

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1978

No. 81 Orig.

**COMMONWEALTH OF KENTUCKY, - Plaintiff,**

*versus*

**STATE OF INDIANA AND THEODORE L.  
SENDAK, Attorney General of Indiana - Defendants,  
PUBLIC SERVICE COMPANY OF INDIANA,  
INC., - - - Movant for Leave to Intervene.**

**REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE  
TO FILE COMPLAINT AND IN OPPOSITION TO  
MOTION FOR LEAVE TO INTERVENE OF  
PUBLIC SERVICE COMPANY OF  
INDIANA, INC.**

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of Indiana,       -       -       -       -       -       *Defendants,*  
  
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---

**INTRODUCTION**

The brief of the State of Indiana submitted in opposition to the Motion for Leave to File the Complaint in this action and the brief in support of the Motion for Leave to Intervene and also in Opposition to the Motion for Leave to File the Complaint which was filed on behalf of Public Service Company of Indiana, Inc. (PSI), both contain inaccuracies and overlook pertinent facts and law. This brief will respond to the arguments contained in both briefs. The lack of standing of PSI to intervene will be taken up first and then the arguments advanced in regard to the propriety of the Complaint being filed will then be discussed.

## ARGUMENT

### **I. PUBLIC SERVICE COMPANY OF INDIANA, INC. DOES NOT HAVE STANDING TO INTERVENE BECAUSE ITS INTERESTS ARE REPRESENTED BY THE STATE OF INDIANA.**

The Complaint in this case seeks relief only against the State of Indiana and in no way can result in any Order or Judgment affecting anyone other than that State. The position of PSI is no different in this case from that of any other citizen, voter or taxpayer of Indiana. The only effect the fixing of the boundary between Indiana and Kentucky will have on PSI is that it will determine which State has jurisdiction to issue the certificate required by Section 401 of the Clean Water Act, 33 USC §1341 (Supp. 1970-77) relating to its Marble Hill Nuclear Generating Plant. There is no evidence that the final determination by the Kentucky authorities would differ from that of Indiana. The only question before this Court is the location of the boundary and which state has jurisdiction over territory on the Ohio River and not the issuance of a permit to PSI. The Movant is in no better position to intervene in this case than any other landowner along the Ohio River who has concern over which state will tax his property or subject his use of his property to specific regulation.

The proper parties to cases subject to the original jurisdiction of this Court involving boundaries and other disputes between states have long been held to be limited to the states themselves. *Kentucky v. Indiana*, 281 U. S. 163 (1930). That case involved a suit by

Kentucky against Indiana to enforce a contract between the two states. Kentucky also named as defendants two citizens of Indiana who had filed suit in an Indiana court to enjoin consummation of the contract. In dismissing the individual defendants from the case Mr. Chief Justice Hughes stated:

*A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens.* The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, merely as such, of either state, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard. 281 U. S. at 173. [Emphasis added.]

The Court went on to indicate that the only time it is proper for an individual to be named as a party in an original action between the states is when specific relief is sought against such person. *Id.* at 174-5. That is not the case here for the interest of PSI in the determination of the boundary between Indiana and Kentucky is no different from that of any other citizen or landowner of Indiana.

Movant should be treated in similar fashion to the City of Philadelphia in *New Jersey v. New York*, 345 U. S. 369 (1953). This Court there denied a request

for intervention by Philadelphia because Pennsylvania had already intervened stating:

Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. *Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.* 345 U. S. at 373. [Emphasis supplied.]

PSI has advanced no reason why the rule of *Kentucky v. Indiana*, 281 U. S. 163 (1930) should be in any way loosened. The Movant has not met the burden of showing a compelling interest on the precise issue before this Court that differentiates itself from other citizens of Indiana and, therefore, the Motion for Leave to Intervene should in all respects be denied.

## **II. LEAVE TO FILE THE COMPLAINT SHOULD BE GRANTED.**

### **A. The Present Controversy Involves More Than the Marble Hill Nuclear Power Plant.**

Both the State of Indiana and PSI have implied that this case arose solely because of the so-called Marble Hill Dispute involving a permit for a nuclear generating plant near Madison, Indiana (Brief of Indiana, p. 5; Brief of PSI, pp. 11-12). These assertions ignore the allegations of Paragraph 12 of the Complaint of Kentucky which state:

12. That a serious and justiciable controversy exists in that the State of Indiana is now assessing property taxes on, and exercising regulatory juris-



diction over, property located below the present low-water mark on the northern shore of the Ohio River in accordance with its view of the location of the boundary line and is thus taxing, attempting to exercise police power over, and regulating property which the Commonwealth of Kentucky believes to be wholly within its borders.

Specifically Indiana is attempting to tax property located in the Ohio River adjacent to Jeffersonville, Indiana which the taxpayer claims is within the boundary of Kentucky. This issue was specifically raised in 1975 in *Jeffboat, Incorporated v. Indiana State Board of Tax Commissioners*, No. 75-S-286 in Clark Superior Court, Indiana. Similar cases have been filed by the taxpayer for subsequent years. It is significant to note that counsel representing Defendant in those actions is Theodore L. Sendak, Attorney General of Indiana, who also represents Indiana in this case. Indiana admits that the construction of a port facility on the Indiana side of the Ohio River across from Kentucky may also be the subject of a problem as to the location of a boundary (Indiana Brief, p. 5). Thus, numerous areas of actual controversy exist involving the location of the boundary between Kentucky and Indiana and the alleged exercise of authority by Indiana over territory claimed by Kentucky. This Court should resolve that issue so that future litigation may be avoided as the northern bank of the Ohio River continues to develop over the years.

**B. The Record Reflects Existence of Factual Dispute  
as to the Location of the Boundary.**

Indiana admits that the previous decisions of this Court involving the location of its boundary with Kentucky have resulted in decisions favorable to both states (Indiana Brief, p. 3). This is a positive admission that the issue has not been resolved. Indiana then goes on to claim that acts of the United States Government beginning in 1950 caused sudden changes in the river and that these changes under law do not alter the boundary (Indiana Brief, p. 6). Kentucky asserts that these changes were not violent and, therefore, do affect the boundary. In any event, the nature of the change in the river is an issue of fact which cannot be determined absent an evidentiary hearing.

Indiana further claims prior rulings of this Court dispose of the issues raised in the Complaint and fix the boundary at the low-water mark as it existed in 1792. This view ignores the language of Chief Justice Marshall in *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820):

*These states, then, are to have the river itself,  
wherever that may be, for their boundary.*

18 U. S. (5 Wheat.) at 379. [Emphasis supplied.]

This is a clear indication that Chief Justice Marshall accepted the ancient rule that the river border is subject to accretion and erosion. Indiana has impliedly accepted this position (see Indiana Brief, p. 6). The portion of the opinion in *Indiana v. Kentucky*, 136

U. S. 479 (1890) relied on by Indiana to support its position is misplaced because it misconstrues the holding of the case. That case involved an avulsive change in the course of the Ohio River along a very small section and in no way established a static boundary between the states. The only question before the Court related to a single island and not to the entire boundary.

**C. The Decision of the Nuclear Regulatory Commission Is Not Dispositive of the Issue.**

Both Indiana and PSI take the position that this Court should decline to hear this case because the Nuclear Regulatory Commission has decided the boundary issue and the matter is presently on appeal to the United States Court of Appeals for the District of Columbia Circuit (Indiana Brief, p. 5; PSI Brief, p. 15). The Nuclear Regulatory Commission was established pursuant to 42 U.S.C. §5841(f) and 42 U.S.C. §2201. The jurisdiction of the Commission is set forth in 42 U.S.C. §2201(b) as follows:

(b) Standards and instructions. Establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

The Nuclear Regulatory Commission was not established to decide boundary disputes nor has it any

expertise in such matters. This is an issue that is completely within the normal and usual competence of the Courts. The issues of both fact and law applicable to the present Complaint in no way involve any matter within the expertise of the Nuclear Regulatory Commission and their findings are entitled to little weight in deciding this boundary dispute. *Nader v. Allegheny Airlines*, 426 U. S. 290 (1978).

Kentucky has challenged the Nuclear Regulatory Commission's jurisdiction to decide the location of the boundary. This Court can speedily reach a final and binding determination of an issue that has remained open for over one hundred fifty years by hearing this case. This is especially so since it may be appropriate to consolidate this case with *Ohio v. Kentucky*, No. 27 Original (See Footnote, Page 9 of Our Brief in Support of Motion for Leave to File Complaint).

### CONCLUSION

PSI has shown no compelling reason why its interest in the determination of the boundary between Kentucky and Indiana as distinguished from its other desires is different from that of any other Indiana citizen. Its Motion for Leave to Intervene should be denied.

The present record shows at least three locations where the boundary between Kentucky and Indiana is currently in dispute and each instance raises substantial questions concerning regulation, use and taxation of property. Indiana has admitted that no definitive

resolution of its boundary with Kentucky has ever been made. In the interest of finally deciding the question of how the boundary between Kentucky and Indiana should be determined and where it is located, this Court should grant the Motion for Leave to File the Complaint.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

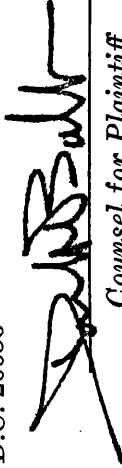
It is hereby certified that three copies of the Reply Brief in Support of Motion for Leave to File Complaint and in Opposition to Motion for Leave to Intervene of Public Service Company of Indiana, Inc. of Plaintiff, was served by United States Mail, first class, postage prepaid, to all counsel of record listed below, on the 17<sup>th</sup> day of January, 1979:

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