

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

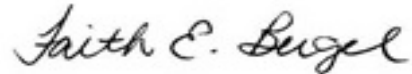
In the Matter of: )  
)  
SIERRA CLUB, ENVIRONMENTAL )  
LAW AND POLICY CENTER, )  
PRAIRIE RIVERS NETWORK, and )  
CITIZENS AGAINST RUINING THE )  
ENVIRONMENT )  
)  
Complainants, )  
)  
)  
v. )  
)  
)  
MIDWEST GENERATION, LLC, )  
)  
)  
Respondent. )

PCB No-2013-015  
(Enforcement – Water)

**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINION** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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

*Attorney for Sierra Club*

Dated: April 1, 2022

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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SIERRA CLUB, ENVIRONMENTAL )  
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MIDWEST GENERATION, LLC, )  
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**COMPLAINANTS’ OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINION**

Pursuant to Section 101.500(d) of the Illinois Pollution Control Board’s (“Board”) Procedural Rules, Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) respectfully request that the Hearing Officer deny Midwest Generation, LLC’s (“MWG”) March 18, 2022 Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion *In Limine* to Exclude Jonathan Shefftz Opinion (“MWG Mot. to File”), for the reasons stated below:

MWG has failed to demonstrate material prejudice as required by Rule 500(e). 35 Ill. Adm. Code 101.500(e). MWG will not be prejudiced by denial of its motion for leave to file because MWG’s proffered reply brief does not offer any argument beyond what it already provided in its original February 4, 2022 Motion *in Limine* to Exclude Jonathan Shefftz Opinion (“MWG Motion *in Limine*”). Denial of the right to file a reply is appropriate and will not prejudice a party when that party has already “adequately stated its position.” *People of the State*

*of Illinois vs. Peabody Coal Company*, PCB 99-134, 2002 WL 745609, at \*3 (Apr. 18, 2002). As justification for its leave to file, MWG claims that Complainants have raised two new arguments: “that Mr. Shefftz’s assumptions ‘can be challenged’ or are ‘in the record.’” MWG Mot. to File at ¶ 11. But these are not new arguments, and were already addressed by MWG. MWG’s motion *in limine* devotes multiple paragraphs to MWG’s assertion that information relied on by Mr. Shefftz is not in the record. *See* MWG Mot. *In Limine* at ¶¶ 11 (“[t]here is nothing in the record supporting . . .”), 12 (“[t]here is nothing in the record to support this statement”), 13, 14. Similarly, MWG’s motion *in limine* adequately presents MWG’s concerns with Mr. Shefftz’s reliance on information provided by Complainants’ counsel and by Dr. Kunkel. *See id.* at ¶¶ 9, 10, 11, 12 (cataloguing information provided by Complainants’ counsel); and ¶ 13 (listing information from Mr. Kunkel’s report). Because MWG’s reply merely repeats assertions adequately presented in its motion *in limine*, MWG’s motion for leave to file should be denied.

Nor has Complainants’ March 4, 2022 Response to Respondent Midwest Generation, LLC’s Motion *in Limine* to exclude Jonathan Shefftz Opinions (“Complainants’ Resp.”) opened the door to a reply. Complainants’ Response merely rebuts the arguments asserted by MWG in its motion *in limine*. Complainants’ assertion that MWG remains free to “challenge [Mr. Shefftz’s] assumptions in the course of a hearing” is not a new argument or even a particularly noteworthy assertion. MWG Mot. to File at 1 (quoting Complainants’ Resp. at 9). MWG contended in its motion *in limine* that it was inappropriate for Mr. Shefftz to rely on certain assumptions, and Complainants responded by providing multiple authorities supporting expert witnesses’ reliance on assumptions, particularly where those experts can be examined regarding their reliance on those assumptions. *See* Complainants’ Resp. at 3-5 (quoting *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539, 544, 428 N.E.2d 495, 499 (1981), and *People v. Negron*,

2012 IL App (1st) 101194, ¶ 49, 984 N.E.2d 491, 502, as modified on denial of reh'g (Jan. 31, 2013)). Because Complainants' response merely responded to the assertions from MWG's motion, no reply is warranted.

MWG's reply should also be rejected because it betrays a fundamental misunderstanding of the respective roles of the Complainants, Respondent, and Board in this proceeding, and therefore "offers no assistance" to the Hearing Officer. *See Commonwealth Edison Co. v. Illinois Environmental Protection Agency*, PCB 04-215, 2007 WL 1266937, at \*2 (April 26, 2007).

MWG seems to suggest that Mr. Shefftz must properly guess the remedial actions that the Board will ultimately order in this case, or that the Board is somehow limited to only the binary choice of approving or rejecting the remedies assessed in Mr. Shefftz's report. This is nonsense. The Board will determine the remedy. The Board may then rely on the methodology presented in Mr. Shefftz's report to determine the appropriate penalty. MWG remains free to examine Mr. Shefftz on that methodology and how changes to the various inputs relied on by Mr. Shefftz impact his calculated penalties.

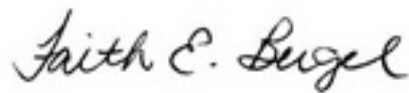
Even if MWG could overcome its failure to demonstrate material prejudice, it abuses the Board's Procedural Rules by submitting a motion and reply whose combined page total dwarfs the original motion *in limine* and Complainants' response. MWG's motion *in limine* totaled 11 pages. Complainants' response totaled 14 pages. MWG's motion for leave to file a reply, and its reply, total a combined 18 pages. Rule 101.500(e)'s admonition that there is no right to a reply requires parties to narrowly tailor any reply that they may seek to file. A reply that exceeds the length of the original motion is not narrowly tailored. This is particularly true here where MWG's reply seeks to address only two arguments. MWG Mot. to File at ¶ 11. It should not take 18 pages to make two arguments, particularly where those arguments were already adequately

addressed in MWG's initial motion. MWG's failure to properly constrain its reply necessitates denial of its motion for leave to file.

For the foregoing reasons, Complainants respectfully request that the Hearing Officer deny MWG's Motion for Leave to File, *Instantly*, Its Reply in Support of Its Motion *In Limine* to Exclude Jonathan Shefftz Opinion.

Dated: April 1, 2022

Respectfully submitted,



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

Peter M. Morgan  
Sierra Club Environmental Law Program  
1536 Wynkoop St., Ste. 200  
Denver, CO 80202  
(303) 454-3367  
peter.morgan@sierraclub.org

*Attorneys for Sierra Club*

Abel Russ  
Attorney  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Washington, DC 20005  
802-662-7800 (phone)  
ARuss@environmentalintegrity.org

*Attorney for Prairie Rivers Network*

Cantrell Jones  
Kiana Courtney  
Environmental Law & Policy Center  
35 E Wacker Dr, Ste 1600

Chicago, IL 60607  
cjones@elpc.org  
kcourtney@elpc.org  
(312) 673-6500

*Attorney for ELPC, Sierra Club and  
Prairie Rivers Network*

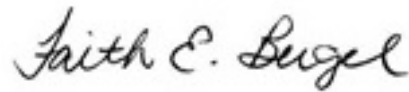
Keith Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker, Suite 750  
Chicago, IL 60606  
312-726-2938  
KHarley@kentlaw.iit.edu

*Attorney for CARE*

**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' OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINION** before 5 p.m. Central Time on April 1, 2022, to the email addresses of the parties on the attached Service List. The entire filing package is 7 pages.

Respectfully submitted,



Faith E. Bugel  
1004 Mohawk  
Wilmette, IL 60091  
[fbugel@gmail.com](mailto:fbugel@gmail.com)

**PCB 2013-015 SERVICE LIST:**

Jennifer T. Nijman  
Kristen L. Gale  
NIJMAN FRANZETTI LLP  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603  
[jn@nijmanfranzetti.com](mailto:jn@nijmanfranzetti.com)  
[kg@nijmanfranzetti.com](mailto:kg@nijmanfranzetti.com)

Bradley P. Halloran,  
Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph St., Suite 11-500  
Chicago, IL 60601  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

Abel Russ  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Washington, DC 20005  
[aruss@environmentalintegrity.org](mailto:aruss@environmentalintegrity.org)

Peter M. Morgan  
Sierra Club  
1536 Wynkoop St., Ste. 200  
Denver, CO 80202  
[peter.morgan@sierraclub.org](mailto:peter.morgan@sierraclub.org)

Cantrell Jones  
Kiana Courtney  
Environmental Law & Policy Center  
35 E Wacker Dr, Ste 1600  
Chicago, IL 60605  
[cjones@elpc.org](mailto:cjones@elpc.org)  
[kcourtney@elpc.org](mailto:kcourtney@elpc.org)

Keith Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker, Suite 750  
Chicago, IL 60606  
[Kharley@kentlaw.edu](mailto:Kharley@kentlaw.edu)