

**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,	)	
	)	
Respondents	)	

**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 EXTENSION OF TIME TO FILE POST-HEARING BRIEF**, copies of which are served on you along with this notice.

Respectfully submitted,

*Faith E. Bugel*

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Dated: October 20, 2023

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of:	)	
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SIERRA CLUB, ENVIRONMENTAL	)	
LAW AND POLICY CENTER,	)	
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CITIZENS AGAINST RUINING THE	)	
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	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent	)	

**COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S  
MOTION FOR EXTENSION OF TIME TO FILE POST-HEARING BRIEF**

Complainants Sierra Club, Environmental Law & Policy Center (“ELPC”), Prairie Rivers Network, and Citizens Against Ruining the Environment (“CARE”), by their undersigned counsel, hereby submit this Response to the Midwest Generation, LLC’s (“MWG”) Motion for an Extension of Time to File Post-Hearing Brief (“Motion”). The Hearing Officer should deny Respondent’s Motion for the following reasons:

1. As Respondent points out, on June 22, 2023, the Parties agreed to a post-hearing briefing schedule. The schedule provided more time for briefing than Complainants thought necessary but, in an effort to work cooperatively and not burden Board staff with additional motions, Complainant agreed to the schedule. [Ex. 1]
2. The hearings were completed on June 15, 2023 and the final motions for leave related to interlocutory appeals were filed in the second and third weeks of September. The parties have been freed of other filing deadlines in this proceeding since late September and aware of the

early January deadline for initial briefs since October 4, 2023. Thus, the parties have been aware of the briefing schedule for a significant amount of time and have had ample opportunity to draft their briefs in late September, all of October, and early November in advance of holidays, vacations, and the conflicts that Respondent identified in their motion.

3. The existing briefing schedule provides more than enough time for the parties to complete briefing, even if it is lengthy and complex as argued by Respondents. The agreed schedule provides 90 days to complete initial briefs, which is approximately 40 days more than the briefing schedule provided in the liability phase: on May 30, 2018, the parties agreed to an initial deadline of July 20, 2018. See Hearing Officer Order, PCB 13-15 (May 30, 2018). An added 50+ day delay on top of the 90 days already allowed for initial remedy-phase briefs is unacceptable at this stage in the proceedings because the Board has directed the parties to “proceed expeditiously.” Board Order, PCB 13-15, at 17 (Feb. 6, 2020).

4. Respondent reads far too much into Complainants’ assent to a provision in the Parties’ post-hearing schedule regarding “possible extensions.” [Resp. Mot. Ex. 1, emphasis added]. Respondent emphasizes that the provision, which states that the “due dates are subject to possible extensions based upon timing of the Board’s decisions and concurrence of other events (i.e. – holidays),” identifies holidays as an example of what might prompt parties to agree to an extension. Respondent, however, has proposed an extension to which Complainants are not willing to agree. Complainants did not bind themselves automatically to agree to any extension that Respondent proposes, however lengthy, simply because the deadline for briefing falls immediately after the winter holidays. The parties’ use of the term “possible” in that provision makes it clear that neither party’s agreement to an extension is guaranteed.

5. MWG requested in its Motion an extension until March 1, 2023 but does not justify a two-month extension. Respondents' counsels' vacations in November and December are insufficient reasons to establish good cause to extend the briefing. Counsel fails to indicate how long these vacations are, but presumably they are not on vacation the entire month of November or December. MWG's conflicts in December and January are also insufficient reasons to extend the briefing. "It is a fact of an attorney's life that conflicts arise . . . ." *Sours Grain Co. v. Illinois EPA*, PCB No. 85-190, 1986 Ill. ENV LEXIS 338, at \*3 (1986). Respondent fails to explain how its counsels' vacations and MWG's conflicts add up to two months of time during which no progress can be made on briefing.

6. Further, when MWG contacted Complainants to request an agreed extension, Respondent asked for an extension until February 16, 2023, [Ex. 2]; but in this Motion, Respondent is now requesting an extension until March 1. It would be prejudicial to Complainants for the Hearing Officer to merely split the time between January 4 and March 1 on the assumption that halfway in between is fair.

7. MWG has demonstrated throughout this proceeding a desire to lengthen every step of the litigation. Prolonging these proceedings is in MWG's interests because it defers the cost of a cleanup.

8. Conversely, Complainants have repeatedly pointed out that resolution of the case – a cleanup – is urgent because the contamination that has been going on for over a decade continues unabated. As a result, Complainants have sought to minimize and curtail requests for additional time and have only requested extensions in extreme circumstances.<sup>1</sup> Delay prejudices Complainants by allowing more contamination to migrate out of relatively discrete coal ash

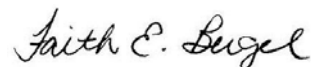
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<sup>1</sup> Complainants asked for an extension to reschedule the January 2023 hearing because one of Complainants' counsel was out for a three-month family-medical leave.

deposits and into the general environment where it is much harder to clean up. Complainants' agreement to a vague provision allowing for "possible extensions" does not eliminate that prejudice.

For the reasons stated above, Complainants respectfully request that the Hearing Officer deny Respondent's Motion for an extension to the briefing deadlines. In the alternative and because Respondent's have asked for far more time than necessary, Complainants urge the Hearing Officer to grant an extension of no more than 2 weeks.

Respectfully submitted,



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*Attorney for ELPC*

**Exhibit 1**



Faith Bugel <fbugel@gmail.com>

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## PCB13-15- Post-Hearing Schedule

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**Faith Bugel** <fbugel@gmail.com>

Wed, Jun 21, 2023 at 9:55 AM

To: Kristen Gale <kg@nijmanfranzetti.com>

Cc: Albert Ettinger <ettinger.albert@gmail.com>, Abel Russ <aruss@environmentalintegrity.org>, Greg Wannier <greg.wannier@sierraclub.org>, Megan Wachspress <megan.wachspress@sierraclub.org>

Kristen,

Thank you for drafting this. I am attaching a version with our edits. We scaled the dates back because, as usual, we are concerned with unnecessary delay.

Thanks,

Faith

[Quoted text hidden]

[Quoted text hidden]



**DRAFT Agreed Post Hearing Briefing Schedule Comp's Edits.docx**

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*Sierra Club, et al v. Midwest Generation, LLC*

**AGREED POST-HEARING BRIEFING SCHEDULE**

Interlocutory Appeals of Hearing Officer Decisions during Hearing Due	21 days after the Illinois Pollution Control Board (“Board”) receives the last hearing transcript from the second set of hearings scheduled for June 12-16
Responses to Interlocutory Appeals Due	<del>21</del> <u>14</u> days after Interlocutory Appeals filed
Simultaneous Post Hearing Briefs Due	<del>90</del> <u>45</u> days after the last Board Decision on the Interlocutory Appeals
Simultaneous Responses to Post Hearing Briefs Due	<del>45</del> <u>30</u> days after the Post Hearing Briefs are filed

- 1) The Parties agree that the due dates are subject to possible extensions based upon timing of the Board’s decisions and concurrence of other events (*i.e.* – holidays).
- 2) The Parties agree that the Post-Hearing Briefs may not exceed 85 pages, which does not include appendices containing relevant material. *See* May 30, 2018 Hearing Officer Order; 35 Ill. Adm. Code 101.302(k).
- 3) The Parties agree that the Responses to the Post-Hearing Briefs may not exceed 50 pages, which does not include appendices containing relevant material. 35 Ill. Adm. Code 101.302(k).

**Exhibit 2**



Faith Bugel &lt;fbugel@gmail.com&gt;

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**PCB13-15 -**

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**Kristen Gale** <kg@nijmanfranzetti.com>  
To: "Faith Bugel (fbugel@gmail.com)" <fbugel@gmail.com>

Wed, Oct 11, 2023 at 9:12 AM

Hi Faith:

The Board's Order on the interrogatory appeals stated that the post-hearing briefs are due Jan. 4th. In consideration of the holidays, including vacations, can we agree to push it back to Feb. 16th?

-Kristen

Please note that our Suite number has changed to "Suite 3400" effective March 24, 2023. Please update your records. Thank you.

[Icon Description automatically generated]

Kristen Laughridge Gale

T: 312-262-5524

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**CERTIFICATE OF SERVICE**

The undersigned, Gregory E. Wannier, 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 the **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR EXTENSION OF TIME TO FILE POST-HEARING BRIEF** before 5 p.m. Central Time on October 20, 2023, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 13 pages.

Respectfully submitted,

*Faith E. Bugel*

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