

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

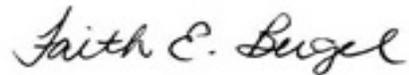
In the Matter of:)
)
SIERRA CLUB, ENVIRONMENTAL)
LAW AND POLICY CENTER,)
PRAIRIE RIVERS NETWORK, and)
CITIZENS AGAINST RUINING THE)
ENVIRONMENT)
)
Complainants,)
)
)
v.)
)
MIDWEST GENERATION, LLC,)
)
)
Respondent.)

PCB No-2013-015
(Enforcement – Water)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ OPPOSITION TO MIDWEST GENERATION, LLC’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINION** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: April 1, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
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)	PCB No-2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

**COMPLAINANTS’ OPPOSITION TO MIDWEST GENERATION,
LLC’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY
IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINION**

Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairie Rivers Network and Citizens Against Ruining the Environment (“Complainants”) oppose Midwest Generation, LLC’s Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion *in Limine* to Exclude Quarles Opinion. As grounds for their opposition, Complainants state as follows:

1. On February 4, 2022, MWG filed its Motion *in Limine* to exclude the opinions of Mark Quarles (“MWG’s Quarles Mot.”). On March 4, 2022, Complainants filed their Response to MWG’s Motion *in Limine* to Exclude Quarles Opinions (“Complainants’ Resp.”). On March 18, 2022, MWG filed a Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion *in Limine* to Exclude Quarles Opinion (“MWG Reply Mot.”).

2. MWG has failed to demonstrate material prejudice as required by Rule 500(e). 35 Ill. Adm. Code 101.500(e). MWG will not be prejudiced by denial of its motion for leave to file

because MWG’s proffered reply brief does not offer any argument beyond what it already provided in its original February 4, 2022 Motion *in Limine* to Exclude Quarles Opinions. Denial of the right to file a reply is appropriate and will not prejudice a party when that party has already “adequately stated its position.” *People of the State of Illinois vs. Peabody Coal Co.*, PCB 99-134, 2002 WL 745609, at *3 (Apr. 18, 2002).

3. MWG argues that it must have the opportunity to respond to Complainants’ “new and contrived reading” of the Hearing Officer’s September 14, 2020 Order. MWG Reply Mot. ¶ 11 (citing *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer’s Order (Sept. 14, 2020) (“Sept. 14, 2020 Order”)). MWG’s motion should be denied because Complainants’ Response regarding the appropriate interpretation of the Hearing Officer’s Order merely rebuts the arguments asserted by MWG in its motion *in limine*.

4. First, it is MWG’s reading of the Hearing Officer Order that is contrived and misleading because MWG originally argued that the Hearing Officer’s Order limited remedy-phase experts to “elaboration and amplification” and completely omitted whole categories of information that the Hearing Officer permits new experts to present. MWG’s Quarles Mot. at 6 (citing Sept. 14, 2020 Order). Complainants’ Response calls MWG out on that incomplete reading of the September 14, 2020 Order and MWG’s omission of the “more information” that the Hearing Officer’s Order permits experts to provide. Complainants’ Resp. 1–4. Second, MWG is not prejudiced at all by Complainants’ response because Complainants’ response provides no more than a normal and reasonable rebuttal to MWG’s original Motion *in Limine*. Complainants’ Response simply offers their interpretation of the Hearing Officer’s order to counter to MWG’s unreasonably narrow reading of the September 14, 2020 Order. This is not a new argument; it is simply a rebuttal to MWG’s arguments.

5. MWG uses their reply to argue that they would be highly prejudiced by what they describe as conflicting opinions from Dr. Kunkel and Mr. Quarles. MWG Reply Mot. ¶ 11. Again, this argument does not merit a reply brief from MWG. This is a new argument by MWG that is not in response to any argument Complainants' made in their response. Complainants have been clear that they are relying on Mr. Quarles for expert opinions as to remedy and relying on Mr. Shefftz for economic opinions. *See, e.g.,* Complainants' Resp. to MWG Quarles Mot., at 8 (discussing that barring Mr. Quarles' testimony would leave Complainants with "no expert who can discuss the mechanics of a remedy at all"). Mr. Shefftz's reliance on Dr. Kunkel's remedy report does not create any conflict between Mr. Quarles' opinions and Dr. Kunkel's opinions. Mr. Shefftz relies on Dr. Kunkel's remedy report for the narrow purpose of providing cost figures. And even if there were a conflict between the inputs that Mr. Shefftz relies on and Mr. Quarles' expert opinions, this would not provide grounds for completely excluding Mr. Quarles' testimony. *See Poltrock v. Chicago & N. W. Transp. Co.*, 151 Ill. App. 3d 250, 255, 502 N.E.2d 1200, 1203 (1986) (expert testimony in conflict with eyewitness testimony does not make it inadmissible).

6. MWG's reply brief "offers no assistance" to the Hearing Officer because it misstates Complainants' arguments. *See Commonwealth Edison Company v. Illinois Environmental Protection Agency*, 2007 WL 1266937, at *2 (April 26, 2007). MWG incorrectly argues that "For Mr. Quarles, Complainants argue that the Kunkel remedy opinion must be ignored." MWG Mot. ¶ 1. Complainants do not argue that Dr. Kunkel's remedy opinion must be ignored. Complainants argue that Mr. Quarles does not need to offer the same opinions as those offered in Dr. Kunkel's remedy report, that report is not part of the record before the Board, and the Hearing Officer Order allows Mr. Quarles to "present more information." Further,

Complainants' response points out that Mr. Quarles' opinions are consistent with Dr. Kunkel's hearing testimony and the rest of the record that is before the Board. Complainants' Resp. at 3-6. Because MWG's reply brief "offers no assistance" to the Hearing Officer, MWG's Motion for Leave to Reply should be denied. *See Commonwealth Edison Co. v. Illinois Environmental Protection Agency*, PCB 04-215, 2007 WL 1266937, at *2 (April 26, 2007).

7. MWG also argues that Complainants' erroneous citation to a party's brief in the *Johns Manville v. Illinois Department of Transportation* proceeding justifies allowing MWG a reply brief. MWG Reply Mot. At ¶ 9. *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2. Complainants agree that this is an error but, contrary to MWG's characterization of that error, it is a minor one. Complainants included three additional cases in the same string citation with the citation to the Johns Manville brief; *Wiegman v. Hitch-Inn Post of Libertyville*, 308 Ill. App. 3d 789, 799 (2d Dist. 1999); *People v. Consolidated Freightways*, PCB 76-107, 1978 WL 9011, *5 (Oct. 4, 1978); *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006). These citations are good law and reliable authority that provided the necessary support for Complainants' arguments, even without the erroneous citation. No other participant relied on Complainants' citation to the *Johns Manville* brief, so it is a case of "no harm no foul." This citation certainly does not warrant a reply by MWG.

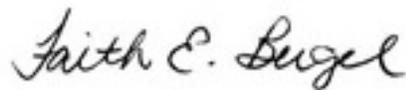
8. Even if MWG could overcome its failure to demonstrate material prejudice, it fails to comply with the Board's Procedural Rules by submitting a motion and reply whose combined page total exceeds the original motion *in limine* and Complainants' response. MWG's motion *in limine* totaled nine pages. Complainants' response totaled 14 pages. MWG's motion for leave to file a reply, and its reply, total a combined 16 pages. Rule 101.500(e)'s admonition that there is no right to a reply requires parties to narrowly tailor any reply that they may seek to

file. A reply that exceeds the length of the original motion is not narrowly tailored. MWG's failure to properly constrain its reply necessitates denial of its motion for leave to file.

For these reasons, Complainants oppose Midwest Generation, LLC's Motion for Leave to File, *Instantly*, Its Reply in Support of Its Motion *in Limine* to Exclude Quarles Opinion.

Dated: April 1, 2022

Respectfully submitted,



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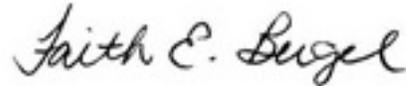
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CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE QUARLES OPINION** before 5 p.m. Central Time on April 1, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 8 pages.

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