

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF INDIANA
 INDIANAPOLIS DIVISION

| | | |
|-------------------------------------|---|----------------------|
| UNITED STATES OF AMERICA, |) | |
| Plaintiff, |) | |
| |) | |
| STATE OF NEW YORK, |) | |
| STATE OF NEW JERSEY, |) | |
| STATE OF CONNECTICUT, |) | |
| HOOSIER ENVIRONMENTAL COUNCIL, |) | |
| and OHIO ENVIRONMENTAL COUNCIL, |) | |
| Plaintiff-Intervenors, |) | |
| |) | |
| vs. |) | 1:99-cv-1693-LJM-JMS |
| |) | |
| CINERGY CORP., PSI ENERGY, INC. and |) | |
| THE CINCINNATI GAS & ELECTRIC |) | |
| COMPANY, |) | |
| Defendants. |) | |

ORDER ON DOCKET NO. 1617

This cause is before the Court on defendants', Cinergy Corp., PSI Energy, Inc., and the Cincinnati Gas & Electric Company (collectively, "Cinergy"), Motion *in Limine* to Exclude Testimonies of Hugh Larkin, Jr. ("Larkin"), and Alan Michael Hekking ("Hekking"). Cinergy asserts that plaintiff's, the United States of America, and plaintiff-intervenors', the States of New York, New Jersey and Connecticut, and the Hoosier Environmental Council and the Ohio Environmental Council (all plaintiffs, collectively, "Plaintiffs"), experts' testimony is irrelevant to the issues that remain for trial and should be excluded. Specifically, Cinergy argues that Larkin and Hekking were proffered as experts on Cinergy's routine maintenance, repair, and replacement ("RMRR") defense, which is no longer at issue in this case.

Plaintiffs have agreed to withdraw Larkin from their witness list and submit that Cinergy's motion with respect to Larkin is now moot. The Court hereby declares Cinergy's motion *in limine* to exclude Larkin's testimony **MOOT**.

With respect to Hekking testimony, however, Plaintiffs argue that Hekking provides context for the project at issue and lays a foundation for Plaintiffs' evidence that Cinergy should have expected its predicted increase in the hours of operation of its units to result in a significant increase in annual emissions. In other words, Hekking will testify to the importance of these projects to increase capacity.

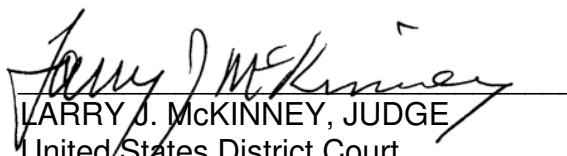
After reviewing Hekking's report and Hekking's testimony at the first liability trial, the Court concludes that his report and testimony are not relevant to the remaining issue in this case or their relevance is substantially outweighed by the danger of confusion of the issues and would unduly delay resolution on the merits. Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, the Court must assess not only whether an expert is qualified to testify to the matters at issue, but whether the testimony will assist the trier of fact. Fed. R. Evid. 702. The latter inquiry focuses on relevance. See *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004). The test for relevance is whether the evidence has any tendency to make a fact at issue more probable or less probable than it would be without the evidence. Fed. R. Evid. 401. In the FRE 702 context, an expert's opinion may assist the trier of fact with any issue involved in the case; the expert need not opine about the ultimate issue. See *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). Here, the remaining issue in the case is whether, for each project still at issue, Cinergy should have expected the project to result in a significant net increase in emissions. Although Hekking's report

summarizes the scope and purpose of several of the remaining projects, the conclusions he makes from those summaries relate only to the RMRR question; there is nothing to connect those summaries to an opinion about the reasonableness of a prediction about emissions increases. Moreover, the scope and purpose of each project, while relevant, is taken directly from Cinergy documents. Hekking's summary of them adds nothing helpful for the jury in deciding the ultimate question.

Because Hekking's summary adds nothing helpful, his testimony is of little relevance. Therefore, under Federal Rule of Evidence 403, the relevance of Hekking's report and testimony on the remaining issue in the case is substantially outweighed by the danger of confusion of the issues. Plaintiffs proffered Hekking's testimony on RMRR and his admissible opinions relate to that topic. The Court has determined that RMRR is no longer an issue in the case; thus any testimony about it could lead the jury to consider issues outside the scope of the emissions question. Moreover, Hekking's testimony could add considerable time to the trial with little benefit.

For these reasons, the Court **DENIES as MOOT** defendants', Cinergy Corp., PSI Energy, Inc., and the Cincinnati Gas & Electric Company, motion *in limine* to exclude the testimony of Hugh Larkin, Jr., and **GRANTS** defendants', Cinergy Corp., PSI Energy, Inc., and the Cincinnati Gas & Electric Company, motion *in limine* to exclude the testimony of Alan Michael Hekking.

IT IS SO ORDERED this 24th day of April, 2009.


LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution attached.

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