

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 and)
)
 STATE OF NEW YORK, STATE OF ,)
 NEW JERSEY, STATE OF)
 CONNECTICUT, HOOSIER)
 ENVIRONMENTAL COUNCIL, and)
 OHIO ENVIRONMENTAL COUNCIL,)
)
 Plaintiff-Intervenors)
)
 v.)
)
 CINERGY GROUP, PSI ENERGY, INC,)
 and THE CINCINNATI GAS & ELECTRIC)
 COMPANY,)
)
 Defendants.)
 _____)

Civil Action No.: 1:99-1693-LJM-JMS

AFFIDAVIT OF PAUL E. GUTERMANN

I, Paul E. Gutermann, being of legal age and first duly sworn, state as follows:

1. I have personal knowledge of the facts set forth in this affidavit and could and would testify to them under oath if called before this Court as a witness.

2. I am a partner in the law firm of Akin Gump Strauss Hauer & Feld LLP. I was lead trial counsel in the matter captioned *United States v. Illinois Power Company*, Civil Action No. 99-CV-833-MJR, (S.D. Ill.)(the “*Illinois Power*” matter), and had direct supervision over the trial preparation activities discussed herein. The *Illinois Power* matter is commonly referred to as one of

the “NSR Cases” and involved allegations similar to those made against the defendants in this matter. I was asked to confirm certain aspects of the *Illinois Power* matter.

3. On April 22, 2003, the parties in the *Illinois Power* matter filed with the Court their original witness lists. The United States’ witness list included Dr. Nancy Kete. *See* United States’ Initial Witness Disclosure (attached hereto as Exhibit A). The United States filing identified Dr. Kete as a “Non-expert Witness[.]” *Id.* I reviewed relevant files in that case and did not uncover any indication that the United States had previously identified Dr. Kete as a person with relevant knowledge.

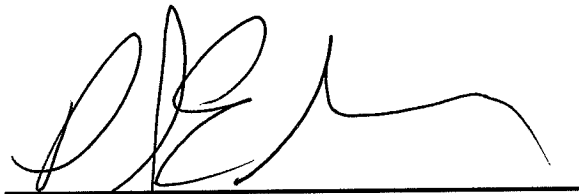
4. After receiving the United States’ witness list, counsel for Illinois Power requested that counsel for the United States provide a brief description of the testimony expected to be offered by certain persons listed on the United States’ Initial Witness List, including Dr. Kete. *See* Letter from Pamela R. Lee & David Roskam (Department of Justice) to Perry M. Rosen (Akin Gump Strauss Hauer & Feld), April 28, 2003 (attached hereto as Exhibit B).

5. On April 28, 2003, counsel for the United States provided the requested description of expected testimony for Dr. Kete. *Id.* That description indicated that Dr. Kete would be a rebuttal witness for the United States, responding to the testimony of Illinois Power witness Kenneth Schweers with respect to EPA historical modeling assumptions regarding whether utility maintenance practices would trigger new source review permitting. *Id.* I reviewed relevant files in the *Illinois Power* matter and did not uncover any indication that the United States disclosed that it had agreed to pay Dr. Kete for her time preparing for and providing testimony.

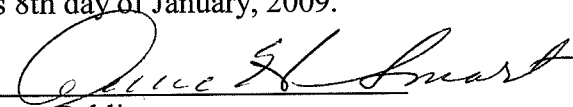
6. Counsel for Illinois Power noticed the deposition of Dr. Kete for May 21, 2003. Counsel for Illinois Power conducted the deposition of Dr. Kete on that date. Counsel for Illinois

Power inquired during the deposition whether the United States was paying Dr. Kete for her time acting as a witness in the *Illinois Power* matter. Dr. Kete testified that the United States had agreed to pay her \$250/hour for her testimony and preparation time for work on the NSR Cases (other than the case involving Duke Energy). Dep. Tr. of Nancy Kete at P.6, l. 20 through P. 8, l.1 (attached hereto as Exhibit C). Upon further questioning, Dr. Kete testified that she had been asked to appear as a “rebuttal witness” and did not have knowledge of whether the United States had designated her as a fact or expert witness.

7. On June 26, 2003, Dr. Kete testified at the trial in the *Illinois Power* matter and confirmed that she was being compensated for her time testifying. Trial Tr. P. 96, l. 11 through P. 96, l. 16. (attached hereto as Exhibit D).



Paul E. Gutermann

District of Columbia
Subscribed and sworn to before me
this 8th day of January, 2009.

Notary Public

ANNE H. SMART
Notary Public, District of Columbia
My Commission Expires April 30, 2010

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 99-833-MJR
)	
ILLINOIS POWER COMPANY and)	
DYNEGY MIDWEST GENERATION,)	
INC.,)	
)	
Defendants.)	

UNITED STATES' INITIAL WITNESS DISCLOSURE

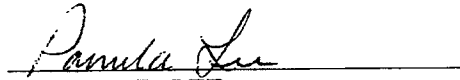
Pursuant to the parties' agreement entitled Pre-Trial Stipulations, the United States hereby lists all witnesses it intends to call as live witnesses at trial. In accordance with the parties' agreement, this list does not include witnesses that may need to be called to establish the admissibility of a document or other exhibits as the parties have agreed to attempt to reach stipulations regarding documents and exhibits. In addition, by agreement of the parties, this list does not include witnesses which the United States intends to call solely through the submission of a deposition transcript or deposition video. A separate schedule for such designations has been agreed upon by the parties. Per agreement of the parties, the United States reserves the right and may chose to name additional or rebuttal witnesses after reviewing the Defendants' original witness list. In accordance with the Court's requirement set forth in Judge Reagan's model pretrial order, the United States' initial witness list includes both witnesses the United States anticipates calling in its case-in-chief and in rebuttal.

The United States anticipates calling as live witnesses at trial the following named individuals.

1. Expert Witnesses
 - a. Ron Sahu
 - b. Robert Koppe
 - c. Hugh Larkin
 - d. Mike Hekking
 - e. Donna Eisenhower
 - f. Wolcott Smith
 - g. Bruce Biewald
2. Non-expert Witnesses
 - a. Barry Buschschulte
 - b. Kirk Nabors
 - c. John L. Suchocki
 - d. David Hawkins
 - e. David Solomon
 - f. Nancy Kete
 - g. Sally Harmon
 - h. Larry Kercher

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division



PAMELA R. LEE
DAVID ROSSKAM
PAUL STOKSTAD
Trial Attorneys
Environmental Enforcement Section
Environment and Natural Resources
Division
Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 305-2775

MIRIAM F. MIQUELON
United States Attorney for the
Southern District of Illinois

WILLIAM COONAN
Assistant United States Attorney
United States Attorney's Office
Southern District of Illinois
9 Executive Drive
Fairview Heights, Illinois 62208

OF COUNSEL:

MARK PALERMO
Assistant Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5

77 W. Jackson Boulevard
Chicago, Illinois 60604-3590

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2003 I caused a true and correct copy of the foregoing United States' Initial Witness Disclosure to be to be served upon the following counsel of record in the manner indicated:

First-Class U.S. Mail,
Postage Prepaid and
Facsimile

Sheldon A. Zabel
Thoms P. Luning
Stephen J. Bonebrake
Mary Ann Mullin
Schiff, Hardin & Waite
6600 Sears Tower
Chicago, Illinois 60606

Harry B. Wilson
Husch & Eppenberger, LLC
100 North Broadway, Suite 1300
St. Louis, Missouri 63102-2789

Via Hand-Delivery and
Facsimile

Paul E. Gutermann
Perry Rosen
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036




EXHIBIT B



U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Telephone (202) 305-2775
Facsimile (202) 616-6584

April 28, 2003

VIA FACSIMILE

Perry Rosen
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(Via Facsimile and Hand Delivery)

Re: United States v. Illinois Power Company and Dynegy Midwest Generation, Inc.,
No. 99-CV-833-MJR (S.D. Ill.)

Dear Perry:

As David and I have both indicated we did not receive your letter dated April 24, 2003. Per our discussion on Saturday morning and your e-mail earlier that day, I am responding to that letter.

You have asked for a brief description of the testimony of six individuals we identified on our initial witness list. As I indicated in our call, the Defendants have previously become aware of several of these individuals through our prior disclosures (Barry Buschulte and Kirk Nabors) or through deposition (Sally Harmon). We are providing the information on these three individuals as well as on the others you ask about based on our understanding that you will not be strictly interpreting our Pre-trial Stipulation to limit our requests for similar information on witnesses on your list to those you have not previously disclosed or we have not deposed.

Barry Buschulte 4396 South Lake Road, Pickneyville, IL 62274. (618) 357-3236. Mr. Buschulte is a boilermaker who worked on projects at the Baldwin plant, and was the general foreman of boilermakers at the Baldwin plant from 1996 to 2001. Mr. Buschulte is expected to provide testimony regarding his experience with maintenance activities at the Baldwin Plant and with regard to component replacements at issue in this case.

Kirk Nabors USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, N. W., Washington, DC 20460. (202) 564-9171. Mr. Nabors is a Computer Specialist with the USEPA Clean Air Markets Division. He is responsible for receiving, reviewing, and maintaining data electronically submitted under the Continuous Emissions Monitoring System ("CEMS") requirements of the Acid Rain program. Mr. Nabors will testify regarding summaries he has developed of CEMS data submitted by the Defendants to EPA. These summaries have been previously provided to Defendants.

John L. Suchocki – Eyewitness Animations, Pompano Beach, Florida. Mr. Suchocki is President of Eyewitness Animations, a firm specializing in the business of producing computer generated animation. Mr. Suchocki will provide foundational testimony, if necessary, on the method and process used to create Plaintiff's three-dimensional



computer animation to be presented during expert testimony presented by Plaintiffs. Mr. Suchocki will provide testimony that the equipment software and procedure used to create the animation is widely accepted by experts in the field of computer animation. Mr. Suchocki will also testify that the procedures used for input and output of information is accurate and reliable.

David Hawkins – Natural Resource Defense Council, 1200 New York Ave., Washington, D.C. 20005. (202) 289-6868. Mr. Hawkins will present testimony rebutting that of Messrs. Barber, Cannon, Mays, Schlesinger, and Schweers. He will testify as to EPA's understanding in the 1970's and 1980's of the application of the Clean Air Act and its regulations to existing facilities that undergo modifications.

Nancy Kete – World Resources Institute, 10 G Street, NE (Suite 800), Washington, D.C. 20002. (202) 729-7730. Ms. Kete is expected to testify as a rebuttal witness to anticipated testimony of Kenneth A. Schweers. Expected testimony will relate to modeling assumptions for use by ICF in the base case forecast. Ms. Kete is expected to testify that EPA was not making any assumptions about whether life extension projects and other modifications would trigger NSPS/NSR and that the agency was aware that the routineness analysis requires consideration of numerous case-specific facts not in EPA's possession. It was not her office's province to enforce NSPS/NSR or to make determinations regarding their applicability in specific cases. Thus, EPA did not instruct ICF to model the effect of new controls because there was no way to determine in the abstract whether modifications would trigger NSPS/NSR.

Sally Harmon – U.S. EPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, N. W., Washington, DC 20460. Ms. Harmon is a regulatory specialist with U.S. EPA and will testify regarding the procedures and authority levels for issuance of applicability determinations. She will testify regarding which applicability determinations are authoritative with regard to the evaluation of what constitutes a capital expenditure under the NSPS regulations.

We would also like some information about some of the witnesses on your list. Please provide information about the nature of the testimony of the following individuals by April 29, 2003:

Mike Dryjanski
 Gary McCutcheon
 Ralph Roberson
 Christopher Romaine
 Shashikant Shah
 Donald Sutton

You have also asked whether the United States would raise objections to the use of deposition transcripts from the other NSR cases. We are willing to discuss the specific depositions you are interested in using with you and to discuss depositions taken in the other NSR cases which we may wish to use. Please give David Roskam or me a call to discuss these depositions.

Sincerely,

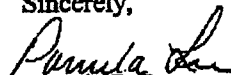

 Pamela R. Lee
 Trial Attorney

EXHIBIT C

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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UNITED STATES OF AMERICA, :

Plaintiff, : Civil Action No.

vs. : 99-CV-833-MJR

ILLINOIS POWER COMPANY and :

DYNEGY MIDWEST GENERATION, INC., :

Defendants. :

-----x

DEPOSITION OF NANCY KETE

Washington, DC
Wednesday, May 21, 2003

REPORTED BY:
CARMEN SMITH

1 A Related to my homeowners association.

2 Q Your deposition in the Duke case took
3 place in January of 2003; is that correct?

4 A I don't remember. It was winter of 2003.

5 Q As far as just the process, you've gone
6 through this now once recently, but you need to wait
7 for me to finish my question before you answer so
8 the court reporter can get it down. If you have any
9 questions, please let me know, because we want to
10 make sure the transcript reflects that you know what
11 you're answering, know what the questions are.

12 If you need to take a break, just let me
13 know. If you need any -- there may come times when
14 we use some technical terms. If you need
15 definitions of anything, let me know.

16 A Okay.

17 Q And I'll probably start out with asking
18 just your understanding of certain terms just so
19 they're basically straight for the record.

20 Before I do that, are you being paid for
21 your time with regard to this deposition?

22 A Yes.

1 A For all the NSR work after Duke.

2 Q You've been asked to be a witness in this
3 case; is that correct?

4 A I believe I'm a rebuttal witness.

5 Q Have you been asked to be a witness in any
6 other case for the Justice Department or for the
7 United States?

8 A I'm not presently working on that.
9 Sometimes I get calls and then the issue goes away.
10 So this is the only case I'm working for Justice on
11 right now.

12 Q Do you know whether you've been listed as
13 a fact witness or an expert witness?

14 A I don't know.

15 Q Have you been asked to testify as an
16 expert witness in this case?

17 A The term I always get is "rebuttal
18 witness."

19 Q So you're not sure whether you have or
20 have not been asked to act as an expert witness?

21 A No, I just -- rebuttal witness.

22 Q You've heard of the term "new source

1 Q And --

2 A Allegedly.

3 Q You're being paid by the United States?

4 A Yes.

5 Q For your time to act as a witness in this
6 case?

7 A Yes.

8 Q And how much are you being paid?

9 A \$250 an hour.

10 Q Is the rate the same for deposition as it
11 is for trial?

12 A I don't know.

13 Q Does that cover your preparation time
14 also?

15 A Yes. I assume.

16 Q Who did you reach this agreement with, if
17 you recall?

18 A Dan Beckhart, a Justice Department
19 attorney.

20 Q Did you reach that agreement for this
21 case, the Illinois Power case, or for all of the NSR
22 cases?

1 review"?

2 A Yes.

3 Q Can you give me your general understanding
4 of that?

5 A There are two senses of the term "new
6 source review." There's a general sense, which
7 would apply to new stationary sources, anywhere in
8 the United States. And it's the general review that
9 a facility has to go through in order to get a
10 permit. But there's a more narrow version of it,
11 which is the kind of permitting that a source has to
12 get if it's in a nonattainment area. So in general,
13 people don't make that distinction, but it's
14 technically just the latter.

15 Q How about "prevention of significant
16 deterioration," are you familiar with that term?

17 A Yes.

18 Q What's your understanding of that term?

19 A Well, we call it PSD. A PSD permit is the
20 kind of permit a source would have to get if it were
21 being sited in an attainment area, an area that met
22 all the ambient air quality standards.

EXHIBIT D

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES of AMERICA,) 99-CV-833-MJR
)
Plaintiff,)
vs.) East St. Louis, Illinois
) June 26, 2003
)
Illinois Power CO., and,)
Dynergy Midwest Generation, INC.)
Defendants,)

TRANSCRIPT OF TRIAL, VOLUME 15
BEFORE THE HONORABLE MICHAEL J. REAGAN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Department of Justice
Environmental Enforcement Section
Environmental and Natural Resources
Division
By: Pamela Lee, David Roskam, Paul
Stokstad, James Lofton, Jerome
MacLaughlin, Catherine McCabe,
Deborah Behles
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Assistant U.S. Attorney
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For the Defendant: Akin, Gump, Strauss, Hauer and Feld, LLP
By: Paul Gutermann, Perry Rosen, David
Quigley, Michael Caldwell, Rachel Gibson
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Schiff, Hardin & Waite
By: Sheldon Zabel, Stephen Bonebrake,
Mary Ann Mullin
6600 Sears Tower
Chicago, IL 60606

Court Reporter: Jane McCorkle
301 W. Main Street
Benton, Illinois 62812

Proceedings recorded by mechanical stenography, transcript
produced by computer.

6 apart from the WEPCo Port Washington plant?

7 A. No.

8 MR. STOKSTAD: No further questions.

9 THE COURT: Mr. Rosen.

10 CROSS EXAMINATION

11 BY MR. ROSEN:

12 Q. Good afternoon, Dr. Kete. Nice to see you again. Just
13 so we equal things out here, you are getting paid to testify
14 today. You are getting paid for your time today; is that
15 correct?

16 A. Yes.

17 Q. You had no involvement in drafting the PSD or NSPS
18 regulations?

19 A. Correct.

20 Q. You have no involvement in the enforcement of the NSPS
21 or PSD regulations?

22 A. Right.

23 Q. You did not, when you were at EPA, make applicability
24 determinations?

25 A. Correct.

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1 Q. The only one you ever worked on was from a policy
2 standpoint, and it was the WEPCo determination?

3 A. Correct.