No. 138, Original

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to
First Interim Report of the Special Master

EXCEPTIONS OF THE STATE OF SOUTH CAROLINA TO FIRST INTERIM REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
W. DAVID SARRATT
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970
Counsel for the State of South Carolina

February 13, 2009

EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

In an equitable apportionment action between two States brought under this Court's original jurisdiction, intervention by a non-state entity is proper only when the putative intervenor demonstrates (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). The State of South Carolina excepts to the following conclusions of the Special Master:

1. That intervention is proper regardless of whether the party States adequately represent the movant's interests, whenever the movant is the "instrumentality" authorized to engage in conduct alleged to harm the plaintiff State, has an "independent property interest" at issue in the action, or otherwise has a "direct stake" in the outcome of the action. *See* First Interim Report at 10-21.
2. That the City of Charlotte, North Carolina, the Catawba River Water Supply Project, and Duke Energy Carolinas, LLC should be permitted to intervene in this original action. *See* First Interim Report at 21-32.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

CONSTITUTION, STATUTES, AND RULES

JUDICIAL MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

GLOSSARY

Charlotte Mot.	Motion for Leave To Intervene of the City of Charlotte, North Carolina, and Brief in Support of Motion, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 13, 2008)
CMO No. 8	Case Management Order No. 8, *South Carolina v. North Carolina*, No. 138, Orig. (Sept. 24, 2008)
Compl.	Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. App.	Appendix to Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. Mot. Br.	Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed June 7, 2007)
Compl. Mot. Reply	Reply Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 22, 2007)
CRA	Comprehensive Relicensing Agreement

CRWSP	Catawba River Water Supply Project
CRWSP Letter Br.	Letter from Thomas C. Goldstein to William K. Suter, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 8, 2008)
CRWSP Mot.	Motion of the Catawba River Water Supply Project for Leave To Intervene and Brief in Support of the Motion, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)
Duke or Duke Energy	Duke Energy Carolinas, LLC
Duke Answer	Answer of Duke Energy Carolinas, LLC's, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007) (attached to Duke Mot.)
Duke Clarify/ Reconsider Opp.	Duke Energy's Brief in Opposition to Motion To Clarify or Reconsider, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed July 10, 2008)
Duke Mot.	Duke Energy Carolinas, LLC's Motion and Brief in Support of Motion To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)

Duke Reply	Duke Energy Carolinas, LLC's Reply Brief in Support of Motion To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 19, 2007)
FERC	Federal Energy Regulatory Commission
IBT	interbasin transfer
LCWSD	Lancaster County Water and Sewer District
LIP	Low Inflow Protocol
mgd	million gallons per day
NC Answer	Answer to Bill of Complaint, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Nov. 30, 2007)
NC App.	Appendix to Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
NC Charlotte Resp.	Brief of the State of North Carolina in Response to the City of Charlotte's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 22, 2008)

NC Opp.	Brief of the State of North Carolina in Opposition, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Aug. 7, 2007)
No. 83 Report	Report of Special Master, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980)
No. 108 First Report	First Interim Report, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989)
No. 108 Second Report	Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992)
No. 128 Report	Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001)
Recommendation	Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC, *South Carolina v. North Carolina*, No. 138, Orig. (May 27, 2008)
Report	First Interim Report of the Special Master, *South Carolina v. North Carolina*, No. 138, Orig. (Nov. 25, 2008)

SC Charlotte Opp.	Brief of the State of South Carolina in Opposition to Motion for Leave To Intervene of the City of Charlotte, North Carolina, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Feb. 25, 2008)
SC Clarify/ Reconsider Mot.	Motion of South Carolina for Clarification or, in the Alternative, for Reconsideration of the May 27, 2008 Order Granting Limited Intervention, *South Carolina v. North Carolina*, No. 138, Orig. (June 27, 2008)
SC CRWSP Opp.	Brief of the State of South Carolina in Opposition to Motion of the Catawba River Water Supply Project for Leave To Intervene, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 13, 2007)
SC Duke Opp.	Brief of the State of South Carolina in Opposition to Duke Energy Carolinas, LLC's Motion for Leave To Intervene and File Answer, *South Carolina v. North Carolina*, No. 138, Orig. (U.S. filed Dec. 11, 2007)

INTRODUCTION

The Catawba River, which originates in North Carolina and flows to South Carolina, has been designated America's Most Endangered River.[1] In this original action, South Carolina seeks an equitable apportionment with North Carolina of the River, so that South Carolina gets its fair share of the River's waters.

The intrastate apportionment of each State's equitable share of the water among municipal or private users within either State is beyond the scope of this action. Yet the Special Master has recommended permitting three non-state entities to intervene with rights of full parties. The putative intervenors seek to transform an equitable apportionment action between two sovereign States into an intramural dispute over the intervenors' competing interests. This Court's longstanding precedent, however, presumes that States act as *parens patriae* in representing the interests of *all* citizens of the State; that this Court's original jurisdiction is not used to resolve intrastate disputes between private persons or political subdivisions within States; and that the standards for intervening in original actions are stringent to avoid transforming such suits into the kinds of actions heard routinely by state and federal courts. Because the Special Master's First Interim Report ("Report") is not true to this Court's precedents limiting when non-state entities may intervene in an original action between States, South Carolina's exceptions should be sustained.

---

[1] *See* American Rivers, *America's Most Endangered Rivers* (2008 ed.), *available at* http://www.americanrivers.org/site/DocServer/MER_Report2008opt.pdf?docID=7681.

JURISDICTION

On October 1, 2007, the Court granted South Carolina's motion for leave to file its Complaint against North Carolina. The Court's jurisdiction over this controversy between two States is both original and exclusive. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

The Court referred three motions for leave to intervene to the Special Master. On November 25, 2008, the Special Master issued her Report recommending that the motions for leave to intervene be granted. On January 9, 2009, the Court granted South Carolina's motion for leave to file exceptions to the Report.

STATEMENT

A. The Catawba River Is Subject To Extended Periods Of Inadequate Flow

The Catawba River originates in the mountains of western North Carolina and flows east and then south into South Carolina, where it serves citizens of the Catawba River Basin (including portions of eight South Carolina counties). The Basin is the fastest growing sub-region in the Carolinas and is expected to see significant growth over the next decade. It is home to nearly 300,000 people in South Carolina alone, and in North Carolina includes portions of the Charlotte metropolitan area, the largest population center in the Carolinas. *See* Compl. ¶ 10; Compl. App. 37.

The availability of Catawba River water is essential to the economic development of the portions of South Carolina it serves. The River provides drinking water for and receives waste discharges from eight counties in South Carolina. It also supports a

number of major industries that employ thousands of people in the Basin. In addition, the River supports other uses, including hydroelectric and thermoelectric power generation, irrigation, aquaculture, recreation, and valuable wildlife habitat.

Although the Carolinas rely heavily on the Catawba River for water, its volume naturally fluctuates and is periodically too low to serve the needs of both States, especially during times of drought. This extreme variation in water flow has been recorded for more than 200 years. In the late eighteenth century, "severe periodic fluctuations in water level" and "inadequate water volume at ordinary stages" prevented efforts to improve the River for navigation. *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981). In recent years, the periodic decreases in river flow — and the accompanying inadequacy of available water — have become dramatically more frequent and severe. At the same time, population growth and water use in the Catawba River Basin have expanded and will continue to increase substantially, placing increasing demands on a resource that is already critically low for extended periods. North Carolina projects that its own consumption will more than double over the next 50 years. *See* NC App. 9a (Aug. 7, 2007).

In the last half century, South Carolina has experienced at least eight major droughts — including severe and extended droughts during the mid-1950s, the late 1980s, and from 1998 through 2002. *See* Compl. App. 15; NC Answer 10 (Nov. 30, 2007). A fourth drought has followed in recent years. During each of these multi-year droughts, water flow has decreased to levels inadequate to support existing

demands on the Catawba River. Drought effects that began in 1998 were particularly severe and harmful to South Carolina's citizens. Low water levels forced closure of major boat landings and public access areas, harming both the public and the businesses that depend on the lakes formed by damming the River. *See* Compl. App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See id.* at 38. Drought also caused Duke Energy (among the proposed intervenors here) to reduce significantly the generation of electricity from its hydroelectric stations located on the River. *See id.* Other businesses incurred substantial costs as well. The Bowater pulp and paper mill, for instance, paid more than $6,000 per day because the decreased water flow was insufficient to assimilate its treated wastewater consistent with state permits. *See id.* at 32-33, 38-39. Indeed, the flow in major tributaries of the River fell to the point that the only water flowing was from wastewater treatment plant discharges. *See id.* at 39.

Both States continue to experience extreme drought conditions, with river stream flows often running less than half of their historical averages.[2] Reports from the respective State climatology offices indicate that all counties in the Catawba River Basin have frequently experienced "severe," "extreme," and/or "exceptional" drought conditions in recent years.[3]

---

[2] *See*, *e.g.*, Catawba-Wateree Drought Management Advisory Group, 2009 News Releases, *available at* http://www.duke-energy.com/lakes/cw-dmag-news-&-info.asp.

[3] South Carolina Department of Natural Resources, South Carolina State Climatology Office, "South Carolina Current Drought Status," *at* http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php (visited Feb. 11, 2009); North Carolina

Moreover, droughts and periods of reduced flow are becoming the norm, rather than the exception. As part of its application to the Federal Energy Regulatory Commission ("FERC") to renew its license to operate 11 hydroelectric projects on the Catawba River, Duke Energy and other stakeholders developed a model gauging river flow. Using that model, Duke projected that, over the next 50 years (the requested term of its license), the River would experience the most severe shortages — referred to as Stage 3 of the "Low Inflow Protocol" ("LIP") — for a total of only four of the 600 months of the license term (0.67% of the projected time period). Yet before Duke's license application has even been approved, the River has already suffered Stage 3 conditions for 15 consecutive months (2.5% of the projected time period), from October 2007 to January 2009. Thus, actual data show a nearly four-fold increase in such low flows over projected data.

B. The Interstate Dispute

Recognizing the need for a framework between the two States to protect each State's equal rights in the Catawba River, South Carolina proposed negotiations for an interstate compact between the States. *See* U.S. Const. art. I, § 10. When North Carolina rejected that entreaty, South Carolina filed a motion before this Court for leave to file its Complaint.

The Complaint alleges that North Carolina, as the upstream State, has unilaterally taken more than its fair share of river water during times of low flow and seeks a decree "equitably apportioning the Catawba

---

Department of Environment and Natural Resources, Division of Water Resources, "Drought Monitoring," *at* http://www.ncwater.org/Drought_Monitoring/ (visited Feb. 11, 2009).

River" between the two States. Compl., Prayer for Relief ¶ 1. As the most obvious examples of North Carolina's over-consumption, the Complaint points to North Carolina's authorization, pursuant to a state statute, of a series of large interbasin transfers ("IBTs") of water from the River Basin, totaling at least 72 million gallons per day ("mgd") (plus any transfers under 2 mgd, which do not require a permit). *See* Compl. ¶¶ 18-19. The Complaint alleges that North Carolina has made these transfers without regard to their effects in South Carolina and to South Carolina's entitlement to an equitable share of river water. North Carolina permits these transfers without restrictions or limitations to protect South Carolina's interests when the River's flow is critically low. *See id.*; *see also* N.C. Gen. Stat. Ann. § 143-215.22L.[4] The Complaint does not request, however, that any particular transfer be restrained, which is an *intra*state matter for North Carolina to determine consistent with its equitable share of the River. Rather, the Complaint "encompasses a general request for an equitable apportionment of the Catawba River" and "requires consideration of a broader set of factors than the interbasin transfers." Case Management Order No. 8, at 1, 4 (Sept. 24, 2008) ("CMO No. 8").[5]

---

[4] This 2007 replacement statute changed the method by which North Carolina permits IBTs, but did nothing to protect South Carolina's equitable rights in the Catawba River. As the Special Master concluded, those "changes do not appear to be material for purposes of the present Report." Report at 5 n.2.

[5] Orders and pleadings filed by or with the Special Master are posted on the Special Master's website at http://www.mto.com/sm.

North Carolina opposed South Carolina's motion for leave to file its Complaint on the principal ground that the FERC proceedings on Duke's relicensing application could "substantially resolve the matters in dispute," to the extent that Duke's relicensing application included an increased minimum-flow requirement for water passing into South Carolina. NC Opp. 15 (Aug. 7, 2007). South Carolina responded that the scope of the FERC proceedings was limited to determining "whether and under what conditions Duke Energy should be granted a new license to continue the operation of its hydroelectric plants," noting that even North Carolina conceded that the procedures for handling periods of low flow in Duke's proposed license (also referred to as the Comprehensive Relicensing Agreement or "CRA") "affect[] only how Duke Energy uses the water in the river, not other users or stakeholders in the re-licensing process." Compl. Mot. Reply 4-5 (Aug. 22, 2007). In any event, South Carolina added, "although Duke Energy can control the Lake Wylie dam" where the Catawba River crosses the border into South Carolina, Duke "has no authority to determine the volume of water . . . withdrawn . . . above that point." *Id.* at 6. When less water flows through the Catawba River system, Duke has less water to release from the Lake Wylie dam. *See id.*

C. The Proposed Intervenors

Three non-state entities — the City of Charlotte, North Carolina ("Charlotte"), the Catawba River Water Supply Project ("CRWSP"), and Duke Energy Carolinas, LLC ("Duke") — each seek leave to intervene as party defendants on North Carolina's side.

1. Charlotte avers that a "primary target[]" of South Carolina's Complaint was Charlotte-

Mecklenburg Utilities' authorization under North Carolina law to transfer up to 33 mgd from the Catawba River Basin. Charlotte Mot. 2, 12 (Feb. 13, 2008). Charlotte argues that North Carolina does not adequately represent its interests because North Carolina "must represent the interests of all water users in the State along the Catawba River," whereas Charlotte will focus "exclusively" on its own interests as a water user within the State. *Id.* at 17-18.

South Carolina opposes Charlotte's motion, because the volume of Charlotte's consumption does not set it apart from other water users in the State and Charlotte's interests are adequately represented by North Carolina. North Carolina takes no position on Charlotte's motion, although it specifically disputes Charlotte's assertion that North Carolina will not adequately represent Charlotte's interests. *See* NC Charlotte Resp. 2 (Feb. 22, 2008) ("The State cannot agree . . . [that] it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina."). Indeed, North Carolina affirmatively states that it will fully represent Charlotte's interests. *See id.*

2. CRWSP is a joint venture between two political subdivisions, one in North Carolina (Union County) and one in South Carolina (Lancaster County Water and Sewer District ("LCWSD")). Union County is authorized under North Carolina law to transfer up to 5 mgd from the Catawba River Basin. LCWSD is a "special purpose district" organized under South Carolina law to serve the citizens of Lancaster County. LCWSD has a permit from South Carolina's Department of Health and Environmental Control to transfer up to 20 mgd from the Basin, but subject to appropriate limitations during periods of low flow.

See South Carolina Water Resources Commission, Class I Interbasin Transfer Permit No. 29 WS01 S02 (May 8, 1989) (requiring minimum flow of 1,200 cubic feet per second as a condition of transfer). In total, CRWSP is permitted to withdraw 36 mgd out of the Basin, although pursuant to the North Carolina permit only 5 mgd may be transferred for use outside of the Basin. *See* CRWSP Mot. 4 (Nov. 30, 2007). The CRWSP plant and point of withdrawal is in Lancaster County, South Carolina. CRWSP thus withdraws water on the South Carolina side of the boundary and transfers it for use on the North Carolina side.[6]

3. Duke was initially created to generate power for the cotton mills operating in the Catawba River Basin. *See* Compl. Mot. Br. 3 (June 7, 2007). It now owns and operates a system of 11 reservoirs in both States that provide hydroelectric power to the region, pursuant to its 50-year license issued in 1958 by the Federal Power Commission, the predecessor to FERC. In advance of its application for relicensing before FERC, Duke initiated a multi-stakeholder negotiation process that ultimately yielded the CRA, which Duke submitted as part of its application. That application remains pending before FERC.[7]

---

[6] South Carolina opposes CRWSP's motion, arguing that "[t]he municipalities composing [CRWSP] represent only a discrete subset of interests in either State," which "compete, within their respective States, for allocation of water *from* each State." SC CRWSP Opp. 4 (Dec. 13, 2007).

[7] FERC has extended Duke's license on an annual basis pending a final determination on its relicensing application. *See* Federal Energy Regulatory Commission, Notice of Authorization for Continued Project Operation, Project No. 2232-522 (Sept. 18, 2008).

Duke asserts three grounds for its intervention. First, Duke argues that it should be permitted to intervene because of its role in controlling the Catawba River's flow through operation of the dams and reservoirs that make up its hydroelectric system. Second, Duke claims a "unique interest" in defending the conditions set forth in the CRA, as well as the terms of its current and (potential) future licenses. Duke Mot. 3 (Nov. 30, 2007). Duke contends (in the absence of the United States or FERC in this action) that it can provide an "essential" link to the ongoing licensing proceedings before FERC, Duke Reply 17 (Dec. 19, 2007), which Duke believes is necessary to avoid the potential for conflicting obligations arising from the two proceedings. Third, Duke asserts state-law rights in North Carolina to "protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments." Duke Answer 5, Prayer for Relief ¶ 2 (attached to Duke Mot.).

South Carolina opposes Duke's motion, because to the extent Duke seeks to intervene to protect its own water uses granted under state law, those interests are insufficient to support intervention under the Court's precedents and are in any event adequately represented by the party States. To the extent Duke seeks to intervene to protect what it terms "federal public interests," South Carolina contends that a private licensee has no authority to intervene to, in effect, represent the United States. *See* SC Duke Opp. 4-5 (Dec. 11, 2007). Moreover, South Carolina maintains that, even absent a decision by the United States or FERC to join these proceedings, this Court is capable of taking notice of and giving due regard to those public proceedings. *See id.* at 6-7.

D. The Special Master's Initial Decision And South Carolina's Motion For Clarification Or Reconsideration

On May 27, 2008, the Special Master issued a recommendation[8] that the Court allow all three entities to intervene for the "limited purpose" of arguing against any final decree that would affect either their "unique interest" or "direct stake" in existing state authorizations to transfer water out of the Catawba River Basin, or, in the case of Duke, its "unique and compelling interest" in its existing federal license and application for license renewal now pending before FERC. Recommendation at 8-12. Finding that each proposed intervenor has a "direct stake" in this action, the Special Master did not specifically consider whether proposed intervenors' interests were adequately represented by the party States. Rather, the Recommendation posits that the Court's precedents do not require a potential intervenor to show that the State is "incapable of representing the proposed intervenor's interests, such as because their interests are in conflict." *Id.* at 8-9.[9]

On June 27, 2008, South Carolina moved for clarification of the Special Master's recommendation. South Carolina understood the Special Master's recommended grant of intervention for "limited purposes"

---

[8] *See* Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC (May 27, 2008) ("Recommendation").

[9] The Special Master, however, rejected both CRWSP's argument that it was entitled to intervene based on its bi-state status and Duke's argument that it should be admitted to protect "federal" "public interests" under its current and pending licenses. *See* Recommendation at 10-11, 12.

necessarily to deny putative intervenors full party status in "Phase One" of the litigation, which the party States had agreed would address the threshold question whether South Carolina has sustained harm from North Carolina's consumptive uses, including interbasin transfers of water from the Catawba River. Thus, consideration of proposed intervenors' interests could be deferred until Phase Two, which has been designed to address remedy. Proposed intervenors took the position that the Special Master's recommendation granted them full party status in all phases of the litigation, including propounding their own written discovery, participating in depositions, filing their own expert reports on the threshold question of South Carolina's injuries, and filing motions and other briefs on all aspects of the litigation. In the alternative, South Carolina moved for reconsideration in the event the Special Master agreed with proposed intervenors' reading of the Recommendation. *See* SC Clarify/Reconsider Mot. (June 27, 2008).

In a July 17, 2008 telephonic conference, the Special Master denied South Carolina's motion for clarification or reconsideration. South Carolina requested that the Special Master's rulings be memorialized in an Interim Report for this Court's review.

E. The Special Master's First Interim Report

On November 25, 2008, the Special Master issued the Report, recommending that the Court grant the motions to intervene, with proposed intervenors permitted to participate fully in all aspects of the lawsuit. The Report concludes that it is not necessary for an intervenor to demonstrate that its State fails adequately to represent its interests, and accordingly that each of the three non-state entities has an individual interest sufficiently compelling and

concrete to warrant intervention. The Report seeks to "distill[]" a uniform rule governing the presence of non-state entities as defendants in original actions. Report at 20. Under that distillation, a non-state entity may intervene in an original action when it is "authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," where it has a "property interest" directly implicated by the States' dispute, where the entity "otherwise has a 'direct stake' in the outcome of the action within the meaning of the Court's cases," or where, "together with one or more of the above circumstances, the presence of the non-state entity would advance the 'full exposition' of the issues." *Id.* at 20-21.

Applying that standard to Charlotte and CRWSP, the Report concludes that each has an interest in defending North Carolina's IBT regime and the existing authorizations granted thereunder against any adverse disposition by the Court. *See id.* at 25. It further reasons that Charlotte and CRWSP are not mere water users, but rather effectuate the "'actual diversion of water'" that South Carolina challenges. *Id.* at 26 (quoting *New Jersey v. New York*, 345 U.S. 369, 371-72 (1953) (per curiam)).

The Report concedes that Duke is neither "the immediate target" of South Carolina's Complaint nor an "authorized agent" of South Carolina's injury. *Id.* at 28. It nonetheless finds that Duke has an interest in preserving its existing reservoir operations and the negotiated outcome set out in both the CRA and Duke's pending license application. *See id.*

The Report does not, however, address whether any of the three proposed intervenors have demon-

strated that their interests would not be adequately represented by North Carolina.[10]

SUMMARY OF ARGUMENT

I. In original actions, the Court requires a potential intervenor to demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). That stringent test is rooted in state sovereignty and the *parens patriae* doctrine, under which the Court deems party States to represent all of their citizens. It also accords with sound principles of judicial administration because the Court exercises its original jurisdiction sparingly. *See id.* at 372-73. In applying the test in equitable apportionment actions, which necessarily involve the States' sovereignty over the multitude of interests by users of river waters, this Court has never approved intervention by non-state entities. Such cases concern the federal law of apportionment of water *between* States, not the state-law questions of how water is allocated among competing interests *within* the State.

The Report disregards the Court's test, first, by failing to require a would-be intervenor to show that no party State adequately represents its interests. Instead, it offers a novel test in recommending that

---

[10] The Report also recommends denial of South Carolina's motion for clarification or reconsideration. The Report concludes that, because proposed intervenors "have an interest in the liability proceedings that could lead to [an] adverse result — including, for example, the question whether South Carolina has suffered harm as a result of particular interbasin transfers within the State of North Carolina," Report at 34, they should be permitted to participate in all phases of the proceedings.

three entities each have "compelling interests" to justify their intervention in this original action. The Report's unprecedented test functionally nullifies the *parens patriae* doctrine, opening the door to widespread intervention in original actions generally, while transforming equitable apportionment suits between sovereign States into forums for litigating intrastate water disputes in this Court.

The Report's primary error in disregarding the Court's adequate-representation requirement is reason enough to reject the novel test it adopts. But the Report compounds that error with the additional conclusions that intervention is proper whenever the movant (1) is the "instrumentality" authorized to engage in conduct alleged to harm the plaintiff State, (2) has an "independent property interest" at issue in the action, or (3) otherwise has a "direct stake" in the outcome of the action. Report at 20-21. Each of those recommended bases for intervention rests on a misreading of the relevant Court precedent. The Court has stringently guarded its original jurisdiction generally, and in equitable apportionment actions particularly, on the ground that water users within a State — whether large or small, municipal or industrial — are situated no differently from other water users and all such interests are properly represented by the State.

II. Under the correct legal standard, none of the proposed intervenors is entitled to intervene. North Carolina defends the existing interbasin transfers it has authorized under state law, including those by Charlotte and CRWSP. Moreover, Charlotte and CRWSP — in seeking to protect their individual transfers from any reduction resulting from an equitable apportionment that reduces North Carolina's

overall share of the Catawba River — invite the Court to take up precisely the kind of intramural dispute the Court typically refuses to entertain.

Duke's interests in controlling its reservoir operations and in the river flows proposed in its pending application for relicensing before FERC are merely derivative of its interests as a water user. North Carolina fully represents those interests, in particular by asserting that South Carolina's claims should be resolved based on the minimum river flows in the CRA that Duke submitted to FERC. In addition, any "conflict" between this action and any license FERC grants Duke in the future is purely hypothetical at this stage, given that Duke's application to FERC expressly disclaims resolution of the disputed water consumption issues that are the subject of this action. Nor does Duke's knowledge of relevant facts or involvement in pertinent events entitle it to intervene as a full party with rights to elicit facts through discovery from the party States, when such facts are readily obtained through the subpoena process and Duke's participation as an *amicus curiae*.

ARGUMENT

I. THE SPECIAL MASTER FAILED TO APPLY THE CORRECT LEGAL STANDARD FOR INTERVENTION

A. The Test For Intervention In Original Actions Is Stringent

This Court has consistently guarded its original jurisdiction, which applies only to cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. Original equitable apportionment actions such as this one are reserved for adjudicating disputes *between States* and not entities within those States, because, in part, the Court "seek[s] to exercise [its] original jurisdiction sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (denying intervention even where movants satisfied standard for intervention under Federal Rules of Civil Procedure). The Court's exercise of its original jurisdiction is thus founded on the notion that, "[i]n cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." The Federalist No. 81 (Alexander Hamilton). The Framers' policy concern for original jurisdiction in this Court over suits between States is not served by permitting non-state intervenor parties to exert influence over litigation through their advocacy of parochial interests except in the most compelling of circumstances.

Accordingly, the Court requires a potential intervenor to demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373.

That stringent standard is based on the "'*parens patriae*' doctrine," which reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, '*must* be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)) (emphasis added). The standard is a "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration." *Id.* at 373. The Court's strict test ensures that its "original jurisdiction" is not "expanded to the dimensions of ordinary class actions." *Id.*; *cf. Utah v. United States*, 394 U.S. 89, 95-96 (1969) (per curiam) (finding "substantial reasons for denying intervention" where admitting one party "would require the admission of any of the other 120 private landowners who wish to quiet their title to portions of the . . . lands [at issue], greatly increasing the complexity of this litigation"). And it protects the Court from, "in effect, be[ing] drawn into an intramural dispute over the distribution of water within [a State]." *New Jersey v. New York*, 345 U.S. at 373. Were it "[o]therwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.*[11]

---

[11] A stringent test for intervention also avoids Eleventh Amendment issues that would arise were the intervenors to assert claims or seek relief directly against the State. *See*, *e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984) (Eleventh Amendment necessarily "embraces demands for the enforcement of equitable rights") (internal quotation marks omitted); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) (Eleventh Amendment precludes "demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state"). South Carolina reserves the right to argue that the

New Jersey v. New York, the leading case on intervention both generally and in the specific equitable apportionment context implicated here, "demonstrates the wisdom of th[is] rule." *Id.* Three party States (New Jersey, New York, and Pennsylvania) disputed the proper apportionment of the Delaware River. (The Court had earlier permitted Pennsylvania to intervene over vigorous opposition to "protect the rights and interests of Philadelphia and Eastern Pennsylvania." *Id.* at 374.) The City of Philadelphia subsequently moved to intervene because the equitable apportionment decree could interfere with Pennsylvania's state-law authorization — provided for in a recently granted "Home Rule Charter" — to manage Philadelphia's "own water system." *Id.*

After setting forth its three-part test for an "intervenor whose state is already a party," the Court found that "Philadelphia has not met [its] burden and . . . leave to intervene must be denied." *Id.* at 373-74. The Court explained that Pennsylvania was admitted to the litigation "to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River" and that its support of those rights and interests "remain[ed] vigorous and unchanged." *Id.* at 374. In light of Pennsylvania's opposition to any "diversion not justified under the doctrine of equitable apportionment," Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* Although the Home Rule Charter made Philadelphia "responsible for her own water system," the Court found "that responsibility [to be] *invariably* served

---

Eleventh Amendment bars any particular form of relief that may be sought in this suit by proposed intervenors.

by the Commonwealth's position." *Id.* (emphasis added).

The Court also addressed Philadelphia's contention that intervention was warranted because it was a very large water user representing "about half" of the Pennsylvania citizens within the relevant watershed. *Id.* at 373 n.*. The Court stressed that "Philadelphia represent[ed] only a part of the citizens of Pennsylvania who reside in the watershed." *Id.* at 373. If Philadelphia could intervene, then presumably so could other Pennsylvania "cities along the Delaware River . . . which like Philadelphia, are responsible for their own water systems." *Id.* Nor could the Court perceive "any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial." *Id.* Thus, the Court indicated that even very large water users can rarely, if ever, make the required showing for intervention because an intramural dispute over how to allocate water within a State is not sufficiently compelling or unique under the Court's test. *See id.* at 375 (denying Philadelphia's motion for leave to intervene).

The Court reaffirmed these principles in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), in which Wyoming sought to assert a cross-claim against the United States alleging failure to manage federal storage-water reservoirs in violation of a prior decree apportioning the North Platte River. *See id.* at 15. The United States opposed Wyoming's motion for leave to add that claim, raising the "specter" that the cross-claim would open the door for "intervention by many individual" holders of storage-water contracts. *Id.* at 21. The Court allowed Wyoming to add its cross-

claim, rejecting the United States' concern that doing so would invite intervention motions by non-state entities with the explanation that such individual contractors would not have a basis for intervening. Because a "State is presumed to speak in the best interests of those citizens," the contractors would be "unlikely" to "show that their proprietary interests are not adequately represented by their State." *Id.* at 21-22.[12] Those principles have been invoked routinely to deny intervention to other non-state entities.

B. The General Rule Against Intervention In Original Actions Is Particularly Strong In Equitable Apportionment Cases

Although the Court has rarely permitted intervention in an original action of any sort, it has never permitted intervention by non-sovereign water users in an action to apportion equitably an interstate river between States. Both before and after its 1953 decision in *New Jersey v. New York,* the Court (with the recommendations of its Special Masters) has denied all such requests. The Court has explained that

---

[12] Even under the Federal Rules of Civil Procedure's more permissive standards for intervention, courts will presume, "in the absence of a very compelling showing to the contrary, [that] . . . a state . . . adequately represent[s] the interests of its citizens." 7C Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1909, at 414-22 (3d ed. 2007) (discussing the "adequate[] represent[ation]" standard in Rule 24(a)(2)); *see also Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam) ("[W]here the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required."); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984) (requiring "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant").

"individual users of water . . . ordinarily would have *no* right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538 (emphasis added). Indeed, the Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. at 22.

In *Nebraska v. Wyoming*, 507 U.S. 584, 589-90 (1993), the Court "adopt[ed]" the Special Master's recommendation to deny motions of various water users to intervene in an interstate water dispute. Wyoming-based Basin Electric Power Cooperative sought to intervene on the side of that upstream State to defend itself against claims by Nebraska that the utility's activities in Wyoming violated a previous equitable apportionment decree entered by the Court in 1945. *See* First Interim Report at 1, 11, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) ("No. 108 First Report"). The Special Master found that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming," because both the State and the utility took the same position regarding the waters at issue. *Id.* at 11 n.22, 12 (internal quotation marks omitted). The Special Master thus "saw Basin's position as comparable to that of the City of Philadelphia in *New Jersey v. New York*." *Id.* at 12 n.23. The Special Master likewise rejected the argument that two utilities in Nebraska should be admitted as parties to protect their FERC licenses, finding that "issues concerning their status and re-

sponsibilities as FERC licensees would not be part of this proceeding." *Id.* at 14.[13]

This Court has permitted intervention by a non-state entity in only one equitable apportionment case, but there the proposed intervenors were sovereign Indian Tribes. *See Arizona v. California*, 460 U.S. 605 (1983). As the Court explained, "the Indians are entitled to take their place as independent qualified members of the modern body politic," and therefore "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id.* at 615 (internal quotation marks omitted); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns."). Because of their sovereign status, the Tribes did not have to show that the United States would inadequately represent their interests. *See Arizona v. California*, 460 U.S. at 615 n.5. The Court's historical treatment of sovereigns confirms the rule that non-sovereign entities must meet a more stringent test for intervention in

---

[13] *See also* Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001) ("No. 128 Report") (in an action to quiet title to submerged lands, denying motion to intervene as defendants by private parties with an alleged commercial interest in harvesting and selling fish in the disputed area); Brief for the United States in Opp. at 4, *Alaska v. United States*, No. 128, Orig. (U.S. filed Apr. 2001) (opposing intervention because a private party may intervene in an original action only in "compelling circumstances"). In earlier cases, the Court had summarily denied motions to intervene by non-state water users in original actions between States. *See, e.g.*, *Arizona v. California*, 345 U.S. 914 (1953) (farmers and ranchers) (denying Motion on Behalf of Sidney Kartus *et al.*, No. 10, Orig. (U.S. filed Feb. 10, 1953)); *Nebraska v. Wyoming*, 296 U.S. 548 (1935) (hydroelectric power company and significant water user) (denying Motion of Platte Valley Public Power & Irrigation District, No. 13, Orig. (U.S. filed Oct. 19, 1935)).

an original action between States, which are presumed to represent adequately the interests of all their citizens.

Sound reasons support a strong presumption against intervention in equitable apportionment cases by a person whose State is already litigating as a party. Federal common law determines water rights as between States, not as between individuals within States. As the Court explained in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), "whether 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." *Id.* at 110. As between two States, the state-law rights of a "private appropriator" in either State "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Although this Court routinely adjudges whether state law is preempted by federal law, it does not sit in review of the meaning of state law in its normal applications to parties.[14]

The Court applied those principles in *Hinderlider*, which held that "apportionment [by this Court] is binding upon the citizens of each State and all water claimants," even where the State had previously allocated state-law water rights among individual claimants. 304 U.S. at 106. To the extent non-state water claimants seek to protect their water rights vis-à-vis other water users in their own State, forums other

---

[14] *See*, *e.g.*, *Fiore v. White*, 528 U.S. 23 (1999) (certifying state-law question to state supreme court); 28 U.S.C. § 1257(a); Eugene Gressman *et al., Supreme Court Practice* 141-45 (9th ed. 2007).

than original actions in this Court are available to resolve such intrastate water disputes. *See*, *e.g.*, *United States v. Nevada*, 412 U.S. at 539-40 (intrastate water disputes can be settled in other courts). But to include intrastate users of water in federal-law apportionment disputes between States provides a forum for the in-state user both to advocate positions inconsistent with the State and to introduce intramural disputes into a litigation apportioning river water between two States. *See New Jersey v. New York*, 345 U.S. at 372-73.

C. The Report's Novel Approach To Intervention Is Inconsistent With This Court's Precedent

The Report develops a new legal standard "distilled" from both the Court's decisions on intervention and cases in which complaining States voluntarily named non-state entities as defendants. Report at 20. Under the Report's novel test, "non-state entities may become parties" in original actions between States

> [1] where the non-state entity is the instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief, [2] where the non-state entity has an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute, [3] where the non-state entity otherwise has a "direct stake" in the outcome of the action within the meaning of the Court's cases discussed above, or [4] where, together with one or more of the above circumstances, the presence of the non-state entity would advance the "full exposition" of the issues.

Id. at 20-21.

Notably absent from that distillation is the Court's requirement that an "intervenor whose state is already a party" demonstrate concretely that its interest "is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. In addition, each of the four prongs of the Report's test rests on a misreading of the relevant Court precedent, which has not adopted those factors as generally applicable in deciding intervention.

1. The Report's Approach Nullifies the Court's Adequate-Representation Requirement

In *New Jersey v. New York*, the Court explained that an intervenor has "the burden of showing" a "compelling interest" — one "apart from [an] interest" shared by others in the State — that "is not properly represented by the state." 345 U.S. at 373. Despite that clear precedent, the Report's test imposes no requirement that an intervenor identify any respect in which it is not adequately represented by the party States. The Report reasons that the Court did not "mean that there must be a conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests." Report at 23.

But considerations of that type are precisely what the Court meant when it found that Philadelphia had "not met [its] burden" under the Court's test, so "leave to intervene must be denied." *New Jersey v. New York*, 345 U.S. at 373-74. The Court stressed that Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests," which were "invariably served by the Commonwealth's position." *Id.* at 374. That

factor — dispositive in *New Jersey v. New York* — plays no role in the Report's test.

If *New Jersey v. New York* left any room for doubt on the importance of adequacy of representation in the intervention analysis, *Nebraska v. Wyoming* eliminated it. The Court permitted Wyoming to add a cross-claim, despite the "specter, raised by the United States, of intervention by many individual . . . contractors" if Wyoming's claim were added. 515 U.S. at 21; *see supra* pp. 20-21. The Court held that any "requests to intervene by individual contractees" would be "treated under" the three-part *New Jersey* test and that it was "unlikely" that individual contractees could "show that their proprietary interests are not adequately represented by their State." 515 U.S. at 21-22.[15]

By failing to impose on a proposed intervenor the heavy burden of demonstrating concretely why its interests are not adequately represented by the party States, the Report's approach conflicts with this Court's precedent. That conflict is reason enough to reject the Report's legal standard for intervention. However, as shown below, each of the four factors included in the test is individually flawed as well.

---

[15] Courts of appeals routinely enforce the adequacy-of-representation standard where private parties seek to intervene in support of a government entity. *See San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (en banc); *Maine v. Director, U.S. Fish & Wildlife Serv.,* 262 F.3d 13, 19 (1st Cir. 2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996); *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996); *Keith v. Daley,* 764 F.2d 1265, 1268 (7th Cir. 1985).

2. The Report's "Instrumentality" Test Has No Basis in This Court's Precedent

The Report reads *New Jersey v. New York* and other cases where "the Court has allowed non-state entities . . . to be named as defendants" as authorizing intervention "in water disputes" by parties that are "accused of being the agent of injury" or the "instrumentality authorized to carry out the wrongful conduct." Report at 14, 21. In fact, the Report cites no case permitting a non-state entity to intervene in an original action because it is an "agent of injury" or "instrumentality."

In *New Jersey v. New York*, this Court did refer to New York City as "the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." 345 U.S. at 375. But the Court was not justifying the City's continued presence in the lawsuit; it was explaining why New Jersey saw fit to name the City as a defendant, although one "subordinate to the parent state as the primary defendant." *Id.* The Court did not suggest — much less hold — that New Jersey's rationale for naming New York City as a defendant would have permitted the City to intervene over New Jersey's objection had New Jersey instead named only New York State as a defendant.

The other cases the Report cites in which a plaintiff State voluntarily elected to name both the State and non-state entities as defendants likewise shed no light on the standard applicable when a non-state entity seeks to intervene. In fact, all but one of the cases the Special Master cites was filed prior to

1932,[16] when the Court clarified that an equitable apportionment decree binds the citizens of party States. *See Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *Nebraska v. Wyoming*, 295 U.S. at 43; *cf. Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding the question whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). Unsurprisingly, before the Court resolved that question, "the practice . . . developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck *et al.*, *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.). Since 1932, "individual water claimants usually have not been joined in equitable apportionment suits." *Id.* at 45-21.[17]

The Report errs further in assigning significance to the Court's failure in these cases to dismiss non-state entities *sua sponte* as improperly named parties.[18] Contrary to the Report's claim (at 16-17), the Court

---

[16] The complaint in *Colorado v. Kansas*, 320 U.S. 383 (1943), was filed in 1928. *See id.* at 387-88; Report at 15.

[17] The one case cited by the Report filed after 1932 — *Arizona v. California*, 373 U.S. 546 (1963) — "presented special circumstances." Beck § 45.03(b), at 45-21. Namely, six of the seven non-state entities named had "contracts with the Secretary of the Interior," which Arizona alleged violated a federal statute. *Id.* The seventh non-state entity "was a party, with the other six," to a contract that "was part of the framework of the water delivery contracts between the Secretary of the Interior and the other six." *Id.* at 45-21 to 45-22. Arizona apparently named these non-state entities because it "wanted to test the validity" of those contracts under the federal statute. *Id.* at 45-22.

[18] In none of the cases is there evidence that a party State — or the non-state entity itself — moved to dismiss the non-state entity.

has not used its authority to "decide[] whether and in what form the Court's original jurisdiction will be exercised" to pass on the appropriateness of the non-state entities a plaintiff State has voluntarily included as additional defendants. The only case the Report cites for that proposition is *Kentucky v. Indiana*. But, there, the Court allowed Kentucky to file its bill of complaint, which named Indiana and certain of its citizens. *See* 281 U.S. at 169-70. The Court further permitted the Indiana citizens to file a motion to dismiss the complaint in its entirety and heard argument on the motion, which it denied. *See id.* at 171-72. Only after a later hearing on the merits did the Court dismiss the Indiana citizens, based on its finding that Kentucky had failed to state a claim against them. *See id.* at 175 ("As no sufficient ground appears for maintaining the bill of complaint against the individual defendants, it should be dismissed as against them.").[19] Such a ruling on the merits does not support a non-state entity's entitlement to intervention.

More generally, the Report obliterates the distinction between joinder and intervention. Although the Report claims there is "not a compelling logical distinction" between cases where a State voluntarily names additional non-state entities as defendants and one in which such entities seek to intervene, over the objection of the plaintiff State, Report at 16, there is

---

[19] Contrary to the Report's claim, the Court did not dismiss the Indiana citizens because it found their "interests would be represented sufficiently by the defendant state." Report at 17. The Court recognized that Indiana and its citizens were at odds and that the citizens sought "to contest . . . the position taken by the state." 281 U.S. at 173; *see id.* at 171-72. The Court held that the citizens had "no standing" to contest the State's position. *Id.* at 174.

both a logical and a legal distinction. Logically, the distinction comports with the principle that a plaintiff is master of the complaint and is in the best position to determine whether the defendant it chooses to sue can provide adequate relief for the claimed harms to the plaintiff State, which in turn shoulders the burdens and risks of litigating against additional defendants in other forums if the full relief sought against the named defendant State proves to be inadequate.[20] This Court has previously recognized that a State "may properly waive the protection" that the joinder rule provides against such duplicative litigation and has refused to permit intervention, over the opposition of a State, by a party that could have been joined. *See Utah v. United States*, 394 U.S. at 95. Legally, the distinction comports with the Federal Rules of Civil Procedure, which set different standards for joinder (Rules 19 and 20) and intervention (Rule 24).[21]

Finally, the Report's "agent of injury" or "instrumentality" test eviscerates the *parens patriae* principle that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345

---

[20] *Cf. Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005) (rejecting contention that complete diversity jurisdiction can be destroyed based on putative parties not named by plaintiff in the complaint).

[21] Parties that may properly be joined as defendants in a complaint under Rule 19 or 20 may — if not joined — be denied intervention. For example, an entity that has "an interest relating to the subject of the action," the resolution of which may "impair or impede the person's ability to protect the interest," is required to be joined. Fed. R. Civ. P. 19(a)(1)(B)(i). However, if such an entity is not joined and moves to intervene, intervention may be denied when "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

U.S. at 372 (quoting *Kentucky v. Indiana*, 281 U.S. at 173). States act through agents — whether agencies, political subdivisions, or authorizations for citizens to act. In virtually all cases in which one State complains that another State has caused it injury, that injury will be carried out by the actions of an agent or instrumentality of the State. The Report's rule would permit all such agents — which may be numerous — to intervene, without regard to whether the State adequately represents their interests. Without any limiting principle, the Report's test subjects a State to the enormous additional costs, burdens, and delay of litigating against the putative "agents" of another State when that State itself has been accepted by this Court as a valid defendant that can provide the relief sought by the plaintiff State.

3. The Report's Invocation of an "Independent Property Interest" Relies on Distinguishable Cases Involving Real Property

The Report notes that the Court "allowed intervention by a non-state party whose property interests were at stake" in one case and indicated, in another, that intervention would be proper in such circumstances. Report at 19-20. The Report cites two cases, but both involved real property interests in discrete pieces of property. In *Texas v. Louisiana*, 426 U.S. 465 (1976) (per curiam), the United States claimed title to an island located within the City of Port Arthur; the City moved to intervene, the United States did not oppose, and the Court granted the

motion. *See id.* at 466.[22] Similarly, in *Utah v. United States*, the Court denied Morton International's motion to intervene after finding that a stipulation between Utah and the United States rendered it "unnecessary [for the Court] to consider whether the United States or [Morton] ha[s] title" to the lands in question. 394 U.S. at 93. The Court noted that Morton's motion "would have had a substantial basis" if its title to the property were at issue. *Id.* at 92.[23]

In both cases, the existence of a disputed title in real property between a private party and a sovereign entity was found sufficient — or, in the case of *Utah v. United States*, likely sufficient — to permit the private party to intervene to defend its claim of title to the unique property at issue. In those instances, the party State could not adequately represent the interests of the private party, which asserted its title to the property not only against the United States, but also against the State.

Such a real property dispute is inherently different from a dispute over water rights. Whereas land is quintessentially a non-fungible asset — and each of the cases discussed above involved disputes about

---

[22] *See* Report of Special Master at 15-21, *Texas v. Louisiana*, No. 36, Orig. (Mar. 15, 1975) (recommending denial of United States' claim).

[23] Similarly, in *Oklahoma v. Texas*, 252 U.S. 372 (1920), which involved a dispute regarding title to a portion of the bed of the Red River, the Court appointed a receiver to hold and manage "all the lands" at issue, and proactively authorized Oklahoma and the United States to "make any claimant" to that property "a party to the cause." *Id.* at 372-73, 376. Numerous parties then "intervened for the purpose of asserting rights to particular tracts [of land] in the receiver's possession." *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922).

unique parcels of land — one gallon of river water is the same as any other. South Carolina does not seek to recover "Charlotte's" water any more than "CRWSP's" or "Concord's" or any other particular North Carolina user's. No water user has the kind of unique interest in the apportionment of an interstate stream that an owner of a particular parcel has toward real property. In the equitable apportionment context, the state-law rights of a "private appropriator" of water "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind him." *Nebraska v. Wyoming*, 295 U.S. at 43. The Report's analogy to real property disputes, therefore, does not support intervention by water users in an equitable apportionment action.

4. The Report's "Direct Stake" Test Is Inconsistent with This Court's Precedent

A "direct stake" is an insufficient basis to support intervention. In recommending otherwise, the Report cites only *Maryland v. Louisiana*, 451 U.S. 725 (1981), and claims that the Court "has allowed non-state entities to be parties to original actions where they have a 'direct stake' in the action." Report at 19. The Report reads far too much into a single sentence in a lengthy footnote in that decision. *See* 451 U.S. at 745 n.21. In that case, eight States instituted an original action to challenge a Louisiana tax, which was "directly imposed on the owner of imported gas," normally the pipeline companies. *Id.* The plaintiff States did not pay the tax, but the Court found them to have standing as "consumers of natural gas" and as *parens patriae* on behalf of the "citizens in each of the plaintiff States [who] are themselves consumers of natural gas." *Id.* at 736, 739. A group of pipeline

companies that paid the tax sought to intervene. Those companies overwhelmingly were incorporated — and maintained principal places of business — in States not party to the case.[24] The Special Master had recommended that the Court grant the motions to intervene, expressly finding that "the interests of the pipelines differ from those of the states and the United States."[25] *Maryland v. Louisiana*, therefore, is better understood as an inadequate representation case, and not supporting the Report's novel creation of a "direct stake" test for intervention.[26]

No other case suggests that having a "direct stake," without more, warrants intervention. On the contrary, Philadelphia and Basin Electric Power Cooperative indisputably had "direct stake[s]" in *New Jersey v. New York* and *Nebraska v. Wyoming*.[27] Yet neither was permitted to intervene.

---

[24] *See* Motion of Columbia Gas Transmission Corp. *et al.* at 31-34, *Maryland v. Louisiana*, No. 83, Orig. (U.S. filed Aug. 28, 1979).

[25] Report of Special Master at 7, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980) ("No. 83 Report").

[26] Indeed, in *Maryland v. Louisiana*, after "noting that it is not unusual to permit intervention of private parties in original actions," 451 U.S. at 745 n.21 — although citing only the unusual case of *Oklahoma v. Texas*, 252 U.S. 372 (1920) (*see supra* note 23) — the Court also referenced *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), where it permitted intervention only after finding "sufficient doubt about the adequacy of representation" by the Secretary of Labor of the interests of the intervening union members, *id.* at 538.

[27] The Special Master in *Nebraska v. Wyoming* found that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming." No. 108 First Report at 12. The Special Master, however, did not dispute that Basin Electric had shown a direct stake in

5. The Report's "Full Exposition" Factor Does Not Support Intervention

Finally, the Report claims that intervention may be appropriate when "the presence of the non-state entity would advance the 'full exposition' of the issues." Report at 21. The Report does not claim this as a sufficient basis for intervention, but rather as a factor to be considered "together with one or more of the above circumstances." *Id.* Even on this limited basis, however, the Report misstates the relevance of this "full exposition" factor.

The Report draws the "full exposition" language from the single sentence in *Maryland v. Louisiana* approving of the Special Master's decision to permit the pipelines to intervene, "in the interest of a full exposition of the issues." 451 U.S. at 745 n.21. However, the Special Master there had found that the "interests of the pipelines differ[ed] from those of the states and the United States," which therefore would not adequately represent the pipelines, even though all parties challenging the Louisiana tax "raise[d] the same issues and require[d] the same proof." No. 83 Report at 7. Neither the Special Master's report nor the Court's decision suggests that the ability of the pipelines to assist in the exposition of those issues would have supported intervention absent the divergence of interests among the pipelines as transporters, and the States as consumers, of the taxed gas.

---

the case; rather, the Special Master found that Basin Electric's position was "comparable to that of the City of Philadelphia in *New Jersey v. New York*" and that Philadelphia "asserted unquestioned interest in the use of the Delaware River's water." *Id.* at 12 n.23.

To the extent the Report means to suggest that an entity's possession of information relevant to the factual development of a case supports intervention, that too is mistaken. *Cf.* Report at 30 (claiming that Duke "will provide a direct link" to other proceedings, which "will foster 'a full exposition of the issues'") (quoting *Maryland v. Louisiana*, 451 U.S. at 745 n.21). A non-state entity's possession of relevant information is no reason to permit that entity to intervene, thereby granting it the right — among others — to elicit facts from the party States through discovery and to contradict the State of which it is a citizen in advancing litigation positions on behalf of sovereign interests. On the contrary, participation as an *amicus curiae* enables such entities "both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues," as the Special Master in *Nebraska v. Wyoming* recommended in denying numerous motions to intervene by non-state entities with "interests [that] could be represented by a current party." No. 108 First Report at 6, 8.[28]

Similarly, in *Maryland v. Louisiana*, the Special Master permitted an association representing gas distributors to file an *amicus* brief, finding that "the views of the distributors may be helpful in the dispo-

---

[28] Approximately three years later, the same Special Master recommended denial of renewed motions for intervention, noting that "most of the *amici* have . . . participated to some degree in the current proceedings"; finding that none had "made the case for changed circumstances since June, 1989"; and reiterating that the *amici* are "potential sources of expertise." Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 101, 103, 104, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 9, 1992) ("No. 108 Second Report").

sition of the case." No. 83 Report at 9. The Report, however, gives no consideration of *amicus curiae* participation as an alternative. Nor does it acknowledge the sufficiency of third-party subpoenas as a mechanism for the party States to obtain the requisite information within proposed intervenors' custody and control for a "full exposition" of the issues.

II. PROPOSED INTERVENORS FAIL THE COURT'S STRICT STANDARD FOR INTERVENTION

Applying the correct legal standard, none of the intervenors is entitled to join this action. The Report fails to identify any cognizable interest — let alone any compelling interest — asserted by proposed intervenors that is not either adequately represented by North Carolina or collateral to this proceeding. Proposed intervenors therefore cannot overcome the strong presumption that "individual users of water . . . have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. at 538.

A. Charlotte Is Not Entitled To Intervene

1. Charlotte Cannot Demonstrate Any Interest Not Adequately Represented by North Carolina

Charlotte must, at a minimum, point to some "concrete consideration" as to which its position in this litigation diverges from that of North Carolina. *New Jersey v. New York*, 345 U.S. at 374. Charlotte cannot do so because its interests align completely with North Carolina's.

The Report accepts Charlotte's interest in its interbasin transfer permit as the sole basis for recommending that Charlotte be allowed to intervene. *See* Report at 22, 25 ("Charlotte's right to

intervene turns on its status as one of the recipients of the three interbasin transfers that South Carolina identifies in its Complaint"). Although Charlotte asserts that North Carolina will not adequately represent its interests, North Carolina emphatically disagrees:

> [T]he State must represent the interests of every person that uses water from the North Carolina portion of the Catawba River basin. In fact, the State has a particular concern for its political subdivisions, such as Charlotte, which actually operate the infrastructure to provide water to the State's citizens. Charlotte has been granted authority by the State to make IBTs. The State has every reason to defend the IBTs that it has authorized for the benefit of its citizens. The State cannot agree with any implication that because it represents all of the users of water in North Carolina it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina.

NC Charlotte Resp. 1-2 (citations omitted).[29] The Report acknowledges that North Carolina's interests are "similar to" and "aligned with" Charlotte's, but identifies no respect in which North Carolina does not adequately represent Charlotte's interests. Report at 23-24. That alone disposes of Charlotte's motion for intervention.

---

[29] North Carolina, like South Carolina, has the power and duty to represent its citizens and the public interest. *See, e.g.*, *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628-29 (S.C. 2002). *See generally Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.").

Indeed, North Carolina and Charlotte stand in precisely the same relationship as Pennsylvania and Philadelphia in *New Jersey v. New York*. Like Pennsylvania, North Carolina represents "the interests of its citizens," and its "position remains vigorous and unchanged": "[s]he is opposed to any" reduction in the amount of water, "under the doctrine of equitable apportionment," that North Carolina currently uses. 345 U.S. at 374. Charlotte's "responsib[ility] for her own water system . . . is invariably served by [North Carolina's] position." *Id.*; *see Town of Grimesland v. City of Washington*, 66 S.E.2d 794, 798 (N.C. 1951) ("Municipal corporations are instrumentalities of the state for the administration of local government.").

Charlotte is likewise no different from Basin Electric, which moved to intervene in *Nebraska v. Wyoming*. Basin Electric explained that it managed the Grayrocks Dam and Reservoir, the operation of which Nebraska had identified in its complaint as a means by which Wyoming "[d]eplet[ed] the flows of the North Platte River."[30] The Special Master denied that motion, finding that "Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming." No. 108 First Report at 12. Therefore, the Special Master found, "Basin's position [w]as comparable to that of the City of Philadelphia in *New Jersey v. New York*," which likewise was denied leave to intervene on the ground that "the state must be deemed to represent all of its citizens in an original case." *Id.* at 12 n.23.

---

[30] Memorandum in Support of Motion of Basic Electric Power Cooperative for Leave To Intervene at 2-3, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Apr. 13, 1987) (quoting Pet. ¶ 3a, *Nebraska v. Wyoming*, No. 108, Orig. (U.S. filed Oct. 7, 1986)).

Although Charlotte attempts to establish that North Carolina cannot adequately represent its interests, Charlotte's claim raises precisely the kind of "intramural dispute" the Court refused to entertain in *New Jersey v. New York*. Charlotte contends that the "one clear difference" between its own interests and North Carolina's is that "North Carolina . . . must balance the multiple interests of all upstream and downstream users of the River in the State whereas Charlotte's interests are exclusively downstream." Charlotte Mot. 19 (internal quotation marks and brackets omitted). That "difference" of interests, however, represents a purely intrastate struggle "over the distribution of water within" North Carolina and cannot satisfy the Court's requirement of showing an interest "not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373.

2. Charlotte's Interbasin Transfer Permit Does Not Set It Apart from Other Water Users in North Carolina

The Report recommends that Charlotte be permitted to intervene because South Carolina's Complaint identifies Charlotte's interbasin transfer as an example of North Carolina's water consumption in excess of its equitable share. *See* Report at 25. Like Philadelphia, however, Charlotte "represents only a part of the citizens of [North Carolina] who reside in the watershed area of the [Catawba] River and its tributaries and depend upon those waters." *New Jersey v. New York*, 345 U.S. at 373. Even considering IBTs alone, North Carolina has identified at least 22 other interbasin transfers of water from the Catawba River Basin, which North Carolina's IBT statute expressly authorizes (but for which a specific permit is not required). *See* SC Br. in Response to CMO No. 3

as to the Scope of the Complaint 5 & Ex. 1 (Mar. 20, 2008). The congruence of Charlotte's interest in defending the current IBT regime with that of other transferors precludes any "practical limitation on the number of similarly situated entities that would be entitled to be made parties." Report at 25 (citing *New Jersey v. New York*, 345 U.S. at 373).

The Report's recommendation is problematic for another reason. South Carolina discussed two recent approved transfers and one requested transfer in the Complaint by way of example (the 2002 Charlotte-Mecklenburg permit, a 2007 permit to the Cities of Concord and Kannapolis, North Carolina, and a permit increase request by Union County, the North Carolina component of CRWSP). Those examples served to describe the current harms alleged in the Complaint, their continued effects for the foreseeable future, and the deficiency in North Carolina's IBT statute in failing to take into account harms to South Carolina from such transfers.

South Carolina noted those withdrawals to illustrate that North Carolina's position "that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained." *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Under the Report's reasoning, a State opens the door to possible intervention by providing more detail in its pleadings. The Report's overly permissive approach to intervention thus paradoxically discourages States from providing more detailed pleadings that enable prompter resolution of disputes.

As the Special Master has concluded, South Carolina's Complaint does not seek to enjoin any particular transfer (as did the Complaint in *New Jersey v. New York*, 345 U.S. at 370-71),[31] but rather prays for a decree equitably apportioning the Catawba River and enjoining *any and all* withdrawals from the River in excess of North Carolina's equitable share. *See* CMO No. 8, at 4. South Carolina's request for an equitable apportionment thus "encompasses a broader inquiry" that, under the Court's precedents, "requires the consideration of many factors," including but not just North Carolina's IBTs.[32]

Similarly, South Carolina's alleged injuries are not limited to those caused solely by Charlotte's activity. Rather, the *cumulative* effects of withdrawals in North Carolina result in low flows across the border and harms to South Carolina's citizens. Whether water is withdrawn by any specific North Carolina user is of no moment to South Carolina. Charlotte occupies the same position as all other Catawba River water users with regard to its interests in ensuring that any equitable apportionment decree does not disrupt its current water uses. Charlotte, therefore, cannot demonstrate an interest "apart from

---

[31] South Carolina did seek a preliminary injunction that would have prevented North Carolina from authorizing additional transfers during the pendency of this litigation. North Carolina pledged not to authorize any such transfers. The Court denied South Carolina's motion.

[32] CMO No. 8, at 4 (citing *Colorado v. Kansas*, 320 U.S. at 393-94 ("all the factors which create equities in favor of one state or the other must be weighed"); *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (factors include (among others) "the consumptive use[s] of water in the several sections of the river, the character and rate of return flows, [and] the extent of established uses")).

[its] interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. at 373.

3. Charlotte's State-Law Permit Rights Are Not Compelling

Charlotte also fails to meet the first *New Jersey* requirement because its state-law rights as a permit holder are not "compelling" in this equitable apportionment case. This Court has made clear that "state law cannot be used" to resolve disputes between States about the use of an interstate river. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) ("our federal system does not permit the controversy to be resolved under state law"). State-law water-use rights have accordingly proved insufficient to warrant intervention. For example, Charlotte's permit rights are no more compelling than those of the storage contract holders in *Nebraska v. Wyoming*, which the Court deemed insufficient to justify intervention. *See* 515 U.S. at 21. Indeed, the Court concluded that the storage contract holders would be denied intervention in that case even though it acknowledged that the scope of their contract rights would likely be adjudicated in the action. *See id.* Nor does Charlotte's permit authority differ in kind from Philadelphia's "Home Rule Charter," which was not a justifiable basis for intervention. *See New Jersey v. New York*, 345 U.S. at 374. Any interest Charlotte has in preserving its state authorization to consume water, therefore, cannot rise to a "compelling" interest to support intervention.

B. CRWSP's Motion Fails For Substantially Similar Reasons As Charlotte's

The Report treats CRWSP's motion as "similar analytically to Charlotte's." Report at 25. For all the reasons set forth in Point II.A, *supra*, CRWSP cannot make the showing required by *New Jersey v. New York*. Indeed, like Charlotte, CRWSP fails all three of *New Jersey*'s requirements.

CRWSP is a joint venture between two municipalities, Union County, North Carolina, and the Lancaster County Water and Sewer District in South Carolina. Although CRWSP withdraws all of its water on the South Carolina side of the boundary, much of that water is transported via pipeline for consumption in North Carolina.

As with Charlotte, the Report recommends that CRWSP be granted intervention "in order to defend its transfer, which is the subject of South Carolina's claim for relief." Report at 27-28. Again, the Report ignores that South Carolina's relief does not specifically target CRWSP's transfer rights or that CRWSP's interests are adequately represented by the party States. North Carolina has stated directly that it "has every reason to defend the IBTs that it has authorized for the benefit of its citizens." NC Charlotte Resp. 2. By the same token, South Carolina "must be deemed to represent all its citizens," *New Jersey v. New York*, 345 U.S. at 372 (internal quotation marks omitted), including its political subdivisions such as LCWSD.

CRWSP relies on its bi-state status to justify intervention, but the Report correctly rejected that argument. *See* Report at 27. CRWSP has not argued that either of its member municipalities would itself be permitted to intervene — nor could it. And CRWSP

does not argue for intervention based on its South Carolina consumption, because to do so presumably would align its interests with South Carolina's. The fact that CRWSP is a cross-boundary joint venture between municipalities does nothing to change the character of its interest as a stalking horse for North Carolina water users. The municipalities composing CRWSP inherently advance only state-law interests, which amplifies the reasons for denying intervention.

As with Charlotte, CRWSP's interests in water consumption (in either State) are far from unique or compelling. Indeed, the Court's fear that permitting Philadelphia to intervene would invite more "political subdivisions of the states" and "[l]arge industrial" water users to intervene (*New Jersey v. New York*, 345 U.S. at 373) was prescient: the Report's reasoning for admitting Charlotte leads directly to a similar recommendation that two more municipalities (through CRWSP) and a private corporation (Duke, discussed below) also be admitted. The Report itself thus illustrates the problem with ignoring the critical limiting principle of the *New Jersey* test — that the proposed intervenor demonstrate an interest that is "not properly represented by the state." *Id.* Because CRWSP cannot meet that requirement — or the other two prongs of the *New Jersey* test — its motion should be denied.

C. Duke's Claimed Interests Provide No Basis For Intervention Because They Rest On Its Status As A Water User And Are Collateral To This Action

Like Charlotte, Duke is a very large consumer of water, both in operating its hydroelectric plants and in cooling its nuclear facilities. This Court has consistently held that private water users — even

"[l]arge industrial plants which . . . are corporate creatures of the state" and have "substantial" interests in the use of river water — have no right to intervene in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 372-74; *see supra* p. 20.

The Report recommends granting Duke's motion on the ground that Duke purportedly has "strong and independent interests that could affect, or be affected by, the outcome of this proceeding" and that justify intervention. Report at 28. First, the Report relies on Duke's claim that, through its reservoirs, it "controls the flow of the Catawba River" such that "any Court-ordered alteration of the flow would [likely] be carried out by Duke and would directly affect its operations." *Id.* at 29. "Second, and relatedly, the terms of Duke's existing and prospective licenses, as well as the negotiated terms agreed upon by relevant stakeholders through the CRA, are relevant to the proceedings here." *Id.*[33] Those factors, however, do not justify intervention under the proper test.

1. Duke's Interests Are Adequately Represented

As with Charlotte and CRWSP, the Report does not claim that North Carolina fails to represent the Duke interests found to justify intervention. Nor could it. As the Report recognizes, North Carolina itself has argued that the CRA is sufficient to protect South Carolina's interests. *See* NC Opp. 11-17. North Carolina thus will advance Duke's similar interest in defending the CRA: because the Low Inflow Protocol

[33] The Report also cites as a third factor "the *process* that Duke orchestrated . . . that resulted in the CRA," Report at 31, which is merely derivative of the second factor.

contained within the CRA sets minimum outflows that Duke must send to South Carolina in times of low inflows to the Catawba River Basin, Duke's interests in its reservoir operations will be represented by North Carolina's advocacy. Duke thus stands in a similar position to Philadelphia in *New Jersey v. New York*.[34]

Duke has argued that North Carolina's advocacy for the CRA is not adequate to represent Duke's interests because North Carolina (like South Carolina) in addition "may seek to maximize its portion" of the River, which "may endanger the negotiated solution embodied in the CRA." Duke Reply 11. That assertion, however, raises an intramural dispute between Duke and North Carolina over how North Carolina law will apportion that State's equitable share of water among its users. To the extent Duke consumes water in North Carolina, that State represents its interests here; the same is true of South Carolina, to the extent Duke consumes water on that side of the boundary. As the Special Master correctly found with respect to CRWSP, as an "ordinary user of water" — even one located, like CRWSP, on both sides of the river — Duke lacks "a sufficiently compelling basis to intervene in an original action." Report at 27. Whatever the total allocation made to each State, Duke and other water users will be able to ask the States to allocate sufficient water to sustain their individual uses, and this Court has

---

[34] *See* Report at 30 ("The terms of the CRA are central to the defenses asserted by North Carolina, which contends, in essence, that the CRA provides South Carolina with more than enough water to meet its needs, thus obviating this proceeding.").

made clear that it will not use its original jurisdiction to make such intrastate apportionments.[35]

2. Duke's Interests Are Not Compelling or Different from Other Water Users'

Duke's two related interests — its reservoir operations and defense of the CRA that Duke has requested FERC to approve — are simply other ways of describing Duke's interests as a large water user, for they concern Duke's ability to use Catawba River water. The more water Duke has in its reservoirs from any success by South Carolina in reducing North Carolina's equitable right to consume the upstream water of the River, the more easily it can comply with its federal license obligations. Duke's prayer for relief reflects its interests as a water user, by asking this Court to "protect Duke's riparian interests in the Catawba River flow and its interests in the excess water created by Duke's impoundments." Duke Answer 5.[36]

Thus, Duke's interest in its reservoir operations is indisputably grounded in Duke's interests in using the waters of the Catawba River, an interest that this Court has held does not justify intervention.

---

[35] Duke's status as a signatory to the CRA provides no "practical limitation on the number of similarly situated entities that would be entitled to be made parties." Report at 25 (citing *New Jersey v. New York*, 345 U.S. at 373).

[36] Duke otherwise concedes that its interest as a consumer of water is *not* sufficient to justify intervention. *See* Duke Clarify/Reconsider Opp. 10 n.5 (July 10, 2008) ("Duke is a significant consumer of water. But as South Carolina notes, 'Duke has not asserted [its] interests as a consumer' in support of intervention[.]") (quoting SC Clarify/Reconsider Mot. 17). That concession proves that Duke's assertion of its water-use rights cannot form the basis for its intervention.

Duke's interest in the CRA is no different, for if approved it would establish certain minimum-flow requirements to which Duke would have to adhere. *See* Duke Mot. 6 ("[T]he CRA would establish the minimum daily flow from Lake Wylie [located at the boundary between the States] in a variety of settings, from no drought . . . through [various] drought conditions."). Tellingly, the Report rejected as a basis for intervention Duke's asserted "public interest" duty to comply with its FERC license and federal law, Report at 31 n.3. The intervention recommendation thus is based solely on Duke's parochial interest in controlling the Catawba River's flow in such a way as to maximize shareholder profits from Duke's power generation operations — precisely the type of "large industrial plant" interests that *New Jersey v. New York* explained cannot justify intervention in an equitable apportionment action.

3. South Carolina's Requested Relief Would Not Undermine Duke's Ability To Operate Its Reservoirs

South Carolina seeks a decree that would apportion the Catawba River and *reduce* the total consumption and pollution by entities in North Carolina as a whole. Any such reductions would necessarily *increase* the amount of water available for Duke to manage in its reservoirs and to discharge into South Carolina, particularly in times of drought or low flows. The availability of additional water would make it *easier*, not harder, for Duke to manage the flow of the River and to meet any obligations it has in its licenses or in the CRA (if and when approved by FERC). Accordingly, the CRA poses no conflict with the determination of North Carolina's and South Carolina's respective rights to the River in this case.

The Report identifies no serious likelihood that the Court's decree could conflict with federal licenses or the CRA. Duke thus lacks a "compelling" interest sufficient to justify intervention.

4. The Proposed CRA Expressly Carves Out the Types of Interests Addressed in an Equitable Apportionment of the Catawba River

Neither Duke nor the Report has shown that this Court's determination of the party States' respective rights to an equitable apportionment of the Catawba River would disrupt the terms of the CRA, if and when approved by FERC. The hypothetical danger of a conflict between Duke's prospective license and equitable apportionment is insufficient to justify intervention.

FERC's consistent practice has been to craft licenses so as not to intrude on any equitable apportionment by the Court.[37] Moreover, the CRA, by its plain terms, does *not* purport to control any of the disputed water consumption in North Carolina that is at issue here and, instead, expressly *disclaims* resolution of the water-rights issues raised in this case:

---

[37] *See*, *e.g.*, *Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241, at 61,948 (2005) ("[T]his Agreement shall not be construed to limit in any way any right of the State of North Carolina . . . to seek an equitable apportionment of the waters of the Roanoke River."); *see also PacifiCorp*, 105 FERC ¶ 62,207, at 64,476 (2003) ("[n]othing in this article shall require the licensee to violate its obligations under . . . , or permit or require any action inconsistent with, the water contracts and agreements, interstate compact, judicial decrees, state water rights, and flood control responsibilities"), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004).

> 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.

CRA § 39.9. Duke's relicensing application similarly acknowledges that a determination of such water rights is beyond the scope of the FERC proceeding.[38]

Indeed, the CRA, and in particular the LIP, operates on the principle that, the more water Duke receives upstream, the more water it should release downstream. *See* NC App. 6a-7a (describing various stages of the LIP). If South Carolina's suit is successful, Duke will have more water with which to comply with its federal license obligations, not less. Therefore, the danger of a "conflict" between Duke's prospective license and this Court's determination of the party States' respective rights to the Catawba River is, at best, highly speculative and plainly insufficient to support intervention.

Finally, to the extent Duke seeks to participate in this action not to defend any *actual* license or pending application, but rather the "scientific data and conclusions" that underlie the CRA, Report at 31, Duke will have every opportunity to make that showing before FERC. FERC will set Duke's licensing conditions in the first instance and will evaluate directly the validity of any scientific data and conclusions that support Duke's application.

---

[38] *See* Duke Energy Application for New License at ES-21, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) ("[T]his Application does not comprehensively assess nor take a position on the approval of such future requests. Public policy for inter-basin water transfers is clearly the exclusive jurisdiction of the state agencies and was, therefore, not addressed during the relicensing process.").

5. Duke Should Not Be Permitted To Intervene Merely To Provide the Court with Access to Potentially Relevant Information

The Report states that quantifying the amount of water that would be available to South Carolina but for over-appropriated uses in North Carolina "will require an analysis of Duke's operations and the flows that it is required to maintain from its reservoirs into South Carolina." Report at 28-29. The Report thus suggests that a proposed intervenor's *possession of information* essential to the case is sufficient to permit intervention. Neither Duke nor the Report offers any instance in which this Court has permitted full party status in an original action simply because an entity claims to possess relevant information, and there is none. *See supra* p. 37.

Moreover, intervention is not the only means by which to obtain access to information that the Special Master deems essential to the Court's apportionment analysis. The FERC proceedings respecting Duke's license application are a matter of public record, and the parties have already brought and will continue to bring the relevant portions of those legal sources to the attention of the Court and the Special Master.

To the extent Duke has factual or technical information and expertise that would aid the Court's analysis and that is otherwise unavailable, that information can be obtained through other means, such as third-party subpoenas or by the submission of an *amicus curiae* brief. Indeed, that is the more common role for interested persons with material information not already brought to the Court's atten-

tion by parties to the case.[39] The Report fails to explain why such an *amicus curiae* role would not enable each of the proposed intervenors sufficient opportunity to represent their interests.

The Special Master presiding over a similar issue presented in *Alaska v. United States*, 545 U.S. 75 (2005), made a similar recommendation, rejecting third-party intervention in an original action and relying on the observation of a federal district court:

> It is easy enough to see what are the arguments against intervention where, as here[,] the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

No. 128 Report at 21-22 (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)). Similarly, the Special Master in *Nebraska v. Wyoming* recommended denial of numerous motions to intervene, but permitted those same parties to participate as *amici curiae*, "as traditional friends of the court to aid in full exposition of the issues" and as "potential sources of

---

[39] CRWSP, for instance, concedes that, "whether the [proposed] Intervenors participate in this case as parties or as amici, their legal arguments would be the same." CRWSP Letter Br. 2 (U.S. filed Dec. 8, 2008).

expertise." No. 108 First Report at 6; No. 108 Second Report at 104.

CONCLUSION

The Exceptions of the State of South Carolina to the First Interim Report of the Special Master should be sustained, and the motions for leave to intervene of Charlotte, CRWSP, and Duke should be denied.

Respectfully submitted,

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
W. DAVID SARRATT
MICHAEL K. GOTTLIEB
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
Special Counsel to the State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970
Counsel for the State of South Carolina

February 13, 2009