IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 81, Original

COMMONWEALTH OF KENTUCKY - - Plaintiff

versus

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

---

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

AND

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

STEVEN L. BESHEAR
Attorney General
Capitol Building
Frankfort, Kentucky 40601

DAVID K. MARTIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

DONALD H. BALLEISEN
RONALD D. RAY
GREENEBAUM DOLL & McDONALD
3300 First National Tower
Louisville, Kentucky 40202
Special Counsel

Attorneys for the Commonwealth of Kentucky

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 Indiana, - - - *Defendants,*

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

AND

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

I. INTRODUCTION

The Commonwealth of Kentucky opposes the motion of Public Service Company of Indiana, Inc. (P.S.I.) for leave to file an *amicus curiae* response in support of the motion of the State of Indiana upon the grounds Indiana adequately represents the interests of P.S.I. In addition Rule 35 of the rules of this Court does not provide for a response in support of a motion. In the event this Court grants leave to file the response

amicus curiae, the Commonwealth of Kentucky vigorously asserts that the position expressed in its response by P.S.I. in support of the summary adoption of the report of the Special Master is in error because the doctrine of res judicata is not applicable to this case. That doctrine is also not before this Court at this time because the Special Master in his report specifically refused to rule on that issue and stated that there was no evidence on that point before him.

II. The Motion for Leave to File as *Amicus Curiae* Should Be Denied.

P.S.I. has moved for leave to file a response *amicus curiae* to the pending motion for summary adoption of the report of the Special Master. P.S.I. has previously moved for leave to intervene; that motion was referred to the Special Master who in his first report denied the motion and allowed P.S.I. to partcipate as *amicus* (1st Report of Special Master, p-11). No confirmation or rejection of that report has been made.

The reasons for rejecting the request of P.S.I. to file a response *amicus* are similar to those that deny it the right to intervene. A state sued in this Court by virtue of the grant of original jurisdiction is deemed to represent the interests of all of its citizens. *Kentucky* v. *Indiana,* 281 U. S. 163 (1930). The only time it is proper for an individual to be named as a party in an action such as this or to be permitted to intervene is when specific relief is sought against such a person. *Id.* at 174-5. A municipal corporation has been equated to a large industrial corporation and denied

the right to intervene in a boundary dispute. *New Jersey* v. *New York,* 345 U. S. 369 (1953).

In effect each citizen of a state is deemed to be a plaintiff for the purposes of intervention and the State acts as the representative of all of its citizens. It would circumvent the rules of intervention if P.S.I. were allowed to file as an *amicus* in view of the fact that it is a citizen and resident of Indiana. The traditional function of an *amicus* response is to assert an interest of the party filing the brief that is distinct from that of the parties in the case. *United States* v. *Barnett,* 376 U. S. 681 at 738 (1964) (separate opinion of Goldberg J.). Since P.S.I. is in effect a party, or at least, its interests are being fully protected by a party, to allow it to file a response *amicus* would be counter to the long-established rules relating to both intervention in original actions and to the requirements that must be met before one is granted permission to file an *amicus* response.

At this juncture P.S.I. is seeking in its *amicus* response to raise an issue not presently before this Court, for the Special Master specifically declined to review the question of res judicata (2d Report of Special Master, p. 19). Accepted procedure does not permit an *amicus* to introduce new issues. *Utah* v. *United States,* 394 U. S. 89 at 96 (1969). Since the interest of P.S.I. is protected by a party to this case and since P.S.I. also seeks to inject a new issue into this proceeding, its Motion for Leave to File Response as *Amicus Curiae* should be denied.

III. The Decision of the Nuclear Regulatory Commission Is Not Res Judicata.

The sole distinct contention of P.S.I. at this time is that since the Nuclear Regulatory Commission (N.R.C.) rejected the Kentucky view of the 1942 Compact between Kentucky and Indiana (1942 Ky. Acts C. 116; 1943 Ind. Acts, C. 2) the ruling of the N.R.C. is a bar to this proceeding, at least insofar as the effect of that Compact is concerned. P.S.I. attempts to bolster its position by asserting without discussion of the facts that Kentucky has not appealed the holding of the N.R.C. on the boundary issue (Response in Support of Motion for Summary Adoption of Special Master's Report, p. 2). This position is directly opposite to that taken by P.S.I. last year when it sought leave to intervene in this matter and asserted in its brief the boundary issue was on appeal to the United States Court of Appeals for the District of Columbia Circuit from the N.R.C. and the Court should decline jurisdiction because if it accepted jurisdiction its action would amount to the granting of a petition for a writ of certiorari in advance of judgment (Brief in Support of Motion for Leave to Intervene and in Opposition to Motion for Leave to File Complaint filed by Public Service Company of Indiana, pp. 6-9).

P.S.I. made the following unequivocal statement at page 7 of its Brief in Support of Motion to Intervene.

> 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.

P.S.I. has submitted no reason why one year after this statement it now claims that Kentucky is barred by res judicata. Its prior position effectively disposes of its present argument. The facts surrounding the N.R.C. proceeding amply support the position that P.S.I. espoused last year that the matter is on appeal. That being so, the holding of the N.R.C. cannot be res judicata because it is not final.

A. The Proceeding Before the N.R.C.

The claim of P.S.I. that the doctrine of res judicata should apply to this case arises out of a licensing proceeding before the Nuclear Regulatory Commission.[1] P.S.I. had applied to the N.R.C. for a permit to construct a nuclear generating plant at Marble Hill near Madison, Indiana. The warm water effluent from the plant if built will be discharged into the Ohio River. Because of this, Kentucky maintained that P.S.I. was required to obtain a so-called § 401 Certification from it pursuant to § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1976). This statute requires that before any Federal agency may issue a license or permit to construct a facility that will discharge pollutants into navigable water a certificate must be obtained from the state

[1]None of the facts set forth relating to the proceedings before the Nuclear Regulatory Commission are in the present record. They may be found in the record of *Commonwealth of Kentucky, ex rel. Stephens* v. *United States Nuclear Regulatory Commision,* No. 78-1369 pending in the United States Court of Appeals for the District of Columbia Circuit. That case is now under submission to the Court of Appeals.

in which this discharge will originate, to the effect that the discharge will comply with the water quality standards of that state.

Rather than obtain a § 401 Permit from Kentucky, P.S.I. had purported to obtain the permit from Indiana. Kentucky opposed the grant of a license to construct a nuclear generating plant by P.S.I. because of the absence of a § 401 Certificate issued by it. Kentucky claimed that the warm water effluent would enter the Ohio River in Kentucky.

Before granting a license such as that requested by P.S.I. the N.R.C. holds public hearings. The N.R.C. has a three-step procedure for passing on such license applications. The first step is before the Atomic Safety and Licensing Board (Licensing Board), the second step is heard by the Atomic Safety and Licensing Appeal Board (Appeal Board) and the final step is to the Commissioners themselves (10 CFR, Part 2, subpart G). The Licensing Board on August 22, 1977 issued a decision authorizing limited work by P.S.I. on the Marble Hill Nuclear Generating Station. The Licensing Board stated that the state in which the warm water effluent enters the river is of no import. Kentucky and others appealed to the Appeal Board because of the absence of a § 401 Certification from Kentucky. This appeal was decided in ALAB 459, 7 N.R.C. 179 (1978), which held that the location of the end of the discharge pipe was the sole factor in determining which state should issue the required § 401 Certificate. It was further held that the boundary line between Kentucky and Indiana was the 1792 low-water mark on the north

side of the Ohio River. Since there was no record on where that mark was located the case was remanded to the Licensing Board for determination of the boundary. The full Commission declined to review the decision in ALAB 459. This result was appealed to the United States Court of Appeals for the District of Columbia Circuit in *Commonwealth of Kentucky, ex rel. Stephens* v. *United States Nuclear Regulatory Commission,* No. 78-1369. That case is still pending. Throughout the proceedings before the N.R.C., Kentucky consistently took the position that the Commission did not have jurisdiction to decide the boundary issue. This is exemplified by the following excerpt from the transcript before the appeal board.

> [Mr. Martin, Counsel for Kentucky] . . . it appeared to me that since both States perhaps would be present that I should say again we don't think anyone but the Supreme Court can adjudicate a boundary dispute between States; and our participation in the boundary issue here is only for the limited purpose of determining the effect of the boundary on the issuance of the particular Nuclear Regulatory Commission license involved.
>
> CHAIRMAN SALZMAN: We understand that fully. We are not prepared to decide anything here except whether Applicant is required to get a section 401 certification from your State, or Indiana. We will leave the boundary line where it is.
>
> MR. MARTIN: Our presence here does not indicate any preference for your judgment over that of the Supreme Court, which we think is the only one which should adjudicate the boundary issue.

Transcript of Oral Argument, August 15, 1978, pp. 19, 20, Record, Vol. 39 No. 22.

The licensing Board after a hearing determined that the 1792 low-water mark was such that the discharge took place within Indiana.[2] This decision was appealed to the Appeal Board which upheld the finding and attempted to interpret the 1942 Compact. This decision is found in ALAB 493, 8 N.R.C. 253 (1978). The prosecution of the appeal of ALAB 459 in case No. 78-1369 was stayed pending resolution of the appeal by Kentucky which resulted in ALAB 493. If the position of Kentucky in regard to ALAB 459 is upheld, ALAB 493 becomes a nullity. Since the U. S. Court of Appeals for the District of Columbia Circuit by order dated April 8, 1978 in Case 78-1369 directed that the entire record considered by the Appeals Board in ALAB 493 be made a part of the record before it, Kentucky did not specifically appeal the ruling in ALAB 493. However, the record before the Court of Appeals in No. 78-1369 includes all of the matters which were considered by the N.R.C. and decided by it. There can be on final decision on the applicability of the 1942 Compact until the Court of Appeals has rendered its decision and the parties have exhausted their remedies before this Court. This being so, it would be most premature to apply the doctrine of res judicata because

[2]Had the N.R.C. followed the intent of the Virginia Cession as declared by Chief Justice Marshall in *Handly's Lessee* v. *Anthony*, 18 U. S. (5 Wheat.) 374 (1820) that the river Ohio itself be the boundary, no such effort would have been required. This is a concrete example of how that rule in reality is the rule of convenience Marshall declared it to be.

there is no final appealable order before the court at this time.

B. Res Judicata is not Applicable to this Case.

The facts set out above show that none of the issues raised in the N.R.C. proceeding have as yet been finally decided. P.S.I. conceded this over a year ago. All of the rulings made before the N.R.C. are now before the United States Court of Appeals for the District of Columbia Circuit in *Kentucky* v. *Nuclear Regulatory Commission,* No. 78-1369 and in the absence of the record in that case it would be improvident for this court to attempt to resolve the res judicata issue even though it is clear that that doctrine has no application to this case. This is especially so where it is obvious that Kentucky has challenged the authority of the Commission to decide the border dispute and the Chairman of the Hearing Panel has agreed that only this Court can resolve that issue.

It cannot be seriously controverted that the N.R.C. has no expertise on the question of boundary disputes and that it was not the intent of Congress to provide that it have such expertise. This Court is given the sole authority to decide such matters pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States. In fact, a boundary dispute is a subject that is furthest from the area of competence of the N.R.C. It is also clear that all the rulings or orders of the N.R.C. are being considered at this time by the United States Court of Appeals for the District of

Columbia Circuit. This of necessity makes the validity of the ruling in ALAB 493 depend on whether the acceptance of the 1792 line in ALAB 459 was correct, an issue not yet finally decided and still before the Court of Appeals. ALAB 493 can have no res judicata significance even if it eventually is held to be within the competence of the N.R.C., because of the absence of a final ajudication on the merits. *FTC* v. *Food Town Stores, Inc.,* 547 F. 2d 247 (5th Cir. 1977), 1B Moore's Federal Practice, ¶0.409 at p. 1001 n.5 (2d Ed. 1974). Thus, there can be no justification to apply res judicata to any party or issue in this litigation.

There is no record before this Court at this time which would enable it to determine if any prior action had any significance in the res judicata sense. It is the obligation of the party arguing the application of res judicata to place the necessary facts in the record. This has not been done here as was pointed out by the Special Master at p. 19 of his Second Report. Absent such a record it is not proper to consider the issue. *United States* v. *Friedland,* 391 F. 2d 378 (2d Cir. 1968). Section 10 of the Restatement of Judgments declares that the doctrine of res judicata is not to be applied mechanically but is to be used judiciously. It states that where the tribunal does not have jurisdiction over the subject matter, is a court of limited jurisdiction and the issue of jurisdiction is a matter of law, it is contrary to sound public policy to allow the decision of such a tribunal to have finality. This is exactly the situation with the N.R.C. The N.R.C. does not have primary jurisdiction over boundary disputes

nor does it have any expertise concerning such disputes. It is a tribunal of limited jurisdiction and in accord with the provisions of Section 10 of the Restatement of Judgments any ruling it may make on a boundary dispute has no binding effect whatsoever.

The policy behind the provisions of Section 10 of the Restatement of Judgment was impliedly adopted in *Atlanta Gas Light Co.* v. *F.P.C.*, 495 F. 2d 1070 (D.C. Cir. 1974). In that case the issue was whether the Gas Light Company was subject to F.P.C. jurisdiction because it might be operating in two states. In order to determine this issue the F.P.C. had to consider the age-old boundary dispute between Georgia and Tennessee and decide the location of the boundary line. The F.P.C. declined to exercise jurisdiction as to whether the company was subject to Commission jurisdiction pending resolution of the border dispute, presumably by this Court. At that juncture Atlanta Gas Light Company petitioned the Court of Appeals to review the Order of the Federal Power Commission. The Court of Appeals did review the order and directed the F.P.C. to consider the boundary dispute. On this point the Court stated:

> The F.P.C., however, has misperceived its task. While it cannot resolve boundary disputes, it can and should determine the application of the Natural Gas Act in light of such disputes. The issue is jurisdiction, not geography. Administrative agencies often have to apply regulatory schemes to unforeseen circumstances. *In making such an application here, the F.P.C. would not be resolving the Georgia-Tennessee disagreement* — it would

> simply be determining the implications of that disagreement for purposes of the statute, a common procedure in the law. 495 F. 2d at 1072 (Emphasis supplied).

The findings of the F.P.C., it was held, could in no way oust this court of its exclusive jurisdiction to finally determine the boundary dispute. So here. The only res judicata effect a decision of the N.R.C. could have regarding a boundary issue would be the impact of the boundary question on the application of statutes administered by N.R.C.

While we believe that the doctrine of res judicata has no application in this case, we also urge that it would be most unwise for this Court to consider the issue raised by the *amicus* response in the absence of any record on that subject. This attempt to inject a new issue into the proceedings in the absence of the complete record relevant to the res judicata question shows the great wisdom of the rule of *Utah* v. *U. S.,* 394 U. S. 89, at 96 (1969) that an *amicus* is not permitted to bring a new issue into a pending case.

IV. CONCLUSION

P.S.I. as a citizen of Indiana is in reality a party to this action and that being so it should not be permitted to file an *amicus curiae* response. Its tendered response injects into this case an issue not presently before the Court and thus is not in accord with the purpose of an *amicus* brief. For these reasons the motion of P.S.I. for leave to file an *amicus* response should be denied.

The issue which P.S.I. seeks to inject into this case, that the decision of the N.R.C. is res judicata is wholly lacking in merit. P.S.I. has previously conceded before this court that that issue is on appeal. In any event res judicata cannot apply because there is no final non-appealable judgment in existence at this time relating to any applicable action of the N.R.C. In addition since the N.R.C. does not possess jurisdiction over the boundary dispute which is the sole issue in this case and it lacks expertise in such matters the use of res judicata in this case would be inappropriate. For the reasons stated herein and in our Response In Opposition To Motion For Summary Adoption of the Special Master's Report and Remand to the Special Master the motion of Indiana should in all respects be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General
Capitol Building
Frankfort, Kentucky 40601

DAVID K. MARTIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

DONALD H. BALLEISEN
RONALD D. RAY
GREENEBAUM DOLL & MCDONALD
3300 First National Tower
Louisville, Kentucky 40202
Special Counsel

Attorneys for the Commonwealth of Kentucky

CERTIFICATE OF SERVICE

The undersigned hereby certifies on behalf of the Plaintiff herein that on the 14 day of March, 1980, he caused three copies each of "Response in Opposition to Motion for Leave to File Response As *Amicus Curiae* and Response in Opposition to Response in Support of Defendants' Motion for Summary Adoption of the Special Master's Report and Remand to the Special Master" to be served by United States mail, first class, postage prepaid, addressed to Robert Van Pelt, Special Master, 556 Federal Building, Lincoln, Nebraska 68508; Hon. Theodore L. Sendak, Attorney General of Indiana, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204; William E. Daily, Chief Counsel, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204; Hon. Otis Bowen, Governor of Indiana, State Capitol, Indianapolis, Indiana 46204; Michael F. McBride, Harry H. Voigt, LeBoeuf, Lamb, Leiby & MacRae, 1757 N Street, N.W., Washington, D.C. 20036; Charles W. Campbell, Senior Vice President and General Counsel, Public Service Company of Indiana, Inc., 1000 East Main Street, Plainfield, Indiana 46168.

DONALD H. BALLEISEN
GREENEBAUM DOLL & MCDONALD
3300 First National Tower
Louisville, Kentucky 40202
(502) 589-4200
Special Counsel