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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 81, Original

COMMONWEALTH OF KENTUCKY,
Plaintiff,

v.

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

**MOTION FOR LEAVE TO FILE
RESPONSE AS *AMICUS CURIAE***

AND

**RESPONSE IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY ADOPTION OF THE
SPECIAL MASTER'S REPORT AND REMAND
TO THE SPECIAL MASTER**

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**MOTION FOR LEAVE TO FILE
RESPONSE AS *AMICUS CURIAE***

Public Service Company of Indiana, Inc. ("Public Service") hereby moves for leave to file the response attached hereto as *amicus curiae*. The consent of the parties to file this response was requested, but the Commonwealth of Kentucky refused its consent. The grounds for this motion are:

1. The Special Master in this case, the Honorable Robert Van Pelt, recommended in a Report to the Court that Public Service be permitted to participate as *amicus curiae*. On October 1, 1979, the Court ordered the Special Master's Report filed and permitted the parties 30 days to file exceptions thereto. 100 S.Ct. 34. No exceptions to that Report were filed by any party, including Kentucky.

2. The Court's ruling on Defendants' motion for summary adoption of the Special Master's subsequent Report, lodged November 28, 1979, will materially affect Public Service's rights, as explained in the Special Master's first Report at 4-7.

3. Public Service's response discusses an order of the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission in a proceeding to which Kentucky and Indiana were parties, *Public Service Company of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253 (1978) ("ALAB-493"). ALAB-493, which is now final, 28 U.S.C. 2344 (1976), rejected an argument that Kentucky at times has made with respect to the Indiana-Kentucky boundary—an argument that is not addressed in Defendants' present motion. The rejection of Kentucky's argument in ALAB-493 materially affects the rights of Public Service. Accordingly, Public Service's interests may not be fully protected without consideration of its accompanying response.

4. Since the accompanying response addresses only proceedings to which Kentucky was a party, consideration of the response would not prejudice Kentucky.

WHEREFORE, for good cause shown, Public Service prays that the Court grant it leave to file as *amicus curiae* the response attached hereto.

Respectfully submitted,

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February 26, 1980

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Plaintiff,

v.

STATE OF INDIANA and
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General of the State of Indiana,
Defendants.

**RESPONSE IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY ADOPTION OF THE
SPECIAL MASTER'S REPORT AND REMAND
TO THE SPECIAL MASTER**

On February 13, 1980, Defendants State of Indiana and Attorney General Sendak filed a motion for summary adoption of the Special Master's Report¹ and remand to the Special Master. As *amicus curiae*, Public Service Company of Indiana, Inc. ("Public Service")² hereby responds in support of Defendants' motion.

¹ The Report of which summary adoption is recommended was lodged on November 28, 1979, but has not been ordered filed by the Court. It recommended that the boundary between Kentucky and Indiana be adjudged the 1792 low-water mark on the Indiana side.

² An earlier Report of the Special Master, ordered filed on October 1, 1979, (*see* 100 S.Ct. 34) recommended that Public Service be permitted to participate in this case as an *amicus curiae*. No exceptions to that Report have been filed.

In its recent decision in *Ohio v. Kentucky*, 48 U.S.L.W. 4092 (January 21, 1980), the Court determined that the boundary between Ohio and Kentucky “‘is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792’”, and that the boundary “‘is not the low-water mark on the northerly side of the Ohio River as it exists today’”. 48 U.S.L.W. at 4092-93. The Court’s opinion was based on the opinion of the Court in *Indiana v. Kentucky*, 136 U.S. 479 (1890). 48 U.S.L.W. at 4093. The Court stated:

The fact that *Indiana v. Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment, rather than a portion in its Ohio-Kentucky segment, is of no possible legal consequence; the applicable principles are the same, and the holding in *Indiana v. Kentucky* has pertinent application and is controlling precedent here.

Id.

The sole issue posed by this case is the location of the boundary between Indiana and Kentucky. The holding of the Court in *Ohio v. Kentucky* resolves that issue.

In other litigation, Kentucky has, at times, argued that the 1942 compact between Indiana and Kentucky set a different boundary between those two States. See *Public Service Company of Indiana Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253 (1978). ALAB-493 is a well-reasoned opinion that completely refutes Kentucky’s reading of the compact. Kentucky has not sought judicial review of ALAB-493; it is now final, 28 U.S.C. §2344 (1976); and it is *res judicata* on the legal interpretation of the compact, as both parties herein, as well as Public Service, were parties to ALAB-493.

Defendants' motion should be granted.

Respectfully submitted,

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