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**Headed South:
Equitable Apportionment Comes to the Carolinas**

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ABSTRACT

In 2007, South Carolina initiated an original action in the United States Supreme Court seeking equitable apportionment with North Carolina of the Catawba-Wateree River. The Court referred the matter to a Special Master, together with the motions of three non-state entities – the Catawba River Water Supply Project (CRWSP), Duke Energy Carolinas, LLC (Duke Energy), and the city of Charlotte, N. C. – seeking to intervene as parties. Charlotte withdraws water from the Catawba in North Carolina upstream of South Carolina. Duke operates hydropower dams along the River in both states. CRWSP withdraws water in South Carolina, but distributes it in both states. Over South Carolina’s objections, the Special Master recommended that all three entities be allowed intervention. Reviewing South Carolina’s exceptions, the Supreme Court clarified the standard governing intervention, holding that a party that shows a compelling, distinct interest in his own right not properly represented by the state can intervene. Applying that standard, it affirmed intervention by Duke and the CRWSP but denied intervention by Charlotte. The majority’s opinion stands as a landmark development in equitable apportionment jurisprudence and will greatly impact the progress of this particular case. The action now returns to the Special Master for expanded discovery and an eventual hearing on the merits. Meanwhile, Federal Energy Regulatory Commission (FERC) relicensing of Duke’s impoundments along the Catawba proceeds in parallel, with the South Carolina Attorney General participating in state administrative proceedings concerning a South Carolina water quality certification that was issued by staff of the S.C. Department of Health and Environmental Control (DHEC) but then rescinded by the DHEC Board.

I. Origin and Development of the Catawba-Wateree Equitable Apportionment Case

A. Origin of the Case and Initial Proceedings

On June 7, 2007, South Carolina Attorney General Henry McMaster filed a motion for leave to file a complaint on behalf of South Carolina against the State of North Carolina, seeking equitable apportionment of the Catawba-Wateree, a river that arises in the mountains of North Carolina and flows down into South Carolina.¹ In addition to equitable apportionment of the river, South Carolina's proposed Complaint sought a declaration that North Carolina's interbasin transfer statute cannot be used to determine each state's share of the river, as well as an injunction preventing North Carolina from allowing transfers of water from the Catawba River basins to other rivers basins in a manner inconsistent with the requested apportionment.² North Carolina opposed the motion on grounds that the Catawba's flow was being addressed in a FERC relicensing proceeding, wherein Duke Energy seeks an operating license for a system of 11 impoundments along the river in both states. While its petition for leave to file a complaint was pending, South Carolina moved for a preliminary injunction to prevent North Carolina from authorizing transfers of water from the Catawba River beyond those previously authorized, which North Carolina also opposed. On October 1, 2007, the Court granted South Carolina's motion for leave to file the Complaint, directed that North Carolina file an answer, and denied South Carolina's motion for a preliminary injunction.³

South Carolina contends North Carolina has authorized upstream transfers of water from the Catawba River basin that exceed North Carolina's equitable share of the river and has done so pursuant to a North Carolina statute that requires any person seeking to transfer more than 2 million gallons of water per day (mgd) from the Catawba River basin to obtain a permit from the North Carolina Environmental Management Commission.⁴ The complaint alleges that North Carolina has issued permits to Charlotte for the transfer of up to 33 mgd; to the North Carolina cities of Concord and Kannapolis for the transfer of 10 mgd; has authorized Union County (through the CRWSP) to transfer at least 5 million gallons a day; and has implicitly authorize an unknown number of transfers below the 2 mgd permitting threshold.⁵ South Carolina claims that the net effect of these upstream transfers is to deprive South Carolina of its equitable share of the Catawba River's water, particularly during periods of drought or low river flow. While South Carolina seeks a decree that equitably apportions the Catawba River between the two States and enjoins North Carolina from authorizing transfers in excess of that State's equitable share, it does not specify a minimum flow of water that would satisfy South Carolina's equitable needs.

North Carolina agrees that severe drought conditions have affected the flow of the Catawba and other rivers in the States, but denies that its own actions have caused harm to South Carolina.⁶ North Carolina specifically denies that actions it took pursuant to its interbasin permitting statute—including transfers approved for Charlotte-Mecklenburg and Union County—exceed North Carolina's equitable share of the Catawba River.⁷ Rather, according to North

¹ The Catawba River becomes the Wateree River in South Carolina, which then joins the Congaree River to form the Santee River, which travels to the Atlantic Ocean. For purposes of this paper, the subject river is referred to as simply the "Catawba." See Mot. for Leave to File Compl. at 3.

² Compl., Prayer for Relief, ¶¶ 1-2.

³ *South Carolina v. North Carolina*, 552 U.S. 804, 128 S. Ct. 349 (2007).

⁴ See N.C. Gen. Stat. Ann. § 143-215.22L(a)(1) (2007); § 143-215.22G(1)(h).

⁵ Complaint ¶ 18, 21, 22.

⁶ Answer ¶¶ 2, 17-18.

⁷ *Id.* ¶¶ 3, 20(a), 21.

Carolina, the Catawba River's flows have fluctuated as a result of various factors including requirements "imposed pursuant to a license issued by [FERC] and the operation of hydroelectric generation facilities located on the River."⁸ North Carolina has also interposed a series of affirmative defenses, including laches and a claim that the complaint should be dismissed because South Carolina's position amounts to "nothing more than a difference of opinion with the manner in which a FERC-regulated hydroelectric project stores and releases flows" such that the complained-about low flows could be avoided through "revisions to the operational parameters of the several hydroelectric dams that populate the Catawba River."⁹ North Carolina also contends that FERC's involvement and other federal interests within the Catawba-Wataree-Santee River Basin are such that the United States is an indispensable party to the litigation.¹⁰

B. Proceedings before the Special Master

As is standard with original actions, the Court, having granted South Carolina's motion for leave to file, appointed a special master to help it decide the case. "The special master acts somewhat like a district court judge or magistrate, hearing motions and overseeing any trial in the matter," albeit with "much more discretion than district court judges about how to conduct the proceedings before them."¹¹ While the Court has never revealed how it selects special masters, in the past it often chose senior federal judges and justices, but more recently has selected former Supreme Court law clerks, including, in this case, Kristen Linsley Myles, a former clerk to Justice Antonin Scalia and the first female special master ever appointed.¹² Selection of less senior special masters has at least one major benefit: they may actually survive an equitable apportionment case. *Arizona v. California* lasted decades, and "required five different special masters, some of whom had to be replaced because they died before the case was resolved."¹³ The case involved a two-year long trial, the testimony of 340 witnesses, 25,000 pages of transcript, and resolved in a master's recommendation that stretched 433 pages long.¹⁴ The Supreme Court itself heard nearly twenty-four total hours of argument.¹⁵

Following assignment of the case to the Special Master, Duke Energy and CRWSP filed motions for leave to intervene as defendants in November 2007, followed, in February 2008, by a third motion to intervene as a defendant by the city of Charlotte, North Carolina. South Carolina opposed all three motions, and North Carolina took no position.¹⁶ The Court referred all three motions to the Special Master,¹⁷ who held a hearing on the motions on March 28, 2008, in

⁸ *Id.* ¶ 2.

⁹ Answer ¶ 32(a).

¹⁰ *Id.* ¶ 36.

¹¹ J. Bleich, M. Friedland, D. Han and A. Feinberg, "Very Special Masters – Handling the Supreme Court's Original Jurisdiction Cases," 2009 *San Francisco Att'y* 45, 47 (Winter, 2009).

¹² *Id.*, at 48.

¹³ *Id.* (citing Ann-Marie C. Carstens, "Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases," 86 *Minn. L. Rev.* 625, 647, 655 (2002)).

¹⁴ Bleich et al., *supra*, 2009 *San Francisco Att'y* at 48.

¹⁵ *Id.*, at 48.

¹⁶ First Interim Report of the Special Master, O.T. 2008, No. 138, Orig, at 8 (First Interim Rept.). North Carolina later supported intervention.

¹⁷ 552 U.S. 1160, 128 S.Ct 117 (2008).

Richmond, Virginia, and issued an order granting the motions on May 27, 2008.¹⁸ On June 27, 2008, South Carolina filed a motion for clarification or, in the alternative, for reconsideration of the order. After telephonic conference at which the Special Master indicated that the motion would be denied, South Carolina requested that the Special Master issue an Interim Report to the Court so that South Carolina could present exceptions to these rulings, which the Special Master granted.¹⁹

Meanwhile, discovery commenced, including discovery between the parties and the intervenors as guided by an order from the Special Master governing discovery pending Court resolution of the intervention issue.²⁰ A separate dispute then arose concerning the scope of the pleadings and of the issues open for discovery, with North Carolina contending that South Carolina's Complaint was limited (and discovery was limited) to the propriety of North Carolina's authorization of interbasin transfers (IBTs) and the harms from those IBTs during droughts, and South Carolina contending that its Complaint was not so limited and that restrictions on discovery at this stage would not be appropriate. In a September 24, 2008 order the Special Master ruled that, while interbasin transfers were the central focus of the Complaint, and while the harms alleged focused primarily upon drought conditions and the upstream portion of the river as it flowed through South Carolina, the general prayer for an equitable apportionment of the Catawba permitted consideration of other factors so that a blanket limitation on discovery at the initial stage was not warranted.²¹

Back in the Supreme Court, the parties briefed the intervention issue in 2009, with oral argument heard October 13, 2009. The full Court issued its opinion on January 10, 2010.

II. The Court's Decision on Intervention in Equitable Apportionment Actions

The Justices splintered in a surprising 5-4 fashion in resolving intervention. The majority opinion, favoring intervention by Duke and CRWSP but not Charlotte, was authored by Justice Alito, joined by Justices Stevens, Scalia, Kennedy and Breyer. The dissent, opposing all three interventions, was penned by Chief Justice Roberts, joined by Justices Thomas, Ginsburg and Sotomayor. The majority's opinion stands as a landmark development in equitable apportionment jurisprudence and could greatly impact the progress of this particular case.

A. Justice Alito's Majority Opinion

The majority begins with the precept that "[p]articipation by nonstate parties in actions arising under our original jurisdiction is not a new development," citing Article III, § 2, of the Constitution as contemplating suits "between a State and Citizens of another State" within the Court's original jurisdiction.²² The majority notes that "for more than two centuries, the Court has exercised that jurisdiction over nonstate parties in suits between two or more States," and

¹⁸ First Interim Rept., at 8.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *North Carolina v. South Carolina*, 130 S.Ct. 854, 861 (2010).

observes that “[n]onstate entities have even participated as parties in disputes between States, such as the one before us now, where the States were seeking equitable apportionment of water resources.”²³ Moreover, the majority points out that the Court has granted leave for nonstate entities to intervene as parties in original actions between States for nearly 90 years.²⁴ However, rather than adopt the Special Master’s synthesis of that history – essentially, as allowing non-state involvement intervention for “compelling” reasons – the majority clarified the proper standard for intervention by nonstate entities, as earlier set forth in *New Jersey v. New York*, 345 U.S. 369, 73 S.Ct. 689 (1953) (*per curiam*).

In *New Jersey*, the State of New Jersey sued the State of New York and the city of New York in 1929 for their diversion of the Delaware River's headwaters.²⁵ After granting the Commonwealth of Pennsylvania leave to intervene, the Court in 1931 entered a decree enjoining certain diversions of water by the State of New York and the city of New York.²⁶ In 1952, New York City moved to modify the decree, and New Jersey and Pennsylvania filed oppositions. Philadelphia then sought to intervene, on the basis of its use of the Delaware River's water. The Court kept Philadelphia out. Because Pennsylvania had intervened “to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River,”²⁷ and was acting *parens patriae*, it was “deemed to represent all [of] its citizens.”²⁸ Accordingly, to ensure due respect to “sovereign dignity” and to provide “a working rule for good judicial administration,”²⁹ the Court denied intervention using the following standard:

An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.³⁰

Applying this standard to the Carolinas’ dispute, the majority Court concludes that the CRWSP – a joint venture established with the encouragement of regulatory authorities in both States and designed to serve the increasing water needs of Union County, North Carolina, as well as Lancaster County, South Carolina – should be allowed to intervene. The majority notes that the CRWSP’s advisory board consists of representatives from both counties, draws its revenues from sales in both states, and operates infrastructure and assets that are owned by both counties as tenants-in-common, with roughly half of the CRWSP’s total withdrawals of water from the Catawba River going to South Carolina consumers.³¹ Indeed, the Court found that the CRWSP

²³ *Id.*

²⁴ *Id.*, citing *Maryland v. Louisiana*, 451 U.S. 725, 745, n. 21, 101 S. Ct. 2114 (1981) (private corporation intervention into original action challenging a State's imposition of a tax that burdened interstate commerce); *Oklahoma v. Texas*, 254 U.S. 609, 41 S. Ct. 12 (1920) (individual and corporate citizen intervention to protect rights in contested land in boundary dispute); *Texas v. Louisiana*, 426 U.S. 465, 466, 96 S. Ct. 2155 (1976) (*per curiam*) (municipality intervention in boundary dispute).

²⁵ 345 U.S. at 370.

²⁶ *Id.*, at 371.

²⁷ *Id.*, at 374.

²⁸ *Id.*, at 372-373 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930)).

²⁹ *Id.*, at 373.

³⁰ *Id.*

³¹ *South Carolina*, 130 S. Ct., at 864.

had been given a certificate by South Carolina in 1989 authorizing up to 20 mgd to be transferred out of the Catawba River basin, with Lancaster County (S.C.) currently using 2 mgd of this amount, Union County (N.C.) using 5 mgd, and the remaining 13 mgd not yet used.³² Moreover, because the CRWSP pumps water to Union County across state lines pursuant to a parallel certificate issued by North Carolina, CRWSP's activities depend upon authority conferred by both States and thus, the majority concluded, "neither State can properly represent the interests of the CRWSP in this litigation."³³ Indeed North Carolina, at oral argument, stated that it could not represent CRWSP's interests, which the majority attributes to that state's having to take the position that "downstream users" – including CRWSP partner Lancaster County, S.C. – "should receive less water."³⁴ Conversely, because Lancaster County is obligated to provide water to Mecklenburg County, *North Carolina*, South Carolina "may not be interested in protecting all uses of Lancaster County's share of the CRWSP's water."³⁵

The majority cites similar reasons in support of Duke Energy's intervention. As an initial matter, the opinion deems it significant that any equitable apportionment of the river would need to take into account Duke Energy's 11 dams, which ultimately control how much water enters South Carolina, as well as "the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region. . . ."³⁶ The majority also discerns that Duke has a "unique and compelling interest" in protecting the terms of its existing FERC license and the Comprehensive Relicensing Agreement (CRA) it forged with many stakeholders as part of its FERC license renewal application," which the majority says it will "likely [] consider in reaching the ultimate disposition of this case."³⁷ Since "[n]either state has signed the CRA or expressed an intention to defend its terms," neither was seen to sufficiently represent Duke's interests, thus justifying intervention.³⁸

When it came to Charlotte, the majority opinion goes the other way. Because Charlotte "is a municipality of North Carolina, and for purposes of this litigation, its transfers of water from the Catawba River basin constitute part of North Carolina's equitable share," the sheer magnitude of its withdrawals and the likely impact of the relief sought by South Carolina on it was deemed insufficient to "distinguish it in kind from other members of the class" – as Philadelphia's interest failed to distinguish it in *New Jersey v. New York*.³⁹ Furthermore, the majority notes that the State of North Carolina, while nominally supporting Charlotte's intervention, represented to the Court that it would be defending Charlotte's right to its interbasin transfer, thereby reducing the chances of inadequate representation.⁴⁰

B. Chief Justice Roberts' Dissent

³² *Id.*, at 864-865.

³³ *Id.*, at 865.

³⁴ *Id.*

³⁵ *Id.*, at 865 n.6.

³⁶ *Id.*, at 866.

³⁷ *Id.*, at 866-67.

³⁸ *Id.*, at 867.

³⁹ *Id.*

⁴⁰ *Id.*, at 868.

The dissent penned by Chief Justice Roberts is notable for its forceful objection to the expansion of intervention in original actions and its prediction that the decision will greatly alter future equitable apportionment cases and make them akin to class actions:

The result is literally unprecedented: Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never. That is because the apportionment of an interstate waterway is a sovereign dispute, and the key to intervention in such an action is just that – sovereignty. The Court's decision to permit nonsovereigns to intervene in this case has the potential to alter in a fundamental way the nature of our original jurisdiction, transforming it from a means of resolving high disputes between sovereigns into a forum for airing private interests.⁴¹

The dissent arrives at these conclusions from its view that original jurisdiction cases in general, and equitable apportionment cases in particular, are an extremely rare species of dispute, and are defined by two central attributes. First, the Court's original jurisdiction encompasses only grave concerns between the States that, absent a forum for their peaceful resolution “would amount to *casus belli* if the States were fully sovereign.”⁴² Second, as a forum for resolving those issues, the Supreme Court faces serious practical limitations because it is “not well suited to assume the role of a trial judge.”⁴³ These considerations, in turn, lead to dissent to argue for a much more rigid application of the standard announced in *New Jersey v. New York*, with particular focus put on precluding “a State from being ‘judicially impeached on matters of policy by its own subjects,’” and to prevent “the use of the Court's original jurisdiction to air ‘intramural dispute[s]’ that should be settled in a different forum – namely, within the States.”⁴⁴

Because Charlotte, Duke Energy and CRWSP all stake claims to water, the dissent concludes that they all merely seek to vindicate rights derivative of the respective States' rights to the Catawba River as shared with other citizens of those States.⁴⁵ Thus the dissent agrees that Charlotte has no basis for intervention, but goes further to contend that Duke Energy and the CRWSP lack any basis as well. As for Duke, the dissent suggests that the information and evidence said to justify its involvement in resolution of the case could be gleaned through amicus participation, while Duke's needs for water for electricity generation “are simply interests in a particular use of water or its flow” that “are no different in kind from the interests of any other entity that relies on water for its commercial operation.”⁴⁶ The dissent discounts the FERC proceedings as well, observing that the Federal Government, which filed an amicus brief and presented oral in opposition to intervention, “is doubtless familiar with the pending FERC proceedings, and it sees no corresponding need for us to grant Duke Energy's motion to intervene.”⁴⁷

⁴¹ *Id.*, at 869.

⁴² *Id.*, (quoting *Texas v. New Mexico*, 462 U.S. 554, 571, n. 18, 103 S. Ct. 2558, (1983)).

⁴³ *Id.*

⁴⁴ *Id.*, at 870 (quoting *New Jersey*, 345 U.S., at 373).

⁴⁵ *Id.*, at 873.

⁴⁶ *Id.*

⁴⁷ *Id.*, at 874.

Turning to CRWSP, the dissent finds it similar to “any bi-state entity, or indeed any corporation or individual conducting business in both states” that should “seek to vindicate [its] interests within each State.”⁴⁸ Nor is the dissent concerned by the specter that the respective States will not properly represent that entity’s interests, since each State must be deemed to represent all its citizens and may not be “judicially impeached on matters of policy by its own subjects.”⁴⁹

Considering the practical impact of the majority’s view on future cases, the dissent predicts that lowering of the velvet rope to allow more intervention will, in addition to diluting the dignity of original jurisdiction cases, prompt more parties to seek intervention into them. “To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well – and we will be hard put to refuse them.”⁵⁰ Equitable apportionment cases will “take on the characteristics of an interpleader case,” with common parties “jostling for their share like animals at a water hole” and prolonging already epochal cases with “more issues to decide, more discovery requests, more exceptions to the recommendations of the Special Master,” and (perhaps most significant for Court personnel) “mak[ing] settling a case more difficult.”⁵¹

III. What Happens Next

Just how fundamentally the majority’s opinion will change this case, and equitable apportionment cases in general, remains to be seen. To be sure, the entry of legally well-provisioned litigants into a dispute does not typically simplify matters or reduce costs for the other parties. On the other hand, in an era of limited governmental budgets, the entry of new participants on a particular state’s side will assist that side in the prosecution of these extremely resource intensive and time consuming cases. For this reason alone, the majority’s opinion will likely prompt more non-state parties to seek intervention in original jurisdiction cases, citing what a standard that seems not unlike that governing permissive intervention under Federal Rule of Civil Procedure 24. Unless the factual scenario dealt with by the Court in this case is subsequently viewed as unique, the majority decision is sure to lead to many more applications for intervention in original jurisdiction cases, and presumably many more orders granting intervention. Letting the whole “herd” will make cases more cumbersome and expensive, and perhaps less grave and delicate. It could, moreover, lead to those entities with means having an inordinate gravitational pull on litigation that historically revolved around semi-sovereign States.

The intervention of Duke Energy and CRWSP in the inter-Carolina dispute could have a number of effects. Whether it makes settlement more or less possible seems like an open question. Certainly things would seem to be more difficult as a mathematical matter: to the extent there are now four parties to the dispute rather than two, agreement may have gotten twice as difficult to achieve (or exponentially so). Furthermore, Duke and the South Carolina Attorney

⁴⁸ *Id.*

⁴⁹ *Id.* (internal quotations and citations omitted).

⁵⁰ *Id.*, at 875.

⁵¹ *Id.*

General are now facing off in state administrative proceedings concerning South Carolina's water quality certification for Duke's hydropower relicensing application.⁵² Cross-currents between these cases could edge the parties towards settlement, or they could fuel an ongoing litigation spiral.

Another key factor in the impact of intervention will be the Special Master, and how she chooses to manage the case. As both the majority and dissent acknowledge, information about Duke's hydropower system – which effectively controls how much of the Catawba River enters into South Carolina – is relevant to resolution of the equitable apportionment case. The Special Master has already made efforts to manage how that information comes into the record. If properly managed, intervention and the resultant discovery production could dovetail with efforts initiated before the Court resolved the intervention issue. The magnitude of the case and magnitude of the parties involved would suggest that discovery could be onerous and lengthy. It is probably a good thing that the Court, along with adopting a more relaxed intervention standard, also appears to have adopted a practice of appointing younger special masters.

⁵² *Duke Energy Carolinas, LLC v. South Carolina Department of Health and Environmental Control*, Docket No. 09-ALJ-07-0377-CC (S.C. ALC 2010). The author is represents other parties in that water quality certification matter.