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
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

Attached Service List

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer Denying Its Objection to Jonathan Shefftz's Opinion and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Ruling Denying Its Objection to Jonathan Shefftz Opinion, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 30, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing for Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer Denying Its Objection to Jonathan Shefftz's Opinion and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Ruling Denying Its Objection to Jonathan Shefftz Opinion were filed electronically on August 30, 2023 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 copies were sent via e-mail on August 30, 2023 to the parties on the service list.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINION

Respondent, Midwest Generation, LLC ("MWG"), requests that the Illinois Pollution Control Board ("Board") grant this Motion for Leave to File, *Instanter*, its Reply (to Complainants' Response) in support of its Appeal of the Hearing Officer denying its objection to Jonathan Shefftz's opinions, pursuant to Sections 101.500 and 101.514 of the Board's Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply brief is warranted because Complainants' Response Brief presents new and specious arguments that MWG could not have anticipated when drafting its appeal. What's more, the Response Brief fails to provide a consistent description of Mr. Shefftz's opinion, producing a confusing document that seems designed to induce an erroneous ruling by the Board. MWG will be materially prejudiced if it is not allowed to provide the Board with an accurate outline of and reply to the Response Brief's new arguments.

In support of its motion seeking leave to file, *instanter*, MWG submits its Reply and states:

1. In their response to MWG's Appeal of the Hearing Officer's Ruling Denying MWG's Objection to Mr. Shefftz's opinions ("Response"), Complainants describe the "Sole Purpose" of Mr. Shefftz's testimony in a manner inconsistent with the testimony itself.

2. Although Mr. Shefftz purported to provide an estimate of economic benefit, the Response Brief now claims that there is no estimate, or that any such estimate should be ignored. Section A of the Response Brief insists that his testimony is just a "framework," that will eventually take the Board's "inputs" (based on findings the Board has not made yet) and produce "outputs" relevant to preparing the economic-benefit estimates required by 415 ILCS 5/42(h). As such, Complainants admit that Mr. Shefftz's opinions do nothing to aid the Board.

3. Further, Complainants' Response Brief is internally inconsistent and apparently designed to be confusing, with a "Section A" advancing "just a framework" interpretation and "Section B" providing actual costs and penalties.

4. Section B reveals that Mr. Shefftz was not *just* providing a framework. He took assertions fed to him by Complainants' counsel to produce, according to Complainants, the "best estimate of that benefit based either directly on established facts, or on reasonable inferences from those facts."

5. In December 2022, this Board warned Complainants that if Mr. Shefftz's testimony was not tethered to direct or circumstantial evidence as supported by the facts or reasonable inferences, then it would not meet the Board's evidentiary standards. Board Order, Dec. 15, 2022, p. 16, *citing Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1st Dist. 1993).

6. Yet Complainants now admit that each of the assumptions Mr. Shefftz relies upon for his opinion are either from information excluded from the record or from statements made to Mr. Shefftz by Complainants' attorneys, which are also not in the record. Because none of the

underlying information to Mr. Shefftz's report was presented at the hearing, MWG had no ability to challenge any of Mr. Shefftz's assumptions at the hearing, which was fundamentally unfair to MWG and violates the rules of evidence. Ill. R. Evid. 102, 703.

7. Complainants claim in Section B that Mr. Shefftz's "economic-benefits model framework" was "create[ed]" using hypothetical assumptions regarding remedy, dates of violation, and duration of violation, provided to Mr. Shefftz by Complainants' counsel. Their claim conflates the "framework" with the assumptions Mr. Shefftz used as inputs into the framework.

8. Mr. Shefftz has never claimed that the information he received from Complainants' counsel was relevant to how he created his model. Rather, they formed the inputs. Inputs that have no basis in the record are simply not valid.

9. Complainants' seem to be engaged in an effort to create maximum confusion surrounding Mr. Shefftz's use of costs relating to Mr. Kunkel's inadmissible remedy assessment, with the goal of inducing the Board to approve an outcome that is not consistent with the Illinois Rules of Evidence. MWG should be given an opportunity to point out and attempt to resolve that confusion to avoid an unduly prejudicial outcome.

10. Complainants' specious and false assertions against MWG's economic expert, Gayle Koch, are new and merit a reply also. Complainants claim that Ms. Koch has no basis to assert that a "worst-case" remedy as to cost would be the removal of all of the soil, materials, buildings, and equipment at each of the four Stations. If a full removal from all four Stations is not worst case, it is difficult to imagine what is. It does not take an expert to make that conclusion. In any case, Ms. Koch was simply pointing out that it was Mr. Shefftz who appeared to use the highest cost (worst case) remedy in order to inflate his view of economic benefit in his opinions.

Ms. Koch, in contrast, noted that the Board's rules required her to use the lowest cost alternatives – Mr. Shefftz failed to do so.

11. Similarly, Complainants falsely claim that Ms. Koch says the Weaver Remedy is the "best." She never made such a claim. Again, as required by Section 42(h)(3) of the Act, she reviewed the "lowest cost" alternatives presented by the experts. 415 ILCS 5/42(h)(3).

12. MWG has prepared its Reply in support of its Appeal which is attached hereto.

13. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by allowing MWG an opportunity to address arguments and misrepresentations that it could not have anticipated when drafting its appeal.

14. This Motion is timely filed on August 30, 2023, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Reply (to Complainants' Response) in support of its Appeal of the Hearing Officer denying its objection to Jonathan Shefftz's opinions, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ OPINIONS

Complainants simply cannot keep their story straight. The first half of their Response Brief protests that all Mr. Shefftz is doing is providing expert testimony in non-opinion form: His testimony is, in effect, a spreadsheet that will calculate economic benefits once the Board fills in the empty cells.

But the second half of the Response Brief admits that, actually, Complainants already filled in those cells, thereby providing the "best estimate of that benefit based either directly on established facts, or on reasonable inferences from those facts." Response Br. at 12. But those "facts" come from an "expert report" that is not in the record, that was prepared by an expert that MWG never got to cross-examine, and that the Complainants did not introduce "for the truth of anything in the report." This "best estimate" belies their description of the Shefftz Report as a mere "framework."

The Board told the Complainants that the bare minimum requirement for presenting hypotheticals to an expert is to demonstrate a connection between the hypotheticals and admissible evidence. Almost one year later, they still have not done that, and the best they can do is (1) use Mr. Quarles' groundwater-testing recommendation to prolong this decade-old case into a multi-step future process, and (2) reinvent Mr. Shefftz's opinion as a non-opinion so that no "direct or circumstantial evidence" supporting their assumptions is required.

If the Complainants' own response brief cannot reliably inform the Board what the Shefftz Report *is*, then it is not helpful. The Board has rules that prohibit unhelpful expert testimony. It should enforce them to promote compliance by litigants in future proceedings and to avoid a prejudicial error in an already complex case.

A. The Complainants Cannot Save Mr. Shefftz's Opinion by Changing It to a Non-Opinion at the Last Minute.

For years, the Board has been pushing Complainants to provide the evidence their burden of proof requires. In its June 20, 2019 Order, the Board stated that it lacked sufficient information to determine an appropriate remedy and directed the Hearing Officer to hold additional hearings "to determine the appropriate relief and any remedy[.]" July 19, 2019 Board Order, p. 93. Then, in December 2022, it warned Complainants that if Mr. Shefftz's testimony was not tethered to direct or circumstantial evidence as supported by the facts or reasonable inferences, then it would not meet the Board's evidentiary standards. Board Order, Dec. 15, 2022, p. 16, *citing Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1st Dist. 1993).

Complainants now face the consequences of their failure to take those warnings to heart. They failed to give MWG an opportunity to cross-examine their prior expert, Mr. Kunkel, on remedy costs and failed to demonstrate that the costs in Kunkel's remedy report (relied on by Mr. Shefftz) are reliable and authentic. They failed to find a new expert that could build on Mr. Kunkel's

conclusions or support his cost estimates. Their own expert chose to completely ignore the Kunkel reports. They failed to elicit testimony from Mr. Shefftz establishing that he had expertise sufficient to ensure that cost-table numbers (that he obtained from Mr. Kunkel's Remedy Report and subsequently relied on) were plausible. And they told the Hearing Officer that their own position was that nothing in the Kunkel Remedy Report should be taken as true.

So their last viable strategy is to claim that the "sole purpose" of Mr. Shefftz's testimony is to provide the Board a "framework." Response Br. at 4. The Complainants insist that this is no different from (for example) a formula showing the Board how to convert feet-per-second-squared to meters-per-minute-squared. Complainants' do not seem to realize that what they are now describing is not an "opinion" at all. While an expert may provide "other" testimony in addition to opinions, the expert testimony can only be allowed if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. Illinois Rule of Evidence 702. Mr. Shefftz does neither because the "evidence" Mr. Shefftz relies on (Kunkel Remedy Report) is totally unsupported and has been rejected by Complainants.

Nonetheless, the Complainants accuse MWG of "entirely misunderstand[ing]" Mr. Shefftz's role. Response Br. at 3. But if that is true, then Mr. Shefftz does not understand his role, either. He did not describe himself as a spreadsheet. He described himself as a relay-runner, expecting to first receive a baton from Mr. Kunkel, which he would then pass to the Board. 5/17/23 NDI Tr., 13:16-20 & 15:1-13. Mr. Shefftz's problem is that his "baton" has no substance. But now the Complainants imply that he is just a coach on the sidelines, telling *the Board* what to do with a

baton once Mr. Quarles (Complainants' testifying groundwater expert) potentially gives it to them sometime in the future.[1]

The Board has given the Complainants every opportunity to adjust Mr. Shefftz's opinion to account for Mr. Kunkel's disappearance and Mr. Quarles' refusal to even acknowledge the Kunkel Remedy Report. Yet, if anything, the purpose of Mr. Shefftz's testimony is now more confusing than ever and would not be "relied upon by prudent persons in the conduct of serious affairs[.]" 35 Ill. Adm. Code 101.626(a). The Board can still receive expert testimony in future cases. By stressing the importance of coherence now, it can ensure that it will receive coherent (and therefore helpful) expert reports in the future.

B. Complainants Admit Mr. Shefftz's Opinion Is Not Supported by the Record.

Despite the Hearing Officer having ruled that Kunkel's Remedy Report is inadmissible, Complainants are still trying to sneak it into evidence. Although they claim that the "Sole Purpose" of Mr. Shefftz's testimony is to provide the Board a "model framework into which the Board will provide the final inputs based on its eventual determination," it turns out that Mr. Shefftz and the Complainants filled in the "inputs" already, using numbers from the rejected Kunkel Remedy Report. Response Br. at 3, 7-12. If Mr. Shefftz's framework is as helpful as the Complainants claim, then it should not be necessary to tell the Board what the output purports to be before it has even decided what the inputs are.[2]

[1] The Response Brief admits that Mr. Quarles "at this stage of the proceedings" has still not presented a remedy. Response Br. at 7, 8.

[2] The Response Brief suggests that Mr. Shefftz "used" the inputs Complainants' attorneys gave him to "creat[e]" the model. Response Br. at 7. If this were true, which it is not, it would put the cart before the horse. Indeed, the Response Brief elsewhere admits that all the inputs are good for are helping the model create "output[s]." Response Br. at 3. And there is no evidence in Mr. Shefftz's testimony or in his report that he "created" a new model or his model reflects anything outside of broadly accepted economic-modeling practices and the requirements of Sections 33 and 42(h) of the Act.

In any event, to the extent that providing "hypothetical" inputs into the model might be useful, Complainants have disregarded Board's demand that those hypotheticals be based on "circumstantial or direct evidence, as supported by the facts or reasonable inferences[.]" Board Order, Dec. 15, 2022, p. 16, *citing Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1st Dist. 1993). Despite making blanket claims that Mr. Shefftz's opinions are based upon hypothetical assumptions connected to factual evidence in the case, Complainants point to no document, testimony or record that support his assumptions. Response Br. at 7. They admit that the cost estimates Mr. Shefftz relies upon were not created by their testifying expert, Mark Quarles. Response Br. at 8.

Instead, those estimates are contained in Mr. Kunkel's Remedy Report, which Complainants posit, without any explanation or basis, was supported by "extensive documentation and expert analysis" Response Br. at 8. Even if that were true (which it is not), the cost estimates in Mr. Kunkel's Remedy report are not within the realm of circumstantial or direct evidence, nor supported by the record. *Carter*, 247 Ill. App. 3d at 296. The Hearing Officer granted MWG's motion to exclude the Kunkel Remedy report, and Complainants did not appeal that decision. 5/16/23 NDI Tr., 22:15-23, 91:14-15.[3] And how could they? They had already told the Hearing Officer that "the Kunkel Remedy Report is not being offered for the truth of anything in the report" Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023).

Complainants also do not identify any evidence in the record that supports Mr. Shefftz's assumptions on the start date of a corrective action at the MWG Stations or its duration. Comp. Resp. p. 9. Even Mr. Shefftz admits that he had not seen any factual evidence to this effect: He

[3] Notably, Complainants do not dispute that Mr. Shefftz's report contains a critical error because he double counted the costs proposed by Mr. Kunkel. They also do not dispute that Mr. Shefftz's on-the-fly correction of his error relied upon a remedy that was not recommended by Mr. Kunkel – overinflating his estimate. Comp. Ex. 412, p. 12.

was just "follow[ing] the legal inputs from the side that is retaining me." 5/17/23 NDI Tr., 38:20-22. Whether Mr. Shefftz "felt it was appropriate" to maintain this practice is beside the point. Response Br. at 10. The Board says that, under Illinois evidentiary rules, it was not appropriate to provide Mr. Shefftz hypotheticals that were not based "circumstantial or direct evidence, as supported by the facts or reasonable inferences[.]" Board Order, Dec. 15, 2022, p. 16.

MWG never had the opportunity to place Mr. Kunkel's findings in "the crucible of cross-examination." *Williams v. Illinois*, 567 U.S. 50, 66 (2012). And MWG's Appeal Brief outlines, at length, just a *sample* of the questions MWG would have addressed to Mr. Kunkel at the remedy hearing. The Complainants make no effort to dispute that, (1) these questions would have discredited Mr. Kunkel, and that (2) these questions could not have been raised at the liability hearing. As for the question of whether MWG was prejudiced by not having the opportunity to cross-examine Mr. Kunkel, the Complainants' efforts to keep his findings in front of the Board through Mr. Shefftz, regardless of the Illinois Rules of Evidence, strongly support that inference.

C. Complainants' Claims About Gayle Koch Are Baseless.

Complainants make baseless claims about MWG's economic expert's expertise and misrepresent her testimony. For example, Complainants claim that Ms. Koch had no basis for describing a complete site-wide removal of all four Stations as the "worst-case" scenario. Response Br. at 6-7.

That is ironic. The proposed remedy that Mr. Shefftz relied upon required removing ***all*** the soil, equipment, buildings, and material at the Joliet 29 Station, Powerton Station, Waukegan Station, and Will County Station regardless of whether anything is contaminated. This is obviously

the "worst-case scenario," which is why the Complainants now strive to sneak this specific part of the Kunkel Remedy Report into evidence.

Complainants also claim that Ms. Koch stated that MWG's experts (Weaver Consultants) provided the "best remedy." Response Br. at 7. Tellingly, they provide no citation to this claim. Ms. Koch never stated any remedy was the best. Instead, pursuant to Section 42(h)(3) of the Act, Ms. Koch reviewed and relied upon the "lowest cost" remedies presented by the experts, in this case the estimates prepared by Weaver Consultants. 415 ILCS 5/42(h)(3).[4]

Overall, compared to Mr. Shefftz's opinion, Ms. Koch's opinion is helpful to the Board because it (1) is based upon facts in the in the record, (2) provides a remedy recommended by testifying experts which the Complainants had the opportunity to cross-examine, and (3) outlines the context of MWG's history to help the Board determine the economic reasonableness of a remedy and penalty.

D. Conclusion

Complainants keep making promises they do not keep. They tell the Board that they are just providing a framework, when they are actually submitting full calculations based on pure speculation. They promise the Hearing Officer that Mr. Kunkel's Remedy Report is not submitted for the truth of the matter; now they tell the Board that it *is* the factual basis for their hypotheticals to Mr. Shefftz. They claim that the record contains other evidence supporting the hypothetical inputs; then they fail to identify it. They participated in a remedies hearing, and now inform the Board of their plans to introduce remedies evidence at some later "stage of the proceedings."

[4] The Complainants make a belated attempt to attack Ms. Koch as "a half-expert at everything" who offered opinions "on topics well outside her stated expertise in this case." Resp. Br. at 7. If that were true, they would have lodged an objection at the hearing. They did not.

None of this is helpful. It is reasonable to now assume that this chaos Complainants have presented to the Board is purposeful: They seek to come away with a substantial judgment against MWG that hinges on costs from an expert report that was never submitted to cross-examination and that no party to this case even posits as true. The Illinois Rules of Evidence prohibit the use of inadmissible or irrelevant evidence. The Board should enforce them.

Respectfully submitted,

MIDWEST GENERATION, LLC

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