

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION BY THE PUBLIC SERVICE)
COMMISSION OF THE APPLICATION OF THE FUEL) CASE NO.
ADJUSTMENT CLAUSE OF BIG RIVERS ELECTRIC) 90-360-C
CORPORATION FROM NOVEMBER 1, 1991 TO)
APRIL 30, 1992)

O R D E R

Kentucky Industrial Utility Customers ("KIUC") has requested that the Commission issue a subpoena requiring the appearance of William H. Thorpe, former general manager of Big Rivers Electric Corporation ("Big Rivers"), to testify on KIUC's behalf at the scheduled hearing in this matter.

KIUC contends that "Thorpe's testimony is necessary to KIUC's case." Letter from Michael L. Kurtz to Don Mills of 10/18/93, at 1-2. The United States Attorney has advised this Commission that compelling Thorpe to testify at the scheduled hearing may adversely affect an ongoing federal criminal investigation and has requested that the Commission refrain from subpoenaing Thorpe.¹

In this instance, the public's interest in the effective administration of justice clearly outweighs KIUC's need for Thorpe's testimony. Stating that even without Thorpe's testimony "an overwhelming amount of evidence regarding the imprudence and unreasonableness of fuel costs on the Big Rivers system has already

¹ Letter from Scott C. Cox to Gerald Wuetcher of 10/14/93. Attached as Exhibit A to this Order.

been put forward in our pre-filed direct testimony," Id. at 2, KIUC concedes that Thorpe's testimony would at best be cumulative.

KIUC's course of conduct also conveys this point. Despite the fact that this proceeding is over a year old, KIUC has never attempted to depose or otherwise question Thorpe. Nothing in the record indicates that its expert witnesses have attempted to interview Thorpe or that the testimony of any of its witnesses is dependent upon Thorpe's testimony. Furthermore, KIUC's delay until just ten days before the scheduled hearing to seek a subpoena suggests that Thorpe's testimony is not essential to its case.

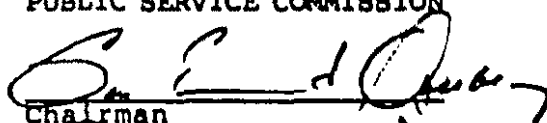
Finally, other sources are readily available which document Thorpe's conduct as general manager of Big Rivers and his role in that utility's fuel procurement decisions. Over ten thousand pages of internal Big Rivers documents are presently in the case record. The sworn statements of some of Thorpe's alleged associates about Thorpe's actions are available in public court records.

The potential effect of Thorpe's compelled testimony on current federal criminal investigations is, in contrast, quite severe. The U.S. Attorney asserts that such testimony might bar criminal prosecutions. The spectacle of conflicting government action would seriously undermine public confidence in both federal and state governments and erode the public confidence in the administration of the law.

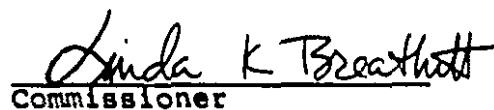
IT IS THEREFORE ORDERED that KIUC's request for a subpoena for William H. Thorpe is denied.

Done at Frankfort, Kentucky, this 21st day of October, 1993.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director



United States Attorney
Western District of Kentucky

MT/SCC/jlm
90R0784

Bank of Louisville Building
510 West Broadway
Louisville, Kentucky 40202

503/582-5911

RECEIVED

October 14, 1993

OCT 15 1993

Mr. Gerald Wuetcher
Kentucky Public Service Commission
Post Office Box 615
Frankfort, Kentucky 40602

GENERAL COUNSEL

Re: Big Rivers Investigation

Dear Jerry:

I am concerned about the Public Service Commission subpoenaing certain witnesses to testify before the Commission who are involved in the federal criminal investigation surrounding Big Rivers. As we discussed today, KRS 278.350 appears to grant a minimum of use immunity to any witnesses appearing before the Commission. I am concerned that with the United States Supreme Court precedent enunciated in the North and Poindexter decisions, we could potentially be barred from prosecuting any targets who are required to testify before your Commission.

The North and Poindexter Opinions

In July of 1987, Lieutenant Colonel Oliver North was compelled to testify before congress for six days about his involvement in the Iran contra affair after being provided a grant of use immunity pursuant to 18 U.S.C. § 6002 (federal immunity statute). North 1, 910 F.2d at 851. Subsequently, he was prosecuted by the independent counsel ("IC") for conduct about which he testified (id.). On appeal, North contended that his Fifth Amendment right against self-incrimination was violated by the failure of the district court to make an adequate determination about whether the IC used his immunized testimony against him. Id. The D.C. Circuit agreed with North, vacated his conviction, and remanded the case for further hearings to determine if the conviction and indictment were tainted by the use of the immunized testimony. Id. at 852. On remand, the IC concluded that he could not satisfy the burden imposed by the D.C. Circuit, and moved to dismiss the Indictment.

The D.C. Circuit followed the same reasoning in Poindexter, only it concluded that the conviction of Admiral John Poindexter was, in fact, tainted by use of his immunized testimony, and remanded the case only for determination of whether the

indictment was also tainted. 1991 U.S. App. Lexis at 22-23. The IC has indicated that he intends to seek Supreme Court review of this decision.

The D.C. Circuit decisions in these two cases are constitutionally based. In Kastigar v. U.S., 406 U.S. 441 (1972), the Supreme Court held that the federal immunity statute's guarantee of use immunity is "...coextensive with the [Fifth Amendment] privilege against self-incrimination" and "prohibits the prosecutorial authorities from using the compelled testimony in any respect...." Id. at 453 (emphasis in original).

In the North and Poindexter cases, the D.C. Circuit interpreted the scope of the constitutional minimum provided by the statute. See North 1, 910 F.2d at 856, ("We hold that the district court's truncated Kastigar inquiry was insufficient to protect North's Fifth Amendment right to avoid self-incrimination.").

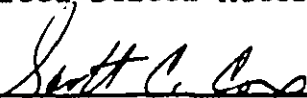
Therefore, when a defendant has provided immunized testimony and contends that the prosecution has either used that testimony against him or her, the prosecution must either contend that the North and Poindexter opinions were wrongly decided and should not apply, or that the prosecution can satisfy the burdens established in those opinions. The prosecution **CANNOT** argue that the North and Poindexter opinions apply only to immunity granted pursuant to the federal statute, and not to immunity provided in other contexts.

As you can see from the above-referenced cases, it would be extremely problematic if the Commission continued to seek the testimony of certain individuals who have been targeted for prosecution by the federal grand jury here in the Western District of Kentucky. I am concerned that any further prosecution of the individuals would be barred by the Public Service Commission's actions and I would therefore request on behalf of the United States Attorney's Office in the Western District of Kentucky that your office refrain from subpoenaing the witnesses we discussed earlier today.

If you have any questions about this matter, don't hesitate to contact me at your convenience.

Sincerely,

MICHAEL TROOP
United States Attorney



Scott C. Cox
Assistant U.S. Attorney