

No. 138, ORIGINAL

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

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STATE OF SOUTH CAROLINA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA,

*Defendant.*

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**On Motion for Leave to File Bill of Complaint**

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**BRIEF OF THE STATE OF  
NORTH CAROLINA IN OPPOSITION**

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August 7, 2007

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**QUESTION PRESENTED**

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

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## JURISDICTION

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

## STATEMENT

### Introduction

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

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

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

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

### **Duke Energy Relicensing**

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

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

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

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

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

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<sup>1</sup>Excerpts of the CRA are set out in the declarations of Fransen and Reed. The entirety of the agreement is available at [http://www.duke-energy.com/pdfs/comp\\_relicensing\\_agreement.pdf](http://www.duke-energy.com/pdfs/comp_relicensing_agreement.pdf).

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

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

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

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

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

### **North Carolina's Interbasin Transfers**

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

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

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

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

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

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

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

[A.W. Badr]<sup>3</sup> and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

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

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

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

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

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

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

### **SUMMARY OF ARGUMENT**

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

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

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

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

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Fransen, app. 17a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSION**

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

Respectfully submitted,

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August 7, 2007

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## **APPENDIX**

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    Attachment A

        Excerpts from Appendix C: Low Inflow  
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