

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.

JOINT PROPOSED PRE-HEARING SCHEDULING ORDER

Plaintiff, the State of Mississippi (“Plaintiff”), and Defendants, the State of Tennessee, the City of Memphis, Tennessee, and Memphis Light, Gas & Water Division (collectively, “Defendants”), respectfully submit their Joint Proposed Pre-Hearing Order pursuant to the Joint Case Management Order dated November 1, 2017, as modified by the Orders Extending Certain Case Management Plan Deadline dated December 13, 2017, and February 20, 2018. Dkt. Nos. 61, 62, 63 (“Case Management Order”). For purposes of the proceedings before the Special Master, the parties set forth the following proposed plan for final preparation and procedure for the evidentiary hearing “on the limited issue of whether the Aquifer and the water constitutes an interstate resource” (Dkt. No. 55) and pre- and post-briefing:

I. Final Pre-Hearing Proceedings

Final pre-hearing proceedings will commence and be completed in accordance with the schedule stated herein.

A. Exchange of Witness and Exhibit Information

1. The parties have already exchanged witness lists. The parties will provide the Special Master with the credentials of their expert witnesses on or before September 14, 2018.
2. The parties will exchange exhibit lists and deposition designations for their cases in chief by September 14, 2018.
3. Deposition cross-designations for their cases-in-chief shall be exchanged by October 5, 2018.
4. Objections to exhibits and deposition designations will be exchanged by October 19, 2018.
5. Amendments to the parties' witness lists, exhibit lists, and deposition designations shall be allowed only by leave of the Special Master.

B. Dispositive Motions

[Plaintiff and Defendants do not agree on the issue of whether additional dispositive motions should be filed before the completion of the evidentiary hearing and submission of this matter to the Special Master ordered by the August 12, 2016, Memorandum Decision. (Dkt. No. 55). Mississippi's position is that the legal arguments should now be made within the context of a full factual record created at the hearing ordered by the Special Master. Defendant's position is that the limited issue defined by the Special Master can and should be resolved on a motion for summary judgment before the evidentiary hearing because Defendants contend that there are no genuinely disputed issues of material fact. Defendants propose the following schedule for such motions: the deadline for filing Dispositive Motions: June 1, 2018; for filing Responses: July 6, 2018; and for filing Replies: July 24, 2018.]

C. Motions *in Limine* and Motions Challenging the Credentials of Expert Witnesses or the Admissibility of Expert Testimony

1. All motions *in limine* and motions challenging the credentials of expert witnesses or the admissibility of expert testimony, if any, shall be filed by November 1, 2018.

2. Responses to motions *in limine* and motions challenging the credentials of expert witnesses or the admissibility of expert testimony motions shall be filed by November 20, 2018.

3. Any replies shall be filed by December 7, 2018.

4. Each motion *in limine* shall be no more than 20 pages (excluding exhibits). Each response in opposition shall be no more than 20 pages (excluding exhibits). Reply memoranda shall be no more than 15 pages (excluding exhibits).

D. Pre-Hearing Briefs

Pre-hearing briefs, if any, shall be filed by the parties on or before December 20, 2018. Pre-hearing briefs shall not exceed forty (40) pages.

E. Amicus Briefs

The United States may, without further leave of the Special Master, file an *amicus curiae* pre-hearing brief on or before December 20, 2018.

F. Exhibits

1. The parties shall file four copies of all exhibits by January 7, 2019, and all exhibits shall be pre-marked. Plaintiff's exhibits shall be numbered with an "MS" sequence (starting with MS-0001), and

Defendants' exhibits shall be numbered with a "TN" sequence (starting with TN-3000) and "ME" sequence (starting with ME-6000). Any joint exhibits shall be numbered with a "J" sequence (starting with J-9000).

2. On January 7, 2019, the parties shall file a Joint Exhibit List ("Exhibit List") in spreadsheet form, in either Excel or Word format. The Exhibit List shall contain columns for "Offered," "Objection," and "Admitted." On the Exhibit List, the parties shall mark exhibits to which objection has been made, and the basis for the objection.

II. Hearing Proceedings

A. Schedule

1. The hearing shall commence on January 14, 2019, at 9:00 a.m. (Central Standard Time) at the United States District Court for the Middle District of Tennessee, at Nashville, in Courtroom _____. Unless otherwise specified by the Special Master, the proceeding shall be in session from 9:00 a.m. to 5:00 p.m. each weekday, with breaks for lunch and as necessary.

2. As a general matter, the hearing will proceed as follows:

- a. Plaintiff's and Defendants' opening statements.
- b. Plaintiff's witnesses and exhibits.

- c. Cross-examination of Plaintiff's witnesses.
- d. Redirect examination of Plaintiff's witnesses.
- e. Defendants' witnesses and exhibits.
- f. Cross-examination of Defendants' witnesses.
- g. Redirect examination of Defendants' witnesses.
- h. Plaintiff's rebuttal testimony and exhibits, cross-examination and redirect.
- i. Parties' closing statements.

3. Rebuttal testimony will be allowed in the discretion of the Special Master.

B. Sequestration of Witnesses

Expert witnesses will only be sequestered if good cause is shown.

C. Miscellaneous.

As the pre-hearing schedule proceeds, the parties will work together and submit to the Special Master any procedural matters that they believe might make the hearing more efficient. These matters could include, but are not limited to, provisions to handle confidential documents (if any) and time limits for direct, cross and re-direct examinations of witnesses.

D Evidentiary Hearing Subpoenas

The parties shall bring to the attention of the Special Master any need for subpoenas for attendance at the hearing as soon as reasonably practicable.

E. Audio/Visual Equipment

Counsel should contact information technology staff as directed by the Clerk of the District Court for the Middle District of Tennessee, with any issues relating to audio/visual equipment. Counsel should also inform the Special Master of their planned use of audio/visual equipment at or before the pre-hearing conference.

III. Pre-hearing Conference

A pre-hearing conference will be held on _____, 201_, at the United States District Court for the Middle District of Tennessee at Nashville.

IV. Post-hearing Filings

- A.** No later than 90 days after the end of the hearing, the parties shall file:
- 1.** Proposed findings of fact and conclusions of law (with citations to the record); and
 - 2.** Post-hearing briefs that summarize each party's argument. Post-hearing briefs shall be limited to 40 pages.

B. Responses to post-hearing briefs (Section IV(A)(2)) shall be filed 30 days after service of the post-hearing briefs and shall be limited to 30 pages.

Respectfully and jointly submitted, this 20th day of March, 2018:

/s C. Michael Ellingburg
Lead Counsel for Plaintiff State of Mississippi

/s David C. Frederick
Lead Counsel for Defendant State of Tennessee

/s Leo M. Bearman
*Lead Counsel for Defendants City of Memphis
and Memphis Light Gas & Water Division*

CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that I have served the foregoing Joint Proposed Pre-Hearing Scheduling Order by electronic mail on all parties on the Special Master's approved service list.

/s/ David C. Frederick
David C. Frederick