ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

August 5, 2020

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Re: Sierra Club et al. v. MWG; PCB 13-15

Dear Don:

Today I filed with the Board in *Sierra Club et al. v. MWG*; PCB 13-15 a REDACTED Complainants' Reply to Midwest Generation, LLC's Supplemental Response to Complainants' Memorandum Regarding Replacement of their Expert. We filed the redacted version today through the electronic filing system, and a paper copy of the unredacted version will be mailed today via USPS.

We have emailed the UNREDACTED Reply with the red label to all parties and the Hearing Officer today.

Please let me know if you have any questions.

Sincerely,

_____

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cc: Brad Halloran
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Kristen Gale
Jeffrey Hammons
Keith Harley
Abel Russ
Faith E. Bugel
Greg Wannier

**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' REPLY TO MIDWEST GENERATION, LLC'S SUPPLEMENTAL RESPONSE TO COMPLAINANTS' MEMORANDUM REGARDING REPLACEMENT OF THEIR EXPERT** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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*Attorney for Sierra Club*

Dated: August 5, 2020

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| | ) | |
| Respondent. | ) | |

**COMPLAINANTS' REPLY TO MIDWEST GENERATION, LLC'S SUPPLEMENTAL RESPONSE TO COMPLAINANTS' MEMORANDUM REGARDING REPLACEMENT OF THEIR EXPERT**

Midwest Generation, LLC's ("MWG's") supplemental response perpetuates the fiction they have injected into what would otherwise be a simple procedural matter of replacing an expert when there is ample time remaining in the discovery process. As Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, "Complainants") have demonstrated time and again throughout these several rounds of briefing, Illinois courts have only ever erected barriers to replacing expert witnesses in situations where doing so would unduly prejudice the other party.

The standard of prejudice that courts have applied in this context does not mean any prejudice whatsoever but is narrowly defined to mean the non-moving party's ability to obtain full information regarding expert opinions and prepare a response. MWG is unable to cite to a single case prohibiting an expert witness substitution during the early stages of the discovery

process because courts have never found such prejudice. Similarly, the circumstances here weigh against finding prejudice because MWG will have ample opportunity to review new experts' reports disclosing their opinions, to depose such experts on their opinions, to prepare cross-examination of those experts, and to offer expert testimony in response to those opinions. Only when these opportunities are absent do courts find prejudice and restrict expert substitutions or testimony.

MWG misconstrues the applicable legal standard when it argues that Complainants need to provide a justifiable basis for its identification of new experts in the remedy phase of this matter. Even under that incorrect standard, Complainants have demonstrated that they have a justifiable basis, which was presented at the explicit request of the Hearing Officer. In the absence of a finding that MWG is prejudiced, there is no justification for prohibiting Complainants from substituting their experts in the early stages of discovery.

## I. DISCOVERY IS OPEN IN THIS PROCEEDING AND, THEREFORE, COMPLAINANTS ARE FREE TO IDENTIFY WHAT EXPERTS THEY WANT FOR THE REMEDY STAGE OF DISCOVERY

The premise underlying MWG's objection to allowing Complainants to identify new experts for the remedy stage of this case is that discovery has closed. MWG Supp. Resp. at 1 ("long after discovery has closed"). But discovery is not closed. The Board reopened discovery when it remanded the case back to the Hearing Officer to conduct discovery on remedy. In its April 16, 2020 Order, the Board explicitly stated that its "February 6, 2020 Board order directed the parties to proceed expeditiously to discovery in the remedy phase of this matter." *Sierra Club et al., v. Midwest Generation*, LLC, PCB 13-15, Order at 2 (April 16, 2020). In furtherance of the Board's February 6, 2020 Order, the Hearing Officer's February 25, 2020 Order "directed the parties to file a proposed discovery schedule by March 9, 2020." *Sierra Club et al., v. Midwest*

*Generation*, LLC, PCB 13-15, Hearing Officer Order (Feb. 25, 2020).[1]

Because the Board reopened discovery for the remedy phase of this case, Complainants are free to identify new experts to support their case in chief on remedy. And because strict disclosure is possible, Complainants can and will adhere to the requirements of Rule 213.[2] MWG relies on cases where a party seeks to substitute or identify a new expert near the end of or after the close of discovery or on the eve of a trial or hearing. MWG Supp. Resp. at 4-5. As explained below, none of those cases are applicable to the present case where discovery is open, the next hearing has not been scheduled, and the hearing will not take place until next year:

- *People v. Pruim* is distinguishable because it involved complainant's disclosure of new experts after discovery had closed and two months before the scheduled hearing. PCB 04-207, Hearing Officer Order at 5 (Sept. 24, 2008) *cited in* MWG Supp. Resp. at 4.
- *Nelson v. Upadhyaya* is distinguishable because it concerned a proposed expert substitution after discovery had closed and "[s]hortly before trial." 836 N.E.2d 784, 786-87 (Ill. App. Ct. 1st Dist. Sept. 23, 2005) *cited in* MWG Supp. Resp. at 4.
- *Indiana Ins. Co. v. Valmont Elec. Inc*. is distinguishable because it involved replacing an expert after discovery had closed. No. TH97-0009-C-T/F, 2001 WL 1823587, at *1 (S.D.

[1] Pursuant to the Hearing Officer's February 25, 2020 Order, the parties submitted dueling discovery schedules, and each schedule included a new round of expert reports and depositions. On March 30, 2020, the Hearing Officer approved the discovery schedules up until May 29, 2020, and that partial discovery schedule did not include deadlines for expert reports or depositions.

[2] 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. *See Sierra Club et al., v. Midwest Generation, LLC, PCB 13-15, Hearing Officer Order at 1 (July 18, 2017).* Rule 213 reads: "Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:...

> *Controlled Expert Witnesses.* A 'controlled expert witness' is a person giving expert testimony who is the party, … or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S.Ct. R. 213(f) (eff. Jan. 1, 2007).
>
> "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).

Ind. Dec. 27, 2001) *cited in* MWG Supp. Resp. at 4.

- *U.S. ex rel. Agate Steel, Inc. v. Jaynes Corp.* is distinguishable because it involved a request to substitute experts "in light of the looming discovery cutoff." No. 2:13-CV-01907-APG, 2015 WL 1546717, at *2 (D. Nev. Apr. 6, 2015) *cited in* MWG Supp. Resp. at 4.
- *Smith v. Murphy* is distinguishable because it concerned identifying a new expert three days before trial was scheduled to begin. 994 N.E.2d 617, 621-22 (Ill. App. Ct. 1st. Dist. July 16, 2013) (plaintiff disclosed new expert on October 14, 2011 and trial was scheduled October 17, 2011) *cited in* MWG Supp. Resp. at 5.
- *Firstar Bank v. Peirce* is distinguishable because it involved whether to bar expert testimony that was not disclosed in plaintiffs' answer to defendant's Rule 213 interrogatory, the dispute took place after the close of discovery, and – most importantly – the case was not about substituting or identifying new experts. 714 N.E.2d 116, 120-21 (Ill. App. Ct. 1st Dist. June 30, 1999) *cited in* MWG Supp. Resp. at 5.

The present case is distinguishable from all of the caselaw cited by MWG because we are not on the verge of any hearing, and any hearing in the present case will be preceded by a full and complete remedy-phase discovery schedule with both written discovery, expert reports, and depositions. There is no case law that supports MWG's proposition that Complainants are not allowed to identify new or substitute experts in support of their case in chief on remedy issues when the Board has reopened discovery to focus on remedy issues.

## II. MWG'S PROPOSED STANDARD CONFLICTS WITH CASE LAW

MWG's opposition relies on a flawed interpretation of what the applicable legal standard is for substituting an expert witness. The standard put forth by MWG dictates that the Hearing

Officer should examine the Complainants' reason for substituting their expert. None of the cases MWG cites, however, involve scrutinizing the party's basis for substitution of their expert.[3] *See, e.g., People v. Pruim*, PCB 04-207, Hearing Officer Order, at 5 (Sept. 24, 2008) ("The ***timing*** of complainant's disclosure of replacement Agency witnesses is not acceptable." (emphasis added)); *Smith v. Murphy* 994 N.E.2d 617, 622 (Ill. App. Ct. 1st. Dist. July 16, 2013) ("As a sanction for plaintiff's use of an undisclosed expert witness's affidavit in response to defendants' motion for summary judgment, the trial court did not allow plaintiff to use this ***untimely*** evidence to attempt to defeat the motion." (emphasis added)); *Prather v. McGrady*, 261 Ill. App. 3d 880, 887, 634 N.E.2d 299, 304 (1994) ("[T]he violation was caused by plaintiff's ***untimely disclosure*** of her experts and the failure to secure extensions of the time limits set out in the scheduling order.") (emphasis added). Further, courts have noted that it is routine to substitute experts. *See, e.g., Adams v. Northern Ill. Gas Co.*, 774 N.E.2d 850, (Ill. App. Ct. 1st Dist. 2002) (In denying request to preserve expert testimony, the trial court stated "We substitute experts quite frequently.").

The cases MWG cites to may provide information on the different circumstances as to why an expert needed to be replaced (such as illness, death, etc.), but none of those cases weigh the reason for substitution as justifiable or not. Instead, each case hinges exclusively on whether the timeliness of the substitution would prejudice the non-moving party. In the present case, because Complainants are seeking to identify new experts before a full discovery schedule has been ordered, before any expert reports or depositions, and before any discovery cut off or hearing, MWG will face no prejudice from Complainants' identification of new experts to opine

[3] NON-DISCLOSABLE INFORMATION [redacted]

on remedy pursuant to the Board's previous orders.

## III. COMPLAINANTS MEET THE STANDARD FOR IDENTIFYING NEW EXPERTS BECAUSE MWG WILL FACE NO PREJUDICE

Because Complainants will timely disclose new experts by the yet-to-be-scheduled expert report deadline during remedy-phase discovery, we need not even apply the test for undisclosed experts or undisclosed expert testimony. But even if that standard was applicable, Complainants would meet the standard. In determining whether to punish a party's discovery violation by excluding an expert or certain expert testimony, a court will consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Sullivan v. Edward Hosp.*, 806 N.E.2d 645, 652 (Ill. Sup. Ct. Feb. 5, 2004).

Although Complainants have not committed any discovery violation—Complainants' request to identify new experts comes before the Hearing Officer has even set a deadline for disclosure of expert witnesses—the standard for exclusion of testimony is akin to the relief that MWG seeks: the exclusion of testimony from any new experts. And it is clear from applying these factors that MWG fails to meet that standard. *See, e.g.,* MWG Supp. Resp. at 5 (*citing to Smith v. Murphy*, 994 N.E.2d at 622 (providing the same standard and citing to *Sullivan v. Edward Hosp*. in support of the standard).

Regarding the first factor (surprise) and second factor (prejudice), MWG will be neither surprised nor prejudiced because Complainants' new experts' opinions will be timely disclosed in their expert reports in accordance with Supreme Court Rule 213,[4] and MWG will be able to

[4] Because the Hearing Officer has yet to set a full discovery schedule, the exact date of expert disclosures is unknown at this point in the case.

rebut those opinions with their own expert reports and depose our new experts. MWG will not be surprised by Complainants' identification of new experts because Complainants' pending request to identify new experts comes before the Hearing Officer has even set a full discovery schedule in this case.[5] No case cited by MWG supports a finding of prejudice or surprise when the expert identification or substitution occurs prior to any Hearing Officer-imposed deadlines on expert disclosures. Similarly, MWG argues that adherence to Rule 213 prohibits Complainants' identification of new witnesses "long after discovery has closed." MWG Supp. Resp. at 5. Once again, MWG ignores the fact that remedy-phase discovery is open and Complainants can and will meet Rule 213's disclosure requirements in the remedy-phase discovery period.

MWG's theory of prejudice is that, because it spent some resources in liability-phase discovery on remedy issues, it should not have to expend any more resources on expert discovery on remedy issues, even though the Board has expressly ordered the Hearing Officer and parties to conduct additional remedy discovery and develop the record on remedy. MWG Supp. Resp. at 7-8; *Sierra Club et al., v. Midwest Generation*, LLC, PCB 13-15, Order at 2 (April 16, 2020); *Sierra Club et al., v. Midwest Generation*, LLC, PCB 13-15, Hearing Officer Order (Feb. 25, 2020). MWG does not cite to any case law to support its theory of prejudice. Expending resources to defend a party's position is a necessary part of litigation, especially when, as in the present case, the Board has already found MWG liable for years' worth of violations, expressly reopened discovery, and explicitly ordered the parties to conduct discovery on remedy issues.

The prejudice recognized by courts focuses on whether a non-moving party's ability to develop its case in chief or defense has been harmed by the moving party's late disclosure of expert testimony or substitution, which is why courts generally do not find prejudice exists if the

[5] See, e.g.,

non-moving party has an opportunity to depose the witness, and otherwise rebut, late-disclosed testimony. *See, e.g., 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.*, 634 N.E.2d 1133, 1142 (May 19, 1994) (holding that party was not prejudiced when trial court did not bar late-disclosed testimony when a 48-day continuance "allowed defendant to depose the witnesses before trial and examine the additional evidence sufficiently to adjust its defense accordingly"). Because MWG will be able to rebut Complainants' new experts with their own experts and reports and will be able to depose Complainants' new experts, MWG will suffer no prejudice.

The other factors support Complainants' right to identify new experts. On the third factor (the nature of the testimony), Complainants seek to comply with the Board's order remanding this matter for additional discovery on remedy by identifying new expert witnesses to opine on remedy issues. The nature of Complainants' new expert's testimony falls squarely within the Board's command.

The fourth factor (the diligence of the adverse party) is not applicable because Complainants are requesting to identify new experts before the Hearing Officer has even set a schedule for expert disclosures and reports. As a result, there has been no opportunity for MWG to be or not be diligent in response to any new expert: they will be given the opportunity to depose and rebut any remedy expert opinions at a later date (thus, no "diligence" has been required). The fifth factor (the timely objection to the testimony) is not applicable because Complainants are the ones who prospectively brought the pending motion to identify new experts prior to any deadline to disclose witnesses, so there are no timeliness concerns.

On the sixth and last factor (the good faith of the party calling the witness), Complainants have exercised good faith in its request to identify new expert witnesses because Complainants request came before the Hearing Officer set any deadlines for disclosure or expert reports. Complainants' intent to seek resolution before any problems arose demonstrates good faith. Complainants could have waited for the Hearing Officer to set an expert disclosure deadline and then identified new experts pursuant to that deadline without any notice, but Complainants opted to act in good faith and raise the issue prior to any deadlines so that the Hearing Officer and MWG would not be surprised or prejudiced.

## IV. COMPLAINANTS' NEW EXPERTS SHOULD NOT BE REQUIRED TO ADHERE TO FIVE-YEAR-OLD OPINIONS OF LIABILITY-PHASE EXPERTS

MWG's argument that new experts' opinions must be similar to liability-phase expert opinions relies on the flawed premise that discovery has closed. MWG Supp. Resp. at 6. As explained *ad nauseum* in prior briefing and *supra* § I, the Board reopened discovery in this matter for remedy. None of the cases MWG cites in support of its argument that the expert's opinion must be the same are applicable in the present case when discovery is open and a full discovery schedule has yet to be set, including applicable expert disclosure deadlines. MWG Supp. Resp. at 5-8.

In *Thomas v. Johnson Controls Inc.*, cited in MWG Supp. Resp. at 6, the Appellate Court held that defendant was prejudiced and the trial court erred by allowing plaintiff to rely on evidence that was produced "on the eve of trial" while barring defendant from offering a rebuttal expert on the evidence. *Id*. at 95. This case has no bearing on the present case because Complainants are not disclosing evidence (or anything else) on the eve of trial. Complainants are seeking permission to disclose new experts in the early stages of the discovery process in preparation for possible testimony at some future hearing, which will occur at an as-yet

undetermined date set by the Hearing Officer.

MWG again cites to *Indiana Ins. Co.*, *Nelson*, *U.S. ex rel. Agate Steel* and *Smith v. Murphy*, and they are all distinguishable, as discussed *supra* at § I, because the substitution of the expert was occurring after or near the close of discovery. *Indiana Ins. Co.*, No. TH97-0009-C-T/F, 2001 WL 1823587, (S.D. Ind. Dec. 27, 2001); *Nelson*, 836 N.E.2d 784, 786-87 (Ill. App. Ct. 1st Dist. Sept. 23, 2005); *U.S. ex rel. Agate Steel*, No. 2:13-CV-01907-APG, 2015 WL 1546717, *2 (D. Nev. Apr. 6, 2015); *Smith v. Murphy*, 994 N.E.2d 617, 621-22 (Ill. App. Ct. 1st. Dist. July 16, 2013). In those cases, the substitution was allowed but the prejudice caused by its last-minute timing was mitigated by requiring the substitute expert to adhere to the original expert's opinion.

As explained *supra* § III, there is no prejudice here because MWG will receive Complainants expert disclosures and reports on remedy, and MWG will be able to prepare a response to the new expert through their own expert's testimony, through expert depositions, and through preparation of a cross-examination of the new expert. If no prejudice needs to be mitigated—such as in the present case—then there is no reason to require a new expert to adhere to the old expert's opinions.

MWG's position is also inconsistent with case law because Dr. Kunkel would not be bound in this remedy phase by his own liability-phase report and deposition, especially in light of (1) discovery reopening, (2) forthcoming remedy-phase expert reports, and (3) remedy-phase expert depositions. Prior to the liability phase hearing in this case, MWG moved *in limine* to restrict Kunkel's ability to refer to or rely on evidence produced after his 2015 expert reports and 2016 deposition had occurred, and the Hearing Officer rightfully rejected MWG's motion as "unduly restrictive." *Sierra Club et al., v. Midwest Generation*, LLC, PCB 13-15, Hearing Officer Order at 1 (July 18, 2017). For the same reason, in the remedy phase of this matter,

Kunkel would not be bound to just his 2015 expert reports and depositions, and yet MWG argues that any new expert identified in this matter must be limited to Kunkel's opinions as expressed in his 2015 expert reports and 2016 deposition. MWG's position is unduly restrictive because it places an even more onerous restriction on new experts than even Kunkel himself would have faced.

No case law would supports restricting Dr. Kunkel from modifying his opinions in the remedy phase of this case based on the Board's ninety-page order and findings on liability and the five years' worth of evidence and information accumulated since he prepared his original expert reports in 2015. In cases that bar an expert from modifying their opinion, the modifications all came after discovery had closed and depositions had already been conducted. *See, e.g., Baird v. Adeli*, 573 N.E.2d 279, 283-84 (Ill. App. Ct. 4th Dist. May 30, 1991) (upholding trial court order barring expert "from rendering any opinions contrary to those previously expressed in his discovery deposition or written report."); *Atkins v. Deere & Co*., 612 N.E.2d 843, 846 (Ill. App. Ct. 3d. Dist. Mar. 22, 1993) (rejecting interpretation of Rule 220 (now Rule 213) that would forbid expert from changing opinion based on "new information which might come to light."); *Ramos v. Pyati*, 534 N.E.2d 472, 482 (Ill. App. Ct. 1st Dist. Jan. 27, 1989) (rejecting defendant's attempt to supplement "one month before trial" its Rule 220 (now Rule 213) interrogatory response because "it attempted to change the expert's opinion as expressed in his earlier deposition.").

Because there will be a new round of expert reports and depositions, Kunkel would not be bound by his opinions rendered five years ago but instead would be bound by new remedy phase reports and depositions based on more recent evidence that has come to light in the last five years. For that same reason, a new expert should not be bound by those five-year-old

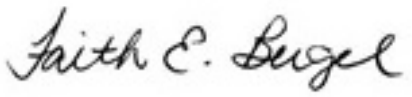
opinions because it would restrict a new expert in a way that even Kunkel would not be restricted.

## IV. CONCLUSION

For the foregoing reasons, the Hearing Officer should grant Complainants' Motion for Leave to Designate Substitute Expert Witnesses and deny all modifying requests offered by MWG.

Dated: August 5, 2020

Respectfully submitted,



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## 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' REPLY TO MIDWEST GENERATION, LLC'S SUPPLEMENTAL RESPONSE TO COMPLAINANTS' MEMORANDUM REGARDING REPLACEMENT OF THEIR EXPERT** before 5 p.m. Central Time on August 5, 2020 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 15 pages.

Respectfully submitted,

/s/ Jeffrey Hammons
Jeffrey Hammons

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