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 MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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Dated: August 10, 2022

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COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") Appeal from the Hearing Officer Ruling's Allowing Quarles's Opinions and Redacting Quarles's Notes ("MWG Appeal"). The Illinois Pollution Control Board ("Board") should uphold the Hearing Officer's July 13, 2022 Order denying MWG's motion to exclude the expert opinions of Mark Quarles (35 Ill. Adm. Code 101.518) because Mr. Quarles's opinions are consistent with the Hearing Officer's September 14, 2020 order "provide more information." In addition, Mr. Quarles's opinions assist the Board because he recommends a process for remedy. The Board should also uphold (1) the Hearing Officer's denial of MWG's motion to exclude certain observations Mr. Quarles made in his expert reports about MWG's experts' credentials (1) the Hearing Officer's granting Complainants' motion to exclude a derogatory statement in Mr. Quarles's notes for the reasons stated below. Finally, in support of

their arguments that the Board should uphold the Hearing Officer's rulings, Complainants incorporate by reference "Complainants' Response to Respondent Midwest Generation, LLC's Motion *in Limine* to Exclude Quarles's Opinions," "Complainants' Motion *in Limin*e to Exclude Certain Documents," and "Complainants' Memorandum In Support Of Motion For Leave To Designate Substitute Expert Witnesses."

A. The Hearing Officer's Orders Allowing Substitution of Expert Witnesses and Denying MWG's MIL Are Not in Error and Are Consistent

MWG argues that Hearing Officer Halloran's July 27, 2022 decision on MWG's Motion *in Limine* regarding Mark Quarles's testimony violates the Hearing Officer's own order of Sept. 14, 2020 allowing substitution of expert witnesses. MWG Appeal at 7-9. MWG suggests that the Hearing Officer somehow misinterpreted or misunderstood his own order. To the contrary, the Hearing Officer is best equipped to interpret his own order.

First, turning to the Hearing Officer's September 14, 2020 Order, the Hearing Officer properly allowed the substitution of Complainant's Expert. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 3 (Sept. 14, 2020) ("Sept. 14, 2020 Order"). The Hearing Officer allowed both parties to identify additional witnesses and concluded that "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." Sept. 14, 2020 Order, at 3. As discussed below, the Hearing Officer got the standard for substituting experts right: If the parties will not be surprised or prejudiced, parties may substitute experts. *See People v. Pruim*, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008). Just like Complainants, MWG identified multiple new witnesses—four in total, those witnesses provided "more information," just like Complainants' expert, and that information was new, different and outside the scope of testimony that liability phase experts had provided in the record of this proceeding.

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 that Order.

> 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, including elaboration and amplification.

Sept. 14, 2020 Order, at 3.

MWG ignores the broad language of the Hearing Officer's Sept. 14, 2020 Order, which allows the parties and their substitute expert witnesses and directs the parties 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. Because new expert testimony is not limited in the way MWG argues, Mr. Quarles's reports and opinions are consistent with Hearing Officer's Sept. 14, 2020 Order.

MWG argues that Complainants somehow "misled the Hearing Officer by focusing their argument on the term 'testimony' in the Hearing Officer's Sept. 14, 2020 Order." MWG Appeal at 7. This is a ridiculous assertion. Complainants cannot imagine a scenario where a party could mislead a hearing officer, board, or court by focusing on a term that the adjudicator used in **their own order**. The Hearing Officer stated that "any testimony already given stands." Sept. 14,

2020 Order, at 3. Complainants focused on the word "testimony," among other things because the Hearing Officer used the word "testimony." Complainants' Response to Respondent Midwest Generation, LLC's *Motion in Limine* to Exclude Quarles's Opinions, at 4-7 (March 4, 2022) ("Comp's Response"). What could possibly be misleading about that?

In addition, the Complainants focused on the directive in the Hearing Officer's Sept. 14, 2020 Order that, among other directives, "the parties must proceed to . . . present more information" and Mr. Quarles's reports and deposition testimony build on the "testimony that stands." Sept. 14, 2020 Order, at 3. As pointed out in Complainants' Response to Respondent's *Motion in Limine*, presenting more information does not require the parties to adhere lock step to the previous expert witness's opinions. Comp's Response, at 3-6. Mr. Quarles's reports show that he builds on the testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board's findings and Interim Order. Quarles Initial Report at 1-13; Quarles Rebuttal Report at 2-3 (containing 100+ citations to the Interim Board Order). 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, Mr. Quarles's reports, opinions and deposition testimony are all consistent with Dr. Kunkel's hearing testimony and the evidence that is in the record.

Dr. Kunkel's remedy report is not "testimony that stands." Dr. Kunkel's report on remedy is reliable, relevant evidence on remedy in this proceeding; the report, however, 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.).[1] A witness's statements only rise to the level of "testimony" if they are provided under oath. 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 and, therefore, is not testimony. *Id.* Dr. Kunkel's Remedy Report is also 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). Dr. Kunkel's deposition testimony, while it is "testimony", is not part of the formal liability-phase record. Dr. Kunkel provided no hearing testimony on remedy because the Hearing Officer and the Board ordered a separate hearing on remedy. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 1 (Feb. 9, 2017); Interim Board Order, at 93 (June 20, 2019). The testimony that is part of the record is Dr. Kunkel's liability hearing testimony. Liability-phase deposition testimony, with respect to remedy, certainly can be relied on for proper purposes (*e.g.*, impeachment of a witness) but, because his deposition testimony was not admitted into evidence at the liability-phase hearing, there is no reason for Dr. Kunkel's deposition phase testimony to bind or limit Mr. Quarles's remedy phase testimony. Sept. 14, 2020 Order, at 3.

In short, Hearing Officer Halloran allowed the substitution of expert witnesses and found that the parties were not prejudiced by the substitution of expert witnesses because there was plentiful time and were opportunities to exchange expert reports and take depositions. Sept. 14,

[1] In addition, it is reasonable for Shefftz to rely on Dr. Kunkel's Remedy Report because Mark Quarles has recommended an iterative approach based around a nature and extent study. Although that approach will ultimately yield the most targeted remedy, by definition it cannot immediately produce a cost estimate. So, Mr. Shefftz reasonably relied on the estimate from Dr. Kunkel's report, which describes a full ash removal approach.

2020 Order, at 3. Further, in allowing elaboration, amplification, building on prior testimony, and **presenting more information**, the Hearing Officer did not require the new experts to adhere to prior experts' testimony. For these reasons, Mr. Quarles's testimony and reports are completely consistent with the Hearing Officer's Sept. 14, 2020 Order and should not be barred.

B. MWG Will Not Be Surprised or Ambushed Because Mr. Quarles is Limited to His Opinions Expressed in His Expert Report and Deposition Testimony.

MWG claims that they will be surprised because they do not know what Complainants are going to seek as remedies. MWG Appeal at 10. MWG is not prejudiced or surprised in the present case, because MWG is on notice of exactly what Complainants expert witnesses will say: MWG has received Complainants' expert reports from Mr. Shefftz and Mr. Quarles, deposed both experts, many months before the scheduled hearing, and have had the opportunity to prepare responsive reports and expert opinions. *See 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"). Mr. Quarles's hearing testimony will be consistent with his reports and deposition and likewise with Mr. Shefftz. Based on Mr. Quarles's recommendation for a nature and extent investigation, where an adequate investigation has already occurred and the facts from that investigation support removal, Complainants will recommend removal. For instance, Mr. Quarles discusses the Former Slag/Fly Ash Storage Area at Waukegan, indicating that cap-in-place is not a long-term remedy that will improve groundwater conditions. Quarles Rebuttal

Report at 31.[2] Further, where removal is required as a matter of law, Complainants will also recommend removal.

MWG relies on *Nelson v. Upadhyaya*, but substitution of experts is not even what was at issue in the cited opinion. The substitution of experts is only mentioned in dicta that was recounting the procedural history of the case:

> Shortly before trial an illness made Dr. Eichenwald unavailable to testify. The court permitted plaintiff to identify a substitute expert on pediatric infectious diseases. Plaintiffs named Dr. Roger Barkin as the substitute and arranged for a deposition on the eve of trial. Following the deposition defendants moved to bar Dr. Barkin from testifying in plaintiffs' case in chief because he had reviewed far more material than had Dr. Eichenwald and Dr. Barkin held opinions Dr. Eichenwald had not expressed. The court granted the motion to bar Dr. Barkin's testimony.

Nelson v. Upadhyaya, 361 Ill. App. 3d 415, 417-418, N.E.2d 784, 786–87 (Ill. App. Ct. 2005). At issue in *Nelson v. Upadhyaya* was whether the testimony of defense experts adequately supported the verdict and whether materials that post-dated the doctors' treatment of the plaintiff could be used to establish the standard of care at the time of injury. *See id.* at 422. Further, even the substitution of experts discussed in the procedural history of the case is distinguishable because the element of surprise. In *Nelson v. Upadhyaya*, the defendants did not have an opportunity to depose plaintiff's substitute expert until the eve of trial. *Id.* at 418. At that late date, there would have been no opportunity for defendants to prepare a responsive case to plaintiff's new expert's new opinions and the material he relied on for his opinions.

[2] "As discussed in Section 2.3.5, MWG plans to close the FS/FAS Area by constructing a cap over the wastes that are at least 22 feet below ground and are sometimes saturated. Also, as discussed in Section 2.3.5, that closure method will not prevent continued leaching of CCR constituents to groundwater and in fact, the concentrations might even increase. If the FS/FAS Area is considered to be an active pond according to the CCR Rule and the Illinois CCR regulations, closure-in-place would not be a closure option because CCRs would remain saturated. The only remaining closure option would therefore be closure-by-removal – where MWG would be required to excavate all CCRs and transport them to a lined landfill. MWG's plan to construct a cap is not a long-term remedy that would be expected to improve groundwater conditions." Quarles Rebuttal Report at 31.

MWG seeks to have Mr. Quarles completely barred from testifying yet barring of a party's witness is an extreme measure used in only the most egregious cases of surprise and prejudice. 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*, 136 Ill. App. 3d 700, 704, 483 N.E.2d 686, 689 (Ill. App. Ct. 2d Dist. 1985) (emphasis added) (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)). Just like in *Nelson v. Upadhyaya* relied upon by MWG, 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. *See Smith v. Murphy*, 2013 IL App (1st) 121839, ¶ 26, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist. 2013). A party is only prejudiced when they will not be able to depose an expert or retain their own rebuttal expert. *Id.* at ¶ 27 ("[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."). Respondents claim that they are prejudiced because they "tailored" their hearing strategy and cross-examination of Dr. Kunkel in the first hearing in consideration of a second hearing on remedy. MWG Appeal at 3. Complainants question what it means that Respondents tailored their hearing strategy considering that no remedy topics were covered in the liability hearing. Being completely unable to prepare a litigation strategy rises to the level of prejudice which is very different from Respondent's claim of prejudice. *See Firstar Bank v. Peirce*, 306 Ill. App. 3d 525, 532-533, 714 N.E.2d 116, 120 (Ill. App. Ct. 1st Dist. 1999) (explaining that undisclosed expert witnesses are a surprise and

prejudicial when opposing party had no time to prepare or construct trial strategy). In the present case, Complainants disclosed their substituted expert witness and provided his reports years before hearing, and he was deposed more than a year before hearing. MWG was thus given ample time to talk to our expert and prepare a responsive case. MWG is neither surprised nor prejudiced by Mr. Quarles's testimony or opinions.

Barring Mr. Quarles's testimony would harm Complainants far more than any prejudice that Respondent conjures up from allowing Mr. Quarles's 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. That is far more prejudicial than MWG's claimed impact on its "tailored" ligation strategy. In short, there is no surprise because Respondent is on notice as to what each expert will testify to: Mr. Quarles will offer opinions consistent with his reports and deposition, and Mr. Shefftz will offer opinions consistent with his reports and deposition.

C. Quarles's Opinions Aid the Board

MWG argues that Mark Quarles's opinions do not aid the Board. MWG Appeal at 11-13. Mark Quarles's recommended a remedial process with the first step constituting source identification and an investigation, followed by a determination of what to do for each area where coal ash is causing contamination at the sites. Quarles Initial Report, at 17-25 (Jan. 25, 2021). 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). *Id.* at 2-17. 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).

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 Report at 17. After the sources are adequately identified, additional information needs to be collected to determine how much and what types of ash are present, how much ash is saturated, the migration of contaminants and migration pathways,

conditions of the ash and the aquifer, and the direction of groundwater flow. *Id.* 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 and Mr. Quarles identified the components of a nature and extent investigation. *Id.* at 24. Mr. Quarles also identified regulatory support for the concept of a nature and extent identification. "Defining the nature and extent of contamination is a basic foundation of any environmental investigation defined by State and Federal regulations." *Id.* at 18; *see also id.* at 21. (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—an alternatives analysis. *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.

MWG also argues that Mr. Quarles's opinions on the qualification of the Weaver witnesses do not aid the Board. The Board is given wide discretion on determining whether to permit expert testimony such as Mr. Quarles's. *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 789, 799 (2d Dist. 1999); *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's 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's opinions.

Mr. Quarles more than establishes himself as a qualified expert on CCR remediation and his testimony on the Weaver witnesses will help the Board. Quarles Initial Report, App. A, at 1-5. "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." *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *3 (citing *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006)). Mr. Quarles's testimony is helpful to the Board because it is informative on the experts' qualifications. Even 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.*, PCB 84-160, 1985 WL 21429, at *5. 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). Mr. Quarles's testimony on the Weaver witnesses should be permitted, and the Board can weigh Mr. Quarles's testimony accordingly.

D. The Hearing Officer's Rulings—Allowing Quarles to Opine on Weaver's Credentials and Excluding Quarles's Remark—Are Consistent and Proper

MWG argues that Mr. Quarles's opinions on the Weaver expert witnesses' credentials should be excluded or, alternatively, the derogatory remark in Mr. Quarles's notes should not be redacted. MWG Appeal at 13-15. To the contrary, the Hearing Officer's rulings on Mr. Quarles's opinions on the Weaver witnesses and on the remark in Mr. Quarles's notes should be upheld. MWG cites *La Playita Cicero, Inc. v. Town of Cicero* to support its argument that Mr. Quarles's opinions on the Weaver witnesses should be excluded. MWG Appeal at 14 (citing 2017 U.S.

Dist. LEXIS 44868, *26-27 (N.D. Ill. Mar. 28, 2017)). MWG claims the *La Playita Cicero* stands for the proposition that the court excluded "expert's general opinions on witness's character and credibility because they were not supported by the facts and would not help the trier of fact." MWG Appeal at 14. However, the Court's actual statement on excluding the witness's testimony is as follows:

> [T]he Court agrees with Plaintiffs that these overbroad statements about Meza's general credibility and character are not supported by the evaluations Jaffe conducted. "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Gen. Elec., 522 U.S. at 146. Because these generalized criticisms of Meza's credibility and character constitute such *ipse dixit* assertions, the Court finds that they are inadmissible under FRE 702.

La Playita Cicero, Inc. v. Town of Cicero, 2017 U.S. Dist. LEXIS 44868, *26-27, 11-CV-1702, 2017 WL 1151066, at *9 (N.D. Ill. Mar. 28, 2017). MWG claims that Mr. Quarles's critiques of the Weaver witnesses are baseless and analogous to *La Playita Cicero* but Mr. Quarles's claims were not *ipse dixit* assertions. *Ipse dixit* assertions are a person's own assertion without any authority or proof. *Ipse dixit*, Wex Legal Dictionary, Legal Information Institute, Cornell Law School (June 2020). In other words, saying an assertion is *ipse dixit* is similar to saying that it is baseless. MWG's own memorandum in support of their appeal indicates, however, that not only do Mr. Quarles's assertions have a basis, they have more than one. Mr. Quarles's observations regarding the Weaver witnesses were (1) based on reviewing the Weaver witnesses' resumes and (2) based on reviewing reports from a case. MWG Appeal at 14. In fact, MWG contradicted its own statements about Mr. Quarles's review of the Weaver witnesses' CCR experience, saying in one sentence that those critiques were based "solely" on reviewing "a resume" and acknowledging in another sentence that, in fact, Mr. Quarles reviewed more than just a resume but also reviewed reports from a case. *Id.* In short, unlike in *La Playita Cicero*, Mr. Quarles's

assertions were not *ipse dixit* but had a basis. In addition, Mr. Quarles had more than one basis to support his claims about the MWG witnesses.

In the hopes of obscuring Mr. Quarles's legitimate criticisms of the Weaver witnesses, MWG labels the critiques of the experts' qualifications as "personal . . . attacks." MWG Appeal at 13. Once again, MWG goes too far. Mr. Quarles stated, for example, that Mr. Dorgan's "resume did not include any CCR related experience or representative projects, nor did it include any project(s) where he served as an expert witness for any CCR related matter. (WCG at 77-79)." Quarles Rebuttal Report at 4. This was the evidence for Mr. Quarles's statement that "Mr. Dorgan has minimal CCR related expertise." *Id.* As far as Mr. Maxwell, Mr. Quarles stated that "In summary, Maxwell has very limited CCR related experience: four projects in 24 years of environmental consulting." *Id.* at 6. Mr. Quarles goes on to say "Mr. Maxwell's role as a testifying expert in this case is especially concerning given that one of his demonstrative example projects was rejected by IDEM and another consulting firm." *Id.* Mr. Quarles explained further that the reason for concern is that the Mr. Maxwell designed a groundwater monitoring system for a project but "the groundwater monitoring system and his determination for upgradient and downgradient well designations were rejected and disapproved by the regulatory agency." *Id.* Mr. Quarles's observations are not abusive like a personal attack, and he provides the evidence to support them. These **are not** personal attacks.

MWG also invents facts out of whole cloth when smearing Mr. Quarles's valid assessment of the Weaver witnesses. *See* MWG Appeal at 14. MWG claims, without any evidence and without any citations, that Mr. Quarles's review of the Weaver witnesses' resumes was "cursory." *Id.* MWG has absolutely no basis for this claim. In fact, Mr. Quarles provided two paragraphs explaining his criticisms of Mr. Dorgan and two pages explaining his criticisms of Mr. Maxwell,

with his criticisms of Mr. Maxwell supported by Mr. Quarles's additional research. *See* Quarles Rebuttal Report at 4-6. This does not constitute a "cursory" review. In short, by mischaracterizing Mr. Quarles's legitimate criticisms of the Weaver witnesses, it is merely an attempt to distract from the compelling foundation for those criticisms.

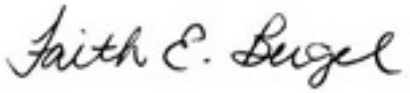
MWG also wants derogatory language allowed into the proceeding. The derogatory language is potentially prejudicial and for that reason, the Hearing Officer correctly concluded, in the July 13, 2022 Order, that language should be kept out of the proceeding. *See* ***Sierra Club v. Midwest Generation, LLC,*** PCB 13-15, Hearing Officer's Order, at 16 (July, 13, 2022) ("July 2022 Hearing Officer Order"). MWG assumes that it was Mr. Quarles who labeled the Weaver witnesses with derogatory language when Mr. Quarles notes from his conference calls do not indicate whether he is capturing his own observations or transcribing something someone else said. MWG's assumption as to the speaker has no basis and without knowing who used the derogatory language, the statement has no probative value and cannot go to motive, bias, nature, or credibility as MWG claims. MWG also offers no explanation as to why or how this statement might go towards Mr. Quarles's motives or credibility. Nor does MWG explain why the statement is not prejudicial. Even if the statement might have some probative value, if its prejudicial effect outweighs its probative value, it should be kept out. For these reasons, the Hearing Officer was correct that "Any relevancy arguments fail where the potentially prejudicial effect is outweighed by its probative value. *See generally People v. Serritella*, No. 1-20-0072, 86 (May 20, 2022)." July 2022 Hearing Officer Order at 16.

E. Conclusion

For all of these reasons, the Board should deny MWG's Appeal requesting that the Board reverse the Hearing Officer rulings allowing Quarles's opinions and redacting Quarles's notes.

Dated: August 10, 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 MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES** before 5 p.m. Central Time on August 10, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 19 pages.

Respectfully submitted,

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