BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
ILLINOIS POWER GENERATING COMPANY; ILLINOIS POWER RESOURCES GENERATING, LLC; ELECTRIC ENERGY, INC.; and VISTRA ENERGY CORP.	)	**PCB 19-078 (Enforcement – Water)**
	)	
Respondents.	)	

NOTICE OF FILING

To:

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Respondent's **Proposed Discovery Schedule on Liability Issues**, copies of which are hereby served upon you.

/s/ *Ryan C. Granholm*
Ryan C. Granholm

Dated: November 1, 2019

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	**PCB No. 19-78**
ILLINOIS POWER GENERATING COMPANY, ILLINOIS POWER RESOURCES GENERATING, LLC, ELECTRIC ENERGY, INC., and VISTRA ENERGY CORP.	)	**(Enforcement – Water)**
	)	
Respondents.	)	

Respondents' Proposed Discovery Schedule on Liability Issues

1. On October 3, 2019, the Illinois Pollution Control Board ("Board") granted Respondents' Motion to Bifurcate this case into separate liability and expert phases, holding that, for purposes of scheduling and case management, "this case is more analogous to Midwest Generation than to CWLP." Order of the Board, 4 (Oct. 3, 2019).

2. By written order dated October 17, 2019, the Hearing Officer directed Sierra Club and Respondents (the "Parties") to file a proposed joint discovery schedule for the liability phase by October 30, 2019. The Hearing Officer extended this deadline on October 31, by Joint Motion of the Parties, to November 1, 2019.

3. While the Parties have negotiated in good faith regarding a proposed discovery schedule for the liability phase of this case, they have not reached agreement regarding the time that will likely be required to complete discovery in this multi-site, multi-party case. Respondents offer below, in Table 1, a proposed schedule—mirroring the discovery timeframes which proved to be necessary for *Sierra Club v. Midwest Generation, LLC*, PCB 13-15—that sets reasonable discovery deadlines that account for the complexity of Sierra Club's Complaint.

I. Sierra Club's Positions to Date Have Not Reflected the Complexity of this Case:

4. Sierra Club and Respondents (collectively, the "Parties") conferred by telephone regarding a proposed discovery schedule on October 22, 2019. During this call, despite the Board's ruling on bifurcation, Sierra Club continued to assert that this case is most analogous to *Sierra Club v. City Water, Light & Power*, PCB 18-11 ("*CWLP*"), a case involving a single site, with a single owner. Accordingly, Sierra Club proposed a thirteen-month discovery schedule, similar to that used in *CWLP* ("Sierra Club's Original Proposal").

5. In contrast, Respondents contend that a discovery schedule similar to that used in *Midwest Generation* is more appropriate. Respondents, therefore, proposed a 24-month schedule, similar to that used in *Midwest Generation* ("Respondent's Proposal," listed on Table 1 below).

6. For its part, Sierra Club has not identified any ways in which discovery in this case will be narrower than discovery in *Sierra Club et al., v. Midwest Generation*, PCB 13-15 ("*Midwest Generation*"), which entailed a total of 24 months from the initial discovery schedule (issued June 9, 2014) to the deadline for dispositive motions (June 1, 2016), and ten months for fact discovery alone. In fact, counsel for Sierra Club orally indicated that it intends to take wide-ranging discovery regarding groundwater conditions and management of coal combustion residuals at each of Respondents' three sites.

7. Instead of distinguishing *Midwest Generation* based on the scope of the allegations or the scope of discovery, Sierra Club contends that *Midwest Generation* required a 24-month schedule because of "extenuating circumstances" unique to that case, such as a bankruptcy. Not so. The docket in *Midwest Generation* clearly indicates that the bankruptcy stay was lifted in that case on January 10, 2014 and a subsequent motion to stay was resolved on

April 17, 2014, well before the initial discovery schedule was set on June 9, 2014. Nevertheless, the Hearing Officer set an initial fifteen-month discovery schedule, which was extended *by agreement* of the parties four separate times before discovery eventually concluded.

8. The Parties held a second call on October 30, 2019 to attempt to reach consensus. Rejecting Respondents' proposal, Sierra Club's attorneys offered to extend the proposed fact discovery deadline to July 1, 2020, but did not offer any revised expert discovery deadlines.

9. As Respondents' noted in their Motion to Bifurcate, this case will likely require complicated fact and expert discovery involving a variety of expert witnesses. Sierra Club's Complaint implicates three separate facilities, four separate corporate entities, and eight separate "repositories" for CCR. Compl. ¶¶ 5, 11, 17. The Complaint cites up to eight years of monitoring data at each facility, and its exhibits identify more than 100 separately-named monitoring wells. Compl. ¶¶ 6, 12, 18, Exs. A-1 – C-3. Sierra Club's attorneys have suggested that they will seek broad discovery on all of these topics.

10. Additionally, Sierra Club does not appear to have accounted for the possibility of third-party discovery on the Illinois Environmental Protection Agency ("IEPA"). This discovery may be required to ascertain the nature and scope of existing permits, corrective measures at Respondents' facilities, and IEPA's application and interpretation of the regulatory requirements at issue.

II. Fact Discovery Will Require More than Eight Months:

11. It will simply not be possible to complete fact discovery, as Sierra Club suggests, on all of these topics in less than eight months—by July 1, 2020. Sierra Club has indicated that it intends to seek full, wide-ranging discovery regarding each of the three sites named in its Complaint. In *Midwest Generation*, a matter that involved only one respondent, fact discovery

lasted nearly ten months.[1] Sierra Club has offered no explanation of how its discovery will be narrower here. To allow sufficient time for document discovery, third party discovery, and fact depositions, Respondents recommend a twelve-month period for the completion of fact discovery on liability issues.

12. Respondents intend to respond to all discovery requests expeditiously and in good faith consistent with all applicable requirements. Absent a clear understanding of each (potentially voluminous) set of requests, Respondents suggest that it would not be useful to set a deadline, as Sierra Club has suggested, for "submission of initial requests for production, interrogatories, and requests for admission."[2] While, for its part, Sierra Club may have the benefit of re-using discovery requests they issued in *CWLP* or *Midwest Generation* (which are unknown to Respondents), Respondents have no such efficiencies, and their burden of responding to Sierra Club's discovery and propounding their own discovery will likely be considerable. Documents may be stored in several physical and electronic locations, possibly with separate custodians for each site.

13. Sierra Club's proposed fact deposition timeline is similarly unrealistic. In *CWLP*, even though it involved only one site and one corporate entity, Sierra Club conducted approximately five fact depositions. Given the number of sites (three) and corporate entities (four) named in Sierra Club's Complaint, Respondents anticipate that Sierra Club may seek *at least* twice as many depositions. Respondents anticipate taking multiple depositions as well.

[1] The initial discovery schedule in *Midwest Generation* was set on June 9, 2014. When the revised schedule was revised for the first time, on February 11, 2015, the fact discovery deadline was moved to March 31, 2015.

[2] Similarly, Respondents do not believe that a deadline for beginning fact depositions is required. The Parties should be free begin fact depositions at any time.

Therefore, to allow sufficient time for document and oral fact discovery, a twelve month fact discovery period is appropriate.

III. Expert Discovery Will Require More than Four Months:

14. Finally, Sierra Club's proposed expert discovery period, allowing Respondents just one month to submit responsive expert reports and just two months for the Parties to complete expert depositions is also inadequate. Respondents' anticipate preparing four to six expert reports, resulting in five to eight total expert depositions. Therefore, at least three months are appropriate for Respondents to prepare their expert reports and at least three months will be required to schedule and conduct expert depositions.

15. In order to allow adequate time for discovery and to minimize the need for the parties to seek future extensions from the Hearing Officer, Respondents request that the Hearing Officer adopt their proposed discovery schedule outlined on Table 1 below.

Table 1		
Event	**SC's Proposal**	**Respondents' Proposal**
Close of fact discovery	7/1/20[3]	11/1/20
Complainants' expert reports due	8/17/20*	1/1/21
Respondents' expert reports due	9/23/20*	4/1/21
Complainants' expert replies due	10/19/20*	5/1/21
Expert depositions begin	11/16/20*	6/1/21
Close of expert discovery	12/16/20*	9/1/21
Deadline for dispositive motions	2/17/21*	11/1/21

WHERFORE, Respondents respectfully request that the Hearing Officer adopt Respondents' proposed discovery schedule for the liability phase of this case, outlined above.

Dated: November 1, 2019

/s/ *Daniel J. Deeb*
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[3] As proposed during the Parties' Oct. 30, 2019 call.

* All expert discovery dates, beginning with this date, have been moved back by 75 days from Sierra Club's Original Proposal, to reflect Sierra Club's revised end of fact discovery, which was moved back 75 days from Sierra Club's Original Proposal. Where counting 75 days from Sierra Club's Original Proposal resulted in a deadline on a weekend, dates were moved to the next business day.

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 1st day of November, 2019, I have served electronically the attached **Proposed Discovery Schedule on Liability Issues**, upon the following persons by e-mail at the email addresses indicated below:

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I further certify that my email address is rgranholm@schiffhardin.com; the number of pages in the email transmission is 11; and the email transmission took place today before 5:00 p.m.

/s/ *Ryan C. Granholm*
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