

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: John Therriault, Assistant Clerk	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Motion for Entry of Agreed Protective Order for Non-Disclosable Information, a copy of which is herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: October 6, 2014

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5255

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MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

MOTION FOR ENTRY OF
AGREED PROTECTIVE ORDER FOR
NON-DISCLOSABLE INFORMATION

Pursuant to 35 Ill. Adm. Code 101.500, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, respectfully requests that the Board enter the attached Protective Order for Non-Disclosable Information. In support of its Motion, MWG states as follows:

1. Pursuant to the schedule set by the Board, Complainants and Respondent (together, the “Parties”) have been engaging in written discovery and seek to share Non-Disclosable information, as that term is defined in Section 101.202 of the Board’s Regulations.
2. The Parties have agreed to the terms of the Protective Order for Non-Disclosable Information, attached as Exhibit 1, and have executed same.
3. The Parties are in agreement in requesting that the Board enter the Protective Order for Non-Disclosable Information.

WHEREFORE, Respondent, Midwest Generation, LLC, respectfully requests that the Board enter the attached Protective Order for Non-Disclosable Information.

Respectfully submitted,

Midwest Generation, LLC

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

Dated: October 6, 2014

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Susan M. Franzetti
Kristen L. Gale
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Respondent.)	

**PROTECTIVE ORDER FOR
NON-DISCLOSABLE INFORMATION**

Pursuant to Section 101.616(d) and Part 130 of the Illinois Pollution Control Board’s (“Board”) Regulations, 35 Ill. Adm. Code 101.616(d) & 130, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complaints”), and Midwest Generation, LLC (“Respondents”) (collectively “Parties”), by and through undersigned counsel, stipulate to the following Protective Order for Non-Disclosable Information (“Protective Order”).

1. Introduction and Scope

This Protective Order shall govern documents and information exchanged during this action, including, but not limited to documents produced by the Parties or non-Parties, interrogatory answers, responses to requests for admission, and depositions testimony (collectively, “Discovery Material”).

2. Designation of Non-Disclosable Information

Discovery Material may be designated “Non-Disclosable Information” as that term is defined in Section 101.202 of the Board’s Regulations, 35 Ill. Adm. Code 101.202. The term “confidential” as that term is used therein, shall mean information whose disclosure could provide an unfair competitive advantage to the disclosing party's competitors, including but not limited to information related to the prices paid for coal ash removal, coal types, coal ash contracts and other financial data that includes prices charged to the party's customers and the disclosing party’s price structure, or information otherwise deemed confidential by the Pollution Control Board.

Non-Disclosable Information shall be so identified at the time of service by including on each page the legend “Non-Disclosable Information.” Any document, material, or information

designated by a Party as "Non-Disclosable Information" must be reviewed by an attorney. The designation of any document, material, or information as "Non-Disclosable Information," in the manner described above, shall constitute a certification by the attorney reviewing the material and making such designation that he or she in good faith believes the material meets the definition of Non-Disclosable Information or is otherwise entitled to protection under Sections 7 and 7.1 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/7 & 7.1 and Part 130 of the Board's Regulations, 35 Ill. Adm. Code 130.

3. Authorized Personnel

Access to and disclosure of the Non-Disclosable Information is limited to the Authorized Personnel identified as the following:

- (a) Counsel of record for the Parties to this lawsuit and the support staff, including paralegal, secretarial, and clerical personnel reasonably necessary to assist such counsel;
- (b) In-house counsel for the Parties with responsibility for the oversight of this litigation;
- (c) Employees of the Parties with responsibility for the oversight of this litigation;
- (d) Witnesses expected to testify at a hearing or trial, and technical experts/ consultants (and their staff) who are retained by a Party or attorney to assist in this action, but only to the extent reasonably necessary to perform such work. A Party desiring to disclose Non-Disclosable Information to testifying witnesses, experts or consultants shall first obtain from each expert or consultant an Acknowledgement in the form provided in Exhibit A;
- (e) Employees of outside vendors providing copy services and exhibit preparation services in connection with this litigation; and,
- (f) Stenographic reporters and videographers engaged for depositions or proceedings necessary to this action.

4. Limitations on Access to Non-Disclosable Information

The Parties agree to limit disclosure of the Non-Disclosable Information to the Board, Hearing Officer, Clerk, the Board's personnel and the Authorized Personnel identified in Paragraph 3, and to not use the Non-Disclosable Information for any purpose whatsoever other than the prosecution or defense of this litigation.

5. Procedures for Filing Non-Disclosable Information

Any Party wishing to include, disclose or attach any Non-Disclosable Information to any pleading, motion, brief or other paper, shall treat the Non-Disclosable Information as protected information pursuant to this Order and pursuant to Sections 7 and 7.1 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/7 & 7.1 and Part 130 of the Board's Regulations, 35 Ill. Adm. Code 130, and not file the Non-Disclosable Information electronically, but only in paper and properly marked. A version of the document that has the Non-Disclosable Information redacted may be filed electronically.

6. Use of Non-Disclosable Information at Hearing or Trial

At any hearing related to this proceeding, subject to the Board's Procedural Rules and the State of Illinois rules of evidence, and any Order of the Board, a Party may use any Non-Disclosable Information for any purpose. In the event that any Non-Disclosable Information is used in a hearing, the Parties shall treat the Non-Disclosable Information as confidential pursuant to Sections 7 and 7.1 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/7 & 7.1 and Part 130 of the Board's Regulations, 35 Ill. Adm. Code 130, and may request that attendance at those portions of the hearing or access to the transcripts of those hearings in which the Non-Disclosable Information is disclosed be restricted to the Board, the Hearing Officer, the Clerk, Board personnel and the Authorized Personnel.

7. Challenge to Designation

In the event that the Party receiving Non-Disclosable Information disagrees with the designation by the producing Party, then the Parties initially will try to resolve the dispute on an informal basis, within five (5) business days from the date that the receiving Party raises the objection to the designation (or a mutually agreed upon longer period) in writing. Any such disputed items shall be treated as Non-Disclosable Information, as designated, and subject to the protections of this Order unless and until the Parties reach an agreement or the Board or Hearing Officer determines otherwise.

If the Parties are unable to resolve their differences, then the objecting Party may file a motion requesting disclosure within ten (10) business day after the informal period has concluded (or a longer time period agreed upon by the Parties). In connection with a motion filed under this provision, the Party designating the information as Non-Disclosable Information shall bear the burden of establishing that good causes exists for the disputed information to be so treated. Non-Disclosable Information marked and identified in accordance with this Protective Order shall remain subject to the terms of this Protective Order unless otherwise agreed by the producing Party or ordered by the Board or Hearing Officer

8. Other Protections

- (a) Nothing herein shall affect any confidentiality obligations to which the Parties may be subject pursuant to agreements independent of this litigation, nor shall anything herein constitute an agreement that such obligations will relieve any Party of the obligation to produce Non-Disclosable Information.
- (b) This Protective Order shall not preclude any Party from seeking additional protection of the Non-Disclosable Information as that Party deems appropriate. Nor shall any Party be precluded from seeking an order from the Board or Hearing Officer permitting the disclosure or use of certain Non-Disclosable Information otherwise prohibited by this Protective Order;
- (c) Nothing herein shall prevent the Parties from mutually agreeing in writing to the use or disclosure of Non-Disclosable Information other than as permitted by this Order; and,

- (d) If it becomes necessary for counsel for a Party receiving Non-Disclosable Information to seek the assistance of any person other than those specified in Paragraph 3 above, the following procedures shall be employed:
- i. Counsel for the receiving Party shall notify, in writing, counsel for the producing Party of the desire to disclose such Non-Disclosable Information and shall identify the person(s) to whom counsel intends to make such disclosure;
 - ii. If no objection to such disclosure is made by counsel for the producing Party within five (5) business days of such notification, counsel for the receiving Party shall be free to make such disclosure to the designated person(s); provided, however, that counsel for the receiving Party shall serve upon opposing counsel, prior to disclosure, an Acknowledgment in the form set forth in Exhibit A whereby such persons agree to comply with and be bound by this Protective Order
 - iii. If the producing Party objects to such disclosure, no disclosure shall be made at that time. However, any Party may bring before the Hearing Officer the question of whether the particular Non-Disclosable Information can be disclosed to the designated person(s) and the Party objecting shall have the burden of establishing before the Hearing Officer the basis for the objection.

9. Inadvertent Disclosure

If Non-Disclosable Information is disclosed to any person other than in the manner authorized by this Order, the person responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of counsel for the producing Party and, if appropriate, to the Hearing Officer and, without prejudice to other rights and remedies of any Party, take reasonable and appropriate measures to prevent further disclosure by it or by the person who was the recipient of such information.

The inadvertent disclosure of Discovery Material that is subject to a claim of attorney-client privilege, work product privilege, or any other privilege, will not be deemed to waive a Party's claim to its privileged or protected nature or estop that Party or the privilege holder from designating the information or document as attorney-client privileged or subject to the work product doctrine at a later date. Any Party receiving any such information or document shall return it upon request from the producing Party. Upon receiving such a request as to specific information or documents, the receiving Party shall return the information, documents and copies to the producing Party within five (5) business days, regardless of whether the receiving Party agrees with the claim of privilege and/or work-product protection.

10. Materials Not Subject to this Protective Order

Notwithstanding the findings and agreements in this Protective Order, the following materials shall not be subject to this Order, if the content and/or substance thereof:

- (a) is, at the time of disclosure, in the public domain by publication or otherwise and is not otherwise protected from disclosure as a result;

- (b) becomes at any time, through no act or failure to act on the part of the recipient Party, part of the public domain by publication or otherwise; or,
- (c) is already in the possession of a Party at the time of disclosure by the other Party and was not acquired directly or indirectly from the disclosing Party under conditions requiring the confidential treatment of the material.

11. Use and Return of Discovery Material

The Parties hereto agree not use the Discovery Material for any purpose other than the prosecution or defense of this litigation. After this case is completed, including the exhaustion of all appeals, each Party, unless otherwise agreed in writing by counsel for the Parties, shall have sixty (60) calendar days to notify the other Party in writing that it wants the destruction of Discovery Materials by the Party, person, or firm in possession.

The destruction of Discovery Materials shall occur within thirty (30) days after this written notice is received. The Party asked to destroy the Discovery Materials has the option of returning the Materials to the requesting party in lieu of destruction. The Party destroying (or returning) materials under this paragraph shall provide a written certificate to the producing Party attesting to the destruction (or return) of all designated materials. To the extent that documents, extracts or summaries of Discovery Material that constitute attorney work product cannot reasonably be destroyed, the Parties hereto agree they shall be treated as Non-Disclosable Information and shall not be used for any other matters or for any other purposes.

12. Waiver or Termination

The provisions of this Protective Order may not be modified, waived or terminated except by the written stipulation of counsel or order of the Board or Hearing Officer. This Protective Order shall survive the final termination of this proceeding with respect to any retained Non-Disclosable Information. Termination of the proceedings shall not relieve any person from the obligations of this Protective Order, unless the Board or Hearing Officer orders otherwise.

13. Notice

All notices required by this Protective Order are to be served via email or facsimile to the outside counsel for the Parties. The date by which a Party to this action receiving the notice shall respond, or otherwise take action, shall be computed from the date indicating that the email or facsimile was received. Any of the notice requirements herein may be waived in whole or in part, but only in writing signed or emailed by an attorney for the Party designating Non-Disclosable Information under this Order.

14. Other Proceedings

Any person or Party subject to this Order who receives a subpoena, or court order seeking disclosure of another Party's Non-Disclosable Information, such person shall promptly (no more than five (5) business days after receipt) notify counsel for the producing Party of the subpoena or court order and shall provide a copy of the same.

ENTERED:

By: _____
Hearing Officer

DATE: _____

AGREED:

By: *Emily A. [Signature]*, ATTORNEY FOR
Midwest Generation, LLC

AGREED:

By: *Faith E. Beigel* ATTORNEY FOR
Sierra Club

AGREED:

By: *Faith E. Beigel* ATTORNEY FOR
Prairie Rivers Network,

AGREED:

By: *Faith E. Beigel*
Environmental Law & Policy Center

AGREED:

By: *Kurt Hanley*, ATTORNEY FOR
Citizens Against Ruining the Environment

EXHIBIT A

WRITTEN ACKNOWLEDGEMENT TO ABIDE BY THE TERMS OF PROTECTIVE ORDER
FOR NON-DISCLOSABLE INFORMATION

I, _____, do solemnly swear that I have received a copy of the Protective Order for Confidentiality that was entered into by the Parties in connection with *Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment*, Illinois Pollution Control Board, PCB 2013-015, and I hereby agree to be bound by its terms and conditions. I recognize that during my participation in the handling and development of this case I may have occasion to read or hear of Non-Disclosable Information, I agree to use any such Non-Disclosable Information solely in connection with my participation in this case and for no other purpose.

I am employed by _____ and my title is _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, _____, at _____.

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Jennifer L. Cassel
Faith E. Bugel
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606

Abel Russ
Whitney Ferrell
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Motion for Entry of Agreed Protective Order for Non-Disclosable Information were filed electronically on October 6, 2014 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on October 6, 2014 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman