IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiffs, STATE OF NEW YORK, STATE OF NEW JERSEY, STATE OF CONNECTICUT, HOOSIER ENVIRONMENTAL COUNCIL, and OHIO ENVIRONMENTAL COUNCIL, Plaintiff-Intervenors, v. CINERGY CORP., PSI ENERGY, INC., and THE CINCINNATI GAS & ELECTRIC COMPANY, Defendants.	)	Civil Action No. 1:99-cv-1693-LJM-JMS

DECLARATION OF CHIC BORN

Chic Born, being of legal age and pursuant to 28 U.S.C. § 1746, deposes and states:

1. I am a competent adult and have personal knowledge of the following facts.

2. Attached hereto as Exhibit A is a true and accurate copy of my expert report prepared in the above captioned matter.

3. The report summarizes my analysis and findings and includes a complete statement of my opinions. The report also includes data and other information considered by me in forming my opinions, my qualifications, the compensation to be paid for my expert services, and a listing of all cases in which I have testified as an expert at trial or by deposition within the last four years.

4. My opinions are expressed to a reasonable degree of professional certainty.

5. I affirm under penalties of perjury that the foregoing statements are true.

FURTHER AFFIANT SAYETH NAUGHT.

Date: 7 January 2009

Chic Born

Report and Opinion of:
S.R. Born, Attorney at Law
The Mediation Group LLC
8888 Keystone Crossing—Suite 1500
Indianapolis, Indiana 46240

Delivered to:
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204

Re:
United States et al. v. Cinergy Corp. et al.
Civil Action No. 1:99-cv-01693-LJM-JMS
Review of Consulting Services Agreement between Cinergy Corp. and Robert Batdorf

A. Introduction and Assignment

This report and opinion has been prepared at the request of Barnes & Thornburg LLP regarding the captioned matter. I was asked to review an April 3, 2008 agreement letter from Dean M. Moesser, Associate General Counsel-Litigation, Duke Energy, addressed to Mr. Robert Batdorf which was executed on April 7, 2008 concerning compensation for Mr. Batdorf's time serving as a witness (the "Agreement").

Specifically I was asked to consider and render my opinion regarding the following aspects of the Agreement:

1. Whether, in my experience as a lawyer who practiced labor and employment law, representing management interests, I was aware of any practice whereby employers entered such a consulting agreement with retired employees. I was asked as well to describe the circumstances in my experience which cause employers to seek and enter such an agreement.

2. Whether, in my experience, a payment for such consulting service to a retired former employee was a matter that was routinely covered by agreements such as the Agreement and what sorts of compensation for such services I had observed and understood to be used.
3. Whether such agreements covered the subject of payment for time expended preparing for and engaging in the provision of testimony in a court or administrative proceeding.
4. Whether the Agreement conforms to my experience in negotiating and reviewing such consultation agreements, including those which specifically include payment for time expended and reasonable expenses.
5. Whether, under the circumstances of this case, Mr. Robert Batdorf's response to the question, "Are you currently employed, Mr. Batdorf?" was reasonable when he responded, "No, sir, I am currently retired". Trial Tr. at 1291:21-22 (May 19, 2008).

B. Background and Professional Experience

I was educated at Northwestern University (1963-64); Simpson College (1964-1966 and 1967; B.S., 1967); and The American University (1966). My Juris Doctor degree was earned at the Indiana University School of Law-Bloomington (1967-1970: J.D. 1970). While in law school, I was a Note Editor for the Indiana Law Journal (1968-1970). During that period I also worked as a law clerk for Bloomington and Seymour, Indiana law firms.

I joined Ice Miller Donadio & Ryan (currently Ice Miller LLP) in February, 1970 and practiced law there as an associate and subsequently a partner until my retirement in

June, 2006. I am admitted to practice before the Indiana Supreme Court and courts in Indiana, the Southern and Northern Districts of the United States District Courts in Indiana, the Seventh Circuit and the United States Supreme Court. At Ice Miller Donadio & Ryan/Ice Miller LLP, I represented management nationally in labor relations matters. In that respect, I engaged in litigation, arbitration, negotiations and administrative proceedings before federal, state and local courts and agencies. Such agencies included the National Labor Relations Board, the Equal Employment Opportunity Commission, the Wage-Hour Division of the United States Department of Labor, the Indiana Civil Rights Commission and, from time to time agencies in states other than Indiana. I was regularly the representative of management interests in the negotiation and administration of collective bargaining agreements. I was also often engaged to represent management interests in union organizing matters, defending employer interests before the National Labor Relations Board and state labor relations agencies from time to time. I negotiated collective bargaining agreements on behalf of school employers throughout Indiana and represented Indianapolis Public Schools in negotiation, contract administration and alleged unfair practice matters with both professional certificated staff and service employees for a number of years, beginning in 1977. From 1970 forward, I also engaged in defending employers before the federal Occupational Safety and Health Administration and the Indiana Department of Labor OSHA Administration.

I was engaged from time to time in the preparation and review of various types of consulting agreements negotiated between management and retired or retiring employees for the benefit of the employer. I have drafted such agreements and have reviewed other such agreements that I did not negotiate.

I taught and lectured to a number of organizations including the American Bar Association, the National Council of Bar Presidents, the American Hospital Association, the American Arbitration Association, the American Foundry Society, the Indianapolis and Indiana Chambers of Commerce, Indiana Manufacturers' Association, and the Indiana School Boards Association. I also lectured at Indiana University School of Law at Bloomington and at Indianapolis. I have been a member of the OSHA Committee of the U.S. Chamber of Commerce, committees of the Indiana Chamber of Commerce, Associated General Contractors of Indiana and the Indiana Manufacturers Association. I was the principal author of the first five editions of Safety & Health Guide for Indiana Business (1992-2004, Indiana Chamber of Commerce). A complete listing of publications in the past ten years can be provided upon request.

I served as President of the Indiana State Bar Association (1997-98) and previously the Indianapolis Bar Association (1988). I am a fellow of the Indianapolis, Indiana and American Bar Foundations. From 1988 to 1998, I was a member of the American Bar Association House of Delegates.

In addition, I began serving as a civil mediator as part of the original Indianapolis Bar Association Settlement Week process in 1986—before any Indiana Alternative Dispute Resolution rules or certifications had been developed. While at Ice Miller Donadio & Ryan/Ice Miller LLP, I continued to regularly mediate significant civil matters until I joined The Mediation Group LLC following my retirement from Ice Miller. Today, I serve principally as a certified civil mediator, but

also as an arbitrator and occasionally as a consultant to law firms on legal and ethical matters.

C. Documents Reviewed

In preparing this report I have reviewed the following documents in the captioned matter:

1. Plaintiff's Motion for New Trial due to Party Misconduct, or in the Alternative, for Expedited Discovery and an Evidentiary Hearing, Memorandum in Support of same and all attached exhibits;

2. Cinergy's Opposition to Plaintiff's Motion for New Trial due to Party Misconduct, or in the Alternative, for Expedited Discovery and an Evidentiary Hearing and all attached exhibits;

3. Order on Plaintiff's Motion for New Trial;

4. Order to Show Cause;

5. Deposition transcripts of Robert Batdorf depositions taken on September 17, 2004, June 24, 27 and 30, July 1, 5 and 6, 2005.

6. Trial transcripts of testimony of Robert Batdorf taken on May 19 and 20, 2008;

7. Trial transcript of closing arguments on May 21, 2008;

8. Trial transcript of verdict on May 22, 2008;

9. Defendant's Responses to Plaintiff's First Request for Production of Documents;

10. Defendants' Responses to Plaintiff United States' First Supplemental Request for Production of Documents; and,

11. Cinergy's Amended Rule 26(a)(1) Disclosures.

D. Compensation and Testimony

I have not testified as an expert at deposition or trial in the past four years. I am being compensated at $300 per hour for time spent in preparing my opinion and during any required testimony.

E. Opinions

1. Reasons Why Consulting Agreements with Retired Employees Are Necessary and Proper

Businesses in the United States regularly enter consulting agreements with retired employees, sometimes before their retirement and sometimes after. My experience representing management interests in reviewing possible future need for the advice and counsel of retiring or retired employees demonstrates to me that the following general reasons support such consultation contracts. In addition, in situations involving litigation, whether it is merely threatened or contemplated or already exists, the need for such consulting agreements is emphasized. The retired or retiring employee often possesses unique technical abilities or expertise. He or she may have been a decision maker or on a team recommending certain decision-making to members of management. In such circumstances, the factual and possibly the technical bases upon which a decision was reached or a course of action was plotted remain important because certain following decisions may depend on the earlier work.

Regardless of the degree of documentation supporting an earlier decision, the judgment(s) involved in reaching the specific conclusion(s) at issue may require exposition for fresh analysis. The retired employee may be the repository of such information, one who can convey a sense of feeling about the course of action that flat paper or technical documentation cannot convey. Such is a significant possibility when decision-making is based on close or narrowly separated alternatives. Another set of reasons also supports the rather regular use of such consulting agreements: the individual involved may be long senior with the enterprise and, as a result, may be the "institutional memory" for the enterprise regarding subjects that could arise.

The foregoing considerations are emphasized when the possibility of litigation exists. In those circumstances, the technical expertise, decision-making, over-all "sense of the situation" or the "institutional memory" will potentially be required elements of a legal assertion or defense. And, they are considerably magnified when facts that occurred many years ago come under scrutiny as the result of claims made by one party or another. For example, in the case under consideration here, it is my understanding that ten to fifteen year old facts were involved in assessing the decisions made by the management of the defendant enterprise. The significant memory of a retiree with 30 or 35 years experience in the management structure could be central to the establishment of a claim or defense. These are the sorts of general considerations that cause management to retain the contact and assure the availability of retiring or retired employees through consulting agreements.

2. Payment for Consulting Services in Agreements with Retired Employees

Consulting service agreements, in my experience, nearly always include time expended payment of compensation to the retired or retiring employee. In order to help assure that the retired employee continues to consider himself or herself willing to be available to management for discussion, deliberation and potential decision-making, when the retired person has no personal incentive to abandon other activities or lose opportunity time instead of consulting on behalf of the employer, consulting agreements regularly include an agreement to compensate the person for time spent and expenses incurred. Only occasionally are such agreements uncompensated. For example, I have observed circumstances involving a senior family member selling an enterprise to other family members, especially junior family members who would inherit from the seller, in which a consulting arrangement would be memorialized and executed, but provide no compensation. In such cases, compensation is sometimes provided only in the event that a certain number of hours or days of consultation is exceeded.

The specified compensation for services varies widely in my experience. The principal reason for the variance is the difference in the level of active employment compensation and sometimes the expertise of the subject of the agreement. Compensation is occasionally the subject of negotiation, especially in circumstances in which the agreement is reached before retirement—thus, creating an additional potential value of retirement for the employee. However, regardless of the facts that support the need for a consultation agreement, the rate of compensation that I generally observed is tied or determined from the compensation paid the employee

when he or she retired. The former employee's consultation compensation is decided by taking his or her last annual active employment compensation (excluding employer-paid fringe benefits) and dividing by the days or hours worked in a year. More often than not, the agreements with which I have dealt, either directly or in a review capacity, use an employee's total annual taxable compensation as the beginning point for setting the rate of pay. The rate of pay itself is usually expressed as an hourly or daily rate. The number of hours or days to be paid is usually based on time or dairy records maintained and billed by the employee.

3. Consultation Agreements Covering Testimony as a Witness

As a management representative, I served as counsel to employers regularly faced with litigation, especially litigation concerning employment decisions, involving termination, loss of rights or other deprivation of emoluments of employment both for a single employee and a group of employees. Significant sums are at risk in many such cases. If management believed that litigation might occur over subjects which the retiree had authority or decided, it was not unusual to reach an agreement with the operative supervisor or management member to pay for time used in preparation for and time spent testifying or advising a litigation attorney or attorneys. Management, in my experience, understands that individuals are subject to subpoenas in appropriate circumstances and can thereby be required to provide testimony without any preparation other than the individual's distant memory. Management also understands that accurate testimony about meetings, judgments, assessments and decisions made at some time past is difficult if not impossible without time spent reviewing documents, minutes, technical analyses or similar materials used to make the decisions being

questioned in the litigation. Thus, it is consistent with my experience that the consultation agreement includes compensation for time spent preparing for and engaging in testimony as a witness for management. Agreements with which I dealt compensation was based on time spent, including testimony preparation and delivery time.

Of equal significance in offering a consultation agreement such as those described above is the possibility that a retired employee can be provided counsel as part of the agreement, thus serving to protect the employer in its review of facts and materials with the potential consulting witness by assuring that attorney-client privilege applies to discussions and communications with counsel in preparing testimony or responding to interrogatories or motions to produce.

4. Review and Conclusions regarding Batdorf Agreement

I have reviewed the affidavit of Dean Moesser (Exhibit B to Cinergy's Opposition to Plaintiff's Motion for New Trial identified at Section C above) and understand that he determined Mr. Batdorf's rate of compensation for time spent in preparing for and testifying as a fact witness by dividing Mr. Batdorf's annual compensation by 2000 hours. The letter also recites that because of his work for Cinergy Mr. Batdorf had knowledge and expertise regarding matters relevant to the captioned litigation. Based on a review of the documents specified above, I believe that Mr. Batdorf had the knowledge to which the letter adverts. This use of total annual compensation, consisting of base pay, annual bonuses and incentive pay—but, excluding the cost of fringe benefits—is consistent with my experience in setting hourly compensation for time spent in the consultation agreements described above.

The rate of $200 per hour is consistent with my experience, and I therefore believe that rate to be reasonable.

Mr. Batdorf's affidavit was also reviewed (Exhibit A to Cinergy's Opposition to Plaintiff's Motion for New Trial identified at Section C above). It confirmed that he was previously compensated for time spent testifying as a fact witness at a rate determined by dividing only his then-base compensation by 2000. Based on the same reasoning set out above and my experience, I believe that the $88 per hour rate was unreasonably low because it reflected only his base compensation. The work of preparing as a fact witness to stale facts and serving as such witness in the case at hand is difficult and requires considerable effort—effort that is not at all dissimilar to that expended in performing his management and professional responsibilities when still actively employed by Cinergy. Thus, I conclude that payment for Mr. Batdorf's time at a rate nearly fifty-five percent below his final annual rate of compensation while actively employed was not consistent with my experience and was, in fact, unreasonably low. That $88 rate was simply not fair to Mr. Batdorf.

The remaining provisions of the Agreement are neither unusual nor especially remarkable. They concern subjects describing how Mr. Batdorf is to bill for time and expenses; the fact that his compensation would cease at any point at which the Agreement was terminated; the fact that Mr. Batdorf was not an employee of Cinergy, but an independent contractor; the recitation of his agreement to maintain confidential information and trade secrets without disclosure, unless they were in the public domain; his right to counsel, if required, unless a conflict of interest prohibited Cinergy counsel from representing him; and an integration clause.

5. Batdorf's Employment Status

Mr. Batdorf was questioned on the record at trial regarding his employment status. The following question was asked and answer provided:

Q. Are you currently employed, Mr. Batdorf?

A. No, sir, I am currently retired.

(Trial T. 1291: 21-22; May 19, 2008)

I do not believe this answer was incorrect or unreasonable. The definition of "employee" has been extensively considered by governmental agencies and courts over time. For example, the Internal Revenue Service uses a twenty factor test to determine whether an individual is an employee or an independent contractor. Revenue Ruling 87-41, 1987-1.C.B. 296 (1987). This consideration has been undertaken by the Indiana Supreme Court and the Seventh Circuit. Regardless of conclusions reached by such an agency or courts, the consideration of factors concerning employment status are manifold and such decisions are reached only after careful analysis. Despite the depth of analysis, the conclusions reached are far from the common understanding of lay persons. Even so, after signing the Agreement, Mr. Batdorf would not be classified as an "employee" under this test.

Further, laymen, in my experience, understand that they are employed when they work for an enterprise that controls their time, place and conditions of work; when they receive a regular paycheck; when tax withholding occurs; and, when the employer provides their work tools, regardless of the composition of those tools. Mr.

Batdorf reasonably understood he was retired. And, he no longer received a paycheck. He had no right to consideration for annual bonuses. He no longer received paid fringe benefits from Cinergy. As a layman who reasonably believed he was no longer an employee, but was in fact a retiree, his response was reasonable. Further, it was not disingenuous in my view for him to believe he was not an employee, but was a retiree. It is also reasonable to conclude that an attorney—even an attorney fully aware of the Agreement—would accept Mr. Batdorf's answer as accurate.

F. Conclusion

Taken as a whole, the Agreement fits within the general type of post-employment consultation agreement, including the possibility of requiring Mr. Batdorf's service to prepare for and provide testimony that I have seen and reviewed in my experience described above. The wording and organization of the Agreement is not mine and may, therefore, be somewhat different than that which I have observed. However, the terms of the Agreement are not unique in my experience as a management labor and employment lawyer.

Dated this 7th day of January, 2009.

/s/ S.R. (Chic) Born

S.R. Born