

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) AS 2021-001
PETITION OF MIDWEST)
GENERATION, LLC FOR AN)
ADJUSTED STANDARD FROM) (Adjusted Standard)
845.740(a) AND FINDING OF)
INAPPLICABILITY OF PART 845)
(JOLIET 29 STATION))

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Motion for One of Its Expert Witnesses to Testify Remotely, a copy of which is herewith served upon you.

Dated: April 19, 2022

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, and Midwest Generation, LLC's Motion for One of Its Expert Witnesses to Testify Remotely was electronically filed on April 19, 2022 with the following:

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and that copies were sent via e-mail on April 19, 2022 to the parties on the service list.

Dated: April 19, 2022

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) AS 2021-001
Petition of Midwest Generation, LLC's)
Petition for an Adjusted Standard from)
845.740(a) and Finding of Inapplicability)
of Part 845 (Joliet 29 Station))

MOTION FOR ONE OF ITS EXPERT WITNESSES TO TESTIFY REMOTELY

Midwest Generation, LLC (“MWG”), submits this Motion for One of its Expert Witnesses to Testify Remotely, pursuant to Illinois Pollution Control Board (“Board”) Rules 101.500 and 101.600(b). MWG respectfully requests that the Board allow MWG to present its expert on pozzolanic reactions, Mr. Mateusz Radlinski, remotely by WebEx or a similar video conference platform at the hearing for its Petition for an Adjusted Standard scheduled for June 28 and 29, 2022 in Joliet, IL. Mr. Radlinski is located in Menlo Park, CA, and his testimony is expected to take approximately one hour. Appearing remotely would greatly reduce the time and expense otherwise required to appear in Joliet, IL. Other than Mr. Radlinski, MWG’s witnesses, attorneys, and participating representatives will appear in person at the hearing. Illinois EPA has stated it does not object to MWG’s motion. In support thereof, MWG states as follows:

1. On May 11, 2021, MWG filed its Petition for an Adjusted Standard (“Petition”) from 845.740(a) and Finding of Inapplicability of Part 845.
2. On September 22, 2021, Illinois EPA filed its Recommendation to the Board stating that Part 845 was inapplicable to Pond 1 and Pond 3 at the Joliet 29 Station.
3. On February 4, 2022, the Illinois Environmental Protection Agency (“Illinois EPA”) filed with the Board its Recommendation for Pond 2 at the Joliet 29 Station.
4. On March 24, 2022, MWG filed with the Board its Response to Illinois

EPA's Recommendation.

5. Attached to MWG's Response are affidavits and expert reports by seven witnesses, including one by Mr. Radlinski of Exponent.

6. Mr. Radlinski is located in Menlo Park, CA. All of MWG's other witnesses and experts are located within a reasonable driving distance of Joliet, IL and are able to appear at the hearing in person.

7. The hearing on MWG's Petition is scheduled for June 28 and 29, 2022 at the Will County Board Office Building located in Joliet, IL in the County Board Room and/or in a conference room.

8. Section 101.600(b) states that a Board hearing may be held by videoconference and that "[i]n deciding whether a hearing should be held by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness." 35 Ill. Adm. Code 101.600(b).

9. The Board Rules are silent on whether a witness may offer testimony remotely. When the Board Rules are silent, the Board may look to the Supreme Court Rules for guidance. 35 Ill. Adm. Code 101.100(b).

10. Illinois Supreme Court Rule 45 states that a "court may, upon request or on its own order, allow a case participant to participate in a civil or criminal matter remotely, including by telephone or video conference." Ill. S. Ct. R. 45.

11. Illinois Supreme Court Rule 241 states that a court " may, upon request or on its own order, for good cause shown and upon appropriate safeguards, allow a case participant to testify or otherwise participate in a civil trial or evidentiary hearing by video conferencing

from a remote location.” Ill. S. Ct. R. 241.

12. The Illinois Supreme Court’s Policy on Remote Court Appearances in Civil Proceedings also states that “to improve access to courts, increase efficiency, and reduce costs, courts should permit Remote Court Appearances¹ to the extent reasonable, feasible, and appropriate,” and that Rule 45 does not require a Case Participant² to demonstrate hardship or good cause to appear remotely. Ill. S. Ct. Policy on Remote Court Appearances in Civil Proceedings, p. 2, attached as Ex. 1. The Policy also identifies numerous benefits for allowing Remote Court Appearances including decrease the time and expense of coming to court, increase the accessibility to courts for Case Participants outside of the state, and allow witnesses and experts a more efficient and convenient way to provide testimony. *Id.* at 4.³

13. The Board has successfully heard remote witness testimony and permitted remote appearances on multiple occasions. For example, in *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, the hearings for the rulemaking were almost fully remote, in which multiple parties and witnesses testified and participated through the Board’s remote system. More recently, in a hearing held March 9, 2022 for *In the Matter of: Proposed Amendments to Groundwater Quality 35 Ill. Adm. Code 620*, the Board similarly allowed numerous participates and attorneys to appear remotely to “reduce the time and cost of travel for the Board and hearing participants.” *See* PCB R22-18, HO Order, 1/13/2022. Additionally, in *Johns Manville v. Illinois Dept. of Trans.* PCB14-3, Johns Manville remotely presented two witnesses as part of

¹ “Remote Court Appearance” is defined as “Participation by at least one Case Participant in a court proceeding via Telephone or Video Conference.” Ill. S. Ct. Policy on Remote Court Appearances in Civil Proceedings, p. 3.

² “Case Participant” is defined as “Any individual involved in a civil case including the judge presiding over the case, parties, lawyers, . . . , witnesses, experts . . . , and court reporters.” *Id.*

³ Courts are not the only governmental forum embracing remote appearances. Both houses of the 102d General Assembly allowed its members to participate and vote in committees and regular sessions remotely. *See* Rules of the Illinois Senate of the 102d General Assembly, Rules 3-1(f) and 4-1(e) (2022) and Rules of the Illinois House of Representatives of the 102d General Assembly, Rules 15(c) and 25 (2022).

its case in chief, Mr. David Peterson and Mr. Michael Nguyen. *See* PCB14-3, Hr. Trs. 10/26/2020, pp. 128-205 and 10/27/2020 pp. 89-139.⁴

14. In this case, Mr. Radlinski's testimony is limited to his opinion on the qualities, and chemical formulation of poz-o-pac material, and is expected to be approximately one hour. Mr. Radlinki's testimony is important to rebut certain assertions made in Illinois EPA's Recommendation, but he is not one of MWG's primary expert witnesses with respect to the requested adjusted standard.

15. To appear in person for approximately one hour of testimony, Mr. Radlinski would need to fly to Chicago on June 27, 2022 for his testimony on June 28, 2022. Depending on when he would testify on June 28, 2022, he likely would have to travel back to California on June 29, 2022. In total, Mr. Radlinski, would likely spend at least 20 hours traveling, and two nights in a hotel at a significant cost.

16. Allowing Mr. Radlinski to testify remotely for approximately one hour is a more efficient and convenient way to provide testimony, because it will reduce the time and cost of travel of appearing in front of the Board. *See* PCB R22-18, HO Order, 1/3/2022.

17. It is also reasonable and feasible for Mr. Radlinski to testify remotely. Counsel for MWG contacted the Will County Board Infrastructure Supervisor, Mr. Ben Knight, regarding the availability of equipment for presenting a person remotely at the Will County Board Office Building, including screens, cameras, microphones, and speakers.

18. Mr. Knight informed MWG's counsel that the Will County Board Room and other government conference rooms are fully equipped for a person to appear remotely via a WebEx connection, and confirmed that the parties have permission to use the equipment

⁴ The only challenge presented during the *Johns Manville* hearing was due to a certain *court reporter's* remote participation rather than the witnesses. *See* Hr. Tr. 10/29/2022. However, this seems to have been a unique circumstance, because a court reporter on another day participated remotely successfully. *Id.* Hr. Tr. 10/27/2020.

during the hearing. The party requesting to use the equipment must schedule the WebEx meeting and reserve a meeting number.

19. MWG is able to schedule a WebEx meeting and meeting number to use for Mr. Radlinski's remote testimony.

20. Because there will be only one connection between the Will County Board Room and Mr. Radlinski's computer, it is not expected that there will be significant complications for conducting the testimony remotely. In any case, to assist in assuring that Mr. Radlinski's remote testimony will be successful, MWG intends to schedule a date and time before the hearing with Mr. Knight and Mr. Radlinski to confirm that the equipment at the Will County Office Building and Mr. Radlinski's equipment are set up correctly to ensure a successful connection on the hearing date.

21. Additionally, counsel for MWG or a designated assistant will operate and monitor the WebEx during Mr. Radlinski's testimony to maintain the connection.⁵

22. Illinois EPA's counsel stated that they have no objection to MWG's request.

WHEREFORE, MWG respectfully requests that the Board allow Mr. Radlinski to appear and testify remotely at the hearing in this matter.

Respectfully submitted,

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⁵ Mr. Knight also represented to MWG that he would also be able to assist on the day of the hearing.