

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 2013-015 |
| Complainants, |) | (Enforcement – Water) |
| |) | |
| v. |) | |
| |) | |
| MIDWEST GENERATION, LLC, |) | |
| |) | |
| Respondent. |) | |

NOTICE OF FILING

| | |
|----------------------------------|-----------------------|
| TO: Don Brown, Clerk | Attached Service List |
| Illinois Pollution Control Board | |
| 60 E. Van Buren St., Ste. 630 | |
| Chicago, Illinois 60605 | |

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC’s Motion for Expedited Review of its Motions for Interlocutory Appeal of Two of The Hearing Officers’ Decisions, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 27, 2022

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5255

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
CJones@elpc.org
KCourtney@elpc.org

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Peter Morgan
Sierra Club
1536 Wynkoop St., Ste. 200
Denver, CO 80202
Peter.morgan@sierraclub.org

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service, and Midwest Generation, LLC's Motion for Expedited Review of its Motions for Interlocutory Appeal of Two of The Hearing Officers' Decisions, a copy of which is hereby served upon you was filed on July 27, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the Notice of Filing, Certificate of Service, and Midwest Generation, LLC's Motion for Expedited Review of its Motions for Interlocutory Appeal of Two of The Hearing Officers' Decisions were emailed on July 27, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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 2013-015 |
| Complainants, |) | (Enforcement – Water) |
| |) | |
| v. |) | |
| |) | |
| MIDWEST GENERATION, LLC, |) | |
| |) | |
| Respondent. |) | |

**MIDWEST GENERATION, LLC’S MOTION FOR EXPEDITED REVIEW
OF ITS MOTIONS FOR INTERLOCUTORY APPEAL OF TWO
OF THE HEARING OFFICERS’ DECISIONS**

Pursuant to 35 Ill. Adm. Code 101.500, 101.512 and 101.518, Respondent, Midwest Generation, LLC (“MWG”), requests that the Board conduct an expedited review of two appeals filed on this date: MWG’s appeal of the Hearing Officer’s decision to deny MWG’s Motion *In Limine* to Exclude Jonathan Shefftz Opinions; and MWG’s appeal of the Hearing Officer’s decision to deny MWG’s Motion *In Limine* to Exclude Quarles Opinions. In support of its Motion, MWG states as follows:

1. In October 2017 and continuing to January 2018, the parties participated in a lengthy and extensive hearing regarding Complainants’ allegations that MWG violated the Illinois Environmental Protection Act (“Act”). Complainants presented as their groundwater expert, James Kunkel, who had prepared and submitted multiple reports, including “Expert Report on Groundwater Contamination” (Hearing Ex. 401), an “Expert Report on Remedy for Groundwater Contamination,” and a Rebuttal Report (Hearing Ex. 407 & supplemented as Hearing Ex. 412).
2. On June 20, 2019, the Board issued an Interim Order regarding liability, which it reconsidered and modified in part on February 6, 2020.

3. On September 14, 2020, the Hearing Officer granted Complainants' motion to replace Mr. Kunkel and their economic expert witness, but with the condition that the testimony already given stands and the parties must build on that information. The order states, "Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." H.O. Order, Sept. 14, 2020, p. 3.
4. On January 25, 2021 and July 16, 2021, Complainants submitted their expert reports and rebuttal reports of their new groundwater expert, Mark Quarles, and their new economic expert, Jonathan Shefftz.
5. On February 4, 2022, MWG filed its motions *in limine*, including:
 - a. A motion to exclude the opinions of Mr. Quarles because his opinions violate the September 14, 2020, Hearing Officer Order and Illinois law regarding the scope of testimony for a replacement expert witness. Mr. Quarles's opinions do not "elaborate and amplify" the previously admitted Kunkel reports and testimony, and they do not aid the Board, since they do not recommend a remedy, adding confusion to an already complex case. Mr. Quarles entirely disregards Mr. Kunkel's opinions, and Complainants have explicitly withdrawn Kunkel's remedy opinion. *See MWG's Motion in Limine Quarles Opinions, Feb. 4, 2022.*
 - b. A motion to exclude Mr. Shefftz's opinions. Mr. Shefftz develops an opinion on alleged economic benefit to MWG that is not based on direct or even circumstantial evidence. Mr. Shefftz relies on cost estimates for Kunkel's removal remedy -- that Complainants have withdrawn -- and also relies on assumptions fed to him by Complainants' counsel that have no evidentiary basis. Moreover, none of the assumptions Mr. Shefftz bases his opinion on can be challenged or cross examined because there are no witnesses to testify. Mr. Kunkel was withdrawn (and is out of state) and Complainants' counsel are not witnesses at the hearing. *See MWG's Motion in Limine Shefftz Opinions, Feb. 4, 2022.*

6. On July 13, 2022, the Hearing Officer issued his decisions on the parties' motions *in limine*. The Hearing Officer denied MWG's motions *in limine* to exclude Mr. Shefftz's opinions and Mr. Quarles's opinions.

7. Concurrent with this motion, MWG filed an Appeal of the Hearing Officer's Rulings Allowing Quarles Opinions and Redacting Quarles's Notes and an Appeal of the Hearing Officer's Ruling Denying its Motion *In Limine* to Exclude Jonathan Shefftz's Opinions

8. The remedy hearing is tentatively scheduled to begin on late September and October 2022. H.O. Order, April 7, 2022.

9. MWG will be materially prejudiced if the Board does not review the Hearing Officer's decisions before the remedy hearing. At present, Complainants will be allowed to submit inconsistent and opposing expert opinions. On one hand, Complainants will present their new remedy expert, Mr. Quarles, who developed a new remedy theory and completely ignores Mr. Kunkel's (the withdrawn expert's) remedy opinions. Yet on the other hand, Complainants will present their economic expert, Mr. Shefftz, who relies on the costs of the withdrawn remedy and the withdrawn expert, Mr. Kunkel, to develop his economic benefit calculations, even though Complainants are now espousing a new remedy proposed by Mr. Quarles.

10. MWG is faced with a hearing in which it is barred from cross examining the facts and evidence on which their economic expert bases his opinions, and also a new remedy opinion that has no connection to the original opinion nor to the Shefftz economic opinion.

WHEREFORE, for the reasons stated above, due to the material prejudice that will result, MWG requests that the Board expedite the review of MWG's Motions for Interlocutory Appeal of the Hearing Officer's Decisions on MWG's Motion *in Limine* to exclude the expert opinions of Mr. Shefftz and Mr. Quarles.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

