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

AFFIDAVIT OF MARK D. HOPSON
IN RESPONSE TO ORDER TO SHOW CAUSE (Dkt. No. 1508)

WASHINGTON,)
) SS:
DISTRICT OF COLUMBIA)

I, Mark D. Hopson, declare the following:

1. I am a partner in the law firm of Sidley Austin LLP. My office is located in Washington, DC. My practice has involved the litigation and trial of civil and criminal matters since I completed my clerkship for U.S. District Court Judge Thomas F. Hogan in the District of Columbia in 1985.

2. Sidley Austin was hired as litigation counsel in this litigation by Cinergy in 2003; however, I did not begin spending significant amounts of time on this case until late 2007 and early 2008, as the case was being prepared for trial.

3. I spent substantial time with Tom Green and other lawyers and various client representatives during the early stages of my involvement in the case to learn about the law, the facts and the technology. From a very early stage, I understood that this case was unusual because liability turned on evaluating the accuracy of competing predictions and the facts were generally uncontroverted. I also came to understand that, if tried to a jury, the jury probably would have to decide which prediction was "correct" without the benefit of looking at the actual post-project data. Thus, I came to believe that – in common sense terms – the outcome of a trial would turn on contrasting two different approaches towards "predicting" emissions increases. There were no standard jury instructions for this type of case and we could not find a case on point that gave us any insight into how a jury would be asked to weigh competing predictions.

4. From my perspective, the way the evidence was presented by both sides presented a contest between two different approaches to the "emissions increase" prediction. We highlighted a more common sense or practical approach, based upon the "hands on" experience of Cinergy engineers. In contrast, the government's case was based upon a more "scientific" or theoretical approach. The case was framed up by both sides as an argument about which approach was more thoughtful, fair, or reasonable. In that regard, I believed that the strongest argument against the government's formula was that it did not exist as a method for predicting emissions until 1999 (after the projects in question already were completed). As a result, it was not an approach towards predicting emissions that was grounded in existing engineering approaches, but instead had been "made for litigation." By contrast, we attempted to

characterize Cinergy's view as a "reasonable, common sense" approach that "whether the front reheater tubes are old or whether the front reheater tubes are new and shiny doesn't cause emissions . . . ." Cinergy's closing argument, Tr. Trans. Vol. 10 pp. 1552:16, 1553:14-16. The contrast between fact witnesses and expert witnesses was of only secondary relevance because it supported the "hands on/contemporaneous" v. "theoretical/post hoc" theme. To the extent this Court believes that our trial strategy relied upon highlighting the differences between compensated and non-compensated witnesses, that was not the case and any such impression was wholly inadvertent.

5. As trial approached, we spoke to a number of witnesses who had first-hand knowledge of the relevant projects and issues to try and select the best witnesses to explain why Cinergy's engineers and operators did not believe these types of projects would cause an increase in emissions. Messrs. Batdorf and Pulskamp were identified, among others, as potential trial witnesses. At some point Mr. Green began taking the lead in trial team meetings with Mr. Pulskamp and I began taking the lead in those meetings with Mr. Batdorf.

6. As the Court is aware, this case presented some very novel and complex issues and no lawyer for Cinergy was expected to, or did, master all of the potential witnesses, issues, or millions of pages of documents. Prior to trial, I was focused on helping to develop the themes and overall approaches, including our approach to cross examinations, as well as developing our exhibits, demonstratives, motions and jury instructions. I did spend some time working with Mr. Batdorf, but that was a relatively small percentage of the time that I spent in pretrial preparation. Moreover, most of the time I spent with Mr. Batdorf actually involved obtaining information and explanations from him, including him providing me explanations about the various documents and technical issues involved in the case. In my view, the direct testimony that Cinergy had to

present was fairly straightfoward, and I spent most of my time prior to the start of trial focused on potential cross examination and other issues.

7. I did not see either the 2005 consulting agreement or the 2008 consulting agreement, and do not recall knowing about either of these documents, or their terms, prior to the post-trial proceedings in this case. I do not recall hearing about or knowing about whether or not a consulting agreement was called for in discovery, had been produced in discovery, or had been raised in deposition testimony or any other context, prior to the post-trial proceedings in this case. I did not know or understand that this was an issue, one way or another, until this post-trial controversy arose. I do acknowledge that it is possible that a question relating to compensation or a consulting agreement may have been raised at some point in trial preparation; however, if that occurred in my presence, I do not recall it.

8. In my experience, many, if not most, former corporate executives and managers of any significant tenure with a company (including executives and managers that have left voluntarily, been terminated or retired) have some type of consulting agreements (sometimes referred to as employment agreements or post-employment agreements). Such agreements generally exist to ensure that the company can call upon the experience, expertise and institutional knowledge of these individuals in the future if needed, primarily on business issues, but also in litigation. Thus, the question whether a witness in any case had such an agreement would not have struck me as an unusual or problematic situation. My general view is that such an agreement should be treated like any other potential impeachment question involving financial interest – i.e., that if asked, a witness should respond fully and truthfully. Though I cannot recall a discussion with Mr. Batdorf (or any of the other actual or potential witnesses for

Cinergy) about compensation issues, based on my past experience if such a discussion occurred my response would have been the same: respond fully and truthfully.

9. Mr. Batdorf's value as a witness was based upon the fact that he had "lived through" so many of the projects at issue (as well as similar projects) and had an ability to express the reasons why outages or emissions could not accurately be predicted by the Plaintiffs' formula. Mr. Batdorf's role at trial was identical to Mr. Pulskamp's role. In fact, the only substantive difference in their testimony was that Mr. Batdorf was familiar with the Indiana projects and Mr. Pulskamp was familiar with the Ohio projects. Mr. Batdorf's value as a witness had nothing to do with whether he was retired, or an active employee, or a consultant.

10. My reference to Mr. Batdorf as "retired" was not intended in any way to mislead or conceal. At no time during the trial did the thought ever cross my mind that referring to Mr. Batdorf as retired was inaccurate or incomplete. The same is true with respect to every other comment, argument or question I might have made in the courtroom; at no time did I intend to make a misleading argument or suggestion, implied or otherwise, about compensation or employment status. I did not participate in and am not aware of any effort to withhold or conceal such information from the jury, the Court, or the Plaintiffs. Throughout trial, I was not aware of, and never thought about, the existence of a consulting agreement; thus, I did not think about this as a disclosure issue, a credibility issue, or an inducement – or impediment – to Mr. Batdorf's testimony. Instead, I was focused on trying to draw out the themes contrasting first hand experience from after-the-fact, theoretical prediction that I described above. To the extent that the Court believes a contrary impression can be derived from the record, I deeply regret the misunderstanding.

11. Considerations about compensation or financial interest of Cinergy's witnesses had no impact on the way that I conducted myself in this trial, including the questions I asked and the arguments I made on behalf of Cinergy. I certainly was aware that a number of the potential witnesses, as well as the other three Cinergy employees who actually testified, held fairly senior positions with company and were compensated accordingly. But, I cannot recall a single discussion or even any conscious consideration on my part about whether that fact affected their credibility as witnesses.

12. In addition, there was no plan or strategy to portray Mr. Batdorf as a disinterested witness at trial. To the contrary, because his trial testimony involved defending decisions he made while he was a Cinergy employee, I assumed the jury would not perceive Mr. Batdorf to be disinterested. Moreover, I believe that a trial strategy predicated on portraying Mr. Batdorf as a disinterested witness would have been easily rebutted because Mr. Batdorf, by definition, was interested in the decisions he made as a Cinergy employee and which were being challenged in this case. Mr. Batdorf's first-hand experience and contemporaneous decision-making were two of the major reasons we believed he was a good witness and fit Cinergy's trial strategy.

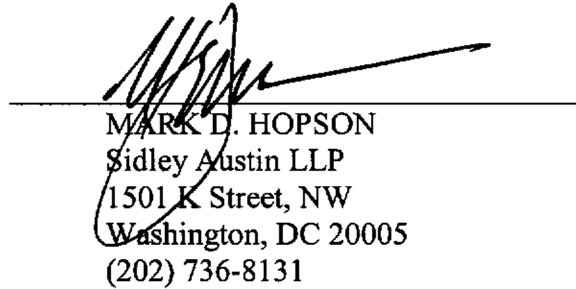
13. At the very outset of his direct examination, when I asked Mr. Batdorf if he was employed, it was used only as a preliminary or introductory question. There was no conscious thought about the significance of the phrasing of the question, and none of my additional questions of him depended on his answer to that question. The same is true with respect to Mr. Batdorf's response that he was retired. I have come to know Mr. Batdorf well enough to understand that he thinks of himself, and speaks of himself, as being retired. Nothing in that exchange struck me as being in any way inaccurate.

14. If I had viewed the trial as presenting more traditional credibility issues – e.g., two witnesses offering contradictory versions of what they saw or heard– it is possible that I would have been more focused on traditional considerations of credibility, bias or impeachment. But, I never considered this as a case where the individual credibility of either side's witnesses (as opposed to credibility of overall approaches, as described above) would carry the day. Even after listening to the government's case in chief, I did not consider the question whether Mr. Batdorf, or any of Cinergy's other witnesses, was being compensated to be material to either party's case. To the contrary my focus during cross examination, direct examination, and closing was on developing our trial themes, as summarized above. Mr. Batdorf's employment status was wholly irrelevant to our trial strategy and I viewed it then and view it now as immaterial to how we would try the case.

15. After Mr. Batdorf's examination was completed Mr. Batdorf, either directly or through an intermediary, asked if he could stay and observe the remainder of the trial. The question of Mr. Batdorf staying in the courtroom or observing the trial had not been raised with me prior to the conclusion of his testimony, and there was no plan or premeditation to the question I posed to the Court. I asked the Court's permission for him to remain in the gallery as a courtesy and to ensure there was no violation, real or perceived, of the Court's separation of witnesses order. My reference to him as being "retired" was not intended to convey any message and was not intended to further any trial strategy or argument. The comment was entirely made in passing, and the only meaning I believe that I intended to convey was that the request was not coming from counsel but was a personal request from Mr. Batdorf, who – because he did not have full time job to get back to – was interested in observing the trial proceedings. To the

extent that a contrary impression was created, I regret creating that impression, which was wholly unintentional.

FURTHER AFFIANT SAYETH NAUGHT.



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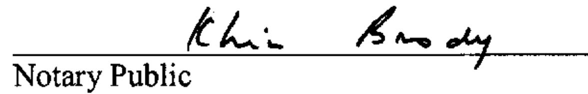
Sworn to and subscribed in my presence this 9/L day of January 2009.



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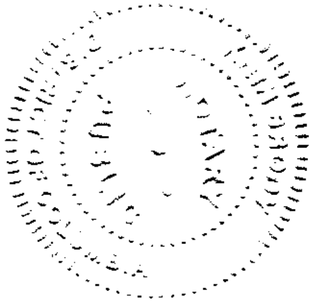

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My Commission Expires May 31, 2011