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' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS,** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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Attorney for Sierra Club

Dated: March 4, 2022

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Respondent.	)	

COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS

Pursuant to 35 Ill. Adm. Code 101.500, Complainants offer the following response to Midwest Generation, LLC's Motion *in Limine* to Exclude Quarles Opinions ("MWG's Quarles Motion").

I. MWG Misrepresents the Hearing Officer's Sept. 14, 2020 Order.

a. The Hearing Officer Order Does Not Limit Mr. Quarles' Opinions and Testimony to Only Elaboration and Amplification.

MWG misrepresents the Hearing Officer's Sept. 14, 2020 Order on substitution of experts and suggests that it places constraints on remedy-phase expert testimony that are nowhere to be found in the Order. Specifically, Respondent claims that the "Hearing Officer . . . order[ed] that the existing expert reports stand, and new experts were only permitted to 'elaborate and amplify'" the opinions of Complainants' liability-phase expert, Dr. James Kunkel. MWG's Quarles Mot. at 6 (citing *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order (Sept. 14, 2020) ("Sept. 14, 2020 Order")). However, the Hearing Officer's Sept.

14, 2020 Order clearly does not constrain remedy phase experts in this way. The Sept. 14, 2020 Order provides, in relevant part:

> The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter. To hold otherwise, I would fail my duty 'to ensure development of a clear, complete, and concise record . . .'. Section 101.610 of the Board's procedural rules. The discovery schedule regarding expert witnesses, including reports and depositions, have yet to be determined. If additional witnesses are identified, neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing. Any testimony already given stands and the parties must proceed to build on that information and present more information, <u>including</u> elaboration and amplification.

Sept. 14, 2020 Order, at 3 (emphasis added). MWG ignores much of the language of the Hearing Officer's Sept. 14, 2020 Order.

MWG disregards the Hearing Officer Halloran's use of the term "including." Sept. 14, 2020 Order, at 3. The Hearing Officer's Order allows Mr. Quarles' testimony to "present more information, <u>including</u> elaboration and amplification." *Id.* According to Black's Law Dictionary, "include" means "to contain as a part of something. The participle *including* typically indicates a partial list. . . . But some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing." Black's Law Dictionary (11th ed. 2019). In other words, the use of the term "including" does not limit Mr. Quarles testimony to just "elaboration and amplification." "Elaboration and amplification" are permitted to be part of Mr. Quarles' testimony, while the term "including" indicates that the totality of Mr. Quarles' testimony may go beyond just elaboration and amplification of prior expert testimony.

MWG also ignores the very broad language of the Hearing Officer's Order, which allows the parties and their substitute expert witnesses to "present more information." Sept. 14, 2020 Order, at 3. The Order allowing expert witnesses to "present more information" does not limit or qualify "more information" with any requirement that such additional information stay within the

scope of the liability-phase testimony or reports. In sum, the Order does not limit the parties' new expert witness testimony to either the scope of the prior expert testimony or reports or to just elaboration and amplification of prior expert testimony or reports. Since new expert testimony is not limited in the way MWG argues, Mr. Quarles' reports and opinions are consistent with Hearing Officer's Sept. 14, 2020 Order.

b. Hearing Testimony Stands—and Mr. Quarles Has Been Consistent with Dr. Kunkel's Hearing Testimony

Consistent with Hearing Officer Halloran's Sept. 14, 2020 Order on substitution of expert witnesses, Mr. Quarles' reports (*Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Expert Opinion of Mark A. Quarles, P.G. (Jan. 25, 2021) ("Quarles Initial Report", Ex. 2 to MWG's Quarles Mot.); *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G. (July, 2021) ("Quarles Rebuttal Report", Ex. 3 to MWG's Quarles Mot.)) build on the "testimony that stands." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 3 (Sept. 14, 2020). Hearing Officer Halloran ordered "that the parties must proceed to build on that information and present more information, including elaboration and amplification." *Id.* Mr. Quarles' reports show that he builds on, elaborates on, and amplifies the most relevant testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board's findings and Interim Order. Quarles Initial Rep. at 1-13; Quarles Rebuttal Rep. at 2-3. By way of example, Mr. Quarles' two reports contain more than 100 citations to the Interim Board Order. It is evident that Mr. Quarles uses the Interim Board Order as the foundation of and basis for his remedy phase reports. The Interim Board Order obviously includes evidence, such as Kunkel's testimony, that provided the grounds for the Board's decision. As a result, consistent with the Hearing Officer's Sept. 14, 2020 Order, Mr. Quarles's opinions and reports present more information and build on, elaborate

on, and amplify the testimony from the liability phase proceedings.

MWG incorrectly suggests that Mr. Quarles was required to elaborate on Dr. Kunkel's opinions with respect to remedy. This is false, for at least three reasons. First, Dr. Kunkel's report on remedy is not "testimony." Hearing Officer Halloran ordered that "[a]ny testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Sept. 14, 2020 Order, at 3 (emphasis added). While Dr. Kunkel's report on remedy is reliable, relevant evidence in regards to remedy in this proceeding, the report is not "testimony." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, James R. Kunkel, Ph.D., P.E. Expert Report on Remedy for Ground-water Contamination (July 1, 2015) ("Kunkel Remedy Report", Ex. 5 to MWG's Quarles Mot.). A witness's statements only rise to the level "testimony" if they are provided under oath. Black's Law Dictionary defines "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary (11th ed. 2019). Dr. Kunkel's Remedy Report was not provided under oath or penalty of perjury, is not signed, and is not notarized. *Id.* Dr. Kunkel's Remedy Report, therefore, is not testimony. While Dr. Kunkel's Remedy Report may be relevant, reliable evidence that is admissible during remedy phase, it is outside the scope of the Hearing Officer's order.

Second, Dr. Kunkel's Remedy Report is not part of the liability phase record. *See, e.g.*, Comp's Ex. 401 James Kunkel Expert Report, Groundwater Contamination-July 1, 2015; Comp's Ex. 407, Kunkel Expert Rebuttal Report-December 8, 2015; 408, Kunkel Expert Rebuttal Report-March 16, 2016; Resp.'s Ex 412, James Kunkel Supplemental Rebuttal Report-December 8, 2015 (comprising all of Kunkel's reports that are exhibits in the record). No hearings have yet been held on remedy, and the existing record is related to liability. While Dr.

Kunkel's Remedy Report is reliable, relevant evidence in regards to remedy in this proceeding, it is not part of the record in the liability phase proceeding and is outside the scope of the Hearing Officer's order.

Third, Dr. Kunkel's deposition testimony, while it is "testimony" in the everyday use of the term, is not part of the formal liability-phase record, and therefore does not qualify as the kind of testimony that the Hearing Officer was referring to. Dr. Kunkel provided no hearing testimony on remedy because the Hearing Officer ordered a separate hearing on remedy. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 1 (Feb. 9, 2017) (ordering that argument on scope of remedy be deferred "until when and if a hearing on remedy is held"). The Board also ordered a separate hearing on remedy. "[T]he Board directs the hearing officer to hold additional hearings to determine the appropriate relief and any remedy, considering Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42 (h) (2016))." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Interim Board Order, at 93 (June 20, 2019). The testimony that <u>is</u> part of the record is Dr. Kunkel's liability hearing testimony. As a result, it would be difficult to see how liability-phase deposition testimony, particularly with respect to remedy, could or should stand pursuant to the Hearing Officer's Sept. 14, 2020 Order. Testimony as referenced in the Hearing Officer's Order should be limited to hearing testimony. Sept. 14, 2020 Order, at 3.

Further, there is no requirement from the Hearing Officer's Order that Mr. Quarles' testimony adhere lock-step to Dr. Kunkel's prior testimony, although Mr. Quarles did appropriately refer to, rely upon, and build upon liability phase testimony, evidence, findings and conclusions in the Board's Interim Order. Nevertheless, Mr. Quarles' opinions and testimony are in no way inconsistent with Dr. Kunkel's positions, and simply present "more information"

as directed by Hearing Officer Halloran. Mr. Quarles' reports recommend a remedial process for determining what should be done for each area where coal ash is causing contamination at the sites. MR. Quarles's reports make clear where and why more information is needed as part of that remedial process (to identify where there is ash, the depth of ash, contact with groundwater, and whether ash is causing contamination). Quarles's reports do not reject Kunkel's recommended remedy of removal. Quarles's reports simply recommend a remedial process (and explain clearly why this process is necessary and why more information is necessary).

c. MWG Has Not Been "Surprised or Prejudiced".

Complainant's expert's testimony will not prejudice MWG, so there is no legal basis for it to be barred. The Hearing Officer already found that MWG will not be prejudiced by Complainant's substitution of experts. Hearing Officer's Order Sept. 14, 2020, at 3. Complainants' substitution of experts—or for that matter, any party's substitution of experts—will not "surprise[] or prejudice[]" any party because the parties "will have knowledge of any new expert reports and depose any new witnesses prior to the hearing." *Id.*; *see also 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"). The barring of 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). 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).

Demonstrating prejudice requires far more than Respondent's mere claim of interference with their litigation strategy. MWG's Quarles Mot., at 2. A party is only prejudiced when they will not be able to depose an expert or retain their own rebuttal expert. *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.").[1] Being completely unable to prepare a litigation strategy rises to the level of prejudice which is very different from Respondent's claim of possibly having to alter their litigation strategy. *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). Because Respondent has knowledge of Complainants' new expert reports, were able to depose new witnesses prior to the hearing, and have had more than a year to prepare for litigation, Respondent is not prejudiced or surprised by Mr. Quarles' testimony. As a result, his testimony

[1] "[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." *Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist.2013).

should not be barred.

Respondent only cites one case in support of their position that Mr. Quarles' reports violate the Hearing Officer's Sept. 14, 2020 Order—*Indiana Insurance Company v. Valmont Electric*. MWG's Quarles Mot., at 2, 4) (*citing Ind. Ins. Co. v. Valmont Elec., Inc.*, 2011 U.S. Dist. LEXIS 23256, *4 (S.D. Ind. 2001)). This case that is not from the Board or even Illinois. A single case from the Southern District of Indiana is not precedent and cannot outweigh the binding Illinois and Board precedent which hold that where a party is not prejudiced, an expert's testimony will not be barred. In any event, that one case is also easily distinguishable. Here, unlike the case cited by MWG, the Hearing Officer did not "order[] that the opinions of the new experts to be the same" or "bar[] any introduction of new and different theories." MWG's Quarles Mot. at 2, 4.

Finally, barring Mr. Quarles's testimony would harm Complainants far more than the fictitious inconvenience that Respondent claims from allowing Mr. Quarles' testimony to go forward. 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.") Complainants would be left with no expert who can discuss the mechanics of a remedy at all.

In sum, Respondent has knowledge of Mark Quarles' expert reports and deposed Mr. Quarles. Based on both the standard in Illinois law for substituting experts and the Hearing Officer's Sept. 14, 2020 Order, Respondent is not prejudiced or surprised and there are no grounds for excluding or limiting Mr. Quarles' opinions or testimony.

II. Mark Quarles' Opinions and Testimony Aid the Board.

MWG argues that Mark Quarles opinions are vague and do not aid the Board. MWG's Quarles Mot., at 5-6. Mark Quarles' recommended remedial process with the first step constituting source identification and an investigation aids the Board because, without source identification and an investigation, the Board cannot consider the factors required by the Illinois Environmental Protection Act Section 33(c) ("Section 33(c)"). 415 ILCS 5/33(c). Specifically, Mr. Quarles' recommendation as to a remedial process that includes source identification and further investigation of the contamination is an essential first step for any remedy. The Board is required to consider Section 33(c). Section 33(c) provides

c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to: (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
(ii) the social and economic value of the pollution source;
(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
(v) any subsequent compliance.

415 ILCS 5/33(c).

The Board spent more than 9 months and 93 pages clearly and meticulously identifying coal areas for which MWG is liable. Among other things, the Board found MWG liable for not adequately investigating and assessing onsite contamination. *See, e.g.*, Interim Order at 79 (finding that MWG "is not undertaking any further actions to stop or even identify the specific source." (emphasis added); *Id.* ("No further investigation of historic areas is taking place"). It is now impossible for the Board, in determining a remedy, to consider several of the Section 33(c)

factors without more information about the source, nature, and extent of the contamination. More specifically, the Board cannot determine whether reducing or eliminating the discharges from certain areas of coal ash, and remedying the numerous open dumping violations, is economically reasonable if the Board does not know how much it would cost to reduce or eliminate those discharges or areas of coal ash. None of the parties can know how much it will cost to reduce or eliminate a discharge or deposit if we do not know the volume of ash, the depth of ash in that area, whether ash is in contact with groundwater, and/or the extent of contamination that area is contributing. As a result, further investigation is needed and Mr. Quarles provides sufficient detail as to what a further investigation looks like.

Identifying more specifically how much and what each source of contamination is contributing is a critical first step. "Source identification is a critical component of a site investigation." Quarles Initial Rep. at 17. After the sources are adequately identified, additional information needs to be collected "to determine, for example:

- How much coal ash exists in unlined disposal and storage areas,
- What types of coal ash exist (e.g., fly ash, bottom ash, slag, and cinders),
- How much saturated and unsaturated coal ash exists,
- The thickness of any saturated coal ash,
- The vertical and horizontal migration of contaminants into the aquifer,
- The chemical and geochemical conditions in the saturated ash and the aquifer,
- The direction of groundwater flow from the disposal and fill areas, and
- Migration pathways of contaminants from the source(s).

Id. at 17. Mr. Quarles went on to point out that the investigation at each station needs to define "the nature and extent of contamination" for each active and historical coal ash areas. *Id*. at 24.

And Mr. Quarles identified the components of a nature and extent investigation:

- Sampling, analyses, and field screening activities,
- Characterization of sources and potential sources of contamination,
- A determination of the degree of saturation of coal ash and connectivity to groundwater,
- A three-dimensional analysis (horizontally and vertically) and the nature, direction, and rate of movement of contaminants,
- Characterization of present and post-remediation exposure routes that may potentially threaten human or environmental receptors, and
- Characterization of significant physical features of the remediation site and vicinity that may affect contaminant fate and transport and present a risk to human health, safety, and the environment.

Id. at 24-25.

Finally, Mr. Quarles also identified regulatory analogies for his recommendations. "Source identification and defining the nature and extent of contamination are fundamental first steps for selecting a remedy under IEPA and Federal programs such as the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. Sections 6901 – 6992k), the Comprehensive Environmental Response, Compensation and Liability Act (CERLCA, 42 U.S.C. Sections 9601 - 9675), and other state- equivalent programs." *Id*. at 21; *see also id*. at 18 ("Defining the nature and extent of contamination is a basic foundation of any environmental investigation defined by State and Federal regulations." (citing 40 CFR Part 257.98 (g)(1), 35 Illinois Administrative Code §§ 740.415, 740.420)).

After a nature and extent investigation, Mr. Quarles recommended a process for selecting a remedy:

Based upon my experience – regardless of the state or Federal regulatory

> framework that requires such a plan – a remedial action or corrective action plan should include an alternatives analysis that considers multiple potential remedial technologies for each contaminated media (e.g., soil, groundwater). Each of those alternatives are then evaluated individually and collectively – based upon site-specific conditions determined during the nature and extent investigation – to then select a recommended remedial approach. An evaluation of these basic components of possible remedial alternatives is fundamental to evaluating and selecting a remedy:
>
> - Ability of the remedy to protect human health and the environment,
> - Ability of the remedy to control, reduce, or eliminate future releases of contaminants,
> - Long and short-term effectiveness of the remedy and the degree of certainty that it will achieve the required objectives,
> - Feasibility of implementation; and
> - Whether remediation objectives will be achieved within a reasonable period of time.

Id. at 22. This all aids the Board because it is impossible to consider the economic reasonability and technical feasibility of any remedy without first knowing the nature and extent of the contamination. Mark Quarles opinions are specific, detailed, and aid the Board.

III. Mr. Quarles' Discussion of the Weaver Witnesses Qualifications

MWG argues that Mr. Quarles' evaluations of the Weaver witnesses' professional qualifications must be barred. MWG's Quarles Mot., at 6-9. MWG is incorrect, however, because if the testimony can aid the Board, the Board has the discretion to allow it. In the present case, Mr. Quarles' testimony on the Weaver witnesses' qualifications can be helpful to the Board, so the Hearing Officer should allow it.

MWG argues that "There is no doubt that whether an expert is qualified is for the Board to determine." MWG's Quarles Mot., at 7. Even if that issue is for the Board to determine, the Board is not by law required to exclude Mr. Quarles' opinions on the qualifications of the

Weaver witnesses. To the contrary, the Board is given wide discretion on determining whether to permit expert testimony such as Mr. Quarles'. *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2 (stating that "the Board is given wide discretion in determining whether to permit expert testimony;" (citing *Wiegman*, 308 Ill. App. 3d at 799; *Consolidated Freightways*, 1978 WL 9011, at *5)). Allowing testimony on an issue for the Board to decide does not usurp the Board's function because the Board is not "required to accept an expert's opinion." *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 799 (2d Dist. 1999) ("Because the jury is not required to accept an expert's opinion, allowing him to testify as to the ultimate issue in a case . . . does not usurp the jury's function.") cited in *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2. In the present case, allowing Mr. Quarles' testimony on the Weaver witnesses' qualifications does not usurp the Board's functions and the Board can decide for themselves whether to accept Mr. Quarles' opinions.

There is no doubt that Mr. Quarles has established himself as an expert on coal ash remediation. His CV indicates that his "Coal combustion waste experience has included investigations for over 100 coal combustion waste disposal sites across the United States, with a particular emphasis on these states: Alabama, Florida, Georgia, Illinois, Iowa, Kentucky, New York, North Carolina, South Carolina, and Tennessee." Quarles Initial Rep., App. A, at 1. His CCR compliance experience includes "expert opinion technical reports, expert testimonies, and comments at public hearings regarding Environmental Impact Statements, CCR Rule compliance, proposed investigations to define the nature and extent of contamination, proposed closure plans, and proposed corrective action measures." *Id.* His CV includes a representative (not comprehensive) list of (1) ten different projects related to CCR; (2) seven pieces of CCR litigation; and (3) several peer-reviewed publications related to CCR. *Id.* at 2-5.

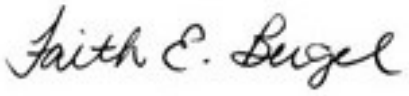
Because Mr. Quarles established himself as a qualified expert on CCR remediation, the question is then whether his testimony is helpful to the Board. "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006) cited in *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *3. Mr. Quarles testimony is helpful to the Board because it is informative on the experts' qualifications. However, MWG argues that Mr. Quarles is not "permitted to opine on the credibility of another witness." MWG's Quarles Mot., at 8. Even if Mr. Quarles is not an "expert" on whether the Weaver witnesses qualify as experts, his testimony can still be helpful to the Board. Where a witness may not qualify as an expert to opine on an issue, their testimony can still have "probative value." *Village of Addison, v. Tedio Printing Co.*, 1985 WL 21429, at *5 (Board found witness's noise survey and testimony had probative value even though witness was not a qualified environmental expert). Under such circumstances, the Board can weigh the expert's testimony accordingly. *Graham v. IEPA*, PCB 95-89, 1995 WL 518726, at *4 (Aug. 24, 1995) (Board weighed expert testimony accordingly over Agency's assertion that expert was not qualified). For these reasons, Mr. Quarles' testimony on the Weaver witnesses should be permitted and the Board can weigh Mr. Quarles' testimony accordingly.

IV. Conclusion

For the reasons stated in detail above, Complainants respectfully request that the Hearing Officer deny MWG's Motion *In Limine* to Exclude Quarles Opinions in its entirety.

Dated: March 4, 2022

Respectfully submitted,



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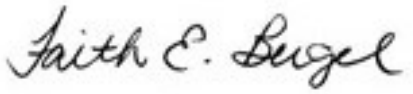
CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, 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' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS** before 5 p.m. Central Time on March 4, 2022, 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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