IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 81 Orig.

COMMONWEALTH OF KENTUCKY,
Plaintiff,

v.

STATE OF INDIANA and THEODORE L. SENDAK,
Attorney General of Indiana,
Defendants,

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Movant for Leave to Intervene.

MOTION FOR LEAVE TO INTERVENE

AND

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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January 5, 1979

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MOTION FOR LEAVE TO INTERVENE

Public Service Company of Indiana, Inc. ("Public Service") hereby moves for leave to intervene in this original action as a party defendant and in opposition to Kentucky's motion for leave to file complaint. The grounds for this motion are:

1. Public Service is the holder of construction permits issued by the Nuclear Regulatory Commission authorizing Public Service to build two nuclear steam-electric generating plants in the State of Indiana at a site located on the Ohio River. Kentucky has opposed, and is opposing, the construction of those plants. As part of its effort to delay or defeat such

construction, Kentucky seeks to assert jurisdiction over the discharge from the plants into the Ohio River. The Nuclear Regulatory Commission twice held that Kentucky is without jurisdiction. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179 (1978), ALAB-493, 8 N.R.C. 253 (1978). If Kentucky's complaint is accepted, the Court will in essence be reviewing the validity of the Nuclear Regulatory Commission's orders. Public Service should be afforded the opportunity to defend the propriety of the Commission's orders. *Cf.* 28 U.S.C. § 2348 (1976) (party to agency proceeding whose interest will be adversely affected if the agency's order is set aside may participate in review proceeding as a matter of right).

2. There is pending before the United States Court of Appeals for the District of Columbia Circuit a petition to review the decision of the Nuclear Regulatory Commission in ALAB-459, *supra*. *Kentucky* v. *Nuclear Regulatory Comm'n,* No. 78-1369, filed April 21, 1978. Pursuant to 28 U.S.C. § 2348 (1976) and Fed. R. App. P. 15, Public Service has intervened in that review proceeding as a party defendant. Action by this Court on Kentucky's complaint could affect the outcome of the case before the District of Columbia Circuit to the disadvantage of Public Service.

3. Public Service is regulated by the State of Indiana through its Environmental Management Board, Stream Pollution Control Board, and Public Service Commission. From time to time, Public Service has taken positions adverse to those asserted by such Indiana agencies. Accordingly, Public Service should not be required to rely upon the State of Indiana to represent the interests of Public Service in this action.

4. Before the Nuclear Regulatory Commission, Public Service presented testimony concerning the correct location of the boundary between Indiana and Kentucky. If this case were to be referred to a Special Master, Public Service could present similar testimony and aid in compiling a sound record.

The interest of Public Service in this original action is more fully set forth in the brief accompanying this motion.

WHEREFORE, Public Service prays that the Court grant it leave to intervene in this original action as a party defendant and in opposition to Kentucky's motion for leave to file complaint.

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

Introduction

This brief is filed by Public Service Company of Indiana, Inc. ("Public Service") in support of its motion for leave to intervene in this original action filed by the Commonwealth of Kentucky on November 7, 1978. In addition, Public Service hereby opposes on the merits Kentucky's motion to institute this action.

Kentucky asks this Court to address questions of law that are presently before the United States Court of Appeals for the District of Columbia Circuit in a review proceeding commenced by Kentucky. Public Service submits that Kentucky should be required to obtain a resolution from the Court of Appeals instead of invoking this Court's original jurisdiction.

Interest of Public Service Company of Indiana

Public Service is an Indiana corporation operating as a public utility within the State of Indiana. Public Service provides electric energy to all or part of 69 of the 92 counties in Indiana, including eight of the 13 counties bordered by the Ohio River. Its service area has an estimated population of 2,600,000 and includes the cities of Terre Haute, Kokomo, Columbus, Lafayette, Bloomington, and New Albany. In addition to retail electric service, Public Service provides electricity at wholesale to 43 cities or towns and 15 rural electric cooperatives. Public Service is the largest electric utility in the State.

To fulfill its statutory obligation to supply electric energy to its customers upon demand, and to meet anticipated increases in the need for electricity in its service area, Public Service is constructing two nuclear steam-electric generating units at a place called Marble Hill in Jefferson County, Indiana. Construction of those units has been authorized by the Nuclear Regulatory Commission. As of December 1, 1978, Public Service had completed approximately 10% of the construction work at an expenditure of some $262 million. Total investment in the two Marble Hill nuclear units is expected to approach $2 billion.

The Marble Hill site is located on the Indiana bank of the Ohio River opposite Trimble County, Kentucky. During operation of the plant, water will be withdrawn from the Ohio

River for use in a mechanical draft cooling tower system approved by the Nuclear Regulatory Commission. Operation of the cooling system also will result in the return of relatively small quantities of water to the Ohio River. To provide for that discharge, Publice Service will build a structure extending approximately 75 feet into the waters of the river.

Because it proposes a discharge into the Ohio River, a navigable water, Public Service was required to comply with § 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (Supp. 1970-77), before it could receive construction permits from the Nuclear Regulatory Commission. Accordingly, Public Service obtained from the Indiana Stream Pollution Control Board a certificate under § 401. That certificate was presented to the Nuclear Regulatory Commission, and the Commission relied upon the Indiana certificate in authorizing the construction of the Marble Hill nuclear units.

While Kentucky initially acquiesced in the issuance of a § 401 certificate by Indiana, it later challenged the validity of that certificate in proceedings before the Nuclear Regulatory Commission. Kentucky asserted that all of the Ohio River up to the present-day shoreline on the Indiana side is part of Kentucky. Thus, according to Kentucky, it has exclusive jurisdiction to issue the certificate required by § 401 of the Clean Water Act, and the certificate issued by Indiana is a nullity. The Commission examined earlier decisions of this Court, particularly *Indiana* v. *Kentucky,* 136 U.S. 479 (1890), and rejected Kentucky's legal argument.[1] *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179 (1978). The Commission held that the Kentucky-Indiana boundary is fixed at the low-water mark as it existed on June 1, 1792, when Kentucky was admitted to the Union. *Id.* at 193-94.

[1] The Commission's decision was rendered by an Atomic Safety and Licensing Appeal Board pursuant to 10 C.F.R. § 2.785 (1978) (delegation of review functions).

The Commission also determined as a matter of fact that the terminal point of the discharge structure for the Marble Hill units would be located on the Indiana side of that line. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-78-12, 7 N.R.C. 573, *aff'd,* ALAB-493, 8 N.R.C. 253 (1978).

The rejection of Kentucky's legal argument by the Commission is now under review in the United States Court of Appeals for the District of Columbia Circuit. *Kentucky* v. *Nuclear Regulatory Comm'n,* No. 78-1369, filed April 21, 1978.

If this Court accepts jurisdiction over a new original action by Kentucky against Indiana concerning the location of the Ohio River boundary between the two States, the validity of the § 401 certificate for the Marble Hill units may be affected in two ways. First, the pendency of a new original action may pretermit or delay resolution of that issue by the Court of Appeals. Kentucky's filing of an original action while the same issue is pending in the Court of Appeals is tantamount to a request for certiorari in advance of judgment pursuant to this Court's Rule 20. Second, should this Court accept jurisdiction of the original action, the location of the boundary (and hence the propriety of the Indiana § 401 certificate) will be subject to further litigation and, perhaps, an eventual decision adverse to the interests of Public Service.

Public Service therefore has an immediate and direct interest in this controversy, which interest may be adversely affected by the action which this Court takes on Kentucky's motion.

Proceedings Before the Nuclear Regulatory Commission

In support of its motion for leave to commence an original action, Kentucky asserts that there is an actual controversy between itself and the State of Indiana. Ky. Br. at 12-14. Only

one specific example is offered to support that assertion. The example given is the authorization by Indiana of the discharge from the Marble Hill nuclear units. Ky. Br. at 15. Kentucky further relies upon a statement made by counsel for Public Service before the Nuclear Regulatory Commission as setting forth the position of Indiana. Ky. Br. at 8-9. Since it is thus clear that Kentucky's principal motivation in seeking to commence an original action is the controversy over the Marble Hill discharge, we believe that it will be helpful to the Court to recount the procedural history of the Nuclear Regulatory Commission's licensing of Marble Hill.[2]

Public Service filed its Application for Licenses to construct and operate the Marble Hill units in July 1975. The Application was accompanied by an Environmental Report, Table 12.0-1 of which indicated that Public Service planned to apply to the State of Indiana for a certificate under § 401 of the Clean Water Act. The table further indicated that Public Service did not intend to apply for any certificates or permits from Kentucky.

On January 30, 1976, the Indiana Stream Pollution Control Board issued a § 401 certificate for the Marble Hill units. A copy of that certificate was sent to the Kentucky Department for Natural Resources and Environmental Protection ("Kentucky DNR"). Pursuant to § 401(a)(2) of the Clean Water Act, Kentucky had the right to protest the Indiana certificate within 60 days. No such protest was made by Kentucky.

On February 4, 1976, the Kentucky DNR requested that it be permitted to participate in licensing proceedings before the Nuclear Regulatory Commission as an "interested State" pursuant to 10 C.F.R. § 2.715 (1978). That request was

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[2] The pleadings, orders, and hearing record before the Commission have been certified to the United States Court of Appeals in Kentucky v. Nuclear Regulatory Comm'n, No. 78-1369 (D.C. Cir., filed April 21, 1978). Pertinent portions will be included in the Joint Appendix to be filed with that court.

granted in an order issued by the Atomic Safety and Licensing Board on March 12, 1976. The Indiana Stream Pollution Control Board was admitted as an "interested State" by the same order.

In March 1976, the Nuclear Regulatory Commission made available for public comment its Draft Environmental Statement relating to the proposed construction of the Marble Hill units. In late May and early June 1976, the Kentucky DNR submitted comments on the Draft Environmental Statement. Those comments made no reference to any requirement for Kentucky certificates or permits for the Marble Hill units.

Public hearings concerning the issuance of a construction permit for the Marble Hill units were commenced in March 1977. During those hearings, on April 27, 1977, counsel representing Kentucky stated to the Licensing Board that Kentucky had "no quarrel" with the issuance of a § 401 certificate by Indiana, but that Kentucky contended that Public Service also should be required to obtain two state permits from Kentucky.

Thus, for over one year following the issuance of the § 401 certificate by Indiana, Kentucky passed up numerous opportunities to challenge its validity. More importantly, the Nuclear Regulatory Commission's Licensing Board was told that Kentucky acquiesced in the issuance of the certificate by Indiana. After the hearing record was closed, however, Kentucky submitted on June 13, 1977, a memorandum of law claiming—for the first time—that Public Service should have obtained a § 401 certificate from Kentucky.

Kentucky's belated assertion of jurisdiction to issue a § 401 certificate for the discharge from the Marble Hill units was rejected by the Licensing Board. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-77-52, 6 N.R.C. 294, 337-38 (1977). The Licensing Board ruled that the discharge from the plant would be located within the State of Indiana and therefore that

Indiana, not Kentucky, had jurisdiction to issue the § 401 certificate. *Id.*

Kentucky filed exceptions to the Licensing Board's decision, contending that the discharge from the Marble Hill units would be located in Kentucky, not Indiana. Kentucky also requested that the Atomic Safety and Licensing Appeal Board stay the order issued by the Licensing Board authorizing the commencement of limited construction activities at the Marble Hill site.

During oral argument before the Appeal Board of Kentucky's motion for a stay on September 12, 1977, counsel for Kentucky was asked whether Kentucky's water quality standards were more stringent than those of Indiana, so that a certificate or permit issued by Kentucky would be more restrictive than the certificate already issued by Indiana. Counsel for Kentucky responded that he did not know what Kentucky's water quality standards were. Kentucky has never asserted that the discharge from the Marble Hill units will violate any Kentucky water quality standard.

The Appeal Board denied Kentucky's request for a stay. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 N.R.C. 630 (1977). Thereafter, the Appeal Board issued its decision on the merits of Kentucky's claim. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179 (1978).

Relying upon *Indiana* v. *Kentucky,* 136 U.S. 479 (1890), the Appeal Board held that the Indiana-Kentucky boundary in the vicinity of Marble Hill is the low-water mark as it existed on June 1, 1792. *Id.* at 193-94. The Appeal Board went on to hold that the record before it was not adequate to support a factual determination as to where the 1792 low-water mark is located. *Id.* at 194-96. It therefore remanded the case to the Licensing Board to receive further evidence concerning the actual location of the boundary.

On remand, the Licensing Board received evidence from Public Service and the staff of the Nuclear Regulatory Commission concerning the location of the 1792 low-water mark. Although invited to do so, Kentucky submitted no evidence. Based upon the evidence before it, the Licensing Board determined that the 1792 low-water mark at the relevant point on the Indiana side of the river is 403.64 feet above mean sea level. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-78-12, 7 N.R.C. 573, 580 (1978). The Licensing Board further found that the end of the discharge pipe will be at elevation 411.5 feet above mean sea level, and thus well within the State of Indiana. *Id.* [3]

Kentucky filed exceptions to the Licensing Board's decision on remand but did not challenge the factual findings made by the Licensing Board. Kentucky's sole objection to the Licensing Board's decision was a continued assertion that the Appeal Board had misinterpreted this Court's decision in *Indiana* v. *Kentucky, supra.*

Although it had previously heard and rejected Kentucky's arguments, the Appeal Board set a further oral argument on Kentucky's exceptions to the Licensing Board's decision on remand. Following that argument, the Appeal Board reaffirmed its prior determination that the Kentucky-Indiana state boundary is the historic low-water mark on the Indiana side of the river as it existed when Kentucky was admitted to the Union in 1792. *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253 (1978).

On April 21, 1978, Kentucky filed in the United States Court of Appeals for the District of Columbia Circuit a petition

[3] Testimony before the Licensing Board showed that the present normal water level is about 420 feet above mean sea level because of a Government dam downstream. This makes it possible for Public Service to build a discharge pipe out into the river and still be above the historic low-water mark.

for judicial review of the Appeal Board's February 16, 1978 decision (ALAB-459). *Kentucky* v. *Nuclear Regulatory Comm'n,* No. 78-1369 (D.C. Cir. 1978). Only one issue is tendered for appellate review: Kentucky's contention that the Appeal Board erred in holding that the Kentucky-Indiana boundary is the 1792 low-water mark. Kentucky's brief has been filed, and answering briefs are due in February 1979. Public Service and the State of Indiana have been granted leave to intervene by the Court of Appeals and may be expected to file briefs supporting the Government's position.

Kentucky filed no petition to review the Appeal Board's August 30, 1978 decision (ALAB-493), and the time within which to do so has expired. 28 U.S.C. § 2344 (1976).

Argument

I.

PUBLIC SERVICE SHOULD BE PERMITTED TO INTERVENE TO PROTECT ITS INTEREST IN BUILDING THE MARBLE HILL NUCLEAR PLANT.

Kentucky claims that it is aggrieved because Indiana "has attempted to exercise regulatory jurisdiction over portions of the Ohio River." Ky. Br. at 11. The only case known to us in which Kentucky has objected to Indiana's exercise of its regulatory jurisdiction is the licensing proceeding before the Nuclear Regulatory Commission for the Marble Hill units of Public Service. Kentucky has also opposed the construction of the Marble Hill plant on other grounds.

Kentucky was permitted to participate in the hearings conducted by the Commission as an "interested State." Kentucky presented testimony contending that the Marble Hill units should not be built because power from those units will not be needed. Kentucky also contended that if additional generating capacity is required, it should be coal-fired rather than nuclear.

Kentucky's contentions were rejected by the Commission, which found to the contrary in ALAB-459, *supra*. Kentucky has not petitioned for judicial review with respect to those issues.

The sole remaining challenge by Kentucky to the validity of the Commission's orders is Kentucky's legal argument that Public Service should have been required to obtain a certificate under § 401 of the Clean Water Act from Kentucky, rather than Indiana. That claim is before the Court of Appeals, where Kentucky has filed a brief containing the same legal arguments it makes to this Court. Ky. Br. at 16-21. Public Service has intervened in the review proceeding before the Court of Appeals and will file a brief there supporting the challenged agency order.

Public Service has a clear right to be heard in the Court of Appeals pursuant to 28 U.S.C. § 2348 (1976). That right may become nugatory if this Court accepts Kentucky's complaint without also granting intervention to Public Service. Kentucky's complaint is not in form directed against the order of the Nuclear Regulatory Commission, but in fact any final decision by this Court on the merits of the complaint will control the ultimate disposition of the case now before the Court of Appeals.

When the Appeal Board asked for further evidence concerning the location of the 1792 low-water mark, Public Service responded by filing expert testimony.[4] Should this case ultimately be sent to a Special Master, Public Service is prepared to present evidence concerning the correct location of the boundary to assist this Court in fashioning its decree. Granting intervention to Public Service will insure that a full record is made. To be sure, Indiana is interested in upholding its jurisdictional position. But Indiana may be less concerned about the precise location of the boundary at any particular point.

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[4] Indiana filed an affidavit supporting Public Service, but submitted no additional testimony, maps, or surveys. As previously noted, Kentucky submitted no evidence.

In *New Jersey* v. *New York,* 345 U.S. 369, 373 (1953), the Court said:

> Our original jurisdiction should not be . . . expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

We submit that Public Service meets that test. Public Service has a compelling interest in upholding the validity of its § 401 certificate from Indiana and avoiding delay or interruption in the construction of its Marble Hill nuclear power plant. Kentucky has not asserted, and no one else claims, that there are other citizens of Indiana with similar interests as a class. There is no possibility of an "intramural dispute", such as the Court discerned in *New Jersey* v. *New York, supra* at 373. Public Service has already demonstrated, in the proceedings before the Nuclear Regulatory Commission, its ability to contribute to the record separately from the State of Indiana.

In addition, Public Service is a full party to the review proceeding in the District of Columbia Circuit. To protect its interests in that case, Public Service needs the right fully to participate in this action as well.

In many ways, Public Service is the real party at whom Kentucky's complaint is directed. That being so, the Court should not hesitate to grant leave for Public Service to intervene and permit it, along with the State of Indiana, to oppose Kentucky's claims.

II.

BECAUSE THE VERY QUESTION KENTUCKY SEEKS TO LITIGATE IS BEFORE THE COURT OF APPEALS, THIS COURT SHOULD DECLINE JURISDICTION OF AN ORIGINAL ACTION.

Kentucky claims that "an actual controversy" exists between itself and the State of Indiana concerning location of the Ohio River boundary between the two states. Ky. Br. at 12. As we have shown, the only specific example of any such controversy proffered by Kentucky is the dispute over discharges into the Ohio River from the Marble Hill nuclear units being constructed by Public Service. That controversy arose because Kentucky elected to participate in the Nuclear Regulatory Commission's licensing hearings and there to assert its claim to jurisdiction over the entire Ohio River.

Kentucky's claim that its territory extends to the present-day Indiana shoreline was twice rejected by the Atomic Safety and Licensing Appeal Board. The Appeal Board held that prior decisions of this Court, particularly *Indiana* v. *Kentucky, supra,* were controlling and required the conclusion that the Kentucky-Indiana boundary is located where it was when Kentucky was admitted to the Union in 1792. Following the first Appeal Board decision, Kentucky elected to seek review of that conclusion in the United States Court of Appeals. Having chosen a suitable forum for judicial consideration of its claim, Kentucky should be required to obtain a resolution of the controversy from the Court of Appeals before invoking this Court's jurisdiction.

This Court has repeatedly held that the exercise of its original jurisdiction is discretionary, not mandatory, and that such jurisdiction may appropriately be declined where another suitable forum is available.

Thus, in *Arizona* v. *New Mexico,* 425 U.S. 794 (1976), the Court denied Arizona leave to commence an original action

because a pending state court action in New Mexico provided an adequate forum for litigating the same issues. Quoting *Massachusetts* v. *Missouri,* 308 U.S. 1, 18-19 (1939), the Court said:

> In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . . We have observed that the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum.

425 U.S. at 797.

In *Alabama* v. *Arizona,* 291 U.S. 286, 291 (1934), the Court stated that "[i]ts jurisdiction in respect of controversies between states will not be exerted in the absence of absolute necessity." Here, of course, Kentucky has availed itself of a suitable forum to resolve the only real controversy. Thus, there is no necessity for this Court to exert its original jurisdiction.

Original jurisdiction has been declined even where the alternate forum has been foregone by the complaining state. In *Illinois* v. *Michigan,* 409 U.S. 36 (1972), the Court declined to accept a complaint raising an issue that could have been brought before it by a petition for certiorari, even though Illinois had lost the right to seek certiorari through the passage of time. The Court said that "original jurisdiction of the Court is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought." *Id.* at 37.

See also United States v. *Nevada,* 412 U.S. 534, 538 (1973), where the Court said:

> We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.

Public Service submits that the facts of this case require denial of Kentucky's motion in light of the prior decisions of this Court. Kentucky has pending in the District of Columbia Circuit a petition for review that presents the same legal issues it now tenders to this Court. Those issues can promptly be addressed by the Court of Appeals. If Kentucky is dissatisfied with the result in that court, further review may be sought by certiorari. *Cf. West Virginia* v. *Sims,* 341 U.S. 22, 30 (1951).

Kentucky argues that this Court has never "denied a state's motion for leave to file a complaint when that complaint sets forth, as Kentucky sets forth here, a boundary dispute between two states wherein there exists an actual dispute ripe for judicial determination." Ky. Br. at 14. So far as we can ascertain, that statement is true. But it is also misleading. In prior cases involving a boundary dispute, the availability of an alternate forum has not been considered by the Court. Here, by contrast, the alternate forum is available and the dispute is already before that forum. No reason appears why the Court should treat a boundary dispute differently from other jurisdictional controversies between two States.

The boundary dispute initiated by Kentucky is more properly resolved by the Court of Appeals in the first instance. That court has before it a concrete case with an administrative record. There is presently nothing before this Court except an abstract legal controversy. By requiring Kentucky to proceed in the Court of Appeals and awaiting a possible petition for certiorari, this Court will have the advantage of acting upon a record already made. *Cf. Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493, 498 (1971). It will also have the benefit of the

prior decisions of the Appeal Board and the Court of Appeals to narrow and sharpen the legal issues. From the standpoint of the judicial economy and efficiency of this Court, the only sensible course is to deny Kentucky's motion and require it to proceed before the Court of Appeals.

CONCLUSION

For the foregoing reasons, Public Service should be granted leave to intervene in this original action and Kentucky's motion for leave to commence the action should be denied.

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