bill of Compl., Prayer for Relief, ¶ 2.

The Catawba River originates in the Appalachian Mountains of North Carolina near Asheville. The river runs for approximately 150 miles through North Carolina before it forms a 10 mile stretch of the border between North and South Carolina at Lake Wylie. The Catawba River then continues for roughly 60 miles through South Carolina until it flows into the Wateree River near Columbia, South Carolina. Water from the Wateree River flows into the Santee River and eventually reaches the Atlantic Ocean.

The flow of the Catawba River is controlled by a series of 11 dams and reservoirs operated by Duke Energy – six in North Carolina, one at the North Carolina/South Carolina border, and four in South Carolina. Decl. of Fransen, app. 4a. These reservoirs allow Duke Energy to generate hydroelectric power and supply cooling water for its two nuclear power

plants and three coal-fired plants in the Catawba River basin. Lake Wylie, formed by the seventh dam along the Catawba River, is located on the border between North Carolina and South Carolina. The flow of water from the Catawba River into South Carolina is therefore controlled by the Lake Wylie dam. *Id.* at 4a-5a.

Duke Energy Relicensing

In 1958, the Federal Power Commission – now the Federal Energy Regulatory Commission ("FERC") – originally licensed the 11 dams operated by Duke Energy on the Catawba River. *Duke Power Co.*, 20 F.P.C. 360 (1958). This license is for a period of 50 years and expires in August 2008. *Id.*; *accord* Decl. of Fransen, app. 5a; Decl. of Reed, app. 55a. Under this license, Duke Energy is required to release a minimum of 411 cubic feet per second ("cfs") into South Carolina from the Lake Wylie dam. Decl. of Reed, app. 58a.

In February 2003, Duke Energy began the process of relicensing these 11 dams ("the Catawba-Wateree Hydro Project"). Decl. of Reed, app. 55a. That process included conducting detailed modeling of the flow of the Catawba River. Decl. of Fransen, app. 5a-6a, 9a. This modeling takes into account anticipated water uses and withdrawals from the river through the Year 2058. *Id.* As part of its relicensing process, Duke Energy sought to include all stakeholders in an effort to build a consensus concerning the terms of a new license for these dams. Decl. of Reed, app. 55a-57a. One of the central issues in that process concerns flow of the river during times of drought. Decl. of Morris, app. 42a. During 1998-2002, the Catawba River basin experienced the most severe drought in the last 75

years. Decl. of Fransen, app. 6a. This drought produced hardship in both North Carolina and South Carolina. Decl. of Morris, app. 41a-45a.

The discussions and negotiations between Duke Energy and the stakeholders ultimately led to a Comprehensive Relicensing Agreement ("CRA") that was signed by Duke Energy and 69 stakeholders in the Summer of 2006 and amended in December 2006.[1] Decl. of Reed, app. 57a, 59a, 60a. The signatories to the CRA include the South Carolina Department of Natural Resources; the North Carolina Department of Environment and Natural Resources; the South Carolina Department of Parks, Recreation and Tourism; Camden, S.C.; Rock Hill, S.C.; Kershaw County, S.C.; and Bowater, Inc. Decl. of Reed, app. 59a-60a. The CRA constitutes a request by its signatories that FERC grant Duke Energy a license, subject to the terms and conditions of the CRA, for the Catawba-Wateree Hydro Project. Decl. of Fransen, app. 6a; Decl. of Reed, app. 57a-58a.

The CRA, if its terms are adopted by FERC, provides substantial protections to South Carolina. Under the CRA, the minimum flow from the Lake Wylie dam would be increased from 411 cfs to 1,100 cfs in the absence of drought conditions. Decl. of Reed, app. 57a-58a. The CRA provides that in a Stage 1 drought, Duke Energy would be required to release a minimum of 860 cfs at the Lake Wylie dam. Decl. of Fransen, app. 7a. During a Stage 2 drought, Duke

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[1]Excerpts of the CRA are set out in the declarations of Fransen and Reed. The entirety of the agreement is available at http://www.duke-energy.com/pdfs/comp_relicensing_agreement.pdf.

Energy would be required to release a minimum of 720 cfs at the Lake Wylie dam. *Id.* During a Stage 3 drought, Duke Energy would be required to release a minimum of 700 cfs. *Id.* Thus, the CRA ensures that even under the severe drought conditions, South Carolina will receive a much greater minimum flow than is required under Duke Energy's current license.

The minimum flow of 1,100 cfs into South Carolina, along with all of the other terms of the CRA, was a negotiated compromise. Decl. of Reed, app. 57a-58a. This compromise also included an understanding that North Carolina would, over the course of the new license, make additional interbasin transfers of water from the Catawba River to North Carolina communities that lacked sufficient water supplies. Decl. of Fransen, app. 9a-10a. Specifically, the CRA includes a chart of the projected water withdrawals. *Id.* This chart includes all of the interbasin transfers that are the subject of South Carolina's motion. *Id.* The signatories acknowledge that even with these interbasin transfers, the model shows that the flow into South Carolina is "expected to meet existing and projected future (Year 2058) water use needs." *Id.* (quoting CRA).

The CRA also sets out a Low Inflow Protocol for entities that use or withdraw water from the Catawba River basin. Decl. of Fransen, app. 6a-7a; Decl. of Reed, app. 58a. This protocol requires communities to implement specific water conservation measures during times of drought. Decl. of Reed, app. 58a. Those measures become more stringent as drought conditions become more severe. *Id.* The Low Inflow Protocol is based on the principle that all water users must share the responsibility to conserve water during drought conditions. Decl. of Reed, Attach. A, app. 63a.

During the 1998-2002 drought, no such protocol was in existence to ensure water conservation.

Although Duke Energy filed its relicensing application with FERC on August 29, 2006, FERC has not yet ruled on that application. Decl. of Fransen, app. 12a; Decl. of Reed, app. 60a. It is anticipated that FERC will relicense Duke Energy's 11 dams prior to the expiration of the current permit in August 2008. Decl. of Reed, app. 61a.

North Carolina's Interbasin Transfers

North Carolina law precludes the transfer of more than two million gallons of water per day from one river basin to another without a permit. N.C. Gen. Stat. § 143-215.22I(a)(1) (2005).[2] In determining whether a permit should be granted, the North Carolina Environmental Management Commission ("NC EMC") must consider (1) the reasonableness of the transfer, (2) present and future detrimental effects

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[2]On August 2, 2007, the North Carolina General Assembly ratified House Bill 820. The bill repeals N.C. Gen. Stat. § 143-215.22I, the existing statute governing interbasin transfers, replacing it with a new N.C. Gen. Stat. § 143-215.22L. While the new statute retains many features of the existing regulatory scheme, it places additional requirements on applicants for interbasin transfers. As of the date of the filing of North Carolina's brief in this matter, the Governor had not signed the bill; therefore, it is not yet effective. However, the bill will become law, unless vetoed. N.C. Const. art. II, § 22, pt. 7.

on the river basins and (3) whether reasonable alternatives exist to the proposed transfer. N.C. Gen. Stat. § 143-215.22I(f) (2005).

In November 2004, the cities of Concord and Kannapolis, N.C. submitted a petition to the NC EMC for authority to withdraw water from the Catawba River basin and transfer that water to the Rocky River sub-basin. Decl. of Morris, app. 50a. That petition, as later amended by Concord and Kannapolis, sought a maximum transfer of 36 million gallons per day. *See* Decl. of Fransen, app. 19a.

The cities of Concord and Kannapolis were struck particularly hard by the drought of 1998-2002. Decl. of Hiatt, app. 23a-25a; Decl. of Legg, app. 31a-33a. These cities lie at the uppermost portion of the Rocky River sub-basin, a small watershed area. Accordingly, these cities can obtain only very limited yield from that watershed. Decl. of Hiatt, app. 23a, 28a; Decl. of Legg, app. 31a, 36a.

In August 2005, during the review process for the Concord and Kannapolis interbasin transfer petition, the South Carolina Department of Natural Resources ("SC DNR") informed North Carolina that the proposed interbasin transfer would not harm South Carolina. Specifically, an official with SC DNR informed Thomas Fransen of the North Carolina Division of Water Resources:

> As follow-up to our recent conversation . . . regarding the subject IBT [i.e., interbasin transfer], I've re-discussed the matter with

> [A.W. Badr][3] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee 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. Thanks for the info on it.

Decl. of Fransen, app. 18a (quoting SC DNR e-mail).

At its January 2007 meeting, the NC EMC approved a transfer by Concord and Kannapolis of not more than 10 million gallons per day from the Catawba River basin to the Rocky River sub-basin, which was less than a third of the cities' request. Decl. of Fransen, app. 19a. The certificate issued by the NC EMC requires Concord and Kannapolis to comply with drought restrictions virtually identical to the Low Inflow Protocol in the CRA. *Id.*

The transfer of 10 million gallons per day to Concord and Kannapolis constitutes less than 0.4% of the average flow of the Catawba River. Decl. of Fransen, app. 16a. In contrast, evaporation from cooling water used at Duke Energy's nuclear and coal-fired plants on the Catawba River consumes 5.2% of the average flow of the river. Decl. of Morris, app. 49a. Energy generated from these power plants benefits residents of both South Carolina and North Carolina.

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[3]Despite his original opinion that the subject interbasin transfer does not harm South Carolina, Badr has submitted an affidavit in support of South Carolina's motion for leave to file a Bill of Complaint.

Notwithstanding South Carolina's acknowledgment in the CRA that this interbasin transfer would not impact the ability of the Catawba River to meet current and projected water use needs through the Year 2058, South Carolina filed its motion for leave to file a Bill of Complaint on June 7, 2007. South Carolina's Bill of Complaint seeks to permanently enjoin the interbasin transfer to Concord and Kannapolis and requests an equitable apportionment of the Catawba River.

Additionally, South Carolina has filed a separate application seeking to preliminarily enjoin North Carolina from issuing any permit for an interbasin transfer from the Catawba River basin that was not approved on or before June 7, 2007. Contemporaneously with the filing of this Brief in Opposition, North Carolina is filing a response to that application.

SUMMARY OF ARGUMENT

The Court should refrain from granting South Carolina leave to file a Bill of Complaint given the pendency of proceedings currently before FERC that will substantially, if not entirely, resolve the present dispute.

Duke Energy is currently undergoing a comprehensive relicensing of the 11 dams it operates on the Catawba River, including the Lake Wylie dam that controls the flow of the river into South Carolina. As part of the FERC relicensing process, Duke Energy, South Carolina and North Carolina (through their respective agencies) have filed a submission with FERC that requests FERC to increase substantially

the minimum flow at the Lake Wylie dam into South Carolina.

Should this request be adopted by FERC, all of South Carolina's complaints concerning past droughts (particularly the drought of 1998-2002) become irrelevant. South Carolina's motion concedes that the Catawba River has ample water for interbasin transfers when drought conditions are not in effect. Moreover, under the terms that have been proposed to FERC, during drought conditions, Duke Energy will be required to release into South Carolina a minimum flow from the Catawba River that is almost double the current requirement. Thus, the FERC proceedings will impact substantially the very issue upon which South Carolina bases its complaint – the minimum flow of the Catawba River into South Carolina.

Declining to hear South Carolina's complaint at this time would be particularly appropriate given that South Carolina's Bill of Complaint relies almost exclusively upon the compromise that was negotiated between Duke Energy, South Carolina, North Carolina and other stakeholders in the FERC process. Specifically, South Carolina asserts that it should be entitled to 1,100 cfs of water from the Catawba River. Bill of Compl. ¶ 14. This argument is based on a specific section of a negotiated settlement that has been submitted to FERC – a proposal on which FERC has not yet acted. Accordingly, it would be premature for South Carolina to base its complaint upon a proposed term to a FERC license that has not yet been issued.

Finally, South Carolina has not demonstrated a threatened invasion of its rights by North Carolina. South Carolina has merely alleged that the Catawba River produces less water in times of drought. South

Carolina's allegation does not demonstrate an actual or threatened invasion of South Carolina's rights and does not constitute a claim of such serious magnitude so as to justify invoking this Court's original jurisdiction.

ARGUMENT

THE MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT SHOULD BE DENIED

Article III of the Constitution provides that this Court shall have original jurisdiction over a limited number of disputes, including those "in which a State shall be Party." U.S. Const. art. III, § 2; *see* 28 U.S.C. § 1251(a) (2000). This Court has repeatedly recognized that, even when this Court has exclusive original jurisdiction, it has substantial discretion to decline to exercise that jurisdiction. *See, e.g., Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992). This discretion is exercised "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

This Court should therefore be "reluctа[nt] to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Accordingly, leave to file a complaint in an original action should be granted only in "appropriate cases." *Wyoming v. Oklahoma*, 502 U.S. at 451. As the Court explained:

> "[T]he question of what is appropriate concerns, of course, the seriousness and

> dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."

Id. (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). The Court makes "sparing use of [its] original jurisdiction so that [the Court's] increasing duties with the appellate docket will not suffer." *Illinois v. City of Milwaukee*, 406 U.S. at 94; *accord California v. Texas*, 457 U.S. 164, 168 (1982). Original jurisdiction is "'of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi v. Louisiana*, 506 U.S. at 76 (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)).

The Court should deny South Carolina's motion for leave to file a bill of complaint. South Carolina's complaint does not set out an "appropriate case." First, the issue upon which South Carolina bases its complaint (the flow of the Catawba River) is currently being addressed in proceedings before FERC. Second, South Carolina has not demonstrated a threatened invasion of its rights.

I. PROCEEDINGS CURRENTLY BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION WILL DETERMINE THE WATER FLOW OF THE CATAWBA RIVER INTO SOUTH CAROLINA.

In its motion, South Carolina concedes that, in the absence of drought, ample water exists in the Catawba

River to accommodate all current and anticipated consumptive uses, including the interbasin transfers that are the subject of South Carolina's motion for leave to file a complaint. *See* Mot. for Leave to File Bill of Compl., app. 14 [hereinafter "Compl. Mot."] (affidavit of A.W. Badr) ("Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina . . . ."). In his affidavit, Badr states that South Carolina did not receive an adequate flow of water from the Catawba River during the drought of 1998-2002. *Id.* at 15-16. Badr, however, recognizes that this was "mainly because [Duke Energy] did not release as much water from [its] lakes as flowed into them." *Id.* at 16.

The flow of water from the Catawba River into South Carolina is effectively controlled by Duke Energy at its Lake Wylie dam, which lies on the border between North and South Carolina. Decl. of Fransen, app. 4a-5a. Duke Energy's current FERC permit requires a minimum release from the Lake Wylie dam of 411 cfs. Decl. of Reed, app. 58a.

As Badr's affidavit tacitly acknowledges, during the 1998-2002 drought, Duke Energy chose to retain as much water as possible in order to have sufficient reserves to generate electricity. Compl. Mot., app. 16. Thus, Badr's chart of measured daily flow of the Catawba River shows many days in 2001 when the flow into South Carolina approached the minimum flow requirement of Duke Energy's FERC license (411 cfs). *Id.* at 20.

Because Duke Energy's current license expires in August 2008, proceedings currently before FERC will determine the amount of water that is released from the Lake Wylie dam into South Carolina. This

relicensing process involves substantial input from stakeholders and other interested parties. Decl. of Reed, app. 55a-57a. In the Summer of 2006, Duke Energy and 69 stakeholders (including various South Carolina agencies and local governments) entered into a Comprehensive Relicensing Agreement ("CRA") for the Catawba-Wateree Hydro Project. Decl. of Reed, app. 57a, 59a. The CRA spans 501 pages and sets out detailed provisions and requirements that the signatories are asking FERC to incorporate into Duke Energy's license to operate these dams. The CRA constitutes a negotiated compromise of the many interests of the 70 parties to the agreement. Decl. of Reed, app. 57a-58a. Part of that compromise includes specific provisions addressing the quantity of water that flows into South Carolina.

The CRA, if its terms are accepted by FERC, will substantially increase the minimum flow of the Catawba River into South Carolina. While Duke Energy's current license provides for a minimum flow of 411 cfs at the Lake Wylie dam, the CRA would provide for a minimum flow of 1,100 cfs.[4] Decl. of

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[4]In its motion, South Carolina asserts that it should be entitled to 1,100 cfs from the Catawba River as measured 3.5 miles downstream of the Lake Wylie dam. *See* Bill of Compl. ¶ 14; Br. in Supp. of Mot. for Leave to File Bill of Compl., app. 15, 20. South Carolina, however, neglects to inform the Court that it withdraws substantial quantities of water upstream of this measuring point. Specifically, South Carolina withdraws 57 million gallons per day from Lake Wylie, which runs along the border between North Carolina and South Carolina. Decl. of

Reed, app. 57a-58a. Moreover, even during a Stage 3 drought, the CRA would ensure that the amount of water Duke Energy releases from the Lake Wylie dam would be almost double the amount that Duke Energy was required to release during the 1998-2002 drought. Decl. of Fransen, app. 7a. Specifically, during a Stage 3 drought, Duke Energy must release a minimum of 700 cfs from the Lake Wylie dam. *Id.*

Thus, should the CRA be accepted by FERC, the flow of water into South Carolina will be substantially greater than in recent droughts. In fact, South Carolina, through its agencies, has "acknowledge[d] that modeling and evaluation have predicted that . . . the flow releases anticipated [into South Carolina] are expected to meet existing and projected future (Year 2058) water use needs" should the terms of the CRA be adopted by FERC. Decl. of Fransen, app. 9a-10a. Moreover, at the time this acknowledgment was signed by various South Carolina agencies and local governments, the signatories knew and understood that these projections took into account all of the interbasin transfers that are the subject of South Carolina's Bill of Complaint. Decl. of Fransen, app. 9a.

South Carolina's complaint is premised upon the argument that, unless North Carolina's current interbasin transfers are set aside, South Carolina will not receive an adequate flow of water in the event of a severe drought. In support of this argument, South Carolina describes the flow of the river at the South Carolina border during the 1998-2002 drought – the worst drought in over 75 years. The flow of the river at that time, however, is largely irrelevant. Both Duke

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Fransen, app. 17a.

Energy and 69 stakeholders have asked FERC to impose license conditions that will require Duke Energy to release a much greater flow of water from Duke Energy's reservoir at the South Carolina border. Should this license condition be adopted by FERC, South Carolina is assured of receiving substantially greater flow, even in times of drought.[5]

Thus, the FERC proceeding stands as a forum that can substantially resolve the matters in dispute. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The comments Bowater, Inc. recently filed with FERC illustrate this point. In its motion for leave to file a Bill of Complaint, South Carolina describes at length the impact of the 1998-2002 drought on Bowater. In its submissions to FERC, Bowater, however, urges FERC to adopt the terms of the CRA and asserts that the proposed licensing terms will allow for sufficient flow of water into South Carolina:

> From Bowater's perspective, the CRA achieves adequate and predictable flow releases from the Wylie Hydro that support the raw water quantity needs and discharge permit requirements for our facility located in Catawba, South Carolina which is one of the

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[5]Under the CRA, the minimum flow into South Carolina would be increased from the existing minimum flow of 411 cfs by an additional 449 cfs during a Stage 1 drought (from 411 cfs to 860 cfs), 309 cfs during a Stage 2 drought (from 411 cfs to 720 cfs) and 289 cfs during a Stage 3 drought (from 411 cfs to 700 cfs). Decl. of Fransen, app. 7a. This additional flow dwarfs the water needed for interbasin transfers in North Carolina.

> largest coated paper mills in the world. In addition, the long-range planning embodied in the Water Supply Study and in the Low Inflow Protocol provides Bowater as well as the entire Catawba-Wateree Basin with a level of drought protection that has not existed before.

Decl. of Fransen, app. 11a (quoting Bowater's FERC submission).

The FERC proceeding stands to substantially, and perhaps entirely, address the issue that South Carolina has raised in this action (i.e., the minimum flow of the Catawba River into South Carolina). Should FERC implement license terms inconsistent with the CRA, FERC's determination may be appealed to either the United States Court of Appeals for the Fourth Circuit or the United States Court of Appeals for the District of Columbia. 16 U.S.C. § 825*l* (2000).

Additionally, even assuming that the FERC decision does not resolve South Carolina's problem, it would be premature for this Court to accept South Carolina's complaint until the FERC relicensing process is complete. Until a license is issued by FERC, both South Carolina and North Carolina will be forced to argue to this Court the meaning and significance of an agreement (the CRA) that may or may not be adopted by FERC. *See* Bill of Compl. ¶ 14 (relying upon 1,100 cfs set out in CRA).

South Carolina's Bill of Complaint relies upon a negotiated compromise between North Carolina, South Carolina and various interested parties in a FERC proceeding. *Id.* Notwithstanding the delicate balance of this compromise, South Carolina is asking this Court to accept the portion of the compromise that South Carolina likes (a minimum flow of 1,100 cfs),

while throwing out the portion of the compromise it dislikes (the interbasin transfers referenced in the compromise). Thus, South Carolina relies on the CRA in representing to this Court the flow of water from the Catawba River that it believes it should be allocated. South Carolina, however, ignores the fact that a part of the compromise of the CRA was an acknowledgment that the Catawba River has sufficient flow to sustain the interbasin transfers at issue without impacting other current and projected uses of the river. A determination of the meaning and effect of the CRA, however, would be premature until such time as FERC acts on that agreement.

The judicial resources of this Court would be largely wasted if South Carolina's complaint is accepted at this stage and the parties are required to base their arguments upon a FERC license that has not yet been issued.

II. SOUTH CAROLINA HAS NOT DEMONSTRATED A THREATENED INVASION OF ITS RIGHTS.

South Carolina makes the conclusory allegation that transfers of water from the Catawba River by Charlotte, Concord and Kannapolis, N.C. "exceed North Carolina's equitable share of the Catawba River." Bill of Compl. ¶ 4. South Carolina purports to bolster this allegation by asserting that in the FERC relicensing of the Catawba-Wateree Hydro Project, it was agreed by stakeholders that the flow of water into South Carolina should be 1,100 cfs. Bill of Compl. ¶ 14 (relying upon CRA). The Complaint further alleges that in its natural state, the Catawba River would often not deliver 1,100 cfs. Bill of Compl. ¶ 16.

The gist of South Carolina's complaint is that the Catawba River produces less water in times of drought – the exact same condition that occurs in North Carolina. In fact, consumptive uses in North Carolina are small compared to the overall flow of the Catawba River. By far the most significant influences on downstream flows are climatic factors such as drought, and the operation by Duke Energy of its hydroelectric facilities under license by FERC.

The impacts about which South Carolina complains were the result of drought, and not any actions of North Carolina. In fact, during the period in question, North Carolina communities suffered equally if not more than did South Carolina. For example, Lake Rodhiss, which supplies water for the towns of Valdese, Granite Falls and Lenoir, North Carolina, suffered an algal bloom that began in 2001 and continued into 2002, resulting in taste and odor complaints from water users. *Compare* Decl. of Morris, app. 43a, *with* Compl. Mot., app. 38 (declaration of Donna Lisenby) (water for Camden, S.C. had odor and taste problems). Lake Hickory, which supplies water for the City of Hickory, North Carolina, suffered an algal bloom in 2002 and also caused complaints from its water users. Decl. of Morris, app. 43a. Incidents, such as the one in Camden, S.C. about which South Carolina complains, are not uncommon during drought and do not render water unsafe to drink. *Id.* at 43a-44a.

Furthermore, boat ramps in North Carolina were closed by Duke Energy not only on Lake Wylie, but also on Lake James and Lake Norman (both of which lie wholly within North Carolina) due to the fact that the reservoir levels were so low as to create a safety hazard for boaters. Decl. of Fransen, app. 19a-20a.

Moreover, water shortages occurred in Cherryville, N.C. where in mid-August 2002, the town used an emergency pump on a flatbed trailer (provided by the North Carolina Division of Emergency Management) to pump water from a hydrant on the Lincoln County water system into a hydrant on the Cherryville water system. Decl. of Morris, app. 44a-45a. Immediately thereafter, Cherryville drilled an emergency well to provide adequate water supply for its population. *Id.* at 45a.

Of course, the severity of a drought is not in any party's control. But the operations of the hydroelectric facilities can be manipulated to mitigate drought impacts. Over the past few years, both States, learning from their experiences in 1998 to 2002, have sought to craft a new regime for the operation of the dams on the Catawba River in order to diminish the impacts of drought in both States in the future. Thus, although Bowater alleges that its manufacturing operations were impacted in 2002 by the drought, that same corporation has enthusiastically hailed the CRA as providing "adequate and predictable flow releases" that support Bowater's withdrawal and discharge needs and that are "sustainable into the future." Decl. of Fransen, app. 11a (quoting Bowater submission to FERC). Far from being the cause of South Carolina's woes, North Carolina was also a victim of the 1998-2002 drought, as well as a willing and motivated partner in successful efforts to address the situation.[6]

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[6]In addition to relying upon the harm created by the 1998-2002 drought, South Carolina also alleges, based on the report of A.W. Badr, that it would receive 1,100 cfs more frequently under the so-called "natural flow" of the

South Carolina appears to be blaming North Carolina for the fact that South Carolina did not get sufficient rainfall during 1998-2002. South Carolina merely suffered the effects of an extreme drought similar to the effects suffered by others in the region, including North Carolina. South Carolina's allegation simply does not constitute a claim of such serious magnitude so as to require relief from this Court. *See Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995).

Should this Court grant South Carolina's motion for leave to file a Bill of Complaint, several million dollars of attorney and expert witness fees will be expended by the parties in bringing this matter to trial before a Special Master. Environmental regulators in both States will be diverted from their primary job of protecting the environment. More importantly, the resources of this Court should not be consumed by South Carolina based merely upon statements tending

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Catawba River. This analysis is unrealistic. Badr's "natural flow" assumes that North Carolina would consume absolutely no water from the river. It also assumes that the complex of hydropower dams would not exist. This is obviously not a valid basis for evaluation. *See* Decl. of Fransen, app. 12a-15a. Moreover, Badr's report focuses on flows in 2001 when Duke Energy was storing water in case the drought worsened. In the Fall of 2002, when the drought was at its worst, Duke Energy was able to use this stored water to provide South Carolina with enhanced flows that would not have been available even under the unrealistic expectations of the "natural flow" scenario. *See id.* at 14a-15a.

to show that five years ago the Catawba River basin experienced the worst drought in over 75 years.

CONCLUSION

The motion for leave to file a Bill of Complaint should be denied.

Respectfully submitted,

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August 7, 2007

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APPENDIX

APPENDIX CONTENTS

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-A1150

STATE OF SOUTH CAROLINA,
Applicant,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Motion for Leave To File Complaint

REPLY BRIEF IN SUPPORT OF APPLICATION OF THE STATE OF SOUTH CAROLINA FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

South Carolina respectfully submits this reply in support of its application for a preliminary injunction to maintain the status quo in this matter pending the Court's review on the merits.

In an attempt to moot South Carolina's need for preliminary relief, North Carolina represents to the Court that an injunction is unnecessary because it will voluntarily maintain the status quo "for at least the next two years." Br. in Opp. to Mot. for Prelim. Inj. at 5. North Carolina then asserts its right to continue to authorize such transfers during that time – and on an expedited basis – whenever it perceives a need to do so. The inconsistency of those representations fully justifies the preliminary injunction South Carolina seeks.

Since South Carolina filed its application with this Court, North Carolina has taken steps to evade – rather than to address – the complaints raised by South Carolina. First, North Carolina appears to have tabled (for the time being) the long

pending request of Union County to increase the amount it can transfer out of the Catawba River by 13 million gallons per day ("mgd"). Second, North Carolina's Assembly amended the interbasin transfer statute – hoping to "mitigate fighting between . . . [the] states"[1] – but left in place the aspects of the law that have given rise to this dispute.[2] But changing the method by which North Carolina, as the upstream state, determines what water should be left to South Carolina, the downstream state, will not protect South Carolina's equitable rights in the Catawba River. At a minimum, this Court should require that, until an equitable apportionment of the Catawba River is achieved, North Carolina cannot unilaterally authorize any additional interbasin transfers out of the Catawba River. Instead, such transfers should occur (if at all) only on application to, and approval by, a neutral third party, such as a Special Master appointed in this case to make appropriate recommendations to the Court. Such action would completely alleviate the harms North Carolina claims would result from an injunction, while also providing South Carolina with adequate protection from further unilateral and harmful transfers by North Carolina.

A. Enjoining Further Transfers Without Some Neutral Third Party's Permission Would Eliminate The Harms North Carolina Claims Would Result From An Injunction

Contrary to North Carolina's opposition, South Carolina has no objection to an injunction with reasonable limitations. In South Carolina's view, it would be entirely proper for the Court to enjoin North Carolina from authorizing any additional interbasin transfers from the Catawba River without express permission from the

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[1] Thursday, August 2, 2007, at the North Carolina General Assembly, The Fayetteville Observer (August 2, 2007) (available at http://www.fayobserver.com/article_ap?id=108689 (last visited August 17, 2007)).

[2] As of the date of this filing, the amended interbasin transfer statute, which would replace the current § 143-215.22I with a new § 143-215.22L, remains subject to disapproval by the Governor.

Special Master appointed in this matter. That would allow the Special Master to consider the impact of any proposed transfer on uses of the Catawba River in South Carolina, which North Carolina has thus far ignored, and impose appropriate conditions on any such transfer during times of inadequate flow. Importantly, such an injunction would eliminate the harms North Carolina claims would result from a "blanket" bar on additional transfers. In the event North Carolina proposes a transfer that would not invade South Carolina's rights in the Catawba River, North Carolina can be afforded a full opportunity to persuade the Special Master to lift the injunction as to that particular transfer.

By contrast, there is no reason for this Court to defer to the claimed "technical expertise" of the North Carolina Environmental Management Commission ("EMC"). Indeed, it is well settled that the proper apportionment of an interstate stream "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Rather, as South Carolina noted in its opening brief seeking leave to file a complaint, this case must be settled "on the basis of equality of right," recognizing "the equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); Br. in Supp. of Mot. to File at 10.

North Carolina's request for deference to its own agency is particularly inappropriate given that it was North Carolina's insistence on unilateral decisionmaking that precipitated this dispute. North Carolina's view is apparently that South Carolina (and the Court) should simply trust it to make equitable use of the waters of the Catawba River – without a framework for resolving interstate disputes, and without it having any incentive to give due regard for the impact of its

consumptive uses on South Carolina and her citizens. That stance is untenable, as this Court has repeatedly held. *See, e.g., Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) (rejecting the proposition that "a state may rightfully divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary").

B. The Proposed Injunction Would Provide South Carolina With Important Protection From Further Harmful Transfers While An Equitable Apportionment is Determined

Despite its careful suggestions that no new transfers are unlikely to be authorized in the next two years, North Carolina continues to threaten South Carolina with additional harm from its mounting unlawful and unilateral interbasin transfers. As this Court has explained in another original action, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 594 (1923); *see also Doran v. Salem Inn*, 422 U.S. 922 (1975) (affirming grant of preliminary injunction barring enforcement of town ordinance despite the absence of pending enforcement proceedings against plaintiffs).

1. North Carolina's assurances of no new transfers are critically incomplete. First, at the time South Carolina was preparing its initial application in this Court, North Carolina's EMC was considering a request from Union County to increase its maximum authorized daily transfer out of the Catawba from 5 million gallons per day ("mgd") to 18 mgd. *See* app. __ [printout from March 19, 2007 showing proposed transfer.] Indeed, Union County has already completed a draft Environmental Impact Statement, which is a substantial step in the permitting process. *Id.* Yet in opposing South Carolina's request for a preliminary injunction, North Carolina reports – without offering any details – that this proposed transfer is no longer pending because Union

County is "exploring [other] options." Br. in Opp. to Mot. for Prelim. Inj. at 5; Decl. of Fransen, App. 3a. Importantly, North Carolina does not foreclose the possibility that Union County will determine — after this Court rules on South Carolina's motion for a preliminary injunction — that those other options are less preferable than a transfer out of the Catawba River, leading it to reinstate its partially completed application for an interbasin transfer.

Second, North Carolina's suggestion that no additional transfers will be authorized in the next two years because of the "lengthy and arduous process" for obtaining such authority ignores that the North Carolina interbasin transfer statute specifically authorizes the North Carolina Secretary of Environment and Natural Resources to grant a "temporary transfer" without resort to the ordinary permitting process "in the case of water supply problems caused by drought." N.C. Code § 143-215.22I(j).[3] Such "temporary transfers" under the statute can last up to a year. *Id.* (authorizing initial six month period with option to renew for an additional six months). North Carolina thus has an available means to circumvent the "lengthy and arduous" permitting process in a manner that makes a preliminary injunction an important remedy in this litigation. North Carolina, moreover, has now declared that parts of the Catawba River basin in North Carolina are experiencing "Extreme Drought" conditions, with the remainder experiencing "Severe Drought" conditions. *Compare* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited Aug. 17, 2007) (showing drought areas) *with* North Carolina Division of Water Quality, General Map of the Catawba River Basin, http://h2o.enr.state.nc.us/basinwide/whichbasincatawba.htm (visited Aug. 17, 2007)

[3] The provision for temporary transfers in the recently amended version of the statute does not differ materially from the existing version. [Cite H820, § 143.215.22L(q)]

(showing map of Catawba basin in NC). These conditions make such "temporary transfers" sufficiently likely to be authorized during the pendency of this litigation that the threat of irreparable harm to South Carolina from further interbasin transfers is imminent.

2. North Carolina is simply wrong to assert that the interbasin transfers it has authorized thus far have only insignificant effects. North Carolina attempts to make that showing by pointing out that the most recent transfer it authorized of 10 mgd to Concord and Kannapolis constitutes "less that 0.4% of the average daily flow of the river into South Carolina." Br. in Opp. to Mot. for Prelim. Inj. at 8. North Carolina is thus claiming an "average daily flow" of more than 3800 cubic feet per second ("c.f.s."). **[Dr. Badr should confirm these calculations.]** Yet, as South Carolina has alleged here, the "average" flow of the Catawba River masks wide fluctuations – due both to drought and other, non-drought causes of inadequate flow, see Badr Decl., App. 16 – when the flow of the Catawba River is far less than average. In times of extreme drought, flows can drop to as low as 700 c.f.s. More importantly, North Carolina's authorized transfers cannot fairly be considered in isolation. As North Carolina's Morris Declaration makes clear, to date North Carolina has authorized the transfer of at least 72.5 mgd (approximately 112 c.f.s.) out of the Catawba River. In a time of drought, that represents fully 16% of the flow of the river – an amount that can cause the types of environmental harms described in South Carolina's complaint and motion papers. **[cites]** Thus, when it matters most to South Carolina, North Carolina's authorized interbasin transfers are by no means insubstantial.

* * *

South Carolina is likely to succeed on the merits of its claim that an equitable apportionment is warranted and that North Carolina has no right under federal law to

divert substantial portions of the Catawba River in a manner that unfairly diminishes South Carolina's equal rights in the river. South Carolina will suffer irreparable harm in the absence of an injunction, as North Carolina has plainly threatened additional unilateral and unlawful interbasin transfers from the Catawba. Moreover, if North Carolina truly does not contemplate authorizing any additional interbasin transfers in the next two years (as it claims), North Carolina will suffer no harm whatsoever from the limited injunction South Carolina seeks. Indeed, the Court need do nothing more than to hold North Carolina to its representation that "[i]n fact, the status quo will be maintained for at least the next two years." Br. in Opp. to Mot. for Prelim. Inj. at 5. During that time, the parties may develop a full record before a Special Master and the Special Master's recommendations may be reviewed by this Court.

Conclusion

For the foregoing reasons and those stated in the application, South Carolina respectfully requests the issuance of a preliminary injunction enjoining North Carolina, absent permission from a Special Master appointed by this Court, from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of the application, thereby preserving the status quo pending resolution of the related original action filed by South Carolina contemporaneously with the application.

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August [21], 2007

No. 138, Original

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,
v.
STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Complaint

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

North Carolina's inequitable interbasin transfers of water out of the Catawba River basin have caused – and continue to threaten – substantial harm to South Carolina during periods when the Catawba River is at less than adequate flows. Contrary to North Carolina's assertions, that harm to South Carolina is not due solely to natural forces or the actions of Duke Energy, but rather is significantly exacerbated by North Carolina's unilateral actions. Although many factors affect the complex ecological conditions of the Catawba, North Carolina's actions in authorizing at least 72.4 million gallons per day ("mgd") from the river necessarily decrease the available water for South Carolina. The uncertainty over the continued supply of the Catawba for South Carolina residents – and the absence of any other forum in which to obtain an equitable apportionment of the river – amply justifies this Court's exercise of original jurisdiction.

North Carolina erroneously asserts that South Carolina can obtain full relief from North Carolina's harmful conduct in Federal Energy Regulatory Commission ("FERC") proceedings relating to the re-licensing of a Duke Energy hydroelectric project. FERC has no authority under the Constitution to apportion river waters, so any orders it issues regarding Duke Energy cannot address the harms caused to South Carolina's citizens from North Carolina's inequitable and unilateral apportionment of the river. Moreover, FERC's relicensing decisions do not force North Carolina to recognize South Carolina's legal rights in considering future interbasin transfers from the Catawba. North Carolina has refused to enter into negotiations toward an interstate compact regarding apportionment of the Catawba, so "[a] resort to the judicial power is [therefore] the only means left" for South Carolina to protect its rights. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (citation omitted). Accordingly, the Court should grant South Carolina's motion for leave to file a

complaint and appoint a Special Master to make a recommendation as to an equitable apportionment of the Catawba River.

ARGUMENT

I. THIS COURT IS THE ONLY APPROPRIATE FORUM FOR RESOLVING THIS DISPUTE

A. This Case Meets The Normal Standards For This Court's Original Jurisdiction

In this controversy between two states, the Supreme Court's jurisdiction is both original and exclusive. 28 U.S.C. § 1251(a); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 450 (1945). South Carolina's complaint falls squarely within one of the longstanding areas this Court has identified as "particularly appropriate" for the exercise of its original jurisdiction, namely, the equitable apportionment of interstate streams. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1031 (1983) (O'Connor, J., dissenting) (*citing North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1924)). Indeed, this Court has repeatedly acknowledged its "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among states." *Arizona v. California*, 373 US. 546, 564 (1963).

No other forum is available to South Carolina. "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). And no such questions can be resolved by administrative agencies of the federal government, *see, e.g., Georgia v. Pa. R. Co.*, 324 U.S. at 455, 462 (holding "[t]he relief which Georgia seeks is not a matter subject to the jurisdiction of the [Interstate Commerce] Commission"; rather, exercise of the Court's original jurisdiction provided the only "adequate or effective remedy").

Moreover, South Carolina has exhausted political channels in attempting to negotiate this dispute with North Carolina. Prior to seeking leave to file this action, South Carolina, through its Attorney General, expressed its objection not only to the specific interbasin transfer to Kannapolis and Concord, but also to North Carolina's process of "unilaterally" granting interbasin transfers "without addressing the needs and rights of [South Carolina]." App. 1-2. South Carolina's Governor and representatives in Congress from the districts that include the Catawba and Pee Dee basins expressed the same concerns. App. 7. South Carolina urged North Carolina to stay its hand regarding the Kannapolis-Concord transfer to allow the parties an opportunity to negotiate an interstate compact, and a Bi-State Advisory Commission made a similar recommendation.[1] But North Carolina ignored those entreaties and granted the proposed Kannapolis Concord interbasin transfer.

Since this suit was filed, North Carolina has sought to change the facts to "mitigate" this dispute.[2] The North Carolina Assembly has authorized minor amendments to the interbasin transfer statute, and Union County has suspended (for the time being) its

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[1] Specifically, the Catawba/Wateree River Basin Bi-State Advisory Commission, whose members include elected representatives from both North and South Carolina, passed a resolution – submitted to the North Carolina Environmental Management Commission ("ECM") by *North Carolina Senator* Dan Clodfelter – recommending that ECM "delay action for six months and allow the [Commission] the opportunity to attempt to assess this situation and mediate a solution," including the development of "formal procedures and compacts whereby Interstate resolutions to future issues of a similar nature [could] be addressed with all participants contributing to the decision-making process." App. 30. ECM refused this suggestion of a cooperative decisionmaking process and granted the permit unilaterally.

[2] Thursday, August 2, 2007, at the North Carolina General Assembly, The Fayetteville Observer (August 2, 2007) (available at http://www.fayobserver.com/article_ap?id=108689 (last visited August 17, 2007)).

long-pending transfer application. *See* NC Opp. ___. But those temporary palliatives do not alter the fact that South Carolina has no other alternative for protecting its rights and those of her citizens except to invoke the original jurisdiction of this Court. *See Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (holding "the injury complained of" – relating to an upstream state's harmful use of an interstate river – "is such that an adequate remedy can only be found in this court at the suit of the state of Missouri").

B. The FERC Relicensing Proceedings Cannot Afford South Carolina Full Relief

North Carolina incorrectly asserts that FERC can provide South Carolina with an adequate remedy against North Carolina's unilateral interbasin transfers and that FERC proceedings to determine whether and under what conditions Duke Energy should be granted a new license to continue the operation of its hydroelectric plants along the Catawba River could "substantially resolve the matters in dispute." Br. in Opp. to Mot. to File at 15.

First, under the Federal Power Act ("FPA"), FERC has authority to issue a license, upon satisfactory conditions, to operators of hydroelectric projects, such as Duke Energy. *See* 16 U. S. C. §§ 817(1), 792. FERC does not have jurisdiction to oversee water withdrawals made under state statutes, such as the North Carolina Interbasin Transfer Statute. Indeed, under the FPA, the FERC has no jurisdiction over governmental entities. GET CITE; *Bonneville Power* (CA9 2006). Rather, FERC's only recourse for a violation of its licensing conditions is with Duke Energy, and not a State. And Duke Energy is in no way responsible for administering or authorizing any of the interbasin transfers that underlie South Carolina's complaint. As Duke Energy has explained in FERC filings, "[w]hile Duke Energy manages the lakes, it is the State of North Carolina or the State of South Carolina that makes the decisions on whether to grant [interbasin

transfer] certifications." [Cite] FERC thus has no means of penalizing North Carolina's continued approvals of inequitable and unilateral interbasin transfers. *See, e.g., Wyoming v. Oklahoma*, 502 US 437, 451(1992) (noting that suggestion of alternative proceedings provided no assurance "that a State's interests under the Constitution will find a forum for appropriate hearing and full relief"). North Carolina therefore is simply wrong that those FERC proceedings can adequately remedy South Carolina or justify this Court's declining to exercise its original jurisdiction.[3]

Second, North Carolina is incorrect (at __) that the Comprehensive Relicensing Agreement ("CRA") will resolve this issue. In fact, CRA § 39.9 expressly disclaims resolution of the water rights issues raised in this case:

> *Water Rights Unaffected* – This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters.

North Carolina's own key participant in the Duke Energy relicensing proceedings, Steven Reed, who is Environmental Supervisor for North Carolina's Division of Water Resources, has acknowledged that the Low Inflow Protocol ("LIP") laid out in the agreement – and which is triggered at the critical time when flows become inadequate – *affect only how Duke Energy uses the water in the river*, not other users or stakeholders in the relicensing process: "[T]he LIP would not reduce the amount of water each party (except Duke) is permitted to use. The parties have requested that FERC impose the LIP on Duke as a condition of the new li-

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[3] In *New Jersey v. Delaware*, No. 134 Orig., this Court permitted New Jersey's complaint to proceed notwithstanding the existence of FERC proceedings that Delaware asserted would moot New Jersey's case. *See* DE Opp. to NJ Mot. To Reopen, No. 11 Orig., at 26-27 (U.S. filed Oct. 27, 2005). Similarly, this Court in *Maryland v. Louisiana*, 451 US 725 (1981), accepted jurisdiction notwithstanding a pending FERC proceeding.

cense." App. 58a. Thus, contrary to North Carolina's assertions (Br. in Opp. to Mot. to File at 17), the CRA cannot resolve the rights of North Carolina and South Carolina to the waters of the Catawba River.

C. The Proposed Duke Energy License Will Not Offset North Carolina's Inequitable Interbasin Transfers In Any Event

North Carolina also argues incorrectly that, if FERC decides to accept the proposed license for Duke Energy, the minimum flows from the Lake Wylie dam imposed on Duke Energy as a condition of that license will have the practical effect of offsetting the harms to South Carolina caused by the challenged interbasin transfers.

First, North Carolina asserts (off-point) that, under the proposed new license, South Carolina will enjoy more protections *vis-à-vis* Duke Energy as to certain *minimum* flows than it does under the expiring license. But the expiring license terms do not establish the appropriate baseline against which to measure South Carolina's (or North Carolina's) *equitable* share of the Catawba River under federal common law. Thus, the mere assertion that South Carolina may be better off under the new license does not automatically render North Carolina immune from claims that it has taken more than its fair share.

Second, although Duke Energy can control the Lake Wylie dam in the sense that its releases for power generation affect downstream users of the river, it has no authority to determine the volume of water North Carolina authorizes to be withdrawn from the Catawba River basin above that point. Importantly, under the LIP proposed in the new license, when less water flows into the system, Duke Energy is allowed to release less water from the Lake Wyle dam. *See* Br. in Opp. to Mot. to File at 13-14, App. 69a-86a. Thus, excessive interbasin transfers can – and if unabated, likely will – artificially trigger provisions in the CRA that allow for lower flows into South Carolina.

Third, North Carolina argues that, because the model used in reaching the CRA was based on the assumption that North Carolina's consumptive transfers would increase to 85 mgd over the course of the proposed 50 year license period, all transfers of lesser volume cannot be harmful. That factual claim, however, is inappropriate for resolution at this stage. Importantly, the CRA does not limit North Carolina to authorizing the transfer of no more than 85 mgd out of the Catawba for the next 50 years (nor does it obligate South Carolina to acquiesce in transfers up to that level). In addition, as the Morris Declaration shows, in the roughly 15 years North Carolina's interbasin transfer statute has been in effect, EMC has authorized the transfer of 43 mgd out of the Catawba, and the statute "grandfathered" the transfer of another 29.54 mgd out of the Catawba. *Id.* Thus, North Carolina has already authorized the transfer of 72.54 mgd out of the Catawba. App. 48a-49a.

That trend virtually guarantees that, without this Court's action, North Carolina will have authorized transfers far in excess of 85 mgd within the next 50 years – indeed the Union County IBT alone would cause North Carolina to exceed 85 mgd. South Carolina can derive little comfort from North Carolina's permit holders typically not withdrawing the maximum amount allowed under their permits. As North Carolina acknowledges (at __), the permitting process is arduous, and permit applicants understandably seek permits they can "grow into." As these permits age, however, permit holders will use more and more of the maximum allowed before seeking a new permit. Moreover, given that the interbasin transfers are often granted as a supplement to another primary water supply, which will become scarce in times of drought, permit holders may well withdraw more water from the Catawba when it will be most harmful to South Carolina. The CRA therefore does not offer a practical solution to North Carolina's inequitable apportionments.

D. The CRA In No Way Estops South Carolina From Bringing This Complaint

North Carolina's suggestion that South Carolina is somehow estopped from bringing this case because certain of its agencies participated in reaching the CRA is untenable. First, North Carolina mischaracterizes the CRA, which merely acknowledges that "modeling and evaluating have predicted that . . . the flow releases anticipated from the . . . [Lake Wylie dam] are expected to meet existing and projected future (Year 2058) water use needs." App. 9a-10a. That quite tentative statement – which is explicitly made "subject to change and review during the term of the New License," App. 10a – in no way expresses South Carolina's acquiescence to North Carolina's harmful interbasin transfers.

Moreover, the South Carolina agency authorized by law to represent the State in matters involving interbasin transfers, the Board of the Department of Health and Environmental Control ("DHEC"), has not consented to the CRA. *See* S.C. Code §§ 49-21-80, 49-21-10 (empowering DHEC's Board, subject to the approval of the General Assembly, to "negotiate agreements, accords, or compacts on behalf of and in the name of the State with other states"). To the contrary, after Concord and Kannapolis first proposed a transfer of up to 38 mgd, DHEC's Chief of the Bureau of Water, Alton Boozer, wrote to Thomas Fransen in 2001 of his "concern[] with the potential impact that this and any other proposed transfers will have on the water quality and quantity of the Catawba River, and what impact it will have on down stream users."

Even if the CRA could bear the weight North Carolina places upon it, North Carolina's suggestion of estoppel is legally misconceived. It is settled law that "[a] state cannot estop itself by grant or contract from the exercise of the police power." *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 427 (1925). Indeed, even an explicit act of South Carolina's legislature could "neither bargain away the police

could "neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction." *Texas and N.O.R. Co. v. Miller*, 221 U.S. 408, 414 (1911).

II. NORTH CAROLINA'S UNILATERAL INTERBASIN TRANSFERS HARM SOUTH CAROLINA

North Carolina blames natural forces for the harms its interbasin transfers cause, claiming (at __) that "the gist of South Carolina's complaint is that the Catawba River produces less water in times of drought." Indeed, its supporting affidavits seek to demonstrate that North Carolina suffered from the recent drought as well and that, most of the time, the Catawba River carries enough water to satisfy all current uses. But those arguments in fact *support* this Court's jurisdiction to impose an equitable apportionment. South Carolina's complaint asserts that in times of inadequate flows, North Carolina's interbasin transfers substantially and unlawfully exacerbate the harm to South Carolina over and above that caused by other forces. *See, e.g.*, App. 14. And because North Carolina will not agree to a compact or restrict its withdrawals, South Carolina has no means of protecting itself during times when the Catawba's flow is inadequate and North Carolina takes more than its fair share.

A. South Carolina's Complaint Appropriately Focuses On Times Of Inadequate Flow

It is undeniably true that droughts happen only some of the time. In fact, North Carolina has declared that "extreme drought" conditions now exist across much of the Catawba basin, with "severe drought" conditions prevailing in the remainder.[4] And as Dr.

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[4] *Compare* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited Aug. 17, 2007) (showing drought areas), with North Carolina Division of Water Quality, General Map of the Catawba River Basin,

Badr's summary report shows, the Catawba periodically experiences inadequate flows even absent drought conditions. App. 16 ("The Catawba River can experience very low flows at any time of year, not just during the dry summer and fall months.").

This Court's past equitable apportionment decrees have routinely – and appropriately – taken into account variances in a river's flow. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing injunction setting a certain level below which, consistent with New Jersey's equitable rights, New York had to allow the Delaware River to pass); *see also Colorado v. New Mexico*, 459 U.S. 176, 189 (1982) (ordering Special Master to consider "extent to which present levels of use reflect current or historical water shortages"). South Carolina seeks a similar apportionment from the Court here.

B. Disputed Factual Issues Raised By North Carolina Highlight The Need For A Special Master

Among other factual issues, North Carolina challenges causation – whether the harm South Carolina alleges is caused by North Carolina's interbasin transfers or instead by some other force – but that question cannot be resolved at this stage of the litigation. South Carolina adequately alleges substantial harm from North Carolina's interbasin transfers and is accordingly entitled to prove its claim. *See Nebraska v. Wyoming*, 515 US 1, 15 (1995) (noting that Nebraska's "allegations describe a change in conditions sufficient, if proven, to warrant the injunctive relief sought, and Nebraska is accordingly entitled to proceed with its claim."). Similarly, North Carolina's various efforts to impeach South Carolina's witnesses or to quarrel with experts' theories, at best, raise disputed factual issues that should not be resolved on the present record. *See, e.g., Kansas v. Colorado*, 185 U.S. 125, 147

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http://h2o.enr.state.nc.us/basinwide/whichbasincatawba.htm (visited Aug. 17, 2007).

(1902) (holding that "in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence"). Appointment of a Special Master in this matter is therefore warranted.

CONCLUSION

The Court should grant South Carolina's motion for leave to file a complaint and appoint a Special Master to make a recommend how the Catawba River should be equitably apportioned.

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