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	)	
	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES** and **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: April 1, 2020

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.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

COMPLAINANTS' MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES

Pursuant to 35 Ill. Admin. Code. 101.502(a), Complainants respectfully request that the Hearing Officer grant leave to Complainants to designate substitute expert witnesses for the remedy phase of this litigation and disclose them when appropriate to Respondent, Midwest Generation, LLC ("MWG"). In support of this Motion, Complainants state as follows:

1. On June 20, 2019, the Illinois Pollution Control Board (the "Board") found that MWG violated Section 12(a), 12(d) and 21(a) of the Environmental Protection Act and related Board regulations. The Board found the record insufficient to determine the appropriate remedy and directed the hearing officer to hold additional hearings on the appropriate relief and remedy.

2. On February 6, 2020, the Board partially denied MWG's motion to reconsider and clarify the Board's June 20, 2019 decision in this matter. The Board went on to direct the hearing officer to move expeditiously to hearings on remedy.

3. On February 25, 2020, Hearing Officer Bradley P. Halloran directed the parties to file a proposed discovery schedule. The parties each provided a proposed discovery schedule to the Hearing Officer on March 23, 2020.

4. On March 30, 2020 Hearing Officer Halloran approved of the parties' proposed discovery schedules through May 29, 2020, where the parties were both in agreement.

5. Complainants identified two expert witnesses in the liability phase of this proceeding, Dr. James Kunkel and David Schlissel. Dr. Kunkel appeared as an expert on Complainants' behalf in the liability phase of this hearing. Oct. 26, 2017 Hearing Tr. at 24. Complainants have determined that a new expert would be better placed than Dr. Kunkel to address the issues that remain to be resolved in the remedy phase of the litigation.

6. Due to the bifurcation of this proceeding into liability and remedy phases, David Schlissel has not yet appeared as an expert on behalf of Complainants, and Respondents have not yet deposed Mr. Schlissel. Mr. Schlissel recently communicated to Complainants' counsel that he is no longer working in a full-time capacity, has reduced his project load, and does not have availability to re-engage as an expert in this matter.

7. Motions regarding evidence or discovery, like this motion, are properly directed to the Hearing Officer because they are not dispositive of the proceeding. 35 Ill. Admin. Code. 101.502(a) provides, in part,

> The hearing officer has the authority to rule on all motions that are not dispositive of the proceeding. Dispositive motions include motions to dismiss, motions to decide a proceeding on the merits, motions to strike any claim or defense for insufficiency or want of proof, motions claiming lack of jurisdiction, motions for consolidation, motions for summary judgment, and motions for reconsideration.

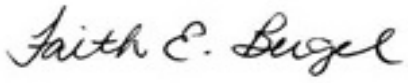
8. Complainants respectfully request that the Hearing Officer grant Complainants' leave to designate substitute expert witnesses in the remedy phase of this proceeding.

Complainants will be prejudiced if barred from designating substitute expert witnesses. Respondents will not be surprised or prejudiced by granting this motion because, under the discovery schedules submitted by the parties, this matter is still months away from the expert phase of remedy discovery, and Respondents will be able to depose any newly substituted experts at the appropriate time in the discovery schedule.

WHEREFORE, Complainants respectfully request that the Hearing Officer grant Complainants Motion for Leave to Designate Substitute Expert Witnesses.

Dated: April 1, 2020

Respectfully submitted,



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Attorney for CARE

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 ENVIRONMENT	)	
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Complainants,	)	
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v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

COMPLAINANTS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES

The Hearing Officer should grant Complainants leave to designate substitute expert witnesses because Respondents will be neither surprised nor prejudiced by this substitution and Complainants would be prejudiced without the substitution.

I. BACKGROUND

Complainants identified two expert witnesses in the liability phase of this proceeding, Dr. James Kunkel and David Schlissel. Dr. Kunkel appeared as an expert on Complainants' behalf in the liability phase of this hearing. Oct. 26, 2017 Hearing Tr. at 24. Over the years of working on this matter, Complainants have determined that a new expert would be better placed than Dr. Kunkel to address the issues that remain to be resolved in the remedy phase of the litigation.

Due to the bifurcation of this proceeding into liability and remedy phases, David Schlissel has not yet appeared as an expert on behalf of Complainants. Mr. Schlissel has communicated to Complainants that since he last worked on this matter, he is no longer working

in a full-time capacity, has reduced his project load, and does not have availability to re-engage as an expert in this matter.

On February 25, 2020, Hearing Officer Bradley P. Halloran directed the parties to file a proposed discovery schedule. Hr'g Officer Order, PCB 13-15 (Feb. 25, 2020). On March 30, 2020 Hearing Officer Halloran approved of the parties' proposed discovery schedule through May 29, 2020, where the parties were both in agreement. Hr'g Officer Order, PCB 13-15 (Mar. 30, 2020).

II. ARGUMENT

A. The Hearing Officer Has the Authority To Decide This Motion.

As an initial matter, this motion is properly directed to the Hearing Officer, not the Board. This motion is an evidentiary motion because Respondent's opposition to Complainants' use of substitute experts seeks to bar the testimony of a party's witness. Ex. A, Resp's email of Mar. 23, 2020. Evidentiary motions are directed to the Hearing Officer because they are not dispositive and fall squarely within the case management responsibilities of the Hearing Officer. This is made clear by Board Rule 101.502(a), which provides in part:

> The hearing officer has the authority to rule on all motions that are not dispositive of the proceeding. Dispositive motions include motions to dismiss, motions to decide a proceeding on the merits, motions to strike any claim or defense for insufficiency or want of proof, motions claiming lack of jurisdiction, motions for consolidation, motions for summary judgment, and motions for reconsideration.

35 Ill. Admin. Code. 101.502(a).

Past hearing officer orders show that hearing officers have the authority to decide motions, like the present motion, addressing whether witnesses' testimony should be allowed. *See, e.g., McDonagh v. Michelon*, PCB 08-76, 2009 WL 294318, at *1 (February 3, 2009) (Hearing officer order denying motion to bar expert witness from completing expert report);

People v. Pruim, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008) (Hearing officer order denying a motion to bar witnesses' testimony). Thus, this motion requesting leave to designate new experts should be decided by the Hearing Officer and not by the Board.

Even if the Board were to interpret this motion as a discovery motion, it would still be properly directed to the Hearing Officer for the same reasons. Discovery motions necessarily resolve non-dispositive disputes between parties and should be directed to hearing officers under the plain language of Rule 101.502(a).

B. Allowing Complainants to Designate Replacement Witnesses Will Neither Surprise nor Prejudice Respondent.

Complainants should not be barred from designating substitute witnesses to replace Complainants' experts because Respondent will suffer neither surprise nor prejudice. The sanction of barring a party's designated witness has not been "imposed in cases where there was no surprise, or the surprise was minimal, or where the surprise and the harm caused by it were alleviated by giving the adverse party an opportunity to talk to the witness prior to his testifying . . . ." *Appelgren v. Walsh*, 483 N.E.2d 686, 689 (Ill. App. Ct. 2d Dist. 1985) (citing *Rosales v. Marquez*, 55 Ill.App.2d 203, 204 N.E.2d 829 (Ill. App. Ct. 2d Dist. 1965); *Miksatka v. Illinois Northern Ry. Co.*, 49 Ill.App.2d 258, 199 N.E.2d 74 (Ill. App. Ct. 2d Dist. 1964). This is a well-founded rule, and it exists for a crucial reason: parties should be given broad leeway in how they present their case so long as they do not prejudice another party.

Following that basic premise and applying it to this situation, there is no basis for Respondent to argue that it would be prejudiced. The Board has consistently held that demonstrating prejudice requires far more than a mere inconvenience to another party. For example, a party is not prejudiced when there is an opportunity to depose a newly disclosed witness. *People v. Pruim*, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008) (PCB hearing

officer denied motion to bar newly-disclosed witness and instead delayed hearing to give movant opportunity to depose witness); *Hartman v. Pittsburgh Corning Corp.*, 261 Ill. App. 3d 706, 720, 634 N.E.2d 1133, 1142 (1994) (holding that party was not prejudiced when 48-day continuance "allowed defendant to depose the witnesses before trial and examine the additional evidence sufficiently to adjust its defense accordingly"); *compare Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist.2013) ("[T]he disclosure of a new expert would be prejudicial to defendants' case because it would be unlikely that the defendants would be able to depose the new expert and retain their own expert to rebut the plaintiff's new expert so close to trial."), *Firstar Bank v. Peirce,* 306 Ill. App. 3d 525, 532, 239 Ill. Dec. 558, 714 N.E.2d 116 (Ill. App. Ct. 1st Dist. 1999) (holding that undisclosed expert witnesses are a surprise and prejudicial when opposing party had no time to prepare or construct trial strategy). The only other circumstances where prejudice has been found set an extremely high standard. In *Castro v. South Chicago*, a party was barred from using an expert witness when the party repeatedly failed to disclose the witness and missed court deadlines for disclosure. *Castro v. South Chicago Community Hosp.*, 166 Ill.App.3d 479, 483-84 (1988).

Similarly, courts typically do not disallow witnesses on the basis of undue surprise without extremely delayed notice by a litigating party. Surprise generally occurs when a party discloses a witness after the close of discovery or in the few days or weeks preceding a scheduled hearing or trial. *Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist. 2013). In *Smith v. Murphy*, the Illinois Appellate Court described the circumstances that lead to surprise.

> [D]efendants were first informed of this previously undisclosed plaintiff's expert witness when plaintiff attached the expert's affidavit to plaintiff's response to defendants' motion for summary judgment well after discovery had closed and the case was set for trial. Therefore, we agree that defendants were clearly surprised when plaintiff disclosed this new expert for the first time in this manner, months after discovery was closed by court order, and just four days before the previously

> agreed-upon trial date which dictated when a timely summary judgment motion could be filed.

Id.

Surprise is, essentially, "springing" an expert on the opposing party. Respondent cannot claim surprise because the remedy phase of this litigation is still in the early stages of discovery. The Board's procedural rules are silent on expert witness disclosures, but Illinois Supreme Court Rules 213(f) and 213(g) provide a guide and support allowing Complainants to designate new experts. *Sierra Club v. Midwest Generation*, PCB 13-15, 2017 WL 3197759, Hr'g Off. Order at *1 (July 18, 2017). The rule reads: "The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial." Ill. S.Ct. Rule 213(g). Illinois Supreme Court Rule 213(g) makes clear that surprise is avoided when an expert witness's opinion in disclosed in an interrogatory or in a deposition. As the Hearing Officer has previously noted, "the rule is intended 'to prevent unfair surprise at trial, without creating an undue burden on the parties before trial.'" *Sierra Club v. Midwest Generation*, PCB 13-15, 2017 WL 3197759, Hr'g Off. Order at *1 (July 18, 2017). There is no surprise or prejudice in the present case because it is at the outset of remedy phase discovery, Complainants will disclose their substitute expert witnesses in response to written discovery and through the use of written expert reports, and the substitute experts can be deposed by MWG. Complainants' request to designate new experts is consistent with Illinois Supreme Court Rule 213(g).

The Hearing Officer has provided for discovery for the remedy phase of this case, (Hr'g Officer Orders, PCB 13-15, Feb. 25, 2020; Mar. 30, 2020), and the discovery schedules proposed by both Complainants and MWG provide for the opportunity to update previous discovery responses, including expert disclosures and reports, and for the depositions of expert witnesses.

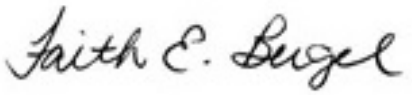
Ex. B, Proposed Disc. Schedules. Thus, Respondent cannot argue that they are prejudiced because they will have an opportunity to depose the substitute experts and to designate new experts to rebut Complainants substitute experts. Ex. B, Proposed Disc. Schedules.

Finally, even if Respondent could demonstrate prejudice, any such prejudice would be far outweighed by the prejudice Complainants would face by not being able to designate new expert witnesses. The Hearing Officer must weigh the effect of barring a witness on the party offering the witness. *Sullivan v. Eichmann*, 213 Ill. 2d 82, 92–93, 820 N.E.2d 449, 454 (2004) ("We further note that a trial court is obligated to consider both the prejudice to the defendant and the detriment caused to the moving party by denial of substitution."). Absent prejudice to the opposing party, a party is not barred from submitting an expert's testimony when barring the testimony would be prejudicial to that party. *McDonagh v. Michelon*, PCB 08-76, 2009 WL 294318, at *1 (February 3, 2009) ("To bar respondents expert from completing his report would be prejudicial to respondents. . . . "). In the present matter, Complainants would be prejudiced if they were barred from designating substitute experts and forced to offer their previously identified experts. One of those experts, David Schlissel, is no longer available to testify in this case, and Complainants have determined that the second expert, Dr. James Kunkel, is not the best-placed expert to address the remaining issues in this matter. Thus, Complainants would be prejudiced if limited to Complainants' existing experts, which in and of itself supports a decision to grant this Motion.

III. CONCLUSION

For the foregoing reasons, the Hearing Officer should grant Complainants' Motion for Leave to Designate Substitute Expert Witnesses.

Dated: April 1, 2020 Respectfully submitted,



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Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, 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' MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES** and **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO DESIGNATE SUBSTITUTE EXPERT WITNESSES** before 5 p.m. Central Time on April 1, 2020 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 18 pages.

Respectfully submitted,

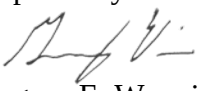

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EXHIBIT A

Gmail **Faith Bugel <fbugel@gmail.com>**

RE: Sierra Club, et al v. Midwest Generation, LLC; (PCB 13-15) Discovery Schedule

8 messages

Jennifer Nijman <jn@nijmanfranzetti.com> Mon, Mar 23, 2020 at 11:20 PM
To: Brad Halloran <Brad.Halloran@illinois.gov>
Cc: Kristen Gale <kg@nijmanfranzetti.com>, Greg Wannier <greg.wannier@sierraclub.org>, Jeffrey Hammons <JHammons@elpc.org>, Abel Russ <aruss@environmentalintegrity.org>, "fbugel@gmail.com" <fbugel@gmail.com>

Dear Hearing Officer Halloran,
As mentioned by Ms. Bugel, the parties were unable to reach agreement on a key issue relating to discovery and agreed to each submit separate schedules with a brief explanation. The disagreement relates to the scope of expert discovery. As you recall, all discovery had been completed in this case before you issued the order to bifurcate. Both written and oral discovery covered liability and remedy issues, and the witnesses testified to the factors during their depositions and at the hearing. The parties' experts submitted reports concerning proposed remedies and concerning financial/economic issues. The experts were also deposed on the bases for their opinions. As a result, the only remaining expert discovery necessary for the next phase of the case is to update the prior expert reports.
Complainants have taken the position that they seek to reopen expert discovery to name new experts and potentially substitute experts, rendering the prior expert discovery useless. MWG should not be required to expend the time and cost to start expert discovery anew at this late stage.
We have attached MWG's proposed schedule which presents a compromise position by requiring parties to request leave of the Board before naming new experts. Thank you

Jennifer T. Nijman
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fax: 312-251-4610
jn@nijmanfranzetti.com<mailto:jn@nijmanfranzetti.com>

MWG's Discovery Schedule (00071523xA9B67).doc
52K

Halloran, Brad <Brad.Halloran@illinois.gov> Tue, Mar 24, 2020 at 9:56 AM
To: Jennifer Nijman <jn@nijmanfranzetti.com>
Cc: Kristen Gale <kg@nijmanfranzetti.com>, Greg Wannier <greg.wannier@sierraclub.org>, Jeffrey Hammons <JHammons@elpc.org>, Abel Russ <aruss@environmentalintegrity.org>, "fbugel@gmail.com" <fbugel@gmail.com>

Dear All- I am in receipt of your e-mails including attachments. As you may or may not know, I am working remotely and have limited access to other documents and research tools. I will peruse and respond accordingly, but without too much effort, it appears that a compromise is the way to go at this point in the proceedings. Thank you.

Brad Halloran

EXHIBIT B

Sierra Club, et al v. Midwest Generation, LLC
MWG's PROPOSED DISCOVERY SCHEDULE
March 23, 2020

Notes: The dates agreed to below assumed that the Discovery Schedule would be entered by March 24, 2020; they may need to be adjusted. In addition, these dates may be moot depending on the Board's decision on Respondent's Motion for Stay of Proceedings. Finally, depending on the discovery requests, due to the Corona Pandemic, MWG's operations may not allow certain discovery to occur.

Parties identify interrogatories and document requests that require updating	April 15, 2020
Parties submit five additional interrogatories and five additional document requests	April 20, 2020
Parties exchange updated answers and documents	May 29, 2020
Parties identify new fact witnesses, if any, and subject area of testimony	June 22, 2020
Parties provide notification of any additional fact witness depositions required and scope of deposition	July 10, 2020
Parties file motions for leave to name new experts, if required *[MWG suggests parties seeking to name a new expert must seek leave of the Board]*	August 7, 2020
Responses to motions for leave to name new experts, if required.[1]	August 28, 2020
Close of Limited Fact Discovery	September 30, 2020
Complainants submit updated reports from currently-named experts, and new expert report if allowed by Board.	October 30, 2020
Respondent submits updated reports from currently-named experts, and response to Complainants' new expert, if any (including new Respondent expert).	November 30, 2020
Complainants submit rebuttal reports for currently-named experts (and response to Respondent's new expert, if any)	December 21, 2020
Respondent submits expert rebuttal report for Complainants' new expert report, if any	January 14, 2021
Expert depositions begin	January 15, 2021
Expert discovery closed	March 15, 2021

[1] The Parties agree that if the Board grants a Party's motion for leave to name a new expert, then the opposing Party may submit a response to the new opinion and the moving Party may submit a rebuttal.

Sierra Club v. Midwest Generation, LLC
COMPLAINANTS' PROPOSED DISCOVERY SCHEDULE/Sections 42(h) and 33(c)
March 23, 2020

Parties identify interrogatories and document requests that require updating	April 15, 2020
Parties submit five additional interrogatories and five additional document requests[1]	April 20, 2020
Parties exchange updated answers and documents and answers and documents in response to new discovery	May 29, 2020
Parties identify new fact witnesses, if any, and subject area of testimony	June 15, 2020
Parties provide notification of any additional fact witness depositions required and scope of deposition	June 30, 2020
Close of Limited Fact Discovery	August 15, 2020
Parties submit simultaneous Initial Expert Reports	September 15, 2020
Parties submit simultaneous Responsive Expert Reports	October 15, 2020
Expert depositions begin	November 15, 2020
Expert discovery closed	January 15, 2021

[1] This does not include document riders to deposition notices.