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March 20, 2018

Via Overnight Courier & Electronic Mail

The Honorable Judge Eugene E. Siler, Jr.  
Special Master  
310 South Main Street, Suite 333  
London, KY 40741  
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Re: State of Mississippi v. State of Tennessee, City of Memphis, Tennessee  
and Memphis Light, Gas & Water Division (No. 143, Orig.)

Dear Judge Siler:

The parties have submitted their Joint Proposed Pre-Hearing Scheduling Order for Your Honor's consideration. You will note, from Section I(B) of the proposed order, that Plaintiffs and Defendants do not agree on the issue of whether additional dispositive motions should be filed before the evidentiary hearing ordered by Your Honor's August 12, 2016, Memorandum Decision. (Dkt. No. 55) The Joint Case Management Order entered on November 1, 2017, (Dkt. No. 61) provides in paragraph 4 that "if the parties cannot agree on certain elements of their proposed plan for the hearing or pre- or post-hearing briefing, they shall set forth their respective positions in letter briefs of not more than five pages . . . ." Mississippi's position on the pending dispute concerning dispositive motions is provided herein.

Mississippi's position is that the parties' legal arguments should be made within the context of a full factual record created at the evidentiary hearing. Your Honor's August 12, 2016, Memorandum Decision (Dkt. No. 55) acknowledges that the issues presented in this case are matters of first impression and held that "an evidentiary hearing on the limited issue of whether the Aquifer and the water constitutes an interstate resource is appropriate." *Id.* at 36. Your Honor also recognized that "Special Masters have only the authority to provide recommendations for findings of fact and law that the Court must then adopt or reject," *id.* at 35; that they "have been advised to err on the side of over-inclusiveness in the record for the purpose of assisting the Court in making its ultimate determination," *id.* at 35-36; and that you have the "responsibility to prepare an adequate record for review." *Id.* at 36.

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Because state groundwater natural resources rights have never been addressed by the Supreme Court, and the characteristics of local natural availability, movement, storage and recharge are the subject of geologic and hydrogeological study, it is Mississippi's position that "an adequate record for review" (*id.* at 36) may only be prepared through the evidentiary hearing Your Honor has ordered, not through summary, piecemeal submissions by the parties. In fact, there is no procedure in the Supreme Court for "summary judgments" as is provided in Rule 56 of the Federal Rules of Civil Procedure.

Defendants have already sought and briefed two summary dismissals of Mississippi's claims--first, through their filing of briefs in opposition to Mississippi's motion for leave to file its Complaint, and second, through their motions to dismiss that were the subject of the Court's Memorandum Decision. At this stage, the only appropriate and most efficient path to a proper analysis and recommendation on the issue defined by your Order is the evidentiary hearing you have already determined "is appropriate." (Dkt. No. 55 at 36) The hearing would be conducted during a two-week period of time in January 2019, and would not be a lengthy one. It appears the only live witnesses will be five experts (two for Mississippi, two for Tennessee, and one for Memphis), supplemented by deposition testimony designations. The presentation of those expert witnesses will provide evidence relevant to the aquifers and groundwater at issue and provide Your Honor with an opportunity to ask clarifying questions of those experts and/or the parties. Further, any arguments the parties may desire to make in support of their respective positions, including their arguments over the existence of disputed or undisputed material facts, can and will be fully presented in their pre-hearing briefs, throughout the course of the evidentiary hearing, and in the parties' post-trial submissions (including proposed findings of fact and conclusions of law supported by citations to the record developed at the hearing).

Defendants assert that the issue at hand can and should be resolved on a summary basis, but the parties' recent "Joint Statement of Stipulated and Contested Facts" served on February 27, 2018 (Dkt. No. 64), contains 89 statements of fact by Mississippi that were disputed by Defendants, and 64 statements of fact by Defendants that were disputed by Mississippi. Mississippi does not believe it is appropriate or efficient for the parties to engage in arguments over those disputed facts through a briefing process when evidence of those facts can be presented at the evidentiary hearing for your consideration and resolution.

Based on the foregoing, Mississippi respectfully requests that the parties' Joint Proposed Pre-hearing Scheduling Order be entered without the inclusion of any provisions providing for the filing of pre-hearing dispositive motions. Mississippi is available at Your Honor's convenience should you desire to receive oral argument on this issue.

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Respectfully submitted,

DANIEL COKER HORTON & BELL

*/s/ C. Michael Ellingburg*

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cc: Service List for No. 143, Orig.