

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. )

---

**AFFIDAVIT OF FRANK R. VOLPE**  
**IN RESPONSE TO ORDER TO SHOW CAUSE (Dkt. No. 1508)**

WASHINGTON, )  
) SS:  
DISTRICT OF COLUMBIA )

I, Frank R. Volpe, declare the following:

1. I am a partner in the law firm of Sidley Austin. I was first admitted to practice in Pennsylvania in 1994. I became a member of the District of Columbia bar in 1995. I have been with Sidley Austin since 1994. My office is located in Washington, DC. My practice involves litigation of criminal and civil matters.

2. While I have worked on this case on and off since 2004, I did not spend substantial amounts of time on the matter until the late fall of 2007.

3. I first learned of the existence of the 2008 Consulting Agreement between Robert Batdorf and Duke Energy in late September/early October 2008, in connection with a discovery issue raised by the Plaintiffs. I saw the 2008 Consulting Agreement for the first time on October 2, 2008. I learned about the 2005 Consulting Agreement on October 3, 2008.

4. I was the number three trial counsel during the May 2008 liability trial. My trial responsibilities included witness preparation, cross-examination of one of the Plaintiffs' experts and direct examination of one of Cinergy's four trial witnesses.

5. During the preparation for trial and during trial itself, I did not perceive any of the material issues to relate to whether a witness was paid or unpaid, nor did I perceive that the case would turn on credibility issues. For example, my cross-examination of Mr. Hugh Larkin, Plaintiffs' accounting expert, did not even bring up the fact that he was a paid expert. Instead, I focused the cross-examination on a more practical issue: do accounting rules say anything about whether a project should be considered routine repair and replacement under the Clean Air Act's New Source Review program. Likewise, neither my direct examination nor the cross-examination of Mr. John Swez focused on bias or credibility issues, despite the fact that, as an employee of Cinergy, Mr. Swez had an obvious interest in helping Cinergy win its case.

6. I understood Cinergy's trial theme to be that the jury should give more weight to the predictions of Cinergy's employees who were at the facilities in question at the time the projects were completed and made the decisions and predictions in real time. In contrast, the Plaintiffs' case relied on testimony from after-the-fact experts evaluating those same

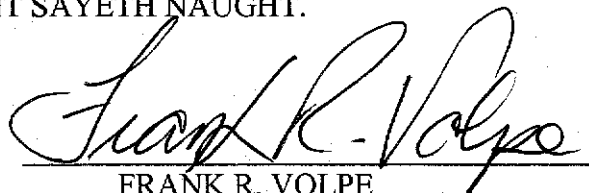
projects without the benefit of any hands-on experience. Cinergy's trial strategy did not depend on characterizing Mr. Batdorf's—or any of Cinergy's other witnesses'—relationship with Cinergy in any particular way other than as the actual Cinergy employees who made the decisions at issue. Furthermore, I am not aware of any pre-trial discussions involving characterizing the relationship between Cinergy and Mr. Batdorf—or any of Cinergy's other witnesses'—in any particular way other than as individuals who had first-hand knowledge of the facts to be presented at trial.

7. During the remedy phase, Mr. Batdorf's name was included on the witness list because he testified at the liability trial. As part of our preparation for the remedy phase trial, we evaluated all the potential witnesses to determine: (1) their level of knowledge about the relevant issues, and (2) whether they would make effective witnesses at trial. During discussions about Mr. Batdorf's possible role at the remedy trial, it became apparent that he was not one of the more knowledgeable witnesses about the specific issues raised by the remedy phase. At that point in time, Mr. Batdorf had not worked at the Wabash River plant for several years and, as a result, his knowledge about current conditions at that facility was limited as was his knowledge about the future projected costs and steps that the government's proposed remedies would entail.

8. In short, the decision to remove Mr. Batdorf from the remedy phase witness list was based on an assessment of Mr. Batdorf's usefulness as a witness in the remedy phase. Removing Mr. Batdorf's name from the witness list had nothing to do with his consulting agreement or any discovery disputes with the government.

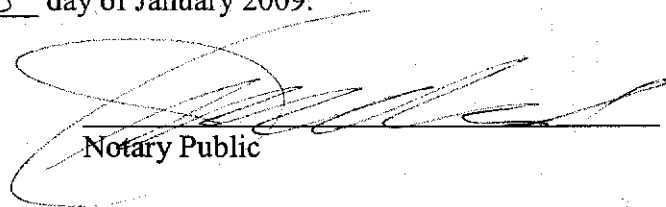
9. I declare under penalty of perjury that the information provided in this declaration is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.



FRANK R. VOLPE  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8366

Sworn to and subscribed in my presence this 8<sup>th</sup> day of January 2009.



Notary Public

**JESSICA Y. WEATHERFORD**  
**NOTARY PUBLIC**  
District of Columbia  
**My Commission Expires February 14, 2009**

