

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,)
) Civil Action No. 1:99-cv-1693-LJM-JMS
Plaintiff-Intervenors,)
)
v.)
)
CINERGY CORP., PSI ENERGY, INC., and)
THE CINCINNATI GAS & ELECTRIC)
COMPANY,)
)
Defendants.)

DECLARATION OF JULIE L. EZELL

Julie L. Ezell, being of legal age and pursuant to 28 U.S.C. § 1746, deposes and says:

1. I have been licensed to practice law in the State of Indiana since October of 1990. I have never been accused of, or found to have engaged in, any misconduct during my legal career by any court, administrative body or disciplinary tribunal.
2. I currently serve as in house counsel for Duke Energy in Plainfield, Indiana. Prior to the Duke Energy-Cinergy merger in 2006, I served as in house counsel to Cinergy, a position I held since October 2000.
3. I was aware in 2005 of Mr. Batdorf's 2005 consulting agreement with Cinergy and I understood that the time Mr. Batdorf spent assisting with this litigation would be

billed under that Agreement. I never saw the 2005 Agreement, nor was I aware of its actual terms, prior to the close of the liability trial. In my experience, offering a consulting agreement to departing company executives is a common practice at Cinergy, so I did not find the 2005 Agreement with Mr. Batdorf unusual or problematic.

4. Dean Moesser sent me a copy of the 2008 Agreement in April 2008, which was the date I learned of the existence of the Agreement. I did not draft either Agreement, but was aware of both Agreements prior to trial. I did not read the 2008 Agreement prior to trial.

5. I worked closely with outside counsel, and in particular Kathryn Thomson, to collect, review and produce documents. I was aware of the documents sought by Plaintiffs in discovery. Prior to trial and before the 2008 Agreement was executed, I considered whether the 2005 Agreement was responsive to Plaintiffs' discovery requests. I concluded, based on my reasoned judgment and experience, that it was not responsive. I did not believe at that time, nor do I believe now, that the 2005 Agreement needed to be disclosed to the government for the following reasons: First, Mr. Batdorf's post-retirement relationship with Cinergy was not raised by the government during any of the six days of his 30(b)(6) depositions despite explicit knowledge by the government that Mr. Batdorf was retiring (or already retired). As a result, I did not consider the consulting agreement to be a major issue. Second, I did not consider the government's failure to ask Mr. Batdorf about his post-retirement relationship with Cinergy to be significant because the government had similarly not asked other former Cinergy employees whether they had ongoing relationships with Cinergy. Third, I was not aware of any existing discovery requests propounded by the government that covered compensation arrangements with former employees prior to the liability trial, and still do not believe that any discovery

sought these agreements. For these reasons, I reasonably concluded that the 2005 Agreement did not need to be disclosed prior to trial.

6. When the 2008 Agreement was executed I concluded the same analysis I applied to the 2005 Agreement also applied to the 2008 Agreement. As a general proposition, we sought to produce every potentially-responsive, non privileged document and if I thought either Agreement was responsive we would have produced it prior to trial. I did not supplement our Rule 26 disclosures because I did not consider either the 2005 Agreement or the 2008 Agreement to represent a material change that was required to be disclosed.

Liability-Phase Discovery.

7. I first became involved in this litigation in November 2002. From that point until the Duke Energy-Cinergy merger in 2006, I was the primary in house counsel for Cinergy responsible for managing the above captioned litigation. In the spring of 2003, settlement negotiations with the government started to breakdown and so Cinergy decided to put together a litigation team to manage discovery and prepare for the jury trial. As a result, Cinergy hired Sidley Austin to serve as lead trial counsel in this litigation. Sidley Austin was tasked with primary responsibility for both offensive and defensive discovery. After Sidley Austin was brought on board, we essentially started discovery over from the beginning, including performing a complete review of all prior discovery requests and responses, including the United States' First and Second Request for Production of Documents.

8. My discovery responsibilities during this period included ensuring that Cinergy had the correct documents or witnesses available and providing them to the appropriate counsel at Sidley Austin. I also attended almost every single deposition of Cinergy employees conducted in this case, approximately 60 in total.

9. Included among the individuals deposed by Plaintiffs were numerous former and retired Cinergy employees who had consulting agreements, or other on-going arrangements with Cinergy, and who were represented by Cinergy's counsel at their depositions. To the best of my knowledge, none of the consulting agreements for these former or retired employees was produced to Plaintiffs as part of our on-going document production. During the depositions of former Cinergy employees, the government asked some, but not all, of the former employee whether they had consulting agreements with Cinergy. Cinergy did not object to these questions by Plaintiffs. I assumed Plaintiffs asked about consulting agreements when they believed they were relevant and did not ask about them when Plaintiffs believed they were not relevant.

10. I assumed the production of Cinergy's consulting agreements with former employees was a non-issue because Plaintiffs never requested these agreements prior to the close of the liability trial despite their explicit knowledge that such agreements existed. Specifically, and to the best of my knowledge, Plaintiffs never asked for copies of the consulting agreements mentioned by former employees during their depositions, never objected that Cinergy had not produced the consulting agreements, nor moved to compel Cinergy to produce the consulting agreements.

Mr. Batdorf's 2005 Consulting Agreement.

11. I attended all seven depositions of Robert Batdorf – his September 14, 2004 personal deposition and his six (6) separate 30(b)(6) depositions conducted on June 24, 27 and 30 and July 1, 5 and 6 of 2005. Mr. Batdorf retired on July 1, 2005 in the middle of his 30(b)(6) depositions. I learned of Mr. Batdorf's plans to retire during the spring of 2005, prior

to his 30(b)(6) depositions. I also learned at that time of his consulting agreement with Barry Pulskamp, although I never saw that agreement or knew of its terms.

12. The lawyers attending Mr. Batdorf's 30(b)(6) depositions were aware of Mr. Batdorf's plan to retire, and the government's attorney, Ms. Himmelhoch, acknowledged Mr. Batdorf's July 1, 2005 retirement on the record. As with many of the other former Cinergy employees deposed by Plaintiffs, the government did not ask Mr. Batdorf whether he had a post-retirement consulting agreement or other formal post-retirement relationship with Cinergy. If the government had asked Mr. Batdorf about a consulting agreement, Cinergy would not have objected to the question, as it had similarly not objected when Plaintiffs posed this same question to other former employees. I assumed the government did not consider whether Mr. Batdorf had a consulting agreement to be material to this litigation.

Mr. Batdorf's 2008 Consulting Agreement.

13. After the Duke Energy–Cinergy Merger in 2006, Dean Moesser, in house counsel at Duke Energy, assumed primary responsibility for managing this litigation. My role shifted to that of a subject-matter expert focused on the environmental issues in the case. In February 2008, I contacted Mr. Batdorf about testifying in the upcoming trial. The trial team had decided we wanted Mr. Batdorf as a trial witness because he was very knowledgeable about the projects at issue and we believed he was a very truthful, honest, and convincing witness.

14. During one of my discussions with Mr. Batdorf, the topic came up of reimbursement for Mr. Batdorf's expenses related to the trial and its preparation. At the time, I assumed that the 2005 consulting agreement had lapsed. Mr. Batdorf informed me that he had not done any work under the 2005 agreement in the past two years and, during that intervening period, Cinergy had merged with Duke Energy so there was a new corporate entity.

Accordingly, I assumed that Mr. Batdorf would need a new consulting agreement in 2008. I informed Mr. Batdorf that his reimbursement and compensation would be handled by Mr. Moesser, who was now responsible for the day-to-day management of the litigation. I did not discuss specifics of compensation with Mr. Batdorf.

15. In April 2008, I was carbon copied on an email that Mr. Moesser sent to Mr. Batdorf attaching the 2008 consulting agreement. I did not read the consulting agreement at that time. At some point prior to trial, I believe I discussed the \$200 an hour compensation figure with Mr. Moesser. I did not find this amount problematic as it was consistent with the amounts provided for in some of the other consulting agreements that Cinergy had with other former employees who were involved in this litigation. Prior to the end of the liability trial, I did not know about the \$88 per hour figure contained in the 2005 Agreement. Even if I had, I would not have considered the \$200 per hour figure in the 2008 Agreement to be problematic because the obligations of preparing for trial, including reviewing thousands of documents and making repeated trips away from his home in southern Indiana, would be far more onerous than the limited involvement in short duration projects that Mr. Pulskamp had envisioned when he set up the 2005 Agreement.

Liability Phase Trial Strategy and Testimony.

16. I was involved with Mr. Batdorf's trial preparation and attended many of his trial preparation sessions. Mr. Batdorf's testimony during these sessions and the trial did not change from the testimony he gave during the seven days he was deposed. I know Mr. Batdorf devoted significant amounts of time to his trial preparation. I spoke with him quite often, and know he reviewed massive amounts of information prior to trial.

17. I was involved with the formation of Cinergy's trial strategy which was that the government attorneys, during "brain storming sessions" with the government experts, had made up its whole "formula" after the Complaint was filed in November 1999. Thus, the government's litigation posture was a new interpretation of the environmental regulations that had not been previously supported. This belief was evidenced by the fact that the government could not get testimony from actual EPA employees to support its case and instead had to rely almost entirely on theoretical experts, specifically hired for the litigation. Accordingly, Cinergy's trial strategy involved contrasting the first-hand, contemporaneous observations and predictions of Cinergy engineers and employees with the theoretical calculations drafted by the government's lawyers and experts years after the fact. Mr. Batdorf fit this strategy because he had worked on the relevant projects while he was employed by Cinergy, had dealt with EPA inspectors while at Cinergy, and had knowledge of how the decisions were made at the time they were made.

18. I do not believe that Cinergy's trial strategy involved contrasting which side had paid or unpaid witnesses. Moreover, I do not believe such a strategy would have been successful at trial because Cinergy's witnesses were very highly compensated employees, or, in the case of Mr. Batdorf, had been a very highly compensated employee. I only recall having one conversation with Mr. Batdorf concerning how to respond to a question about his compensation and that was to advise him to be prepared to answer such a question truthfully and honestly if he were to be asked. There was no effort by the Cinergy attorneys to hide the Agreement from the government, the jury, or the Court during the liability phase trial. In addition, and based on my experience with Mr. Batdorf, I believe he is honest and would have answered that he had such an agreement.

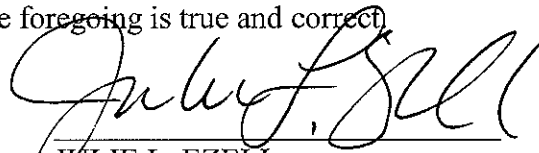
19. I believe that Mr. Batdorf's testimony at trial was complete and honest. Mr. Batdorf's trial testimony was the eighth time that he testified under oath in this case. Despite Mr. Batdorf's testifying for approximately fifty hours over the course of almost four years, I cannot recall a single inconsistent statement made by Mr. Batdorf under oath. I was in the courtroom when Mr. Batdorf testified he was retired. I understood this to be an honest statement by Mr. Batdorf. Everyone, including Ms. Himmelhoch – the government lawyer cross-examining Mr. Batdorf – understood that Mr. Batdorf had retired from Cinergy on July 1, 2005. I did not consider this to be a controversial or material statement. Similarly, I did not consider it a controversial or material statement that Mr. Batdorf was not an employee of Cinergy when he testified at trial. Mr. Batdorf was not under Duke Energy's direct control at the time he testified at the trial, was not considered an employee of Cinergy, and, in fact, could have refused to testify if he did not want to participate in the trial.

Remedy Phase.

20. Mr. Batdorf was among 70 witnesses listed on Cinergy's initial remedy phase witness list. Mr. Batdorf was included because he had been a witness at the liability trial, and he was a former plant manager at the Wabash River Station. During the remedy phase, I spoke several times with Mr. Batdorf about the issues involved, specifically the installation of pollution controls at the Wabash River generating station; however, Mr. Batdorf had not worked at the Wabash River facility since the late 1990s and during his time there they had not installed pollution controls. Cinergy had installed pollution controls at the Gibson facility while Mr. Batdorf worked there; however, Mr. Batdorf believed this would be of only limited relevance and so he suggested several other current and former Cinergy employees who would be more knowledgeable about the installation of pollution controls at Wabash River.

21. The decision to remove Mr. Batdorf from the remedy phase witness list was due to his lack of direct experience with or knowledge of the issues that would be developed at the remedy phase trial.

I declare under penalty of perjury that the foregoing is true and correct.



JULIE L. EZELL