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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSISSIPPI,)
)
 Plaintiff,)
 vs.) NO. 143, ORIGINAL
)
 STATE OF TENNESSEE, CITY OF)
 MEMPHIS, TENNESSEE, and)
 MEMPHIS LIGHT, GAS & WATER)
 DIVISION,)
)
 Defendants.)

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE EUGENE EDWARD SILER, JR.
 DATE: JANUARY 26, 2016
 TIME: 1:30 P.M.
 LOCATION: COURTROOM 783
 U.S. COURTHOUSE
 U.S. DISTRICT COURT
 MIDDLE TENNESSEE
 801 BROADWAY
 NASHVILLE, TENNESSEE

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1 THE COURT: We welcome everybody here, and we
2 appreciate the hospitality of the U.S. District Court here
3 in Nashville, which we sort of picked out as maybe a kind of
4 interim place to hold court. Maybe this will be the place
5 we hold everything, I don't know, but we'll talk about that.

6 What we're trying to do today is to try to see
7 preliminarily what we're doing, and where we go, and have
8 everybody introduce yourself and talk about a case
9 management plan, among other things.

10 I'm new to this kind of job. I have never been a
11 Special Master, but not many people have been a Special
12 Master. I think there have been 143 such cases in the
13 history of the United States.

14 So I talked to two gentlemen who have been Special
15 Masters in other cases; one is still a Special Master in a
16 case going on between Georgia and Florida, so I just can go
17 on what they have told me and what the Supreme Court has
18 told me I'm supposed to do.

19 And I'll hope that with all you august and educated
20 gentlemen and ladies that you can help guide me in what we
21 do.

22 We're all trying to reach the same result, and that is
23 to get special findings to send to the Supreme Court of the
24 United States and let the Supreme Court decide whether our
25 findings are correct or incorrect and whether the

1 conclusions of law are also.

2 So with that, maybe you can introduce yourselves as we
3 go around, and tell where you are from and whom you
4 represent and who's sort of going to be the lead counsel on
5 each side or whether there's some person in between.

6 We do -- I don't know how many we have on the
7 telephone, do you know? Do we have any?

8 THE CLERK: We do.

9 MR. FREDERICK: Your Honor, David Frederick.

10 THE COURT: Mr. Frederick, okay. Is anybody else
11 on the phone? (No audible response.) Okay.

12 All right. We'll start right over -- well, you are
13 the closest, so you tell us who you are and whom you
14 represent.

15 MR. DAVID BEARMAN: Good afternoon, Your Honor.
16 I'm David Bearman, representing the City of Memphis and
17 Memphis Light, Gas & Water Division.

18 THE COURT: Okay.

19 MR. TURNER: Your Honor, I'm Barry Turner, I'm
20 with the Tennessee Attorney General's Office for the State.

21 MR. SLATERY: Your Honor, good afternoon. I'm
22 Herbert Slatery. I'm the Tennessee Attorney General.

23 MR. LEO BEARMAN: Your Honor, I'm Leo Bearman. I
24 represent the City of Memphis and the Memphis Light, Gas &
25 Water Division, and I'm the father of David Bearman.

1 THE COURT: Good. Glad to have both of you and
2 everybody else.

3 MR. ELLINGBURG: Your Honor, my name is Mike
4 Ellingburg. I am the lead counsel for the State of
5 Mississippi. Jackson, Mississippi.

6 THE COURT: Okay.

7 MR. MOFFETT: Your Honor, good afternoon. My
8 name is Larry Moffett. I'm with Daniel, Coker, Horton and
9 Bell, and I'm with Mike Ellingburg. I practice in Oxford,
10 Mississippi, representing the State of Mississippi.

11 THE COURT: We'll start back in the corner, young
12 lady.

13 MS. McMINN: Good afternoon, Your Honor. I'm
14 Alison O'Neal McMinn. I am here today from the Mississippi
15 Attorney General's Office on behalf of the State of
16 Mississippi.

17 MR. READY: Good afternoon, Your Honor. George
18 Ready, from Hernando, Mississippi, appointed Special
19 Attorney General for this particular case, local to DeSoto
20 County, which joins Shelby County on the south side.

21 MR. DON BARRETT: Good afternoon, Your Honor. My
22 name is Don Barrett. I'm from Lexington, Mississippi. I'm
23 a Special Assistant Attorney General representing the State
24 of Mississippi.

25 THE COURT: All right.

1 MR. NEVILLE: Your Honor, I'm George Neville.
2 I'm with the Mississippi Attorney General's Office and
3 representing the State of Mississippi. I practice in the
4 main office in Jackson.

5 THE COURT: Yes, ma'am?

6 MS. BLUMSTEIN: Your Honor, I am Andree
7 Blumstein. I'm the Solicitor General for the State of
8 Tennessee.

9 THE COURT: All right. Good.

10 MS. ROBERTS: Good afternoon, Your Honor. My
11 name is Kristine Roberts. I am with the law firm of Baker,
12 Donelson, Bearman, Caldwell & Berkowitz, practicing with Leo
13 and David Bearman, here on behalf of Memphis and Memphis
14 Light, Gas & Water Division.

15 MS. GRIFFIN: Good afternoon, Your Honor. My
16 name is Charlotte Knight Griffin, and I represent Memphis
17 Light, Gas & Water Division.

18 MS. PATTERSON: Good afternoon, Your Honor. My
19 name is Cheryl Patterson. I am the Vice-President and
20 General Counsel at Memphis, Light, Gas & Water.

21 THE COURT: Okay. Yes, ma'am.

22 MS. HONG: Your Honor, my name is Sohnia Hong.
23 I'm with the office of the Tennessee Attorney General, and I
24 represent the State of Tennessee.

25 MR. NORRIS: Your Honor please, my name is Mark

1 Norris. I'm here on behalf of the City of Memphis with the
2 law firm of Adams and Reese in Memphis and Nashville.

3 THE COURT: Okay.

4 MS. TIPPING: Good afternoon, Your Honor. My
5 name is Elizabeth Tipping. I practice here in Nashville
6 with Neal & Harwell, and I am here on behalf of the State of
7 Mississippi.

8 MR. CHARLES BARRETT: Good afternoon, Your Honor,
9 Charles Barrett, with Neal & Harwell, representing the State
10 of Mississippi as well.

11 THE COURT: All right.

12 MR. HARBISON: Good afternoon, Your Honor. I'm
13 Jay Harbison, also with Neal & Harwell, on behalf of the
14 State of Mississippi.

15 THE COURT: All right. I believe that includes
16 everybody. And some of you I have met before, most of you I
17 don't know. And if I forget what your names are, well,
18 forgive me, but we may see each other quite a bit or we may
19 talk on the telephone.

20 And so the first thing is, I guess, to talk about this
21 case management plan. I don't know whether any of you have
22 ever worked on a case management plan before. Frankly, I
23 have not had one like this.

24 I have been a District Judge for almost 16 years and a
25 Circuit Judge for over 20 years, so I have seen a lot of

1 cases and tried a lot of cases as a trial judge, but these
2 things haven't come past me before. And, as I say, nobody
3 much has experience with these kinds of cases.

4 What -- do you have any suggestions about the case
5 management plan or what sort of format it should come in, or
6 have any of you started working on case management?

7 Yes, sir, tell us, Mr. Bearman.

8 MR. LEO BEARMAN: May I address Your Honor?

9 THE COURT: Sure.

10 MR. LEO BEARMAN: Your Honor, we -- first, if I
11 may, on the line also, I don't think Your Honor has been
12 introduced to them, is Mr. Bruce McMullen, who is the
13 Memphis City Attorney, and also Mr. Philip Oliphant, who is
14 an Assistant City Attorney with the City of Memphis.

15 THE COURT: Okay.

16 MR. LEO BEARMAN: And David Frederick is also on
17 the line.

18 THE COURT: Okay. Yes.

19 MR. LEO BEARMAN: Your Honor, we prepared a draft
20 of a proposed case management order --

21 THE COURT: Okay. Good.

22 MR. LEO BEARMAN: -- and submitted it to the
23 State of Tennessee and worked with them, and it's still in
24 draft form. I want to emphasize that.

25 THE COURT: Okay.

1 MR. LEO BEARMAN: But it does involve the kinds
2 of things that we understand Your Honor will want to have in
3 a case management order, including issues of discovery,
4 including how to file papers, including status reports,
5 formal papers, which federal rules would apply and which
6 might not apply, and issues of discovery.

7 We submitted that to the -- Mississippi, to counsel
8 for Mississippi. They have submitted -- yesterday they
9 submitted back to us revisions, I will say. And some, we
10 have no problem with, but some we have serious problems
11 with.

12 And that's not in final form yet, and so I am
13 reluctant to submit it that way until we try to get it
14 resolved, but one of the major issues Your Honor is going to
15 find, if I may --

16 THE COURT: Sure.

17 MR. LEO BEARMAN: -- is the question of
18 dispositive motions.

19 Our position for the City of Memphis and for the
20 Memphis, Light, Gas & Water Division is that there is and
21 should be heard first a very strong and serious dispositive
22 motion which will resolve this case.

23 And the way we have drafted the case management plan,
24 discovery will be held up until after Your Honor has a
25 chance to review the dispositive motions by the State of

1 Tennessee and by the City of Memphis Light, Gas & Water and
2 pass on them, and we thought that, frankly, it would be
3 wasteful and expensive to go into discovery until after
4 preliminary but dispositive motions had been submitted to
5 the Court and argued.

6 Counsel for Mississippi disagrees with that, and
7 that's going to be one of the major distinctions or
8 differences in our presentation of the case management
9 order.

10 But, as I say, I think that the approach that we have
11 suggested, which is simply that discovery is stayed for 45
12 days after the deadline for amendments to the pleadings to
13 provide the parties with sufficient time to file preliminary
14 dispositive motions.

15 If the motions are filed within that 45 days, our
16 draft of the case management order states that discovery
17 will continue to be stayed until Your Honor has an
18 opportunity to pass on the dispositive motions.

19 And if they're granted, then the case is over. If
20 they are not granted, then we can go on to discovery.

21 As I say, the State of Mississippi disagrees with
22 that, and we disagree with the State of Mississippi on their
23 point.

24 THE COURT: Okay. We'll hear from Mississippi on
25 this. Has that motion been filed, a motion for

1 dispositive -- you were just talking about?

2 MR. LEO BEARMAN: No, sir. Nothing has been
3 filed except the Complaint and the Answer, but Your Honor's
4 letter to us, to all of us, pointed out that you wanted to
5 talk specifically about -- I think Your Honor's phrase was
6 especially dispositive motions.

7 THE COURT: Right.

8 MR. LEO BEARMAN: And so the purpose of our
9 approach is to, frankly, conform with Your Honor's
10 suggestion and get dispositive motions before the Court
11 before expensive and, in our judgment, unnecessary discovery
12 process.

13 And that's the way our draft is going to read,
14 subject, obviously, to Your Honor --

15 THE COURT: Okay. Is the manner of the
16 dispositive motion that it's failed to state a claim on
17 which relief can be granted or is it a jurisdictional issue,
18 or both, or something else?

19 MR. LEO BEARMAN: No, sir. It's just probably
20 going to be a failure to state a claim or in the alternative
21 judgment on the pleadings.

22 I can't speak for the State of Tennessee, obviously.
23 They have got plenty of people here to do that -- Mr.
24 Frederick is on the line -- but it will be dispositive in
25 the sense that we don't think that Mississippi has stated a

1 valid claim.

2 THE COURT: Okay. Let's hear from Mississippi.

3 MR. ELLINGBURG: May it please the Court, again
4 I'm Mike Ellingburg, and I'm representing the State of
5 Mississippi along with Larry Moffett and co-counsel.

6 We do have a disagreement on this. As you are aware,
7 you don't just file an original action in the United States
8 Supreme Court. You do in District Court, I mean, but in the
9 United States Supreme Court, you file a motion for leave to
10 file an original action, which we did in this case. It is a
11 substantial effort.

12 The Court exercises its discretion as to whether it
13 will allow you to invoke its original and exclusive
14 jurisdiction.

15 Our motion was vigorously opposed by the State of
16 Tennessee, by the City of Memphis and Memphis Light, Gas &
17 Water. They made all their arguments as to why this
18 proceeding should never take place.

19 The Supreme Court ultimately rejected those and found
20 that we did have a claim that should proceed.

21 And it's important to look at that from the
22 distinction of a trial court because this is -- this was a
23 significant burden.

24 And we have pleaded, we believe, a very clear case and
25 requested among the things we have requested, declaratory

1 judgment. And that's important because we believe there is
2 a -- and just to clarify a little bit, I mean, I think that
3 there's a little bit of conflation between five and six, you
4 asked about anticipated preliminary motions and you asked us
5 to talk about issues of fact of law, two separate things,
6 but the big issue here is an issue that relates to this
7 water.

8 And it makes it different than any case the Court has
9 seen before. This water is not river water. It's not lake
10 water. You know, it's not surface water of any kind.

11 There is a tremendously well developed body of law for
12 surface water, but surface water and ground water are
13 different.

14 And this particular ground water is really different.
15 This is ground water containing what's referred to as a deep
16 confined aquifer.

17 And the structure of that aquifer is such that water
18 over thousands of years has accumulated through recharge
19 points, migrated down, purified, very, very high quality
20 water, and ultimately was stored -- and this is a
21 terminology used with regard to hydrogeology -- was stored
22 within the two states. Both states have recharge points and
23 both states have ground water movement.

24 Our position very clearly is that the water
25 Mississippi says is being wrongfully taken by the defendants

1 is water which was accumulated in Mississippi, stored in
2 Mississippi, and does not under natural circumstances move
3 interstates, not to the north at least. It does move. And
4 it moves an inch or two daily, but mostly it's stored within
5 a large formation under Northwest Mississippi.

6 THE COURT: How do they get it? Do they get a
7 long pipe underground or something?

8 MR. ELLINGBURG: No, sir, they are pumping out of
9 the state of Tennessee.

10 THE COURT: Okay.

11 MR. ELLINGBURG: We're not arguing that they
12 vertically drilled or anything like that. They have one of
13 the largest water well pumping operations in the world
14 sitting over there. They have three well fields within a
15 mile of the Mississippi border.

16 And so the first question is, is this water interstate
17 water? If it's not interstate water, if it's intrastate
18 water, we don't see a constitutional basis for it being
19 allocated, apportioned, given, whatever you want to call it,
20 to another state under natural conditions.

21 In *Kansas vs. Colorado* where they created equitable
22 apportionment, the first thing the Court did was it traced
23 the path of the river and the rivers, and all of the
24 equitable apportionment cases start off that way. They
25 trace the path of the water through multiple states.

1 And as they said in *Kansas vs. Colorado*, while that
2 water resided in one of those states, that state had the
3 exclusive right under the Constitution to control that
4 water.

5 They created equitable apportionment because it was
6 flowing surface water, which, as it says in the case, flowed
7 through all of the territory from which the different states
8 were made up before the states were created, and that there
9 was an equitable issue because the upstream state captured
10 that water and denied any water to the downstream state
11 where it had historically been available under natural
12 conditions.

13 What we have here is something different. The
14 proposition is that Memphis Light, Gas & Water is operating
15 these well fields -- all right -- in Southwest Tennessee,
16 and they are pulling -- they are sucking the water through
17 because it's a confined formation.

18 And by lowering the pressure at their wellhead, they
19 are, in fact, pulling water into Tennessee which would never
20 naturally have resided in Tennessee.

21 The first issue is it's about the water; I mean, what
22 kind of water is this under the Constitution. We read the
23 Constitution and Supreme Court cases as saying that states
24 retain sovereignty over the land and waters within their
25 territory.

1 Now, the decision even goes a little further because
2 if you look at the *Tarrant* case, which is cited in our
3 papers and our briefs, and the Supreme Court has looked at
4 all this stuff, if you look at the *Tarrant* case, the Court
5 held that even though the parties seeking the right to --
6 actually came in to seek the permit to obtain water which
7 was part of a compact and the release of that water, and it
8 wasn't granted, the Supreme Court said that state had the
9 right not to grant that license, they had the right to
10 control that water even though there was a colorable claim.

11 Here, we have never seen or heard any explanation of a
12 colorable basis for Memphis to take the water and Memphis
13 Light, Gas & Water except they can.

14 And so our position is all this has been put in some
15 great detail before the Supreme Court. They argued that we
16 couldn't file suit if we didn't claim equitable
17 apportionment.

18 They argued that we couldn't state a cause of action
19 under which Mississippi would be entitled to any relief.
20 All those arguments were made.

21 We went through about -- we went through more than a
22 year in this process to get to the point the Supreme Court
23 actually granted our motion and allowed us to file a
24 complaint.

25 We believe that filing a preliminary allegedly

1 dispositive motion is going to be a waste of time and
2 resources, it's going to delay the case, that ultimately
3 what should be done is there should be limited discovery to
4 provide you with sufficient evidentiary material on the
5 nature, the characteristics, the manner in which this water
6 moves, is collected, how it's stored within the ground, so
7 that you can make a decision, first of all, as to who has
8 the sovereign authority to control that water.

9 We say that Tennessee by pumping it out of Mississippi
10 is violating Mississippi's right to control the extraction
11 of water from the state of Mississippi.

12 And so we believe there should be limited discovery on
13 that issue and that that is a foundational issue, what is
14 the nature of this water, is it interstate, is it
15 intrastate, and who has the right to control and regulate
16 it.

17 THE COURT: Well, but if the other side, though,
18 is filing a dispositive motion, are you talking about a
19 motion on the pleadings or motion for -- to dismiss for lack
20 of grounds on which you could find relief, we don't need any
21 discovery, do we?

22 I mean, you just go on what you are going to file in
23 your complaint and what they are going to say is wrong with
24 it. You don't need to go into all this other stuff from
25 what the other side is saying.

1 MR. ELLINGBURG: We have never had any discovery
2 from the State of Tennessee.

3 THE COURT: He's willing to take the chance on
4 it. If you say that Tennessee is doing it, well, we have to
5 accept that as true for purposes of failing to state a claim
6 on which relief can be granted, don't we?

7 MR. ELLINGBURG: Yes, sir, if that's the nature
8 of the motion.

9 THE COURT: That's what I thought Mr. Bearman was
10 saying here.

11 MR. ELLINGBURG: It wasn't real clear to us in
12 the conversations exactly what kind of motion they were
13 going to file, although that was one of the potential
14 options.

15 So at this point in time, we have had three phone
16 calls, and we have been trying to work these things out on
17 the case management plan, but I do think the Court is going
18 to have to make a determination ultimately.

19 And --

20 THE COURT: Well, that's true. I might have to
21 do it in summary fashion, or whatever, or we can hear
22 evidence if we have to. Maybe we don't even need to have a
23 trial on evidence. I don't know what we have to have right
24 now.

25 MR. ELLINGBURG: Yes, sir. We believe that there

1 will need to be some evidence. We believe that this --
2 because ground water is different and because each aquifer
3 is different in the manner in which the water is collected,
4 stored, recharged, and that is it not similar to surface
5 water.

6 And for that reason, we believe that there needs to be
7 a record before the Court makes a ruling on the decisions
8 with regard to who has sovereign right to control the water,
9 which is a declaratory judgment issue, we believe, before
10 the Court.

11 MR. FREDERICK: Your Honor?

12 THE COURT: Yes.

13 MR. FREDERICK: This is David Frederick, Your
14 Honor --

15 THE COURT: Okay. Mr. Frederick.

16 MR. FREDERICK: -- if I could speak for a moment
17 on behalf of the State of Tennessee.

18 THE COURT: Sure.

19 MR. FREDERICK: Our position is that your letter
20 and the Court's practices permit us to file an early
21 dispositive motion and that this is the practice that has
22 been followed in other original cases, including *North*
23 *Carolina vs. South Carolina* -- *South Carolina vs. North*
24 *Carolina*, which I was involved in, and in other actions.

25 And the reason is that the purpose behind the Court's

1 appointment of a Special Master is to vest jurisdiction and
2 discretion in you to determine what is the most efficient
3 way to manage what is very complex litigation.

4 And if I could just take a couple of comments that
5 Mr. Ellingburg just made, he said that the nature of the
6 discovery would involve re-creating what the aquifer was in
7 its natural condition.

8 So if I understand that correctly, he's asking you to
9 supervise discovery so that we can determine what was the
10 state of the aquifer in the 1800's before Memphis started
11 pumping in approximately 1886. That's an enormously complex
12 undertaking.

13 And there's no case that would uphold trying to
14 undertake that kind of complex historical geological
15 analysis before we even know whether they have a viable
16 claim.

17 Now, he also says that there is recharge occurring for
18 the aquifer and that Mississippi is prepared to acknowledge
19 that.

20 If that's so, there are cases from the Supreme Court
21 that indicate that when there is ground water at issue as
22 well as recharge from surface sources, that an equitable
23 apportionment is the proper way to analyze these types of
24 conditions.

25 And so if that's so, we should be permitted to test

1 the proposition that Mississippi is wrong in asserting that
2 it has ownership over water that it has conceded is part of
3 an interstate water resource and has now conceded that it's
4 not asserting that Memphis has diagonal pipes that go and
5 encroach into the geography across the boundary of
6 Mississippi.

7 And so in light of that, we think that it is entirely
8 appropriate for you to decide early dispositive motions on
9 the failure of Mississippi to state a claim.

10 And the Solicitor General of the United States agrees
11 with us. At page 20 of its brief, it notes that having this
12 case decided on a motion to dismiss by a Special Master
13 would be a perfectly appropriate way to dispose of the case,
14 and we would submit that having an experienced appellate
15 judge resolve these issues of law, which fundamentally this
16 case comes down to a question of law, and Mississippi's
17 sovereignty and ownership over the water in an interstate
18 resource that lies below Tennessee, because that's what it's
19 basically arguing, that's a legal question.

20 And that legal question has been resolved against
21 Mississippi's assertion of ownership in multiple cases, and
22 we would like the opportunity to brief that, argue that
23 before you at an appropriate early stage before we go back
24 and try to re-create the conditions of the aquifer as of
25 1880 which seems like an incredibly expensive and wasteful

1 use of public resources.

2 THE COURT: Okay. What I think we'll do is we
3 will hold off discovery for a period of time and let you
4 file your motion. Is your Complaint in the record now,
5 Mr. Ellingburg?

6 MR. ELLINGBURG: Yes, Your Honor, our Complaint
7 and their Answers have both been filed.

8 THE COURT: Okay. Well, then I'll let --

9 MR. ELLINGBURG: They did not raise this motion
10 to dismiss in their Answer.

11 THE COURT: What's that?

12 MR. ELLINGBURG: They did not raise the motion to
13 dismiss in their Answer.

14 THE COURT: Okay. Well, I'll let them file any
15 kind of a dispositive motion. How much time does Tennessee
16 or Memphis or both of you want to file it?

17 MR. LEO BEARMAN: I'm suggesting 60 days.

18 THE COURT: Okay. We'll let you have 30 days. I
19 know you. You have already worked some on this case just a
20 great deal, and I'll let Mississippi have 30 days after that
21 with which to respond.

22 MR. LEO BEARMAN: All right, sir.

23 THE COURT: And we'll hold off all this discovery
24 until after that's completed and I have made a preliminary
25 ruling on it.

1 MR. ELLINGBURG: May I ask a point of
2 clarification?

3 THE COURT: Sure.

4 MR. ELLINGBURG: What they said they are going to
5 file is a motion to dismiss which means that all the facts
6 in our complaint are taken as true?

7 THE COURT: Right, that's correct, sure. That's
8 the way I think we have done for years, and I think we'll
9 try to do it that way too.

10 Okay. What else do we need to resolve today? I have
11 kind of cut you short on the time to file these, but one
12 thing we need to try to do is expedite it.

13 It's important for all the parties and to try to save
14 money for Mississippi and Memphis and Tennessee and
15 everybody else who's involved in this.

16 MR. LEO BEARMAN: Your Honor?

17 THE COURT: Yes, sir.

18 MR. LEO BEARMAN: A lot of their suggestions we
19 agree with.

20 THE COURT: Okay.

21 MR. LEO BEARMAN: But one that immediately occurs
22 is that they suggest that only parties may participate in
23 status conferences and other case proceedings. We don't
24 think that should be the case.

25 We think that anyone who wants to intervene or if

1 there's an amicus brief filed, that individual or entity
2 should at least have the right subject to Your Honor's
3 approval to participate in any status conferences. If Your
4 Honor decides no, then that's where it will be.

5 THE COURT: Do we have any of those parties set
6 -- at the moment among all of our attorneys at this point?

7 MR. LEO BEARMAN: The only one is the Solicitor
8 General.

9 THE COURT: Well, I would hope that we could let
10 the Solicitor General in on it and accept whatever
11 suggestions they have in his office.

12 MR. ELLINGBURG: If I could say, Your Honor --

13 THE COURT: Yes.

14 MR. ELLINGBURG: -- if they are going to file a
15 dispositive motion, we don't really have -- I think as far
16 as what's left for disagreement, we can probably work most
17 of those things out.

18 I think that this was really our major point, was
19 whether there would be a dispositive motion or not.

20 I also say on the intervention issue that there is
21 some Supreme Court case law on which Mr. Frederick was
22 involved which had to do with how many parties should be
23 allowed to intervene in the original action.

24 So if that comes up, we can deal with it, but our only
25 purpose was to say this just should not become a circus,

1 that we would like to limit the participation of those that
2 have any real interest and that are approved by the Court.

3 We would like if people choose to seek to intervene to
4 have some understanding of what they anticipate they will be
5 doing, what the scope and the purpose and the limit of their
6 intervention because it could be unmanageable very quickly.

7 THE COURT: I understand that. If we don't have
8 any, it's a moot issue, but if we have a whole lot of them,
9 we'll probably have to wean them down and let somebody else
10 stand for the whole side or part of the side.

11 MR. LEO BEARMAN: Your Honor, excuse me?

12 MR. FREDERICK: Your Honor, this is David
13 Frederick, if I could just maybe get a clarification on two
14 points?

15 THE COURT: Sure.

16 MR. FREDERICK: May we be permitted to file a
17 reply brief to our motion, our early dispositive motion?

18 THE COURT: Okay. You can have 15 days after
19 the -- Mississippi has filed its response, sure.

20 MR. FREDERICK: Thank you. And for any amicus
21 brief that might be filed to support a motion to dismiss,
22 would those be due on the day that we file or under Supreme
23 Court Rules, seven days after we would file our motion?

24 THE COURT: I'm not sure. Which rule are we
25 talking about on the Supreme Court?

1 MR. FREDERICK: Well, the normal rules in merits
2 briefs call for amicus briefs to be filed seven days after
3 the brief.

4 THE COURT: Okay.

5 MR. FREDERICK: I think that just whether it's on
6 the same day as it used to be or whether it's seven days
7 after, we just would like to be able to notify any potential
8 amicus parties when their brief would be due.

9 THE COURT: Okay. You are talking about amicus
10 on behalf of the Tennessee side, right?

11 MR. FREDERICK: That's correct.

12 THE COURT: Okay. We'll let them have seven days
13 after that has been filed, and I don't know whether there
14 would be any amicus on the other side or not. Do you know?

15 MR. ELLINGBURG: We don't know. There apparently
16 has been some planning on the other side's behalf, but we
17 have not done that yet.

18 THE COURT: Okay. I guess if the other side gets
19 amicus briefs seven days after they have filed their reply
20 or response, we'll let your side have -- amicus have seven
21 days after that --

22 MR. ELLINGBURG: Thank you, Your Honor.

23 THE COURT: -- after the filing. Is that
24 understood?

25 MR. LEO BEARMAN: It is.

1 THE COURT: Okay.

2 MR. LEO BEARMAN: In view of Mr. Ellingburg's
3 comment, I think that while there are a few other minor
4 differences, I think we can hold those off if Your Honor
5 will allow until after the issues --

6 THE COURT: Okay.

7 MR. LEO BEARMAN: -- are presented to you in the
8 dispositive motions, if that's agreeable.

9 THE COURT: Okay. I'm not putting limits on your
10 motion and memorandum in support for either side, but don't
11 send me the family Bible because it's going to be hard for
12 me to wade through all that, and --

13 MR. LEO BEARMAN: We hear Your Honor.

14 THE COURT: Okay. Some of you, he has already
15 spoken to, I'll introduce Mr. Michael Cottone here, who's
16 going to be my assistant. He's a law clerk and case
17 manager. He's very well trained, and he's worked as a clerk
18 on the District Court in Tennessee and is working for me
19 now.

20 So I'm going to take care a lot of these as long as
21 he's with me, but he might leave, and then we'll have to
22 tell somebody else what the case is all about, but we're
23 saving your money because some of these cases in the past
24 have had practicing lawyers who have been special masters,
25 and the parties have to pay the fees of those special

1 masters and also pay the fees of the special master's
2 assistant. So it's going to be cheaper here, but let's try
3 to expedite it. It's important for all parties.

4 I remember -- some of you may remember the great Bob
5 Taylor over at Knoxville. When people would file suit in
6 his court, he would set it down for trial before the summons
7 was ever served on the other side.

8 (Laughter.)

9 THE COURT: We're not going to do it quite that
10 fast, but --

11 MR. LEO BEARMAN: I had the privilege of sitting
12 in one case before His Honor, Judge Taylor, and everything
13 you say is exactly the way it was.

14 THE COURT: Okay. Now, what else do we need to
15 do before we have this dispositive motion or motions? Do we
16 need to decide now as to have periodic status conferences or
17 do you want to wait until after I have made a ruling in this
18 issue, or we can have them -- at some of the cases, we have
19 had telephonic conferences, or they have. Yes, sir?

20 MR. LEO BEARMAN: I think it would help all of us
21 if Your Honor would let us know how you plan that we file
22 documents like motions and memoranda. Should we send them
23 to Cincinnati to -- however -- or is there going to be a --

24 THE COURT: Yes, send those to my chambers,
25 actually in London, Kentucky. And we can have any hearings

1 at London if you want to, but you can't fly in there unless
2 you have a private plane. There's no commercial activity
3 there.

4 And I'm about 100 miles north of Knoxville and
5 80 miles south of Lexington, so just send them to our
6 chambers in London.

7 MR. LEO BEARMAN: London, Kentucky.

8 THE COURT: And they will be kept there.

9 MR. LEO BEARMAN: All right, sir.

10 THE COURT: And you can -- I don't know how many
11 copies you'll be sending to other people or whether you have
12 agreed on that.

13 MR. ELLINGBURG: We did have -- we've come up
14 with a list of all counsel of record and we have agreed to
15 make service on each other by electronic means.

16 THE COURT: Okay. That's fine.

17 MR. ELLINGBURG: I guess just for clarification,
18 you are going to keep the official file?

19 THE COURT: Right, that's correct.

20 MR. ELLINGBURG: So if anything gets filed under
21 normal district court practices would be filed --

22 THE COURT: Right.

23 MR. ELLINGBURG: -- with you, and then in terms
24 of the parties, we're all going to serve each other by
25 electronic means.

1 THE COURT: Okay.

2 MR. ELLINGBURG: And we have talked ourselves
3 about maintaining another -- maybe another docket, but I
4 don't know whether the Court can maintain an electronic
5 docket or whether you would like us to arrange that.

6 THE COURT: I think we can. We have a website
7 already set up, so you can do it. That's what the Supreme
8 Court told me has been done in the past, and I think we're
9 following whatever advice they have given us.

10 MR. ELLINGBURG: That's fantastic.

11 MR. LEO BEARMAN: All right, sir. And we have
12 also compiled a list of the players, a score card, so you
13 can tell the players with the score card, and we'll get that
14 to the Court with all the e-mail addresses.

15 THE COURT: Yes. Okay. I don't know -- assuming
16 that the case is not dismissed, you can be thinking or maybe
17 you know today whether you think a mediator would be
18 appropriate in the case or whether it's useless.

19 I have had several professional meditators who offered
20 their services -- of course, you'll have to pay for them --
21 but whether that's within reason or not useful at all in
22 this kind of case.

23 MR. LEO BEARMAN: Can we confer among our clients
24 and then report back to Your Honor?

25 THE COURT: Okay. That's fine. And the same

1 thing with Mississippi?

2 MR. ELLINGBURG: Yes, sir.

3 THE COURT: Let me make sure I cover everything
4 that I want to here. I guess the important thing is once we
5 have a case management plan, if it's not dismissed, then one
6 of the most important issues is whether there are going to
7 be any factual issues in the case.

8 You have already identified some that Mississippi has
9 raised that may not be a factual issue at all but it could
10 be, and we need to be thinking as we have our status
11 conferences how long it will be to get this case disposed of
12 except by dispositive motion.

13 I don't know that you even know yet. Do you have any
14 ideas of it?

15 MR. ELLINGBURG: I can say this. We don't expect
16 to be the geological effort that Mr. Frederick suggested to
17 be necessary. I believe there's an awful lot of available
18 data that can be used and will be used in the case.

19 THE COURT: Okay. If we have to try the case, is
20 this the place that you want to try it? The Supreme Court
21 experts have said that it's hard to get a district court,
22 but they have been very gracious here to use this one, and
23 it's kind of a central location of sorts.

24 You can always come to London, and we can get plenty
25 of courtrooms, but you might not be able to find London.

1 (Laughter.)

2 THE COURT: And we could always have it at
3 Cincinnati, but that's kind of out of the way for everybody,
4 and we want to make it handy for people to come here.

5 And I imagine -- I don't know where your witnesses
6 would come from, if you have any, whether they would come
7 from Mississippi or Tennessee, or neither place, I don't
8 know.

9 Have you all thought about that? If we have to try
10 it, would you want to try it here or some other place?

11 MR. LEO BEARMAN: Frankly, Your Honor, it seems
12 to me that looking around the room, this is probably the
13 most central location if it's acceptable to you. I mean,
14 it's Your Honor's court, and we'll try it wherever you want
15 obviously. This is fairly centrally located.

16 THE COURT: Okay. Mr. Ellingburg?

17 MR. ELLINGBURG: I believe we need to talk among
18 ourselves --

19 THE COURT: Sure, okay.

20 MR. ELLINGBURG: -- and with our client on that.
21 This may very well be a good location, but it's not
22 something we have thought about at this point.

23 THE COURT: Sure. You may prefer it to be in
24 Memphis, but that involves more travel on my part if we have
25 it in Memphis, but we can talk about that later. We don't

1 have to right now.

2 If we have to go to trial, does anybody have any idea
3 when we would start? Has that come across your mind? Some
4 of these cases have drawn out for a long time.

5 MR. ELLINGBURG: Once we get these preliminary
6 matters out of the way -- the case was prepared to go to
7 trial at one time.

8 THE COURT: Oh, okay.

9 MR. ELLINGBURG: Except there has not been
10 discovery against Tennessee, it was not a party, but the
11 original case was dismissed for failure to join Tennessee on
12 the eve of the trial.

13 THE COURT: Okay.

14 MR. ELLINGBURG: So I think we should be able to
15 work together with what we used from that. Ultimately, it's
16 whatever discovery is needed and try to be ready to go to
17 trial quickly.

18 THE COURT: Okay. That's good to hear. I didn't
19 realize that.

20 Okay. One thing, the documents that are filed are
21 supposed to have the caption of the Supreme Court. I'm not
22 the Supreme Court, but I'm representing them, and we'll
23 later get to -- what documents you want to submit, just make
24 sure that they are properly labeled so that we can
25 understand them when you go through the dispositive motions.

1 After that, when we get closer to trial, we'll set up
2 a format where everybody will know how to label all your
3 exhibits and how that should be.

4 We will just -- we'll contact you from time to time to
5 see if a telephone conference would be useful. And if it's
6 not, we won't have it. But otherwise, I was advised by
7 Mr. Lancaster, from Maine, who is working on the
8 Florida-Georgia issue, that he has a conference about every
9 two weeks, and everybody who's at least a party to the case
10 would participate in it.

11 So that's sort of what we would think about unless you
12 think we need something in person. We can always do one in
13 person, but it would save time and money for your clients if
14 we do it by telephone.

15 MR. ELLINGBURG: That would be -- that would
16 certainly be acceptable to us.

17 THE COURT: That's what?

18 MR. ELLINGBURG: That will certainly be
19 acceptable to Mississippi.

20 THE COURT: Thank you. All right. What else do
21 we need to discuss today that I haven't covered or you
22 haven't covered?

23 If you have discovery, if you want a deposition of
24 somebody, don't send me the transcript of the deposition
25 unless it's a part of what you're going to file upon a

1 motion for summary judgment or something like that. We
2 don't need to look at all these things as we go unless it is
3 very material to the questions, related.

4 MR. LEO BEARMAN: I'm confident we can work that
5 out between the parties.

6 THE COURT: Sure. Okay. What else do we have to
7 resolve today that we can resolve? Anything else?

8 MR. SLATERY: Your Honor, may I ask a technical
9 question just for logistics?

10 THE COURT: Okay.

11 MR. SLATERY: When we submit our motion, when the
12 City and MLGW and the State of Tennessee submit their
13 motion, that will be submitted to you in hard copy, and
14 we'll get some information about the website, I
15 understand --

16 THE COURT: Okay, sure.

17 MR. SLATERY: -- and we can submit that to Your
18 Honor on standard paper?

19 THE COURT: Sure.

20 MR. SLATERY: Does Your Honor prefer 14-point
21 font? I know the Sixth Circuit uses that.

22 THE COURT: Yeah, whatever. I'm used to the
23 Sixth Circuit. I don't keep up with what fonts are good or
24 which one is bad. That's what -- I guess. That's fine.

25 MR. SLATERY: Thank you, Your Honor.

1 THE COURT: If you have any questions about
2 technical issues, call Mr. Cottone here, he knows
3 everything, and he'll be glad to talk to your sites not
4 about the merits of the case but about procedure or anything
5 like that.

6 And we're open as much as we can. We're trying to get
7 it disposed of in a good fashion and justice for all parties
8 here.

9 Do we have anything else we need to take up? Okay.
10 Do you have something?

11 MR. ELLINGBURG: Just one point of clarification.
12 I don't know whether the State of Tennessee and the City of
13 Memphis and Memphis Light, Gas & Water will be filing a
14 joint motion or whether they will be filing separate
15 motions, and I also don't know how many amicus briefs we may
16 face seven days later.

17 THE COURT: Okay. Well, if it runs into a
18 problem about the amicus or intervenor or something like
19 that, you can file a motion for more time if you have to.

20 MR. ELLINGBURG: Thank you, Your Honor.

21 THE COURT: I don't know. Will you have separate
22 briefs for the City and State?

23 MR. LEO BEARMAN: Not sure right now, Your Honor.

24 THE COURT: Okay. All right.

25 MR. ELLINGBURG: Thank you, Your Honor.

1 THE COURT: Okay. All right. We're pleased to
2 have our court reporter here. At any time if you need a
3 copy of the transcript, why, just order it from her and you
4 can have that. I don't know whether you want what we have
5 got today, but that's for you to decide on your own.

6 If there's nothing else, I hope that we can all work
7 together and expedite the handling of this and come up with
8 some solution that's appropriate.

9 All right. Anything else? If not, you may recess
10 court.

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1 REPORTER'S CERTIFICATE

2
3 I, BEVERLY E. "BECKY" COLE, Registered
4 Professional Reporter, with offices at Nashville, do hereby
5 certify:

6 That I reported on the stenotype shorthand machine
7 the proceedings held in open court on January 26, 2016, in
8 the matter of STATE OF MISSISSIPPI v. STATE OF TENNESSEE,
9 CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER
10 DIVISION, No. 143, Original;

11 That a Transcript of Proceedings in connection
12 with the hearing was reduced to typewritten form by me;

13 That the foregoing transcript is a true and
14 accurate record of the proceedings to the best of my skills
15 and abilities;

16 This the 7th of February, 2016.

17
18
19
20 /s/
21 BEVERLY E. COLE, RPR
22
23
24
25