

No. 143, Original

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IN THE  
**Supreme Court of the United States**

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STATE OF MISSISSIPPI,  
*Plaintiff,*

v.

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

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

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**DEFENDANTS' REPLY IN SUPPORT OF THEIR  
JOINT MOTION TO EXCLUDE THE TESTIMONY AND OPINIONS  
OF MISSISSIPPI'S EXPERT DAVID A. WILEY**

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## GLOSSARY

MLGW	Memphis Light, Gas & Water Division
Wiley Dep.	Deposition of David Wiley, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (Sept. 26, 2017)
Wiley 2007 Rep.	Report on Diversion of Ground Water from Northern Mississippi Due to Memphis Area Well Fields (prepared by Leggette, Brashears & Graham, Inc.) (May 2007) (expert report of David A. Wiley)
Wiley June 2017 Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi Into the State of Tennessee (prepared by Leggette, Brashears & Graham, Inc.) (June 30, 2017) (expert report of David A. Wiley)

Pursuant to Section I(C)(3) of the Special Master’s Corrected Pre-Hearing Scheduling Order (Dkt. No. 69), Defendants State of Tennessee, City of Memphis, Tennessee, and Memphis Light, Gas & Water Division (“Defendants”) respectfully submit their Reply in Support of their Joint Motion To Exclude the Testimony and Opinions of Mississippi’s Expert David A. Wiley.

### **INTRODUCTION**

The arguments raised by Mississippi in its Response to Defendants’ Joint Motion To Exclude the Testimony and Opinions of David A. Wiley (“Miss. Br.”) fail to demonstrate that Mr. Wiley’s testimony is sufficiently reliable to be admitted. As explained herein, the Affidavit of David A. Wiley, submitted as Exhibit 3 to Mississippi’s Response, actually supports *Defendants’* Motion – and emphasizes the importance of limiting the proof at trial only to evidence that is relevant to the threshold question whether the Aquifer, including the groundwater in it, is an interstate resource.

Mr. Wiley’s opinions can be divided into two general categories. The first set of opinions relates to the hydrogeological features of the Aquifer. The second concerns Mr. Wiley’s calculations of the amount of groundwater he asserts has been withdrawn from the Aquifer in DeSoto County, Mississippi, and by MLGW in Tennessee, as well as Mr. Wiley’s opinions regarding the groundwater allegedly “diverted” from Mississippi into Tennessee by MLGW’s pumping.

Defendants' Motion seeks to exclude, at the very least, the opinions of Mr. Wiley related to the second category of calculated and compiled data because (1) they are irrelevant to the threshold question whether the Aquifer is an interstate resource, and (2) they are unreliable. For both reasons, these opinions cannot be helpful to the Special Master.

## **ARGUMENT**

### **I. MR. WILEY'S OPINIONS SHOULD BE EXCLUDED BECAUSE THEY ARE NOT RELEVANT TO THE LIMITED ISSUE BEFORE THE SPECIAL MASTER**

Defendants' Joint Motion To Exclude Evidence Irrelevant to the Limited Evidentiary Hearing explains why Mr. Wiley's opinions concerning the amount of annual groundwater pumping in DeSoto County, Mississippi, and by MLGW in Shelby County, Tennessee, and the amount of groundwater in the Aquifer allegedly "diverted" from Mississippi by pumping in Tennessee are irrelevant. *See* Defs.' Jt. Mot. To Exclude Irrelevant Evid. at 7-11. Defendants will not repeat the arguments set out in that Motion and in their Brief supporting that Motion, but adopt and incorporate them herein.

Because Mr. Wiley's opinions concerning these issues are not relevant to whether the Aquifer, including the water in it, is an interstate resource, they cannot be helpful to the trier of fact and should be excluded.

## **II. MR. WILEY’S OPINIONS SHOULD BE EXCLUDED BECAUSE THEY ARE NOT RELIABLE**

### **A. Mr. Wiley’s Affidavit Supports Excluding His Opinions**

#### **1. Mr. Wiley admits to a clerical error in his withdrawal data for DeSoto County, Mississippi**

Mr. Wiley’s Affidavit submitted with Mississippi’s Response confirms that the pumping volumes for DeSoto County, Mississippi, that appeared in his own 2007 and 2017 Reports are unreliable. Mr. Wiley concedes that the annual pumping volumes for DeSoto County listed in his 2007 and 2017 reports are inconsistent. Wiley Aff. ¶ 4. However, Mr. Wiley explains the conflict between the data presented in his two reports is the result of “a clerical error.” *Id.* Mr. Wiley’s “clerical error” is material and significant, especially in light of Mr. Wiley’s agreement that the “amount of pumping” is “an important part of [his] report to get . . . accurate.” Ex. 9 (Wiley Dep. 61:7-10). For example, Mr. Wiley’s 2007 Report recorded the withdrawal volume for DeSoto County in 1982 as 3.6 million gallons per day, Ex. 24 (Wiley 2007 Rep., Table 2); in his 2017 Report, he recorded the volume for 1982 to be 4.18 million gallons per day, Ex. 25 (Wiley June 2017 Rep., Table 2) – an *increase* of 0.58 million gallons per day. However, for 1994, the 2007 Report records 13.05 million gallons per day, and the June 2017 Report has 3.6 million gallons per day for the same year – a *decrease* of 9.45 million gallons per day. Mr. Wiley does not explain what kind of “clerical error” might have resulted in some years increasing and others decreasing – especially by

such large margins. Further, a “clerical error” of 3-9 million gallons per day equates to errors of 1-3 *billion* gallons per year, and potentially hundreds of billions of gallons over the 51-year period between 1965 and 2016.

**2. Mr. Wiley admits he used different mathematical formulas to compute MLGW’s withdrawal volumes**

Mr. Wiley states in his Affidavit that the internal discrepancies between the MLGW pumping volumes listed in Tables 1 and 2 of his 2007 and 2017 Reports were the result of his inconsistent use of “rounding” and/or “conversion” calculations. Wiley Aff. ¶¶ 6-8. According to Mr. Wiley, in order to use his 2007 model, he had to convert pumping volumes from gallons-per-day (“gpd”) as shown in Table 1 to cubic feet per second (“cfs”) for his model. *Id.* ¶ 8. He then converted the cfs volumes back to gpd numbers and recorded that figure in Table 2. *Id.* Mr. Wiley testifies that, for certain years, he converted gpd to cfs by multiplying gallons per day (Table 1) by a conversion factor of 0.00000154723. *Id.* For other years, he rounded the conversion factor and multiplied cfs by 0.00000155. *Id.*

Mr. Wiley’s Affidavit confirms that the inconsistencies in his reports result from inconsistent methodologies. He concedes that the annual MLGW withdrawal rates he used for his computer model (cfs) were computed using different formulas for different years. That discrepancy was then exacerbated because, when Mr. Wiley converted the inconsistent cfs values back to gpd for his Table 2, he



multiplied them by the same number and, therefore, did not take into account the difference created by the rounding error. And, on top of what are already unreliable calculations, Mr. Wiley testifies that the significant difference for year 2006 in Tables 1 and 2 of his 2017 report was the result of his using a different source for the withdrawal volumes for each table. *Id.*

In any event, the discrepancies and inconsistencies between Mr. Wiley's Tables 1 and 2 are apparent and obvious. If the volume in Table 1 is 131,655,274 gallons per day (for year 1985), then that volume expressed in Table 2 in millions of gallons per day should be 131.6 or 131.7. Mr. Wiley's Table 2, however, shows 131.9. Ex. 25 (Wiley June 2017 Rep., Table 2). Mr. Wiley's "rounding" and "conversion" errors for years 1965-2005 were to Mississippi's benefit because he input into his computer model a higher volume of pumping for MLGW than MLGW actually reported. A difference of 200,000 or 300,000 gallons per day is significant when multiplied by 365 days per year, and then again by the 51 years represented in Mr. Wiley's model. Further, the erroneous and unreliable pumping values Mr. Wiley input into his computer model render the results of his model equally erroneous and unreliable, including his calculation of the amount of water allegedly "diverted" from Mississippi to Tennessee *as a result of MLGW's pumping.*

“Clerical errors” and “rounding errors” amounting to *billions* of gallons are not, as Mississippi contends, “slight discrepancies in pumping volumes.” Miss. Br. 9-10. They are material and significant errors. Any opinions offered by Mr. Wiley based on those flawed calculations are unreliable and should be excluded.

**B. Mississippi’s Counsel’s November 2017 Email Did Not Cure Mr. Wiley’s Failure To Explain His Errors**

At his September 2017 deposition, Mr. Wiley was asked to explain the inconsistencies and conflicting data in his reports. Under oath, Mr. Wiley was unable to offer any explanation – a point conceded by Mississippi. *See* Miss. Br. 10 n.2. In its Response, however, Mississippi states that “Mississippi’s counsel provided this explanation (and relevant source documents) to Defendants on November 7, 2017.” *Id.* at 10 n.2 & Ex. 4. But the email from Mississippi’s counsel did not, and could not, change the fact that, when Mr. Wiley was under oath at his deposition, he could not explain the errors.

Further, as is evident from Exhibit 4 to Mississippi’s Response, the November 7, 2017 email did *not* include an affidavit from Mr. Wiley purporting to explain his conflicting data. The email from Mississippi’s counsel was not *Mr. Wiley’s* explanation. The Affidavit of Mr. Wiley (Ex. 3 to Mississippi’s Response) is the first attempt *by Mr. Wiley* to explain some (but not all) of his errors – some 14 months after the close of discovery. Additionally, the November 7, 2017 email omitted material information that addressed the errors in Mr. Wiley’s reports –

errors that Mr. Wiley could not explain at his deposition. It addressed only the conflict in Mr. Wiley's records for MLGW's pumping volume for years 2007-2012 (due to his use of different sources of data). *See* Miss. Br., Ex. 4. The email from Mississippi's counsel contains no mention or explanation of alleged clerical errors, conversion or rounding errors, or Mr. Wiley's going back to review his files. And the email only attached the documents that comprise Exhibit B to Mr. Wiley's Affidavit. Mississippi did not previously provide the documents attached to Mr. Wiley's Affidavit as Exhibits A, C, D, and E. *See id.*

Mr. Wiley's calculations and figures have materially changed several times over the course of his work, and, until now, those changes have been without an explanation – despite Defendants having probed the issues. Mr. Wiley's calculations and figures are unreliable, and he should not be allowed to testify about or offer opinions based upon them.

### **III. PERMITTING MISSISSIPPI TO ATTEMPT TO CURE THE UNRELIABILITY OF MR. WILEY'S TESTIMONY WILL PREJUDICE DEFENDANTS AND NEEDLESSLY INCREASE THE TIME AND EXPENSE OF TRIAL**

Mississippi should not be allowed to expand the scope of Mr. Wiley's testimony with new explanations at the eleventh hour, which will both prejudice Defendants and unnecessarily extend the trial.

Mississippi argues (at 12) that Mr. Wiley's errors go to the weight of the evidence, not to its admissibility, and that his errors can be addressed on cross-

examination. That clearly self-serving argument ignores the fact that Mississippi failed to disclose the information in Mr. Wiley's Affidavit until more than a year after he was deposed – and only two months before the scheduled evidentiary hearing. Defendants have no way to challenge Mr. Wiley's Affidavit before the hearing and no time for their experts to respond to it. Mississippi has known about and had access to the information revealed in Mr. Wiley's Affidavit for at least a year. Only when responding to Defendants' Motion to exclude Mr. Wiley did Mississippi decide to disclose it. Mississippi should not benefit from its failing to disclose information that materially changes Mr. Wiley's deposition testimony.\*

Further, Mississippi's suggestion (at 9) that Mr. Wiley's errors are "easily explained" is belied by the fact that, when Mr. Wiley was deposed, he had *no* explanation. And Mississippi's contention (at 9) that the errors "relate to only a handful of matters" is obviously wrong given that Mr. Wiley's admittedly flawed pumping volumes were the foundation of his computer model and, therefore, taint every opinion based on that model including, without limitation, his opinions concerning the amount of pumping in DeSoto County, Mississippi, and Shelby County, Tennessee, and the amount of water alleged to have been diverted.

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\* The Special Master should find that Mississippi has forfeited and/or waived any right to argue the materiality of the information in Mr. Wiley's Affidavit – information Mississippi failed to disclose for more than a year and did so now only in an effort to prevent its expert from being excluded.

Defendants spent significant time and resources preparing to take Mr. Wiley's deposition. At his deposition, Defendants questioned Mr. Wiley at length about the errors in his reports, and, as Mississippi concedes, he had no explanation. Defendants are entitled to rely on Mr. Wiley's testimony. Mr. Wiley had the opportunity to clarify his depositions answers with an errata form when he reviewed his deposition transcript. Mississippi could have provided the Affidavit included in its Response a year earlier, in November 2017.

Allowing Mississippi to offer testimony by Mr. Wiley based on his flawed calculations imposes an unfair burden on Defendants to cross-examine him without the benefit of a deposition to test his newly revealed excuses. Mississippi's last-minute Affidavit does not, and should not be permitted to, "fix" Mr. Wiley's unreliable calculations and data. Mississippi's Response is too little, too late.

### **CONCLUSION**

For the reasons set out herein and in Defendants' Motion, this Court should exclude the testimony and opinions of Mississippi's expert David A. Wiley concerning pumping volumes and any calculations or opinions based on those flawed numbers including, without limitation, the amounts of groundwater alleged to have been "diverted" by Defendants and/or post-development potentiometric maps generated by Mr. Wiley's model.

Respectfully submitted this 7th day of December 2018,

s/ David C. Frederick

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**CERTIFICATE OF SERVICE**

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this 7th day of December 2018.

/s/ David C. Frederick

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