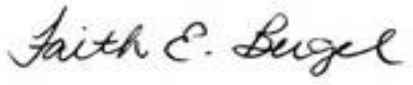
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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,	)	
	)	
Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' MOTION FOR LEAVE TO REPLY, *INSTANTER*, TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE** and **COMPLAINANTS' REPLY TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: June 26, 2020

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

COMPLAINANTS' MOTION FOR LEAVE TO REPLY, *INSTANTER*, TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE

Complainants respectfully request that the Illinois Pollution Control Board ("Board") grant Complainants leave to file, *instanter*, the attached reply to Respondent Midwest Generation, LLC,'s ("MWG") Objection to Complainants' Application for Non-disclosure. In support of this Motion, Complainants state as follows:

1. On May 22, 2020, the Hearing Officer issued an order ("Order") requiring Complainants to respond to two questions. One of those questions could not be responded to without necessarily divulging protected attorney work product in the form of the mental impressions of the attorneys representing Complainants. Complainants were put in the difficult situation of either flouting the Hearing Officer's Order or responding and divulging sensitive attorney mental impressions.

2. On June 1, 2020, in an effort to provide a response to the Hearing Officer's Order

while also maintaining their privileged attorney work product mental impressions, Complainants filed an Application for Non-disclosure ("Application") to protect a privileged affidavit submitted on behalf of one of Complainants' attorneys, Faith E. Bugel (the "Article").

3. On June 15, 2020, Respondent MWG filed an objection to Complainants' Application for Non-disclosure.

4. The Board's rules governing the Application – 35 Ill. Adm. Code 130, et seq. – are silent as to whether objections or replies to objections are allowed. Because the Board's rules are silent as to whether objections or replies are allowed, Complainants request leave to file, *instanter*, the attached reply to MWG's objection.

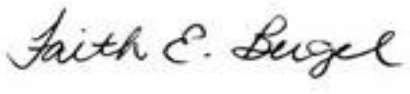
5. Complainants' Application, while not technically a motion, is akin to a motion because it asks the Board to take a certain action. Because the Board's rules on motion practice do not allow replies except with leave of the Board, Complainants follow the same procedure here and request leave to reply to MWG's objection.

6. Complainants would be highly prejudiced if they are not allowed to address the arguments contained in MWG's objection because the Article that Complainants seek to protect from disclosure contains highly-sensitive attorney mental impressions and work product. MWG's objection contains nine pages of argument compared to the four-page Application, and raises a number of arguments that, if accepted by the Board, would have significant implications for how the Board's rules at 35 Ill. Adm. Code 130, *et seq*, apply in the present case. Complainants will be prejudiced if they are not allowed to respond accordingly.

FOR THE FORGOING REASONS, Complainants respectfully request that the Board grant Complainants' Motion for Leave to Reply, *Instanter*, to Midwest Generation, LLC's Objection.

Dated: June 26, 2020

Respectfully submitted,



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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COMPLAINANTS' REPLY TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE

On April 1, 2020, Complainants filed a motion to identify new experts to support their case during the remedy phase of this matter. The Board's multiple orders since June 2019 have made clear that discovery has been reopened to gather information to make a determination on the appropriate remedy in this case. In response to Complainants' motion, on May 22, 2020, the Hearing Officer requested that Complainants supply a detailed basis for their substitution of new experts, even though the legal test for substitution is not whether a party has offered an acceptable basis but rather whether the substitution would cause undue prejudice and surprise to the non-moving party.[1] Because Complainants' basis necessarily involves disclosing their attorney's mental impressions, which are privileged attorney work product, Complainants sought refuge in the Board's Part 130 Rules ("Rules"). 35 Ill. Admin. Code Part 130.

The Board's Part 130 Rules allow Complainants to protect from disclosure to MWG the

[1] For the reasons explained in detail in the briefing before the Hearing Officer, MWG would not be prejudiced or surprised because the Board reopened discovery and because MWG will have the opportunity to fully develop their expert rebuttals to Complainants' new experts.

attorney work product affidavit at issue in Complainants' application for non-disclosure. These Rules are not limited to restricting public disclosure, as Respondent Midwest Generation, LLC,'s ("MWG") argues; to the contrary, the plain language of the Rules also provides protection for non-disclosable information from other parties. Further, Complainants did not put their attorney work product "at issue" or waive their privilege; therefore, their attorney work product should remain protected. And finally, the attorney work product privilege does not just protect work product from discovery: it endures through every stage of litigation and provides protection even when a Hearing Officer's order requests material containing attorney mental impressions and attorney work product, such as the present situation.

For these reasons, as explained further below, the Board should grant Complainants' application for non-disclosure. If the Board denies Complainants' application for non-disclosure, the Board should offer Complainants the opportunity allowed under 35 Ill. Admin. Code 130.408(b) to withdraw their attorney work product affidavit from the record.

I. THE BOARD'S PART 130 RULES NOT ONLY PROHIBIT PUBLIC DISCLOSURE OF COMPLAINANTS' PROTECTED ATTORNEY WORK PRODUCT BUT THEY ALSO PROVIDE THAT THE PROTECTED MATERIAL NEED NOT BE DISCLOSED TO OTHER PARTIES.

As an initial matter, Respondent misrepresents the scope of protection offered by the Board's Rules under Part 130. Nowhere in Part 130 does it state that the protection afforded by the rules is limited to public disclosure only. Midwest Generation's position ignores the plain language of the Board's Rules when arguing that designation of non-disclosable information is to prevent disclosure to the public but not other parties. MWG Br. at 3.

Complainants' application for non-disclosure was prepared and filed pursuant to 35 Ill. Admin. Code 130.400, *et seq*., and 35 Ill. Admin. Code 130.404(d) specifically states: "The applicant is not required to serve any other persons with the article or the page or portion thereof

for which the applicant seeks protection from disclosure." The "other persons" reference in the rule can only mean other parties like MWG because Rule 130.404(d) uses the term "serve," the Board's procedural rules only require service on the Hearing Officer and other parties, and the Hearing Officer is specifically identified as being authorized to receive non-disclosable information in Rule 130.402. In short Rule 130.404(d) specifically authorizes a party seeking protection for non-disclosable information to withhold service of the confidential item on other parties, including in the present case where the confidential item is privileged attorney work product. MWG's argument that the Board's Part 130 rules do not protect non-disclosable information from disclosure to other parties must fail because it is contradicted by the plain language of the Board's Rules.

II. COMPLAINANTS DID NOT PLACE THEIR PROTECTED ATTORNEY WORK PRODUCT "AT ISSUE"

Midwest Generation's next argument is also misplaced because Complainants did not put attorney work product at issue. Complainants did not broach the subject of the attorney work product in Complainants' motion for leave to substitute expert witnesses. Complainants' motion to substitute experts does not offer the specific reason (the attorney work product) for replacement of Dr. Kunkel because, as discussed in the brief supporting Complainants' motion, the standard for review of a motion for leave to name a new expert focuses on whether the substitution would cause the non-moving party undue prejudice and surprise—not whether a party offered an acceptable basis or not for the substitution. *See* Memorandum in Support of Motion for Leave to Designate Substitute Expert Witnesses at 3-6, PCB No. 13-15, (filed April 1, 2020); *see also Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist. 2013) (upholding trial court exclusion of new expert named after close of discovery because it caused "surprise" and would be "prejudicial to defendant's 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.").

A party is not prejudiced when a party has notice that the witness is being substituted and when discovery is still open, thus providing the party an opportunity to depose the new witness. *See* Memorandum in Support of Motion for Leave to Designate Substitute Expert Witnesses at 3-6, PCB No. 13-15, (filed April 1, 2020). For reasons explained in Complainants' Memorandum in Support of their pending Motion for Leave to Designate Substitute Expert Witnesses (filed April 1, 2020) and their reply brief (filed April 29, 2020), MWG will not be prejudiced by the substitution because (1) the Board has expressly reopened discovery for the purposes of remedy, (2) Complainants new experts' opinions will be disclosed in response to MWG's interrogatories and in new expert reports this fall, (3) MWG will be able to rebut the new expert reports with their own expert reports, and (4) MWG will be able to depose the new expert.

The memorandum Complainants filed on June 1, 2020 referencing the attorney work product affidavit was filed in direct response to the Hearing Officer's inquiry – not in support of Complainant's motion. Comps.' Memo. Resp. to Hearing Officer's Order, PCB No. 13-15, (filed June 1, 2020). As a result, Complainants did not put the affidavit with attorney work product at issue. Instead, the Hearing Officer's inquiry raised the basis for substitution.

In any event, this present case is distinguishable from cases in which parties put attorney work product at issue because the attorney work product here is not central to the legal dispute in the overarching matter (groundwater violations caused by coal ash storage and disposal). The cases where work product protections have been waived because a party places them at issue involve situations where the work product was central to a party's legal claims or defenses in a matter, such as when a client files a lawsuit against his or her attorney for malpractice. This point

is made clear in the cases MWG cites in their brief. *See* MWG Obj. at 8. The *Waste Management* decision holds that there are "certain exceptions to 'absolute immunity' of opinion work product. One such exception, the 'at issue' exception, permits discovery of work product where the sought-after material is either *the basis of the lawsuit or the defense thereof*." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 331 (Ill. Sup. Ct. 1991) (internal citations omitted and emphasis added); *see also Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842, 849 (Ill. App. Ct. 4th Dist. 2005) (holding that insurer placed protected material from prior litigation—in which insurer and insured were co-parties—at issue when it brought declaratory judgment action seeking determination that it had met its obligation to the insured after payment was made); *Daily v. Greensfelder, Hemker & Gale*, 98 N.E.3d 604, 618 (Ill. App. Ct. 5th Dist. 2018) (stating in a breach of fiduciary duty case over prior litigation that "We find that the work product of Daily, Stinson, and Padberg relating to these matters fits squarely within the 'at issue' exception to the work product doctrine because it is the basis of Greensfelder's defense in this subsequent litigation that these attorneys played a role in causing the plaintiffs' damages."). MWG does not point to any cases in which a party is held to have waived attorney work product protection and placed work product "at issue" simply by bringing a discovery stage motion.

Another instance when the "at issue" exception to work product protections applies is "when a client sues his attorney for malpractice, or when a lawyer sues his client for payment of fees, waiver is applicable to earlier communications between the now-adversarial parties." *Shapo v. Tires 'N Tracks, Inc.*, 782 N.E.2d 813, 819 (Ill. App. Ct. 1st Dist. 2002) (citing *In re Marriage of Bielawski,* 764 N.E.2d 1254 (Ill. App. Ct. 1st Dist. 2002); *see also SPSS, Inc. v. Carnahan–Walsh,* 641 N.E.2d 984, 988 (Ill. App. Ct. 1st Dist. 1994) (holding in a legal malpractice suit "[a] party waives a claim of privilege by relying on a legal claim or defense, the truthful resolution of

which required the examination of confidential attorney-client communications."). In the present case, Complainants' attorney work product is extremely tangential to the central question of remedy in this case, Complainants have not initiated a new lawsuit for which their work product is a basis of any potential legal claim or defense, and a discovery-stage motion does not rise to the level of a lawsuit.

In short, Complainants did not put the work product at issue when bringing the motion to substitute experts because (1) the motion to substitute experts does not rise to the level of a lawsuit—which is the type of action that puts work product at issue; and (2) the confidential work product affidavit describes Complainants' basis for substituting its expert, which is not and should not be the determining factor in the Hearing Officer's decision on the pending motion. Complainants believe that the Hearing Officer need not even rely on anything in Complainants' privileged attorney work product affidavit because its contents are not relevant to the issue of whether substitution of Complainants' expert at this stage would cause MWG undue prejudice and surprise. Thus, the "at issue" exception does not apply.

III. COMPLAINANTS' PRESENTATION OF THEIR AFFIDAVIT FALLS WITHIN A RANGE OF CIRCUMSTANCES THAT ALLOWS ADJUDICATORY BODIES TO RELY ON AN EX PARTE IN CAMERA REVIEW OF CONFIDENTIAL ATTORNEY WORK PRODUCT.

The Hearing Officer ordered Complainants to provide additional information explaining why Complainants' expert witness needs to be replaced. Hearing Officer Order at 2, PCB 13-15, (May 22, 2020). The answer to the Hearing Officer's inquiry necessarily involved divulging attorney work product. Complainants were thus faced with the choice of either submitting attorney work product while protecting its confidential nature to the Hearing Officer or disregarding his order by not answering and facing the risk of sanctions. 35 Ill. Admin. Code §101.800 (providing that if a person fails to comply with a hearing officer order, the Board may

order sanctions). Complainants opted to comply with the Hearing Officer's Order and follow the Board's Rules as to the filing of non-disclosable information. 35 Ill. Admin. Code Part 130. *See, e.g., Hammond v. Solutia, Inc. Employees' Pension Plan*, Case No. 06-139, 2006 WL 1050692, at *1 (S.D. Ill. Apr. 20, 2006) (granting Plaintiff's request to file part of their reply brief under seal for *in camera* inspection in a class action because, without sealing for *in camera* review only, Plaintiff "believes that such information could then be 'unjustifiably used by defendant Solutia to attack the class claims.'").

Further, MWG ignores the part of the Board's Rule 101.114 which directs parties to "make all communications with respect to an adjudicatory or regulatory proceeding pending before or under consideration by the Board in writing and address them to the Clerk." 35 Ill. Admin. Code § 101.114. This is exactly what Complainants did when Complainants followed the Part 130 rules and filed the non-disclosable information in writing, with the Clerk, and without forwarding a copy to the Hearing Officer. Rule 101.114 guides parties on the procedure to follow in order to *avoid* engaging in an impermissible *ex parte* communication. In following the Part 130 Rules and Rule 101.114, Complainants adhered to all the rules of the Board, including procedures designed to prevent impermissible *ex parte* communications.

Work product can be submitted *ex parte* for *in camera* inspection, not just for a court to determine whether it is in fact work product but for the court to make decisions on the substance of motions. *Glob. Relief Found., Inc. v. O'Neill*, 205 F. Supp. 2d 885, 887 (N.D. Ill. 2002). *In camera* is by definition *ex parte*, but it is allowed for the sole purpose of protecting work product or deciding related motions, for instance, whether the crime fraud exception applies. The Board's Part 130 Rules thus allow us to move for confidentiality of the attorney work product affidavit in an *ex parte* manner. 35 Ill. Admin. Code Part 130.

MWG's reading of the rules would negate the protections that the Board's Part 130 Rules offer to attorney work product. Under MWG's arguments, *ex parte* concerns would prevent any attorney work product from ever being submitted under the Board's Part 130 rules without serving the other parties—something that would completely defeat the attorney work product privilege. MWG's position is inconsistent with the Environmental Protection Act and Board Rules, which explicitly offer protection not only to trade secrets but also to "information privileged against introduction in judicial proceedings," such as attorney work product, among other protections. 35 Ill. Admin. Code § 101.202; *see also* Ill. S. Ct. R. 201(b)(2).

The primary purpose of the attorney work product privilege is to prevent disclosure to the other party and opposing counsel. "In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). As the Illinois Supreme Court has noted, not providing work product protections would be problematic because:

> An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc., 727 N.E.2d 240, 248 (Ill. 2000) (quoting *Hickman*, 329 U.S. at 511). The Illinois Supreme Court has relied on and adopted the rationale of the U.S. Supreme Court in *Hickman*. "The work-product doctrine provides a broader protection than the attorney-client privilege, and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 329 (Ill. 1991). In short, Illinois recognizes the critical importance of attorney work product and

offers protection to attorney work product under the Supreme Court rules and caselaw. Ill. S. Ct. R. 201(b)(2).

MWG's argues that the restriction on *ex parte* communications overrides the protection offered by the Board's Part 130 rules. *See* MWG Obj. at 4-6. To the contrary, under circumstances like the present case, attorney work product protections take priority over *ex parte* concerns. *Glob. Relief Found., Inc. v. O'Neill*, 205 F. Supp. 2d 885, 887 (N.D. Ill. 2002). "[A]s a general rule, 'a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions,' . . . [but] in 'extraordinary circumstances,' it may be necessary for a district court to review and rely on certain evidence *in camera* and *ex parte.*" *Id.* (quoting *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986).)

The Illinois Supreme Court has also adopted the United States Supreme Court's decision that judges may examine *in camera* communications for which privilege is claimed in order to determine whether the crime/fraud exception applies without destroying the confidentiality of the communication. *In re Marriage of Decker*, 606 N.E.2d 1094, 1106 (Ill. Sup. Ct. 1992) (citing *U.S. v. Zolin*, 491 U.S. 554 (1989)). Similarly, the privileged material is being examined for the purpose of deciding a substantive issue—in *Decker*, whether the crime-fraud exception applies—and, in the present case, because the Hearing Officer ordered the submittal in the context of his decision-making process to decide whether a witness should be substituted.[2] For purposes of not destroying the privilege, it is proper to examine the materials *in camera,* and the *ex parte* bar does not override the protection of attorney work product.

[2] Complainants note again here however that they do not believe the provided information is in fact central to this decision. The Hearing Officer does not even need to consider the affidavit containing the attorney work product because the test of whether a party should be allowed to substitute experts is whether it will cause undue prejudice to the other party. *See* Memorandum in Support of Motion for Leave to Designate Substitute Expert Witnesses at 3-6, PCB No. 13-15, (filed April 1, 2020). The appropriate legal does not depend on the basis for the witness substitution.

IV. THE ATTORNEY WORK PRODUCT PRIVILEGE ENDURES THROUGH EVERY STAGE OF BOARD PROCEEDINGS AND IS NOT LIMITED TO DISCOVERY

MWG next asserts that the attorney work product privilege only prohibits disclosure of an attorney's mental impression in the context of discovery, and therefore does not prohibit disclosure in the context of the Board's Section 130 rules. *See* MWG Obj. at 6. For that reason, MWG argues that Complainants cannot seek protection of their attorney's mental impressions through the Board's Section 130 rules. This argument fails because Illinois courts have made clear that the scope and applicability of the attorney work product privilege is not limited to just the discovery context.

The attorney work product privilege exists no matter what stage an adversarial proceeding is at and independent of the adversarial process itself. "The work-product doctrine provides a broader protection than the attorney-client privilege, and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co*., 579 N.E.2d 322, 329 (Ill. Sup. Ct. 1991) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947).

The privilege can be invoked at any time in litigation when circumstances arise where a party is seeking disclosure of an attorney's mental impressions, including after discovery has ended and during trial. "[T]he United States Supreme Court has acknowledged that 'the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pre-trial discovery, could disrupt the orderly development and presentation of his case.'" *People v. Grier*, 413 N.E.2d 1316, 1322 (Ill. App. Ct. 1st Dist. 1980) (quoting *United States v. Nobles*, 422 U.S. 225, 239 (1975)). The privilege can even be invoked outside of the normal context of litigation, too, such as in the

context of public records requested pursuant to Illinois Freedom of Information Act. *In re Appointment of Special Prosecutor*, 91 N.E.3d 424, 438 (App. Ct. 1st Dist. 2017) (remanding case for *in camera* review of attorney fee invoices paid from public funds to determine what extent attorney work product can be redacted from invoices).

For the same reasons, the attorney work product privilege can also be invoked when responding to a Hearing Officer inquiry that necessarily requires divulging attorney work product and an attorney's mental impressions of a witness. To hold otherwise would put parties in the same difficult situation that Complainants in this case found themselves in: either refuse to comply with a Hearing Officer's order, or divulge attorney work product.

V. THE EXISTING PROTECTIVE ORDER IN THIS CASE DOES NOT COVER ATTORNEY WORK PRODUCT.

Finally, although MWG argues that the protective order entered in this case would prohibit public disclosure of Complainants' work product affidavit, this claim rests on an implausibly broad reading of the current protective order and ignores the fact that the harm from divulging attorney work product results from sharing it with opposing counsel and the other party. The scope of the protective order is limited to discovery; it does not address the situation the parties currently find themselves in; namely, where a Hearing Officer's question requires a party to divulge attorney mental impressions. The protective order's scope is as follows:

> This Protective Order shall govern documents and information exchanged during this action, including, but not limited to documents produced by the Parties or non-Parties, interrogatory answers, responses to requests for admission, and depositions testimony (collectively, "Discovery Material").

Sierra Club et al. v. Midwest Generation, LLC, Case No. 13-15, Protective Order for Non-Disclosable Information at 1 (filed Oct. 6, 2014).

Second, the harm in divulging attorney work product comes from opposing counsel receiving it. Attorney work product protection is designed to preclude an "adversary attorney

from taking undue advantage of the former's efforts." *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co*., 579 N.E.2d 322, 329 (Ill. Sup. Ct. 1991) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)). Nothing in the protective order's scope would encompass the attorney work product Complainants were required to divulge in response to the Hearing Officer's questions. Only the Board's Part 130 Rules provided Complainants a way to both answer the Hearing Officer's question while still protecting their privileged attorney work product and mental impressions.

VI. THE BOARD SHOULD EXERCISE ITS DISCRETION AND ALLOW COMPLAINANTS TO WITHDRAW THE AFFIDAVIT IN THE EVENT THE BOARD DENIES COMPLAINANTS' APPLICATION.

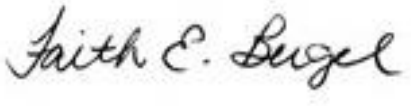
In the event the Board denies Complainants' Application for Non-disclosure, it should exercise its discretion under 35 Ill. Adm. Code 130.408(b) to issue a conditional non-disclosure order and allow Complainants the opportunity to withdraw their attorney's affidavit from the record. Complainants would be highly prejudiced should MWG be allowed to access Complainants' attorney's affidavit containing sensitive attorney mental impressions. Because the legal standard for substituting an expert witness does not rely on a party's "basis" for substitution, as explained above, any decision on Complainants' motion for leave to substitute their expert would not need to rely on Complainants' attorney's affidavit anyway.

VII. CONCLUSION

For the foregoing reasons, the Board should grant Complainants' Application for Non-disclosure.

Dated: June 26, 2020

Respectfully submitted,



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Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, 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 REPLY, *INSTANTER*, TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE** and **COMPLAINANTS' REPLY TO MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE** before 5 p.m. Central Time on June 26, 2020 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 20 pages.

Respectfully submitted,

/s/ Jeffrey Hammons
Jeffrey Hammons

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