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 filed today with the Illinois Pollution Control Board Midwest Generation, LLC's Motion to Reconsider The Board's Order, and Reject Jonathan Shefftz's Opinions and Reports, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: November 9, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Motion to Reconsider the Board's Order, and to Reject Jonathan Shefftz's Opinions and Reports was filed electronically on November 9, 2023 with the following:

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and that true copies of the pleading were emailed on November 9, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER THE BOARD'S ORDER, AND TO REJECT JONATHAN SHEFFTZ'S OPINIONS AND REPORTS

Pursuant to 35 Ill. Adm. Code 101.520, Respondent, Midwest Generation, LLC ("MWG"), respectfully requests that the Illinois Pollution Control Board ("Board") reconsider and reverse its previous order that allowed the opinions and testimony of Complainants' economic expert, Jonathan Shefftz, to be admitted. In its October 5, 2023, Order allowing the opinions, the Board stated that Mr. Shefftz's opinions relied upon assumptions *arising from factual evidence in the case*. Order, p. 15. This is not correct. It is evident that Mr. Shefftz's opinions *did not* arise from factual evidence in this case. *See* MWG's Interlocutory Appeal, ¶¶15, 19, 20, Memo in Support, pp. 5-6, 8-13, 19-20, and its Reply in Support, pp. 4-6.[1] By failing to acknowledge the lack of factual support for Mr. Shefftz's opinions, the Board erred in its application of the law regarding the admission of expert testimony. In support of its Motion, MWG states as follows:

[1] MWG incorporates by reference its Appeal of the Hearing Officer's Ruling Denying its Objection to Jonathan Shefftz's Opinions and Memorandum in Support, filed with the Board on July 25, 2023, and its Reply in Support of its Appeal, filed with the Board on August 30, 2023, attached as Exs. 1 and 2 respectively. In an effort to reduce the volume of the record for this matter, MWG is excluding the exhibits to Exhibit 1 (MWG's Appeal), but incorporates by reference the exhibits.

1. In a motion to reconsider, the Board may consider new evidence, a change in the law, or errors in the Board's application of the law. 35 Ill. Adm. Code 101.520, 101.902. A motion to reconsider may also specify "facts in the record which were overlooked." *City of Quincy v.* Illinois *Environmental Protection Agency*, PCB 08-86, 2010 Ill. ENV LEXIS 213, *48 (June 17, 2010, *citing Wei Enterprises v. IEPA*, PCB04-23, slip op. at 3 (Feb. 19, 2004). Here, the Board overlooked facts (or the lack thereof) in the record which resulted in erroneously allowing expert testimony that has no factual basis.

2. In its Order, the Board makes two key but internally inconsistent statements. First, the Board restates MWG's objections to Mr. Shefftz's opinions - that Mr. Shefftz's opinions relied on cost estimates that had been withdrawn by Complainants and on assumptions fed to him by Complainants' counsel not based in evidence. Oct. 5, 2023 Order, p. 13. In the following sentence, however, the Board states that Mr. Shefftz's reliance on Table 6 from a prior expert's report (Mr. Kunkel's report) is "at issue" and subsequently allows Mr. Shefftz's opinion. *Id.* By referring to Table 6 being the fact at issue, the Board seems to infer, incorrectly, that Table 6 is a sufficient factual basis to admit Mr. Shefftz's opinions. These two concepts are contradictory and cannot be reconciled.

3. Table 6 has no factual or evidentiary value. It consists of a listing of costs for a purported removal remedy that was *withdrawn by Complainants*. The withdrawn remedy was initially conceived by Complainants' prior expert -- who *was withdrawn by Complainants* and who never testified about nor presented the remedy as evidence. Complainants replaced their prior expert with a new expert (Mr. Quarles) who did not adopt (or even read) Mr. Kunkel's idea for a remedy. Despite the fact that the remedy (and expert) that formed the basis for Table 6 was specifically rejected and withdrawn by Complainants, Mr. Shefftz relied on Table 6 costs as the

initial basis for his opinions. Rather than being based in fact or evidence, Mr. Shefftz's opinions relating to Table 6 are based on the rejected opinions of a withdrawn expert.

4. Then, in addition to costs from the rejected remedy in Table 6, Mr. Shefftz relied on a series of assumptions to complete his analysis – none of which are based in fact and, as the Board stated in its Order, were fed to Mr. Shefftz by Complainants' counsel. Oct. 5, 2023 Order, p. 13. Those assumptions, which also formed the basis of Mr. Shefftz's opinions, relate to (i) accepting counsel's presumption of the length of time Mr. Kunkel's *withdrawn* remedy might take, (ii) accepting counsel's presumption of when Mr. Kunkel's purported – and *withdrawn* – remedy should begin, (iii) accepting the unsupported supposition from Complainants' counsel that all groundwater violations are continuing (despite recent sample results and despite groundwater management zones), and (iv) blindly accepting, without supporting testimony from a technical consultant, that MWG's previous compliance measures (such as its Illinois EPA approved impoundment liners and Compliance Commitment Agreements) need not be accounted for. *See* MWG Appeal, ¶19, and Ex. 1, Memo in Support, p. 8-13, 19-20. There is not a single witness nor document admitted into evidence that provides Mr. Shefftz with a factual basis for the conclusions he was fed by counsel. Instead, as the Board stated, they were assumptions fabricated by Complainants' attorneys.

5. By overlooking the absence of factual basis for Mr. Shefftz's opinions, the Board erred in applying Illinois law. Mr. Shefftz's opinions are based upon mere assumptions and there is no foundation for the opinions. As such, the opinions should have been excluded. *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393 (1st Dist. 1998) (Court reversed the admission of expert testimony because there was "simply nothing in the testimony" or materials that supported the expert's conclusion); *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 802 (1st Dist. 2009) (affirming barring expert opinion that lacked factual basis); *In re Marriage of*

Cutler, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (expert opinion should not have been received because it lacked a proper foundation).

6. While Complainants assert that Mr. Shefftz's opinions can be changed at some later date when he is presented with actual facts about a remedy, Complainants' argument effectively admits the problem at hand. Mr. Shefftz's opinion has no basis, and promising to change it in the future, after testimony is complete and the record is closed, is of no value to the Board and is prejudicial to MWG. The Board cannot allow a future, unknown expert opinion to be submitted based on future, unknown inputs that are never presented in evidence and never subjected to cross examination or challenge.

7. The Board's Order also seemed to mischaracterize MWG's appeal as a challenge to Mr. Shefftz's qualifications, stating that the Board saw no reason to disqualify him. Oct. 5, 2023 Order, p. 14-15. MWG did not challenge Mr. Shefftz's *qualifications* as an expert in economics. Instead, MWG has consistently sought to exclude his opinions because they lack any foundation and fail to rely on reasonable assumptions arising from factual evidence <u>*in this case.*</u> *See* Ex. 1, MWG's Interlocutory Appeal, ¶¶15, 19, 20, Memo in Support, pp. 5-6, 8-13, 19-20, and Ex. 2, pp. 4-6. MWG previously used the phrase "garbage in-garbage out" to describe Mr. Shefftz's opinions. That has not changed. Neither the inapplicable costs for a rejected remedy in Table 6, nor the assumptions used by Mr. Shefftz, constitute facts or evidence in this case that can support Mr. Shefftz's opinions.

8. Ultimately, the Board did not address and entirely overlooked the absence of factual basis for the factors Mr. Shefftz used to create his opinions, which was an error and merits reconsideration and reversal of its order.

WHEREFORE, MWG respectfully requests that the Board reconsider its previous Order and enter a new order rejecting Mr. Shefftz's opinions and testimony.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By ____/s/ Jennifer T. Nijman _____
One of Its Attorneys

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EXHIBIT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 26, 2023

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

Respondent Midwest Generation, LLC ("MWG") appeals the Hearing Officer's admission of the opinions of Complainants' expert, Jonathan Shefftz, and his expert reports, Exhibits 1201, 1203, 1207, because his opinions are not relevant and are not based on reliable information. (35 Ill. Adm. Code 101.502(b), 101.518). The Board is faced with opinions presented by an expert that are based on assumptions from counsel or a withdrawn and unavailable expert, and there is no witness or evidence available to allow the assumptions to be questioned for their relative weight.

Introduction

1. None of the sources for Mr. Shefftz's opinions are based on direct or even circumstantial evidence supported by facts or reasonable inferences, as required by the Board's opinion and applicable law. For his testimony at the hearing on this matter, Complainants' second economic expert (Mr. Shefftz) issued opinions that were based on a cost table presented by Complainants' first groundwater expert (Mr. Kunkel), along with information fed to Mr. Shefftz by Complainants'

counsel. But Complainants withdrew and replaced Mr. Kunkel prior to this second phase (remedy phase) of the hearing -- so Mr. Kunkel never testified to his opinions on remedy or his cost table as used by Mr. Shefftz. And Complainants failed to submit into evidence any support for the information that Complainants' counsel fed to Mr. Shefftz.

2. In that regard, MWG's predictions of how the Complainants' expert testimony would proceed were correct. *See* Appeal of the Hearing Officer's denial of Motion in Limine (and memorandum in support of same,) filed July 27, 2022, attached as Exhibit 3, pp. 2, 15-21. Because Complainants' original groundwater expert (Mr. Kunkel) was not available to testify, and because Complainants' did not provide any basis for their opinions that they fed to Mr. Shefftz, MWG could not interrogate whether there is any basis for the information on which Mr. Shefftz relies. Mr. Shefftz's opinions are not based on reliable information, in a clear violation of Illinois Rules of Evidence, and MWG is materially prejudiced by their admission. The Illinois Pollution Control Board ("Board") should reverse the Hearing Officer's decision, exclude Mr. Shefftz's opinions and strike his testimony.

3. In support of its Appeal, MWG incorporates by reference and attaches: (1) Its Motion in Limine to Exclude Jonathan Shefftz Opinions, filed February 4, 2022 (Exhibit 1); (2) its Reply in Support of that motion, filed March 18, 2022 (Exhibit 2); and (3) its appeal of the Hearing Officer's denial of that motion (and memorandum in support of same,) filed July 27, 2022 (Exhibit 3).[1] MWG also submits its Memorandum in Support of this Appeal and states as follows:

Background

4. Following the Hearing Officer's decision (over MWG's objection) to allow Complainants to identify new experts who would amplify and build on testimony of Complainants' original

[1] To reduce the volume of record and duplicity, MWG is filing its motion, reply, and appeal *without* the attachments.

experts, Complainants submitted expert reports and rebuttal reports from their second groundwater expert, Mark Quarles, and their second economic expert, Jonathan Shefftz. As described more fully in MWG's July 27, 2023 appeal of the Hearing Officer's Decision (Ex. 3), Complainants' new groundwater expert (Mr. Quarles) ignored and disregarded the remedy opinions made by Complainants' first expert (Mr. Kunkel). Complainants' economic expert, Jonathon Shefftz, then issued his opinions on purported economic benefit to MWG by using, as the heart of his analysis, (i) Mr. Kunkel's cost estimates for a remedy that was never presented (and Mr. Kunkel was withdrawn), and (ii) positions taken by Complainants' counsel, without any further support. Mr. Quarles' admitted he had barely even heard of Mr. Kunkel.

5. On February 4, 2022, MWG filed a motion to exclude Mr. Shefftz's opinions because they rely on opinions of cost estimates from an expert that Complainants had withdrawn, and because they are based on assumptions fed to him by Complainants' counsel that are not direct or circumstantial evidence as supported by the facts or reasonable inferences. Ex. 1.[2]

6. On July 13, 2022, the Hearing Officer issued his decisions on the parties' motions in limine. The Hearing Officer denied MWG's motion in limine to exclude Mr. Shefftz's opinions in a brief three-paragraph discussion.

7. On July 27, 2022, MWG timely filed an interlocutory appeal of that decision pursuant to 35 Ill. Admin. Code 101.518. MWG accurately predicted that it would be "faced with a hearing in which it is barred from cross examining the facts and evidence on which Mr. Shefftz bases his opinions…" Exhibit 3, p. 2.

[2] MWG also filed a motion to exclude the opinions of Mr. Quarles because, among other issues, they violate the Hearing Officer's order. Because Mr. Quarles admitted to violating the Hearing Officer's order, MWG is separately appealing the Hearing Officer's decision to admit Mr. Quarles's testimony to the Board.

8. On December 15, 2022, the Board denied MWG's appeal, stating that Mr. Shefftz's opinion "relies upon reasonable assumptions arising from the factual evidence." Board Order at 16 (Dec. 15, 2022). The Board does not describe this alleged factual evidence and was apparently hopeful that Mr. Shefftz would shed light on the situation at the hearing. *Id.*

9. On May 1, 2023, MWG filed a Motion in Limine seeking to bar the admission of the report Mr. Kunkel had issued concerning a possible remedy for the MWG Stations ("Kunkel Remedy Report") on the grounds that Complainants had withdrawn Mr. Kunkel as a witness, and Complainants' new expert, Mr. Quarles, was unable to testify to the Kunkel Remedy Report.

10. On May 12, 2023, the Complainants filed a response arguing that the exclusion was unnecessary because "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).

11. At the hearing on May 16, 2023, the Hearing Officer granted MWG's motion to bar the Kunkel Remedy Report, and allowed Mr. Shefftz to testify about limited portions of the report that he had reviewed (i.e. costs) only as an offer of proof. 5/16/23 NDI Tr., 22: 15-23, 91:14-15.

12. MWG renewed its objection to Mr. Shefftz offering testimony at the hearing for the same reasons as outlined in its Motion in Limine -- because the opinions were based on the Kunkel Remedy Report costs and based on assumptions provided by Complainants' counsel, neither of which were "…based on facts or data reasonably relied upon." 5/16/23 Tr., pp. 122-23. The objection was overruled.

13. Mr. Shefftz proceeded to offer testimony relying on the same hearsay assumptions that MWG had previously objected to, *i.e.* duration of remedial work, beginning of noncompliance at each site, etc. This included the remedy cost estimate prepared by Mr. Kunkel, even though the

Complainants had told the Hearing Officer that it was "not being offered for the truth of anything in the report." Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023).

The Opinions of Jonathan Shefftz Violate the Rules of Evidence and the Hearing Officer Erred by Overruling MWG's Objections.

14. The Board's December 15, 2022 ruling allowing Mr. Shefftz's opinions quotes Illinois case law stating: "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible . . . ." (Dec. 15, 2022 Order, at 16, quoting *Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1st Dist. 1993).) The Board went on to state this principle in different terms: "Courts have held that expert witnesses are allowed to rely upon data 'presented to him outside of court and other than by his perception,' so long as it is of a type ordinarily relied upon by experts in the field forming their opinions." (*Id.* quoting *Rock v. Pickleman*, 214 Ill. App. 3d 368, 374 (1st Dist. 1991).) The Board then suggested that MWG could resolve any issues through cross-examination of Mr. Shefftz.

15. But here, there *is no direct or circumstantial evidence*, and no witness or documents for MWG to cross-examine. Mr. Kunkel's cost estimates, which form the basis of Mr. Shefftz's opinions, are Mr. Kunkel's opinion of costs for his opinion on a remedy -- opinions that Complainants' replacement expert (Quarles) completely ignored, did not adopt, and could not testify to. The costs are not "data." Complainants have withdrawn Mr. Kunkel and no one can testify to the costs on which Mr. Shefftz relies. Mr. Shefftz also relies on assumptions made by Complainants' counsel that have no basis in fact, and no direct or circumstantial evidence to support them. 5/17/23 NDI Tr., 37:16-24.

16. When an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393 (1st Dist. 1998). It is well established that, "For expert

testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32. To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[3]

17. As the Board noted, circumstantial evidence may be allowed as evidence. However, the information that formed the basis of Mr. Shefftz's opinions does not qualify as circumstantial. Circumstantial evidence is "the **proof** of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33, 468 N.E.2d 422, 82 Ill. Dec. 160 (1984) (emphasis added). The proven circumstantial facts must be of such a nature and so related as to make the facts to be inferred the more probable. *Pyne v. Witmer*, 129 Ill. 2d 351, 369, 543 N.E.2d 1304, 135 Ill. Dec. 557 (1989).

18. In this case, Complainants cannot point to any direct or circumstantial evidence to support Mr. Shefftz's use of the Kunkel cost data or statements from counsel. Instead, Mr. Shefftz used information from unavailable witnesses that MWG had no ability to cross-examine. Mr. Shefftz developed his economic opinions based on cost data from the Kunkel Remedy Report, yet Complainants replaced Mr. Kunkel, did not present Mr. Kunkel to testify about his cost opinions, and Mr. Kunkel's testimony during the first hearing was limited to liability.[4] Because Mr. Kunkel

[3] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

[4] The Board incorrectly implied in its Dec. 15, 2022 Order that most of the questions MWG would have presented at the remedies-phase hearing were questions that MWG already had an opportunity to pose at the liabilities-phase hearing, where Mr. Kunkel testified in October 2017 and January 2018. *Id* at 17. That is not true. While Mr. Kunkel may have testified "at length," his testimony was limited to his opinion related to liability (Comp. Ex. 401). MWG

does not live in Illinois, MWG could not subpoena him to appear at the second phase of this hearing. MWG also could not cross-examine Complainants' second expert Mr. Quarles about Kunkel's remedy cost estimates, relied on by Mr. Shefftz, because Mr. Quarles did not review the Kunkel report -- his name did not even "ring a bell." 5/15/2023 Tr., p. 153:14-154:9.

19. The remaining information Mr. Shefftz relies on is from Complainants' counsel, who also are not available to cross-examine and who did not present any evidence to support the statements they fed to Mr. Shefftz. Complainants simply told Mr. Shefftz to use Complainants' counsel's assumptions for key inputs into Mr. Shefftz's report, specifically (i) the duration of Mr. Kunkel's opinion for a remedy, (ii) the start date of Mr. Kunkel's purported remedy, (iii) whether groundwater violations are continuing, or (iv) whether MWG's previous compliance measures should be accounted for. MWG has no way to challenge counsel's assumptions.

20. Mr. Shefftz himself stated that he had no opinion on the quality or validity of the estimates that form the basis of his entire opinion and was simply told to use them. 5/16/23 NDI Tr., p. 24:13-24, Ex. 1201, Shefftz Jan. 2021 Rpt. p. 22, Ex. 1202, Shefftz Rebuttal Rpt. p. 14.

21. MWG's expert, Gayle Koch, who teaches a course on how to become an expert, testified that it is not customary to nor consistent "with the ordinary role an expert plays in litigation" to rely solely on counsel. 6/15/23 NDI Tr., p. 11:15-23, 12:1-5.

22. While the Board may generally prefer to allow testimony and assess its weight, this situation is particularly egregious and a clear exception. As the Hearing Officer stated, an expert must still rely on evidence, be it direct or circumstantial, and it must be evidence that is reasonably relied on by experts. Just like the courts in Illinois, the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147 (2nd

was barred from cross-examining Mr. Kunkel on his Remedy Report because, as the Board points out in its Order, "remedy was not a part of the testimony or evidence at the liability hearing." *Id.* at 7.

Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum,* 348 Ill. App. 3d 398, 401 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information).

23. Here, the Board is faced with opinions presented by an expert that are based on *assumptions from counsel or a withdrawn and unavailable expert*, and there is no witness available to allow the assumptions to be questioned for their relative weight. Mr. Shefftz's opinions and testimony do nothing to assist the Board, and it would be arbitrary and capricious if the Board were to allow the testimony to stand. There is no question that MWG is prejudiced by expert testimony about an alleged penalty that MWG is unable to attack in any meaningful way.

24. The Board should follow standard Illinois procedural and evidentiary law, reverse the Hearing Officer's admission of Mr. Shefftz's reports and strike Mr. Shefftz's testimony, or, alternatively, recognize that MWG could not challenge the bases for Mr. Shefftz's opinions and therefore give Mr. Shefftz's report and testimony no weight.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's evidentiary ruling and strike/exclude the baseless opinion testimony by Complainants' expert Jonathan Shefftz.

Respectfully submitted,
Midwest Generation, LLC
By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
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Respondent.	)	

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

Midwest Generation, LLC ("MWG") submits this Memorandum in Support of its Appeal of the Hearing Officer's decision to admit the expert opinions of Complainants' expert, Jonathan Shefftz. Mr. Shefftz's opinions exceed the limits of Illinois Rule of Evidence 703 and, in being based on a report not submitted for "the truth of anything in the report" and on unsupported assumptions of counsel, even Mr. Shefftz admits that his opinion is has no validity.

The morass the Board now faces is exactly as MWG predicted. Mr. Shefftz's testimony relies on information that has no basis in direct or circumstantial evidence. Mr. Shefftz's opinions were based on the hearsay *opinions* of an expert that Mr. Shefftz has no insight into and who was cut loose by the Complainants before he could be cross-examined at the remedy-phase hearing. This "parroting" of hearsay expert testimony by a non-testifying witness is forbidden by Illinois Supreme Court precedent. Mr. Shefftz similarly erred by preparing his estimates based on unsupported representations of counsel. Such representations are not evidence and cannot meet

the "direct or circumstantial evidence" requirement the Board identified in 2022. (Board Order at 16.). MWG is materially prejudiced by the admission of opinions because MWG was prevented from cross-examining the assumptions on which Mr. Shefftz based his opinions about purported economic benefit.

I. Background

The history on this issue is voluminous and reaches back to before the matter was bifurcated. It is described in detail in MWG's July 17, 2022 appeal and memorandum in support, attached as Exhibit 3. Following the Hearing Officer's decision to allow Complainants to substitute its experts, to amplify and build upon prior experts' testimony, Complainants submitted expert and rebuttal reports of their second groundwater expert, Mark Quarles, and their second economic expert, Jonathan Shefftz. Mr. Quarles ignored and entirely disregarded opinions made by Complainants' first expert, Mr. James Kunkel and developed new remedy opinions. And yet, instead of using Mr. Quarles' new remedy opinions, Mr. Shefftz developed his opinions of purported economic benefit to MWG by using costs that the withdrawn expert, Mr. Kunkel, had opined to but never presented.[1] Mr. Shefftz's opinions were also based on statements that Complainants' counsel told Mr. Shefftz to assume as true, without any support for those statements.

a. Pre-Hearing Briefing

On February 4, 2022, MWG filed its motions in limine, including a motion to exclude the Shefftz opinions. MWG moved to exclude the Shefftz opinions in part because the opinions rely on cost estimates for a removal remedy expounded by a witness that Complainants have withdrawn, and rely upon assumptions fed to him by Complainants' counsel that are not based on

[1] Mr. Shefftz did not even rely upon the correct remedy suggested by Mr. Kunkel. Mr. Shefftz relied upon the remedy to remove the *entire* stations, but Mr. Kunkel stated that he never intended for the entire stations to be removed, only the ash ponds and specific other areas he had identified. Comp. Ex. 412, pp. 11-12.

direct or circumstantial evidence. *See* Ex. 1. On July 13, 2022, the Hearing Officer denied MWG's motion to exclude the Shefftz opinions, stating that "Experts relying on counsel's assumptions or hypotheticals within the realm of direct or circumstantial evidence for their opinion is proper if based on direct or circumstantial evidence." H.O. July 13, 2022 Order, p. 9.

On July 27, 2022, MWG appealed the denial of its Motion in Limine to exclude Mr. Shefftz's opinions, largely restating the arguments that had been presented to the Hearing Officer. Despite denying MWG's appeal, the Board noted that there were limits on the ability of experts to rely on the opinions of non-testifying experts and hypotheticals presented by counsel. The outside information must be "of a type ordinarily relied upon by experts in the field in forming their opinion." (Board Order, at 16, citing *Rock v. Pickleman*, 214 Ill. App. 3d 368, 374 (1st Dist. 1991).) And to the extent that Complainants planned on rephrasing Mr. Kunkel's estimates as "hypotheticals," Illinois evidentiary rules would only tolerate that strategy if the hypothetical assumptions were connected to "circumstantial or direct evidence, as supported by the facts or reasonable inferences . . . ." (Board Order at 16, *quoting Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1993).)

Shortly before the remedies-phase hearing, MWG moved to exclude the Kunkel Remedy Report from evidence, in part due to the fact that Mr. Kunkel was not testifying at the hearing and could not be subpoenaed from out of state. MWG Mot. in Limine to Exclude Kunkel Report (May 1, 2023). Complainants argued in response 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). During the hearing, the Hearing Officer granted MWG's motion in limine. 5/16/23 NDI Tr., 22: 15-23, 91:14-15.

b. Mr. Shefftz Testifies at the Remedies Phase Hearing on Behalf of the Complainants Using Unsupported Information.

Prior to Mr. Shefftz's direct testimony at the May 16, 2023 hearing, counsel for MWG reasserted its objection to Mr. Shefftz's testimony due to his reliance on assumptions and information that has no basis or foundation in fact. 5/16/23 Tr., pp. 122-23. The objection was overruled.

Mr. Shefftz would go on to testify that that he stood by the opinions he expressed in his deposition and expert reports, and that he had not taken any meaningful steps to vet the information he had been given as inputs for his economic benefit model. He used, as the basis for his opinions, "Table 6" from the Kunkel Remedy Report, even though he had no independent knowledge or expertise to support or verify any of the cost estimates in that table. 5/16/23 NDI Tr., 101:1-4. And the expert Complainants hired to replace Mr. Kunkel (Mr. Quarles) admitted that it was "impossible" for one to estimate the costs of a site-wide excavation based on the existing evidence regarding the historical ash deposits, further undermining the reliability of Mr. Kunkel's report. 5/16/23 NDI Tr., 85:24, 86:1-3; 6/15/23 NDI Tr., 32:6-7.

In fact, Mr. Shefftz incorrectly used the cost estimates in Table 6 of the Kunkel Remedy Report. Mr. Shefftz used the "worst case scenario-*plus*": A double-counted site-wide excavation. Mr. Shefftz's original opinion had an error that incorrectly inflated his estimate. He double-counted the site-wide excavation by totaling the site-wide excavation costs plus the costs to remove the ash ponds and certain alleged areas of ash. 5/16/23 NDI Tr., p. 131:19, 134:135:2, 6/15/23 NDI Tr., p. 33:3-21. On redirect, Mr. Shefftz attempted to correct his error by calculating an economic benefit using the site-wide excavation calculations only, and excluding the excavations for the ash ponds and alleged ash areas. 5/17/23 NDI Tr., p. 23:26:13-27:10. But, Mr. Kunkel hadn't even recommended site-wide excavation as the removal option, but instead insisted he only intended

for the ash ponds and certain limited ash areas to be removed. Comp. Ex. 412, p. 12, 6/15/23, 31:10-12. At the very least, Mr. Shefftz should have used the cost estimate that reflected the more limited proposal to which Mr. Kunkel opined based the removal of the ash ponds and certain ash areas.[2]

Indeed, some inputs for Mr. Shefftz's model were based, not on any materials given to him for analysis, but instead on opinions provided by Complainants' counsel. In particular, Counsel had directed Mr. Shefftz to assume that the cost-estimates developed by Mr. Kunkel would be spread out over a ten-year period. 5/16/23 NDI Tr., 115:7-14 & 5/17/23 NDI Tr, 37:8-11. Mr. Shefftz took no steps to confirm whether ten years was an appropriate or defendable time period, and even pointed out that he did not regard that as a "fact" at all. 5/17/23 NDI Tr., 37:16-24. The same was true of his reliance on Complainants' counsel's opinion about the beginning date to apply to MWG's alleged noncompliance. 5/16/23 NDI Tr., 115:20-24, 116:1-3, 117:14-16. He had no basis to verify or support using the start date provided by counsel. Indeed, taking any steps to confirm that he was basing his opinions on reasonable assumptions would go against his practice of "follow[ing] the legal inputs from the side that is retaining me." 5/17/23 NDI Tr., 38:20-22.

Mr. Shefftz insisted that there was nothing unusual about his reliance on cost estimates prepared by an environmental engineer---he had done so in prior cases. 5/17/23 NDI Tr., 13:16-20. But he did not claim that it was typical for others in his field to do so, and presumably in those the prior cases the engineer testified or other support was in the record. He nonetheless maintained that he was merely acting as the last runner in a "relay race" and that the question of whether Mr. Kunkel's cost estimates are true (whether Mr. Kunkel "veered off track" or his estimates are "the wrong baton") is for the factfinder to determine. *Id.* at 15:1-13. Of course, in this case the factfinder

[2] As MWG's expert, Gayle Koch, testified, this was still not the least cost alternative required under Section 42(h) of the Act. 415 ILCS 5/42(h), 6/15/23 NDI Tr., p. 30:21-31:7; *see also infra* §I.c.

cannot make that determination. Complainants already admitted that they were not presenting Mr. Kunkel's report as true. And Mr. Kunkel was withdrawn as an expert and not available for the hearing. He never testified about his Remedy Report or the costs stated in the Report and no other witness was able to do so because Mr. Quarles ignored the Kunkel Remedy Report.

c. MWG's Expert, Gayle Koch, Testifies at the Hearing About an Expert's Obligation to Verify.

Gayle Koch, an economist retained by MWG, attested that she has testified as an expert witness in over 25 court proceedings, and her testimony has never been rejected for falling outside of the applicable evidentiary rules. 6/15/23 NDI Tr., 9:20-24. She further noted that Mr. Shefftz's practice of relying almost entirely on information provided by an attorney and lack of effort to validate that information through external efforts was "concerning." (*Id.* 13:19-24, 14:1-3, 29:20-22.) Relying on "advocacy pieces of information," she maintains, produces "advocacy testimony," not "expert testimony." (*Id.* 14:4-9.). She stated she had never relied on counsel for that type of information, instead requesting for documentary or other sources of the information because otherwise the person is "no longer an expert then. You can no longer sponsor your analysis. It's now an advocacy piece." *Id.*, p. 29:20-30:5.

To illustrate, she highlighted Mr. Shefftz's economic-benefit analysis, which relies on three assumptions regarding (1) the date MWG's noncompliance started, (2) the date MWG's noncompliance ended, and (3) the amount of money that would be spent on excavation work each year during the period of noncompliance. (*Id.* at 29:11-19) For each of those inputs, she noted, Mr. Shefftz used information from Complainants' attorney and failed to take any steps to verify the information he was given. (*Id.* at 29:17-19)

A second illustration related to the manner in which the Complainant's attorney had curated the information that was provided to Mr. Shefftz. Table 6 of Mr. Kunkel's Remedy Report outlined

two different removal projects that he claimed MWG could have undertaken to achieve regulatory compliance and proffered cost estimates for each of them – a site-wide removal versus a removal of the ash ponds and certain ash areas. An economic-benefits analysis is supposed to be based around the least expensive compliance option. 415 ILCS 5/42(h)(3). Yet, Mr. Shefftz used costs for the site-wide removal *plus* the removal for the ash ponds and certain areas, and not the lower cost option on Table 6. In any case, Ms. Koch noted that removal as a remedial option is the "worst case scenario," and not the least expensive compliance option. 6/15/23 NDI Tr., 31:1-7. As Ms. Koch pointed out, MWG's Weaver Opinion had a lowest cost alternative that was available to Mr. Shefftz that he should have used in his rebuttal report. Ex. 1802, p. 21.

II. Admission of Mr. Shefftz's Opinions Is Clear Error.

The Hearing Officer's decision to admit Mr. Shefftz's reports and opinions was in error. Under the Board's procedural rules, evidence is admissible if "(1) it is admissible under Illinois civil courts' rules of evidence; or (2) it is material, relevant, and reliable." Board Order, Jan. 25, 2018, pp.2-3. Here, Mr. Shefftz's opinions are not based on direct or circumstantial evidence rendering each opinion unreliable, immaterial, and ultimately not relevant. And to the extent that experts may base opinions on hypotheticals, they cannot do so when the hypothetical is not connected to direct or circumstantial evidence pertaining to the matter at hand. Also, under Illinois Rules of Evidence, experts cannot parrot the opinions of non-testifying experts from a different field without any validation or basis. Experts must base their opinions on "facts or data," not representations of counsel and not on expert reports that are not even being submitted for the truth of their contents. Ill. R. Evid. 703.

Mr. Shefftz's opinions do not conform to these rules, making them as irrelevant to the case as the testimony of any other person called to give fact testimony about a matter they have no direct knowledge of. To say that these "expert opinions" should be admitted anyway materially

prejudices MWG because it unduly risks an unjust outcome in this case and, perhaps as importantly, will muddle future proceedings by encouraging parties to treat the *Illinois Rules of Evidence* and the Board's rules as mere suggestions, not rules.

a. None of Mr. Shefftz's Assumptions Are Based on Direct or Circumstantial Evidence or His Own Expertise

The Board is correct that an expert may rely on counsel's assumptions or hypotheticals "*if* [they are] based on direct or circumstantial evidence." Board Order, Dec. 15, 2022 at 16. (emphasis added). But here, none of the assumptions Mr. Shefftz relies on to formulate his opinion are based on direct or circumstantial evidence or even his own expertise and experience.

When an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393 (1st Dist. 1998). It is well established that, "For expert testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32; *Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (limiting testimony based on lack of reliable foundation); ILL. R. EVID. 703. It is the burden of the proponent of expert testimony to lay this foundation. *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (trial court erred when it allowed proposed expert examiner to testify to conclusions without providing evidentiary foundation for his opinion). A tribunal "is not required to blindly accept the expert's assertion that his testimony has analyzed the adequacy of the foundation." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000). After all, an "expert's opinion is only as valid as the reasons for the opinion." *Perona v. Volkswagen of America, Inc*., 2014 IL App (1st) 130748, ¶ 51; *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781 (1st Dist. 2009). In other words, if an expert's opinion lacks factual support or fails to follow established standards, it should not be received. *Musburger*, 394 Ill. App.

3d at 802 (affirming barring expert opinion that lacked factual basis); *In re Marriage of Cutler*, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (expert opinion should not have been received because it lacked a proper foundation).

To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[3] Moreover, even if the opinion passes the reasonable reliance test, the testimony can still be inadmissible if it "runs afoul of other evidentiary requirements." *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 885 (1st Dist. 1999). For example, "testimony grounded in guess, surmise, or conjecture, not being regarded as proof of a fact, is irrelevant as it has no tendency to make the existence of a fact more or less probable. From this conclusion follows the rule that expert opinions based upon the witness's guess, speculation, or conjecture as to what he believed might have happened are inadmissible." *Id.* at 886. Moreover, "[t]he party calling the expert witness must lay a foundation sufficient to establish that the information upon which the expert bases his opinion is reliable." *Turner v. Williams*, 326 Ill. App. 3d 541, 553 (2d Dist. 2001).

The Board has previously rejected an expert's opinion presented at a hearing because it was solely based upon assumptions. *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc.* concerns a request by a home association to review a village's decision to grant siting for a waste transfer station. PCB 14-99 slip at 18, (Aug. 21, 2014), p. 1. Each party engaged expert appraisers to opine on the potential impact to property

[3] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

values. *Id.* p. 19-20. The Board accepted the two respondents' expert appraisers' opinions because they were based upon evidence. The Board, however, specifically rejected the home association's expert opinion because it was solely based upon assumptions. *Id.* at 72.

Here, Mr. Shefftz's expert opinion is solely based upon assumptions, totally lacking in factual support, and not supported by direct or circumstantial evidence. As explained throughout this appeal, Mr. Shefftz's opinion is based upon costs from prior expert opinions that Complainants have withdrawn – the Kunkel remedy cost opinions. Complainants admit that they are not claiming that the Kunkel remedy costs are correct, and admit that the Board cannot rely on the Kunkel Report for any factual findings. Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023). They claim that the cost opinions provided by withdrawn expert Mr. Kunkel are little more than a "baseline cost assumption to ground Mr. Shefftz's calculations." (*Id.*) But, again, that baseline cost assumption is simply another expert's opinion that has no basis in the record. Even Mr. Shefftz would admit that that his opinion must be rejected. Mr. Shefftz testified that if Mr. Kunkel's cost estimates are not "the truth," then Mr. Shefftz's own opinions are irrelevant and his work "in vain." 5/17/23 NDI Tr., 15:1-7. Moreover, Complainants second expert, hired to replace Mr. Kunkel (Mr. Quarles) admitted that it was "impossible" for one to estimate the costs of a site-wide excavation, which, as Ms. Koch testified, "undercuts the reliability of the Kunkel report." (*Id.*, 85:24, 86:1-3).[4]

In effect, Complainants seem to argue that they are presenting Mr. Shefftz with the Kunkel cost estimates for Mr. Shefftz to create a hypothetical economic benefit analysis (though Complainants never use that term) – but the Board has already determined that hypotheticals must

[4] Mr. Shefftz recently had a portion of his expert opinion in a matter in California excluded for a similar reason – his opinion relied upon another expert's opinion that was found to be unreliable. 5/16/2023 NDI Tr., pp. 109:4-113:19; *San Francisco Baykeeper v. City of Sunnyvale*, 2022 U.S. Dist. LEXIS 164053, pp. 11, 28-29 (N.D. Cal, 2022).

be grounded in truth through direct or circumstantial evidence. The Kunkel Report costs have neither.

The Board's 2022 opinion states that hypotheticals must be "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible…and facts suggested in hypothetical questions need not be undisputed but only supported by the record." Dec. 13, 2022 Board Order, p. 16, *quoting Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1993). It is undisputed that there is no direct evidence to support Mr. Kunkel's cost opinions. There is also no circumstantial evidence. Circumstantial evidence is evidence that supports "an inference which is reasonable and probable, not merely possible." *Stojkovich v. Monadnock Bldg*., 281 Ill. App. 3d 733, 739-740 *citing Pyne v. Witmer*, 129 Ill. 2d 351, 543 N.E.2d 1304, 135 Ill. Dec. 557 (1989). "When a party seeks to rely on circumstantial evidence, the conclusion sought must be more than speculative, it must be the only probable conclusion that could be drawn from the known facts. *Id. citing Williams v. Chicago Board of Education*, 267 Ill. App. 3d 446, 642 N.E.2d 764, 204 Ill. Dec. 863 (1994). Here, Table 6 of the Kunkel opinions is not based on any known facts in the record, and does not support an inference that is reasonable or probable.

Similarly, the assumptions from Complainants' counsel, on which Mr. Shefftz specifically bases his opinions, are also not verified by facts or any direct or circumstantial evidence. There is no document, fact, evidence, or testimony in the record supporting the assumptions counsel told Mr. Shefftz to rely on -- that a removal action should have begun one month after the initial sampling event or that a removal action would take ten years. There is also no document, evidence, or testimony that, as counsel told Mr. Shefftz, MWG would have had to reline its ponds or that MWG would have even continued to manage the wet ash in the CCR surface impoundments. As

discussed above, none of the assumptions fed to Mr. Shefftz from Complainants' counsel qualify as circumstantial evidence because they are not based on known facts, nor are they supported by an inference that is reasonable or probable. *Stojkovich*, 281 Ill. App. 3d at 739-740. Each of these unverified assumptions was used by Mr. Shefftz as a key input to his model for him to opine on alleged economic benefit. Comp. Ex. 1201, p. 22, Table 3. Mr. Shefftz agreed that his assumptions were solely from Complainants' counsel and nothing more. 5/16/2023 NDI Tr., pp. 114:17-115:10, 115:15-116:1 117:14-16, 136:13-140:13.

Mr. Shefftz also agreed that he had no factual basis to support any of these inputs from counsel. Mr. Shefftz stated that Complainants' counsel provided him "with their positions on certain issues," but he did not "know if [he] would consider them facts." 5/17/23 NDI Tr. p. 37:22-38:1. MWG's attorney asked him whether his opinion regarding the relevant period of time "would apply to facts . . . like the start date that petitioner's counsel gave you." 5/17/23 NDI Tr., 37:16-20. Mr. Shefftz pointed out that that "fact" was not an appropriate term: "I wasn't aware that was a fact. I was aware that it was an assertion or a position or an argument by complainant's counsel that that is when the remedy costs should have started to be incurred . . . ." 5/17/23, NDI Tr. pp. 37:16-24 & 38:1-4. Mr. Shefftz further admits that he made no effort to determine whether the 10-year figure had any relationship to the facts of the case, and testified that his standard practice is to simply "follow the legal inputs from the side that is retaining me." 5/17/23 NDI Tr., 38:14-22.[5] Mr. Shefftz's position, to rely on positions provided by Complainants' counsel, would be

[5] Ms. Koch's testimony provides a clear contrast. Her own economic-benefit calculations were based on an assessment of remediation projects that had been reviewed for effectiveness and cost by MWG's groundwater experts from Weaver Consulting Group. 6/15/23 NDI Tr.., 68:13-17. She noted that she had prior experience preparing similar cost estimates, and had past experience exercising judgment of the sort of remediation projects that would be appropriate under the general circumstances here. *Id.* at 68:21-24. As such, she was in a position to independently determine whether the Weaver consultants were providing costs assessments that were substantially high or low. *Id.*, at 69:1-3. Similarly, when she needed to gather relevant data from a MWG employee to assess ash-liner costs, she contacted the employee directly, rather relying on counsel as an intermediary. *Id.*, at 71:13-18.

somewhat acceptable if counsel had any evidence in the record to support the "positions." But they do not.

Mr. Shefftz has no independent knowledge or expertise that would give him the ability to rely upon the assumptions fed him by Complainants' counsel or on Table 6 of Kunkel's report. *People v. Negron*, 2012 IL App (1st) 101194, ¶ 13, 368 Ill. Dec. 545, 548, 984 N.E.2d 491, 494, (Expert allowed to testify because assumptions were founded in the same subject as her expertise.). Mr. Shefftz readily admitted that he is not an engineer and cannot testify as to the accuracy of any of the assumptions he is relying upon. Ex. 1202, Shefftz Jan. 2021 Rpt., p. 22, 5/16/23 NDI Tr., p. 97:1-10, ("*As I am an economist, not an engineer, I have no independent expert opinion on the cost estimates that were prepared in that report*."). He similarly testified that as he is an economist, not an engineer, …"it's beyond my expertise to come up with those sort of cost basis." 5/17/23 NDI Tr. p. 13:19-20. He also stated, "***…I'm not an engineer. I'm not a lawyer. So I have no opinion on the information that plaintiff – that complainants' counsel provided to me.***" 5/16/23 NDI Tr. p. 62:3-5. (emphasis added). He agreed that he had no independent opinion on the duration of the remedy, the start date of the remedy, whether the proposed remedy costs by MWG's experts, MWG's mitigation efforts and groundwater sampling would have prevented or achieved compliance. 5/16/23 NDI Tr., pp. 62:10-63:1, 97:1-10, 115:11-14, 117:14-16. Because he has no expertise in these topics, he could not (nor did he) use his own expertise or knowledge to interpret the data and make the resulting assumptions. Nor was any other expert able to provide that support.

Mr. Shefftz does not rely upon any facts, documents, testimony, or any evidence at all – direct or circumstantial. As a result, Mr. Shefftz's opinions lack factual support and fail to follow established standards. The Board should reverse the Hearing Officer and order that the Shefftz opinions be excluded. *Musburger*, 394 Ill. App. 3d at 802.

b. Mr. Shefftz Did Not Provide Foundation for His Claim That His Parroting of a Non-Testifying Expert's Report Is "Typical."

While experts may sometimes rely on the opinions of other experts, they bear the burden of establishing that doing so is customary. *McKinney v. Hobart Bros. Co.*, 2018 IL App (4th) 170333, ¶47. Complainants' token efforts to lay the foundation for Mr. Shefftz's parroting of Mr. Kunkel's cost estimates do not bring the former's opinion into compliance with Rule 703.

Rule 703 allows a testifying expert to rely on a non-testifying expert when the testifying expert's knowledge overlaps with the expertise of the non-testifying expert: For instance, a medical professional relying on the opinion of a colleague on the same care team. *See Walker v. Soo Line R.R. Co.*, 208 F.3d 581 (7th Cir. 2000).Where the testifying expert admits that he has no insight into the validity of the non-testifying expert's conclusions, then the proffered opinions exceed what Rule 703 allows. For example, a Court found that a corporate-finance auditor cannot parrot the opinions of health-care specialists, even if they all work together at the same consulting firm. *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶¶ 6, 18-19. Similarly, the Seventh Circuit upheld the trial ruling that Fed. R. Evid. 703 did not permit a hydrologist to parrot findings of other groundwater modelers. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp*., 285 F.3d 609, 613-14 (7th Cir. 2002).

According to Mr. Shefftz, there would be nothing uncontroversial about a case where one expert establishes groundwater flows, then another expert determines a remedy based on the first expert's findings, then a third develops the cost estimate based on the second expert's remedy. 5/17/23 NDI Tr., 14:13-19. But that is only the case when the second and third experts testify and support their individual opinions. *Dura Automotive* involved almost the same scenario, and because the groundwater modelers did not testify at trial, a testifying hydrologist could not rely on the opinions of the non-testifying experts. 285 F.3d at 613-14, *cited with approval by Citibank,*

N.A., 2011 IL App (1st) 102427, ¶¶18-19. *See also in re James Wilson Associates*, 965 F.2d 160, 172-73 (7th Cir. 1992) (testifying architect not qualified to parrot opinions of structural engineer regarding physical condition of building).

Here, Mr. Shefftz offered the vague assurance that "typically in these cases" there is a "relay race" where an environmental engineer's "outputs serve as the inputs to my analysis." 5/16/23 Tr., 24:17-24. This is inadequate. He does not specify whether this is "typical" of cases where *he* testifies, or whether it is typical of other matters. To the extent that he was implying that the latter is true, he provides no explanation of how he reached that assessment (e.g., reviewing testimony from other proceedings, discussions with colleagues, etc.). And, most importantly, he neglects to say whether in the "typical case" he describes, members of the "relay team" are allowed to avoid testifying or are unavailable. That is why Mr. Shefftz's metaphor makes no sense here: In a relay race, all the runners are on the same track, equally subject to challenge if they deviate from the rules. No one would ever accept a result where only one member runs at the competition, but the timekeeper uses recordings of his teammates running their legs in a closed practice the previous day to determine the time. In any event, it is hard to see how the litigation strategies Mr. Shefftz describes *could* be typical when they are contrary to Rules of Evidence.

c. It is also not "Typical" for an Expert to Rely Solely on Counsel for Information.

Mr. Shefftz extended his "baton" analogy to conclusions fed to him by Complainants' legal team, stating that it is appropriate to rely on representations from Complainants' counsel and they are part of the relay of information towards his conclusion. 5/17/23 NDI Tr., p. 12:21-14:24. Mr. Shefftz provided no basis for that conclusion and, again, did not explain if other evidence in those cases was admitted to support the claims made by counsel.

MWG's expert, Ms. Koch, testified that this was *not* typical. She stated that the purpose of an expert is to "assist the judge, in this case the Board, with issues that are within [her] expertise." 6/15/2023 NDI Tr., p. 11:12-14. Thus, in preparing her opinion she relied upon documents related to the matter, documents from the previous hearing, accessed publicly available information, spoke with MWG individuals, and consulted and relied upon the opinions from Weaver Consultants – all of which is documented in her report. *Id.*, pp. 12:9-20 & 14:10-22. Ms. Koch's work to collect the relevant factual information is documented in emails between her and MWG counsel. Exs. 1904, 1905, 1906. As she testified, the correspondence reflects that she was asking for documentation as evidence, stating that "that's more reliable than numbers that counsel would give me. And I would not have relied on the numbers coming from counsel."6/15/2023 NDI Tr., p. 136:14-22, *see also* p. 141:4-6 ("I do see that I'm asking for documentation, again, because I need documentation as evidence, not what an attorney says."), 144:1-3 ("But, again, I'm asking for more documentation."). Ms. Koch's efforts to rely on evidence are reflected in her report, which specifies each of her sources. Ex. 1901. Nowhere in her report does she state that she relied upon information "from counsel." By comparison, Mr. Shefftz notes it repeatedly in all three of his opinions. *Compare* Ex. 1901 and Ex. 1202, p. 22 ("The associated dates for all four sites are all based on information that Petitioners' Counsel provided to me…"; "This schedule is based on information that Petitioners' Counsel provided to me…", *see also* pp. 23, 27; Ex. 1203, p. 14 ("…"which Petitioners have informed me is inadequate…"; "…"but with Petitioners have informed me would have needed to be taken…"; "…Petitioners have informed me that the ash liners…"; "…but which Petitioners once again inform me would have needed to be undertaken…"), *see also*, pp. 2, 15, 16, 25; and Ex. 1207, p. 1.

Ms. Koch testified that she would not accept information solely from counsel, without any other citation to a document or expert opinion, because then she would become an advocate, which reduces an expert's credibility. *Id.* 12:21-13:8. She found Mr. Shefftz's reliance on statements from Complainants' counsel concerning. *Id.*, p. 13:19. She stated that:

> "the problem is Mr. Shefftz obtained virtually all of his information from counsel without validating it, without reaching out to other experts that were in the field related to the information he was using. So all of the information going into his model were advocacy pieces of information, and therefore everything that came out of his model was an advocacy piece. And I find that concerning. It's no longer expert testimony. It's advocacy testimony. *Id.*, p. 13:23-14:9.

And she later noted that she would not do the same, stating that she had never relied on counsel for that type of information. *Id.*, p. 29:20. Instead, she requests documentary or other sources of the information because otherwise the person is "no longer an expert then. You can no longer sponsor your analysis. It's now an advocacy piece." *Id.*, p. 29:20-30:5.

III. It is Error to Accept the Shefftz Opinions When MWG Was Precluded from Cross-Examining Any of the Assumptions Shefftz Uses.

i. The Complainants Are Cheating the Rules of Evidence by Introducing Remedy Cost Estimates from a "Former" Expert (Mr. Kunkel) that MWG Could Not Cross-Examine.

Perhaps most importantly, MWG's opportunity to cross-examine Mr. Shefftz was not even a remote equivalent to an opportunity to subject Mr. Kunkel's opinions to the "crucible of cross-examination." *Williams v. Illinois*, 567 U.S. 50, 66 (2012) (internal quote omitted). The Board's December 15, 2022 Order held out hope that cross-examination of Mr. Shefftz could meaningfully test the validity of Mr. Kunkel's opinions in absentia. Board Order Dec. 15, 2022, at 17.[6] Neither

[6] The Board also incorrectly implied in its Dec. 15, 2022 Order that most of the questions MWG would have presented at the remedies-phase hearing were questions that MWG already had an opportunity to pose at the liabilities-phase hearing, where Mr. Kunkel testified in October 2017 and January 2018. *Id* at 17. That is not true. While Mr. Kunkel may have testified "at length," his testimony was limited to his opinion related to liability (Comp. Ex. 401). MWG was barred from cross-examining Mr. Kunkel on his Remedy Report because, as the Board points out in its Order, "remedy was not a part of the testimony or evidence at the liability hearing." *Id.* at 7.

of the parties here agree. The Complainants' position is that, since neither they, nor Mr. Shefftz, take the position that "anything" in the Kunkel Remedy Report is true, the only valid cross-examination questions were whether Mr. Shefftz "is lying or confused and did not in fact rely on the Kunkel Report." (Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023)).

And MWG basically agrees that Mr. Shefftz would not say much more than that, no matter how aggressively he was interrogated. He was acting "as a screen against cross-examination" of Mr. Kunkel. *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). The Hearing Transcript shows that Complainants' strategy has worked, at least so far. Mr. Shefftz confirms that he is continuing to follow Complainants' counsel's instructions to do no more than parrot Mr. Kunkel's cost estimates for a site-wide excavation remedy. And Mr. Shefftz admitted that his expertise does not overlap with Mr. Kunkel's at all. As such he could not respond to any of the questions MWG would have raised about Mr. Kunkel's opinions, had Mr. Kunkel been available to testify:

- How Mr. Kunkel's proposed removal remedy comports with the Board's findings at each Station.
- Whether Mr. Kunkel's analysis of the location of removals is appropriate in light of the Board's findings at each Station.
- Whether Mr. Kunkel's estimates are reliable for the costs of excavation and backfilling for the removal project he is recommending?
- How far Mr. Kunkel's potential ash disposal locations are from the MWG Stations and whether estimated disposal costs reflect that distance?
- Whether Mr. Kunkel investigated landfills that would accept the CCR?
- If so, what landfills and what was the result of his investigation?
- Whether a landfill's refusal to accept the CCR would change the cost estimates?
- Whether Mr. Kunkel's cost estimated accounted for the costs of tipping fees for disposal at a landfill?
- What was the source of the material to be used to backfill following the extensive, proposed excavation?

- How far away was the source of the backfill material?

Indeed, during cross-examination of Mr. Shefftz, MWG's counsel ran through dozens of facts from the Kunkel Remedy Report (facts ostensibly supporting the Table 6 cost estimates). 5/16/23 Tr., pp. 101-108. Each time, Mr. Shefftz admitted that he had no independent knowledge of where any of Mr. Kunkel's facts had come from or how he had used them to form his cost estimates. (*Id.*)

This is the "improper" shielding that the Seventh Circuit (applying an evidentiary rule embraced by the Illinois Supreme Court) warned of in *James Wilson Associates*. This inability to cross-examine is the reason that Illinois courts (and this Board's order) require that any new expert be limited to expounding and adding to the opinions of the former expert – so that there is a witness available to be examined. *People v. Pruim*, PCB 04-207 (Sept. 24, 2008) (Hearing Officer allowed substitution of expert witness because the new expert worked to develop the supplemental opinion, indicating that there was little difference between the old and new expert opinions.) The Board's confidence that it will not be snowed by the kinds of games Rule 703 prohibits is not a substitute for enforcing Rule 703 and the Board's rules in a textbook example of the rules being violated.

ii. <u>MWG Was Blocked from Cross-Examining the Assumptions Fed to Mr. Shefftz by Complainants' Counsel and, in Any Event, Counsel Failed to Lay Foundation Supporting Those Assumptions.</u>

A year ago, Complainants' counsel advised the Board that the "10-year removal timeline represents a reasonable hypothetical time for Mr. Shefftz to employ as an input" because it was based on "Complainants' Counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states." Comp. Resp. to Appeal of Motion in Limine to Exclude Shefftz Opinions, at p. 8 (Aug. 10, 2022). But in the many months between that representation and the hearings, Complainants' counsel took no steps to lay a foundation for that assumption. This inaction was fatal in the wake of the Board's warning that the assumptions presented to experts must be connected to "direct or circumstantial evidence." (Board Order at 16)

As admitted by Complainants, Mr. Shefftz relied upon Complainants' counsel for very specific assumptions that formed the basis for his conclusions about economic benefit to MWG. In fact, without those assumptions from counsel to use as input into his "model", Mr. Shefftz's entire process for calculating economic benefit fails. Despite claiming that the Kunkel remedy was "not offered for the truth of anything in the report," (Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023),) Counsel fed to Mr. Shefftz how long the (withdrawn) Kunkel remedy would take and told Mr. Shefftz to assume that the violations are "continuing." Ex. 1202, p. 14. As the Board is aware, this assumption of continuing violations was reconsidered by the Board in its Revised Interim Order. Board Feb. 6, 2020 Order, p. 13 (Holding that the groundwater management zones continue to be applicable). Again, it cannot possibly be held that such assumptions made by counsel, and not a from witness that can be challenged under oath, are reliable facts for expert testimony: Even Mr. Shefftz admits that these assumptions are not "facts." 5/17/23 NDI Tr., 37:24.

Because Complainants presented no testimony on the duration of the Kunkel remedy nor whether those violations are "continuing," MWG could not interrogate those bold assumptions at the hearing. MWG was prejudiced by having no ability to ask:

- What "similar projects" are Complainants' counsel referring to for their alleged knowledge? What states? What sites? How are the sites "similar"? Do the sites contain CCR? If not – what did the sites contain? How big were the sites? What was the remedy? Where were the disposal locations that the waste went to and how far was the transportation? What other remedies were considered?

- The basis for the assumption that a remedy project would begin within one month after the first round of sampling occurred at the MWG Stations?

- How counsel's assumptions comport with requirements (timing, permitting, assessments etc.) of 35 Ill. Adm. Code 845 ("Illinois CCR Rule")?

- How counsel's assumptions fit within the rules and practices of the Illinois EPA and the Illinois Site Remediation Program ("SRP") process under 35 Ill. Adm. Code Part 740?

- The basis for counsel's statements that the violations are continuing in light of the Board's interim opinions, including the Board's opinions concerning groundwater management zones.

iii. Mr. Shefftz's Opinions do not Aid the Board Because They are Wholly Lacking in Basis

Mr. Shefftz's opinions in his reports and testimony, based upon nothing more than assumptions, do not meet the basic tenet that an expert's testimony must aid the Board. *Johns Manville v. IDOT*, (PCB 14-3, April 26, 2016, B. Halloran), slip op. p. 2, *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429 ("A person will be allowed to testify as an expert …where his testimony will aid the trier of fact in reaching its decision."); Ill. R. Evid. 702. Limiting the expert opinions to only those that assist the Board, acts as a gatekeeper of useless opinions. Just like Illinois circuit courts, the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147, 245 Ill. Dec. 769, 776 (2nd Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum,* 348 Ill. App. 3d 398, 401, 284 Ill. Dec. 164, 167, 809 N.E.2d 730, 733 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information).

Here, Mr. Shefftz simply accepted each of the assumptions he relied upon without question. Mr. Shefftz specifically stated that he ***only*** used the cost figures that appeared in a single table of Mr. Kunkel's report, and the date of the report, (5/16/23 p. 17:6-9), and otherwise relied upon the information solely from Complainants' counsel. Mr. Shefftz also admits that he is just as agnostic about the credibility of the assumptions. Using his own relay race analogy he stated that if inputs he receives from the other experts and legal team (*i.e.* the "batons") are incorrect or found to be

invalid "then all of my work has kind have been in vain." 5/17/23 NDI Tr. 14:3-15:7. Further explaining "Even if my methodology and all my steps were correct, using the relay race an analogy, it's like I was handed the wrong baton or the runner before me veered off track or committed some other violation that disqualifies the entire time." *Id.* 15:8-13. As the phrase goes - "garbage in, garbage out," and an opinion that contains no judgment on the inputs but is merely a calculator, is of no use to the Board and should be stricken.

IV. Conclusion

The Hearing Officer was faced with opinions presented by an expert that are based on assumptions from counsel and a withdrawn and unavailable expert, and there was no witness or evidence available to allow the assumptions to be questioned for their relative weight. It was clear error for the Hearing Officer to accept opinions and testimony that violate *Illinois Evidence Rule* 703 and Board rules and orders. MWG is materially prejudiced by the admission of his opinions because they fail to comply with the fundamental evidentiary requirements. MWG requests that the Board reverse the Hearing Officer's order, and strike/exclude the testimony of Complainants' expert, Jonathan Shefftz, and his reports (Exhibits 1202, 1203, and 1207). Even if the Board declines to reverse the Hearing Officer's decision, the Board should give Mr. Shefftz's reports and testimony no weight.

Respectfully submitted,
Midwest Generation, LLC

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EXHIBIT 2

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 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,

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