In the

Supreme Court of the United States

October Term, 1978

No. 81, Original

COMMONWEALTH OF KENTUCKY,

Plaintiff,

vs.

STATE OF INDIANA AND
THEODORE L. SENDAK,
ATTORNEY GENERAL OF INDIANA,

Defendants,

PUBLIC SERVICE COMPANY
OF INDIANA, INC.

Movant for Leave to Intervene.

REPORT OF SPECIAL MASTER

ROBERT VAN PELT,
Senior U.S. District Judge
Lincoln, Nebraska
Special Master

JOE CHRISTENSEN, INC., 1540 Adams Street, Lincoln, Nebraska 68521

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The undersigned, Robert Van Pelt, by order of this Court dated May 14, 1979, was appointed the Special Master in this case with the usual powers and duties contained in the orders of this Court in original boundary dispute cases. The oath of the Special Master was filed May 21, 1979.

Previously, on January 5, 1979, a motion was filed by the Public Service Company of Indiana, Inc. (hereinafter "Public Service"), for leave to intervene. By the order of May 14, 1979 appointing the Special Master it was provided: "The motion of Public Service Company of Indiana, Inc. for leave to intervene is referred to the Special Master."

This report covers the issues raised by the motion to intervene and your Special Master's findings and recommendations.

I. STATUS OF THE CASE

The Commonwealth of Kentucky on November 7, 1978 filed its motion for leave to file a complaint herein against the State of Indiana and Theodore L. Sendak, Attorney General of Indiana, tendering therewith its complaint and its brief in support of its motion for leave to file complaint. The case was assigned Number 81, Original.

Indiana, on January 5, 1979, filed a brief in opposition to the motion for leave to file complaint. On the same day the motion for leave to intervene above mentioned was filed. On January 18, 1979, a reply brief was filed by Kentucky, together with its brief in opposition to Public Service's motion for leave to intervene. On February 20, 1979, the motion for leave to file bill of complaint was "granted and the defendants are allowed sixty days in which to answer." On April 20, 1979, the answer of the two named defendants was filed.

The parties met informally with the Special Master on July 17, 1979. A stipulation was prepared, signed that day by some of those present and copies were taken by the others for further consideration. It has now been signed by all of the parties, including Public Service. It is understood that Kentucky, who objects to the intervention, is not to be prejudiced by permitting Public Service to sign the stipulation.

The stipulation, so far as material to the intervention issue, provides:

> 1. The Special Master is requested to rule promptly on the Motion for Leave to Intervene filed by Public Service Company of Indiana, Inc. (hereinafter "Public Service"), such ruling to be based on papers heretofore filed in the United States Supreme Court.
>
> 2. This Stipulation is without prejudice to the opposition of the Commonwealth of Kentucky to the motion of Public Service for leave to intervene.

Neither Public Service nor any of the other parties introduced any testimony in support of or in opposition to the motion to intervene.

II. PUBLIC SERVICE'S CLAIMS

Public Service makes certain claims of which the Court should be advised when it considers the motion to intervene and this report. It claims that it operates as a public utility in the State of Indiana providing electrical energy to all or to parts of 69 of the 92 counties in the State of Indiana and to 8 of the 13 counties which border on the Ohio River. It claims it is the largest public utility in the State of Indiana. It claims that it is constructing two nuclear steam-electric generating units at Marble Hill in the State of Indiana which have been authorized by the Nuclear Regulatory Commission; that the cost will approximate two billion dollars and that as of December 1, 1978 approximately 10% of the construction was completed.

The Marble Hill site is located on the Indiana side of the Ohio River and opposite Trimble County, Kentucky; it is claimed by Public Service that the Nuclear Regulatory Commission has approved its withdrawal of water from the Ohio River to be used in a mechanical draft cooling tower system and that a small quantity of this water will be returned to the Ohio River. This will require a structure extending into the river water approximately 75 feet. Through various administrative proceedings Public Service claims that it has been determined that the water discharge point in the Ohio River will be in the State of Indiana. These proceedings are more fully set forth on pages 8, 9, 10 and 11 of Public Service's brief. They will be briefly detailed here because it will be contended that the major issue now before the court has been ruled on in the administrative proceeding.

Public Service was required to comply with the Clean Water Act, 33 U.S.C. § 1341, before it could receive construction permits from the Nuclear Regulatory Commission. It claims that on January 30, 1976, it received from the Indiana Stream Pollution Control Board a certificate under Section 401 of the Clean Water Act which was presented to the Nuclear Regulatory Commission and claims that the Commission relied on the Indiana certificate in authorizing construction.

Public Service also claims that Kentucky initially acquiesced in Indiana's issuance of the Section 401 certificate but that Kentucky now claims it has exclusive authority to issue the Section 401 certificate and that the Indiana certificate is a nullity. Public Service says Kentucky first made its claim that Public Service should have obtained a Section 401 certificate from Kentucky on June 13, 1977. This claim was rejected by the Atomic Safety and Licensing Board which held the discharge would be located in Indiana. Kentucky filed exceptions with the Atomic Safety and Licensing Appeal Board which has been delegated review functions by the Nuclear Regulatory Commission. Relying on *Indiana v. Kentucky*, 136 U.S. 479 (1890), the Appeal Board on February 16, 1978 held that the Indiana-Kentucky boundary in the vicinity of Marble Hill is the Ohio River low-water mark as it existed on June 1, 1792, when Kentucky was admitted to the Union. It remanded the case to the Licensing Board to receive further evidence as to the actual location of the boundary. The Licensing Board heard evidence, some of which was presented by Public Service, and determined the location of the 1792 low-water mark and that the discharge would be well within the Indiana boundary based on the 1792 low-water mark. Kentucky took exceptions to the legal interpretation of *Indiana v. Kentucky, supra*. The Appeals Board heard argument and

reaffirmed its earlier decision that the boundary was the 1792 low-water mark.

Kentucky, on April 21, 1978, filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the original February 16, 1978 decision of the Appeal Board. Public Service states that the only issue before the Court in that appeal is "Kentucky's contention that the Appeal Board erred in holding that the Kentucky-Indiana boundary is the 1792 low-water mark."

At the time of the informal conference with the Special Master held July 17th none of the parties were able to state with certainty when the appeal would be reached for oral argument. The State of Indiana and Public Service each have been granted leave to intervene in that appeal. Your Special Master was told at the time of the informal conference that the Commonwealth of Kentucky had filed a motion to stay the proceedings. Your Special Master is now advised that on the day prior to the conference, to-wit, July 16, 1979, Kentucky's motion to stay proceedings was denied. In the order the Clerk of the United States Court of Appeals "is directed to schedule this case for argument on the merits in the regular course of business."

The same issue will be before the Court in this case. The parties in the stipulation above mentioned further provided:

> 4. Indiana has taken the position in this case that the report of the Special Master in Ohio v. Kentucky correctly decided the issue of law that the boundary between Kentucky and Indiana is the low-water mark on the northerly side of the Ohio River as it existed in 1792.
>
> 5. Kentucky contends the boundary between Kentucky and Indiana is the low-water mark on the northerly bank of the Ohio River as it exists from time to time and that the Special Master was in error in Ohio v. Kentucky, No. 27, Original.

Thus, this Court's ruling on the exceptions to your Special Master's report in *Ohio v. Kentucky*, No. 27, Original, may be decisive of this case.

III. THE LAW AS TO INTERVENTION

The Revised Rules of the Supreme Court do not directly and by name address the issue of how intervention is accomplished. However, Rule 9(2) of the Supreme Court rules provides:

> The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

Rule 24 of the Federal Rules of Civil Procedure governs intervention in district courts. It should, therefore, give guidance in original actions in this Court. Rule 24 provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant

to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene, When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

Public Service has not pointed to any statute of the United States which would give it a conditional or unconditional right to intervene in this action. A reading of Public Service's brief indicates that it is asking for intervention under Rule 24(a)(2) since Public Service has a vital interest in the building of two nuclear plants at Marble Hill in Indiana and has already made expenditures totalling $262,000,000. It is concerned that a decision in this case might adversely affect its interest in the two plants.

There is little question but that Public Service does have an interest in this property. It is possible that the location of the Kentucky-Indiana boundary, if it was found to be different than Public Service believes it is, might have ramifications in terms of the nuclear plants' discharge into Kentucky's waters.

The real question is whether Public Service's interest is, and will be in the future, adequately represented by the State of Indiana.

In discussing the question of representation generally, a leading authority has stated:

> The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate. Finally, if his interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

7A C. Wright & A. Miller, Federal Practice and Procedure § 1909 at 524 (1972) (footnotes omitted). The same text further states:

> [I]n the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately represents the public interest in antitrust suits and in a variety of other matters, that a state adequately represents the interest of its citizens, and that a school board adequately represents the patrons of the school.
>
> This does not mean that intervention always must be denied if the interests of the absentee and one of the parties are identical or if there is a party whose function it is to represent the absentee. It means only that there must be a concrete showing of circumstances in the particular case that make the representation inadequate. . . . In the cases now being considered representation may be inadequate, and intervention will be allowed, if there is even a hint of collusion between the purported representative and those to whom he is formally opposed in the litigation, or if for any other reasons it appears that the representative is not making a diligent effort to protect those whom he represents. *The very rare cases in which a member of the public is allowed to intervene in an action*

> *in which the United States, or some other governmental agency, represents the public interest are cases in which a very strong showing of inadequate representation has been made.*

Id. at 528-31 (footnotes omitted) (emphasis added). The Court of Appeals for the Third Circuit in *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir.) *cert. denied*, 426 U.S. 935 (1976), in an opinion by Judge Aldisert, speaking for a panel on which Judges Forman and Adams were also serving, states:

> Initially, we note that, notwithstanding the liberalizing 1966 amendment of Rule 24(a), the burden of establishing inadequate representation—though the burden "should be treated as minimal"—remains on the proposed intervenor. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Furthermore, a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1909, at 528-29 (1972); *see Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961) (dictum). All defendants here fit that mold. Where official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

Despite the fact that Public Service alleges that various departments of the State of Indiana have from time to time taken positions which have been adverse to it, there is no real indication in this particular lawsuit that Indiana would not fully and adequately represent Public Service. The interests of both lie in extending Indiana's boundary as far into the Ohio River as is proper under the facts.

Your Special Master concludes that Public Service has not sustained even the minimal burden of proof of inadequate representation.

IV. FINDINGS AND RECOMMENDATIONS

In the event the Court intended by its order referring the motion to intervene to the Special Master that he rule on this motion, or in event a recommendation only from the Special Master was intended, your Special Master's findings and recommendations would be the same, namely, that for the reasons hereinabove set forth the motion for leave to intervene should be denied.

Your Special Master further finds that it is proper, and recommends, that the Public Service Company of Indiana, Inc. be permitted to file briefs in this case as a friend of the Court, observing all brief days fixed by the party whose position it advocates as *amicus curiae*, and that it be afforded the right to attend all hearings in this action and to receive all notices given by the Special Master to the parties herein.

Your Special Master further recommends that the Public Service Company of Indiana, Inc. be allowed to renew its motion to intervene at any future hearing before the Special Master if it hereafter develops, and the Special Master finds, that the interests of the Public Service Company of Indiana, Inc. have not been or will not be fully and properly protected, developed or presented by the parties to this litigation.

Respectfully submitted,

ROBERT VAN PELT,
Special Master
566 Federal Bldg.
Lincoln, Nebraska