

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 DEAN M. MOESSER**

Dean M. Moesser, being of legal age and pursuant to 28 U.S.C. § 1746, deposes and says:

1. This declaration supplements my prior affidavit filed with this Court on November 10, 2008. When I drafted the 2008 consulting agreement for Bob Batdorf, I derived the Agreement's \$200 hourly rate by simply converting Mr. Batdorf's annualized compensation at the time he retired to an hourly rate based upon a 40-hour work week. I felt then and now that this methodology was reasonable, and it is consistent with how consulting rates for other retired executives of Duke Energy have been calculated, irrespective of whether the consulting agreement involves assistance during litigation.

2. My intent in drafting the 2008 consulting agreement was to fairly compensate Mr. Batdorf for the value of the considerable time that he would need to invest to prepare for trial, including reviewing thousands of documents, educating trial counsel about the Cinergy projects at issue, making repeated trips away from his home in southern Indiana, and time spent testifying at trial. These were the types of activities I had in mind when I used the phrase “advice and live testimony.” The 2008 consulting agreement anticipated that trial preparation would be managed by Cinergy’s counsel and that Mr. Batdorf would “receive assignments,” such as reviewing documents, from counsel; however, I absolutely never anticipated or expected that the content of Mr. Batdorf’s testimony would be controlled by Cinergy or its counsel. I never communicated or intimated in any way to Mr. Batdorf that payment under the agreement would be contingent upon the content of his testimony or that the content of his testimony would be directed or controlled by counsel. Indeed, the 2008 consulting agreement specifically states that Mr. Batdorf himself “will have the authority and responsibility to select the means, manner, and method of performing the obligations assumed hereunder.”

3. I became involved in management of the above-captioned litigation in mid-2007 after the Supreme Court issued its opinion in *Environmental Defense v. Duke Energy Corp.* I was unaware of the existence of the 2005 Agreement until after the liability trial and after Duke received the Plaintiffs’ motion for new trial. I was also unaware of any obligation to disclose either the 2005 Agreement or the 2008 Agreement to Plaintiffs in this case. I am not aware of any effort by the Cinergy attorneys to hide either the 2005 Agreement or the 2008 Agreement from the government, the jury, or the Court. In addition, and based on my experience with Mr. Batdorf, I believe he is honest and would have testified truthfully about the 2008 Agreement if he had been asked at trial or otherwise.

4. I did not attend every day of trial and I do not recall if I was in the courtroom when Mr. Batdorf testified that he was retired. Regardless, I do not consider the statement that Mr. Batdorf is retired to be controversial or material to the issues at trial. To my understanding, the term “retired” is commonly and correctly used to describe individuals who have resigned their long-term career but who may continue to spend their energies on alternative endeavors, including working on a non-full-time basis. I do not believe that Bob Batdorf was being untruthful or even shading the truth when he testified that he was “retired.”

5. Similarly, I do not consider it a controversial or material statement that Mr. Batdorf was not employed. “Employed” suggests to my mind a full-time employee who has on-going responsibilities to perform daily work under an employer’s supervision. To me this is different from being an independent contractor or a consultant. I believe that Mr. Batdorf’s statement at trial regarding his employment status was entirely truthful and made with no intention to mislead. He certainly was not a Cinergy employee, as was made explicit in the 2008 Agreement.

6. Furthermore, to my knowledge there was no stratagem or even a discussion among members of the trial team regarding Mr. Batdorf’s testimony about his employment status. To my knowledge, that testimony was noncontroversial for the entire team. To the extent that I was present in the courtroom on the day Mr. Batdorf stated that he was retired, I did not pay any particular attention to the statement or consider it to be questionable or controversial in any way.

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

FURTHER AFFIANT SAYETH NAUGHT

\_\_\_\_\_  
s/Dean M. Moesser  
DEAN M. MOESSER