

No. 143, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

**On Bill of Complaint
Before the Special Master, Hon. Eugene Siler**

STATE OF MISSISSIPPI'S MOTION TO EXCLUDE

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STATE OF MISSISSIPPI'S MOTION TO EXCLUDE

The State of Mississippi respectfully requests that the Special Master exclude those materials outside Mississippi's Complaint that have been presented by Defendants as part of their motions for judgment on the pleadings, and in support thereof would show the following:

1. City of Memphis and Memphis Light, Gas & Water Division served their Motion for Judgment on the Pleadings ("Mem. Motion") on February 24, 2016. State of Tennessee served its Motion for Judgment on the Pleadings ("Tenn. Motion") on February 25, 2016. Both motions are in the nature of motions under Rule 12(c) of the Federal Rules of Civil Procedure. The United States served a Brief for the United States as Amicus Curiae Supporting Defendants ("U.S. Br.") on March 3, 2016.

2. A motion for judgment on the pleadings is subject to the same standard as a motion to dismiss. *D'Ambrosio v. Marino*, 747 F. 3d 378, 383 (6th Cir.), *cert. denied*, 135 S. Ct. 758 (2014). Accordingly, in ruling on the pending motions, the well-pleaded factual allegations of Mississippi's Complaint should be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3. Defendants' respective motions and the United States's brief are premised, in significant part, on matters outside Mississippi's Complaint. For

example, Defendants and the United States assert facts based on (1) materials contained within the Appendix that Mississippi filed in support of its Motion for Leave to File Bill of Complaint in Original Action (*see, e.g.*, Mem. Motion at 5, 6, 18; Tenn. Motion at 4, 5, 6, 33, 34; U.S. Br. at 3, 4, 5, 18); (2) the record on appeal in Mississippi's prior litigation with Memphis and MLGW (*see, e.g.*, Mem. Motion at 19, 20; Tenn. Motion at 6, 23, 37, 38, 39, 40; U.S. Br. at 5, 6, 7); (3) statements made at the January 26, 2016, case management conference with the Special Master (*see, e.g.*, Mem. Motion at 4, 42 n.15; Tenn. Motion at 22); (4) briefs filed in support of or in opposition to Mississippi's Motion for Leave to File Bill of Complaint in Original Action (*see, e.g.*, Tenn. Motion at 4, 22, 27, 32, 42; U.S. Br. at 5); (5) factual allegations in Defendants' answers (U.S. Br. at 4); and (6) third-party groundwater studies and population estimates (Mem. Motion at 47; Tenn. Motion at 4, 32, 33; U.S. Br. at 3 n.3, 4, 18). None of these materials are in the Complaint or expressly incorporated therein by reference.

4. Rule 12(d) of the Federal Rules of Civil Procedure provides: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the Court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Accordingly, Mississippi

requests that the Special Master exclude all materials outside the Complaint that have been presented by Defendants and the United States and all statements and arguments made by them in reliance thereon. Mississippi requests such other or additional relief as may be appropriate in the premises.

APRIL 6, 2016

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's order on Initial Conference,
I hereby certify that all parties on the Special Master's approved service list have
been served by electronic mail, this the 6th day of April, 2016.

/s/ C. Michael Ellingburg
C. Michael Ellingburg