

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 electronically filed today with the Illinois Pollution Control Board Midwest Generation, LLC’s Objection to Complainants’ Request for Leave to File Reply *Instante* to Midwest Generation, LLC’s Response to Complainants’ Motion for Interlocutory Appeal of the Hearing Officer’s Orders Regarding Economic Impact Testimony, a copy of which is herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: September 13, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing for Midwest Generation, LLC's Objection to Complainants' Request for Leave to File Reply *Instanter* to Midwest Generation, LLC's Response to Complainants' Motion for Interlocutory Appeal of the Hearing Officer's Orders Regarding Economic Impact Testimony was filed electronically on September 13, 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 September 13, 2023 to the parties on the service list.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC,)	
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MIDWEST GENERATION, LLC’S OBJECTION TO COMPLAINANTS’ REQUEST FOR LEAVE TO FILE REPLY *INSTANTER* TO MIDWEST GENERATION’S LLC’S RESPONSE TO COMPLAINANTS’ MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER’S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY

Midwest Generation, LLC (“MWG”) objects to Complainants’ Request to file a Reply brief (*instanter*) to MWG’s Response to Complainants’ Motion for Interlocutory Appeal of the Hearing Officer’s Orders regarding Economic Impact Testimony and asks that the Board deny the request and disregard the reply brief.

Complainants seek to strike two full pages of the expert report of Gayle Koch, MWG’s economic expert, but fail to recognize that the information on those pages goes beyond the issue of “ability to pay”. Complainants’ Reply misrepresents the questions presented to and the answers provided by Ms. Koch at the hearing. MWG agrees, as it has consistently stated, that anything related specifically to MWG’s ability to pay a remedy or penalty is not allowed – but that is not what Ms. Koch presented on pages 28 and 29 of her opinion. Indeed, at the hearing, Complainants did not ask Ms. Koch specific questions about the information on pages 28 and 29 of her report. Instead, in an attempt to falsely paint those pages as solely related to MWG’s ability to pay,

Complainants' asked general questions that attempted to link MWG's financial information to the costs of a remedy. MWG immediately objected to the connection to ability to pay. 6/15/23 NDI Tr., p. 119:17-120:17.¹ That did not mean, however, that the information on pages 28 and 29 wasn't relevant to other factors.

At the hearing, Ms. Koch confirmed that her opinion was related to two parts: (1) the economic reasonableness of a remedy regardless who will be paying (*i.e.* the 42(h) factors) and (2) whether the total remedy cost and penalty would be reasonable given MWG's financials (in response to Complainants' expert; and she did not discuss this second issue). 6/15/2023 NDI Tr., p. 117:10-118:11. Complainants asked a single general question about the first part, and she agreed that her opinion included whether it is economically reasonable to pay for a remedy regardless of who is paying. *Id.*, at p. 118:12-24. However, Complainants *did not ask* whether any of the information on pages 28 and 29 of Ms. Koch's report were related to any other penalty factors the Board may consider. For example, Complainants could have, but did not, ask Ms. Koch how each of the specifics on pages 28 and 29 of her report relate to the Section 42(h) factors in the Act. 415 ILCS 5/42(h).

When Complainants turned to page 28 during the hearing, they only asked Ms. Koch about how her summary of MWG's financials relates to whether a remedy and penalty *would be reasonable given MWG's financials*. 6/15/23 NDI Tr., p. 119:1- 120:4. That was the objectionable question. Indeed, MWG objected as soon as Complainants asked about whether the size of MWG comes into play on analyzing the economic reasonableness of a remedy (*i.e.* – a question related to ability to pay). *Id.*, at 120:18-20. Even in the offer of proof, after the Hearing Officer's sustained MWG's objection, Complainants continued to only focus on whether MWG has the ability to pay

¹ Complainants conveniently ignore Ms. Koch's direct testimony that she did not determine what MWG is able to pay and has no opinion on that. 6/15/23 NDI Tr., p. 129:12-130:4.

a remedy or penalty. *Id.*, 128:6-129:16. In fact, except for one section, Complainants continued to ignore her opinions on pages 28 and 29 of her report. In the single exception, Complainants asked Ms. Koch how MWG's bankruptcy related to a remedy cost, which she testified was "...valuable information when you look at the period of stated noncompliance..." In other words, Ms. Koch stated MWG's bankruptcy was relevant to consideration of the duration of noncompliance under Section 42(h)(1) of the Act. 415 ILCS 5/42(h)(1). Had Complainants continued with questions on her specific opinions on pages 28 and 29, she would have testified similarly for each.² In short, Complainants asked the wrong questions (likely because they did not want the answers), and failed to ask about how her opinions on pages 28 and 29 were related to the economic reasonableness of a remedy and penalty (*i.e.* – the first part of her economic reasonableness opinion) in consideration of the factors under Section 42 of the Act.

Complainants' reply has no basis and should be rejected because the information they seek to strike on page 28 of Ms. Koch's report is already in the record and Ms. Koch is entitled to opine as to its relevance to factors *other than* ability to pay. The Hearing Officer granted Complainants' request to admit the underlying documents that contain MWG's financial information, over MWG's objections. Comp. Exs. 1204, 1205, and 1206 (each labeled as NDI). That is the same information on page 28 of Ms. Koch's report. Because MWG's financial information is the record, MWG would be highly prejudiced if it were precluded from relying on Ms. Koch's report discussing the financial information.

Merely because Complainants failed to ask the correct questions does not mean that two pages of Ms. Koch's opinion should be dismissed nor that they are entitled to reply. Because

² In the Reply, Complainants also describe their tiresome exercise asking Ms. Koch about redacted information in Mr. Shefftz's report. Complainants' reliance is meaningless because they asked Ms. Koch to attempt to identify the redacted information in Mr. Shefftz's Report that she was responding to, which was an impossible task and proves nothing.

Complainants' Reply mischaracterizes Ms. Koch's opinions and her testimony, Complainants' motion to for leave to file the Reply must be denied and the reply disregarded.

Respectfully submitted,
Midwest Generation, LLC

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

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