

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)	
)	
Complainants,)	
)	
v.)	PCB No-2013-015
)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondents)	

NOTICE OF FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board *Complainants' Motion In Limine to Exclude Expert Testimony of David Callen and Memorandum in Support of Motion in Limine to Exclude Expert Testimony*, copies of which are herewith served upon you.



Jennifer L. Cassel
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Ste. 1600
Chicago, IL 60601
(312) 795-3726
jcassel@elpc.org

Dated: May 20, 2016

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**COMPLAINANTS’ MOTION *IN LIMINE* TO EXCLUDE
EXPERT TESTIMONY OF DAVID CALLEN**

1. Pursuant to Rule 702 of the Illinois Rules of Evidence and as supported by the accompanying Memorandum of Law, Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment move the Illinois Pollution Control Board to exclude testimony by Respondent’s controlled expert witness David Callen concerning the following opinions as set forth in Respondent’s Response to Complainant’s First Set of Interrogatories:

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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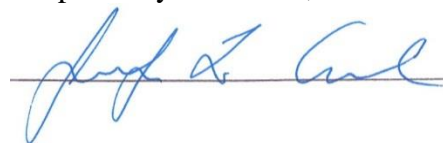
2. As grounds for the motion and as discussed in the accompanying Memorandum of Law, Complainants state that the identified opinions are inadmissible under Rule 702 of the Illinois Rules of Evidence because they constitute legal conclusions, and hence will not assist the trier of fact in understanding the evidence or determining a fact in issue.

WHEREFORE this Court should exclude from evidence any testimony by Mr. Callen concerning the opinions expressed in the identified portions of his expert report.

Dated: May 20, 2016

Respectfully submitted,

Respectfully submitted,



Jennifer L. Cassel
Lindsay Dubin
Environmental Law & Policy Center

35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
ldubin@elpc.org
(312) 795-3726

*Attorneys for ELPC, Sierra Club and
Prairie Rivers Network*

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
fbugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
Greg.wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org
802-662-7800 (phone)
202-296-8822 (fax)

Attorney for Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726-2938 (phone)
312-726-5206 (fax)

Attorney for CARE

Dated: May 20, 2016

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**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE
TO EXCLUDE EXPERT TESTIMONY**

Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups”) submit this memorandum in support of their Motion *In Limine* to Exclude Expert Testimony (“Motion”) based upon the Respondent’s discovery responses to Citizen Groups’ interrogatory related to Respondent’s controlled expert witness, David Callen. [REDACTED]

[REDACTED] identified Mr. Callen’s opinions, the basis for his opinions, and the facts he is relying upon. Certain of these opinions constitute legal conclusions, which do not fall within the scope of permissible expert opinions under the Illinois Rules of Evidence, Rule 702 and therefore are not admissible under Rule 702.

The expert opinions that Plaintiffs seek to exclude, set forth in detail in the Motion, fall into the following categories:

- [REDACTED]

[REDACTED]

[REDACTED]

Both of these categories of opinions, which pertain to the economic reasonableness of remedies in this case, represent inadmissible legal conclusions.

BACKGROUND

On October 3, 2012, Citizens Groups filed a complaint against MWG alleging that, through coal ash ponds at the Joliet 29, Powerton, Waukegan, and Will County generating stations, MWG had caused or contributed to groundwater contamination in violation of 415 ILCS 5/21(a) and had caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405. Compl. at ¶¶ 43-62.

On December 28, 2012, MWG filed a Notice of Stay stemming from Edison Mission Energy's filing for bankruptcy. MWG's Notice of Bankruptcy Stay for Edison Mission Energy, et al., at 1-2.

On April 22, 2013, the Bankruptcy Court partially lifted the stay solely for the IPCB to decide the Motion to Dismiss. Notice of Partial Life of Stay (May 22, 2013).

On October 3, 2013, the IPCB denied MWG's Motion to Dismiss the Complaint as frivolous and duplicative and denied the Motion to Dismiss the open dumping claims, but narrowly granted the Motion as to three paragraphs to the extent they alleged violations of federal regulations. Board Order at 27 (Oct. 3, 2013).

On January 10, 2014, the Bankruptcy Court fully lifted the stay. Notice of Lift of Stay by Bankruptcy Court. On April 1, 2014, NRG purchased MWG out of bankruptcy.

On January 14, 2015, Citizens Groups filed a Second Motion for Leave to File an Amended Complaint, and on February 19, 2015, the Board granted Citizens Groups' Motion.

That Complaint added the term “repositories” to the complaint in addition to the term ponds on the basis that Citizens Groups learned through discovery that MWG caused or allowed coal ash to be kept in two or more landfills at Joliet 29, on land and in multiple additional impoundments at Powerton, at one or more additional repositories at Waukegan, and at one or more additional repositories at Will County. Second Motion for Leave to File an Amended Compl. and Amended Compl. at 2-3.

On September 9, 2015, MWG indicated that David Callen, Chief Accounting Officer of NRG Energy, Inc. and NRG Yield, Inc. would be offering testimony as its controlled expert witness. [REDACTED]

On November 1, 2015, written expert reports were due in the proceeding. Hearing Officer Order (September 30, 2015).

On November 2, 2015, MWG disclosed all of the opinions Mr. Callen would be providing, all of the bases for those opinions, and all of the facts and data he considered in forming those opinions. [REDACTED]

Mr. Callen’s opinions purportedly would be submitted [REDACTED]

Specifically, Mr. Callen will opine [REDACTED]

Mr.

Callen also will testify [REDACTED]

[REDACTED] Mr.
Callen is relying upon, among other things, his knowledge gained [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ARGUMENT

I. David Callen's Testimony Concerning [REDACTED] Should Be Excluded Because These Opinions Are Impermissible Legal Conclusions.

a. Illinois Law Prohibits Expert Testimony Consisting of Legal Conclusions

It is well settled that expert witness testimony comprised of legal conclusions is not permitted under the Illinois law. Under Illinois Rule of Evidence 702, expert witness testimony is admissible only where the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The IPCB and Illinois courts have repeatedly held that interpretations of the law by experts do not meet this standard. See *Illinois v. Panhandle Eastern Pipeline Co.*, PCB No. 99-191, 2000 Ill. ENV LEXIS 414 at *2-*5 (June 22, 2000); see also *Patel*, 366 Ill. App. 3d 255, 270-271); *Lid Assocs. v. Dolan*, 324 Ill. App. 3d 1047, 1058 (2001) (trial court committed reversible error in permitting experts to testify about legal conclusions regarding fiduciary duties); *Coyne v. Robert H. Anderson & Associates, Inc.*, 215 Ill. App. 3d 104, 112 (1991) (trial court erred in permitting expert to testify when testimony included legal conclusions and "had nothing to do with his expertise as a forensic engineer").

The Illinois courts also agree that expert testimony is only admissible "where such testimony will aid the fact finder in reaching its conclusion." *Patel*, 366 Ill. App. 3d at 271. See

also Martin v. Sally, 341 Ill. App. 3d 308, 315 (2003) (explaining that “[e]xpert testimony is admissible at trial when the expert has knowledge or experience not common to a layperson and that knowledge or experience would aid the trier of fact in determining the facts at issue” and that “[t]he critical issue is whether the expert’s . . . testimony aids the trier of fact by explaining a factual issue beyond its ordinary knowledge or whether the opinion merely recites a legal conclusion.”). As the IPCB has pointed out, legal conclusions do not aid the fact finder in determining the relevant facts; as such legal arguments belong in briefs not in expert testimony. *Panhandle Eastern*, 2000 Ill. ENV LEXIS 414 at *4 (“We agree with complainant that the matters to which [the respondent] intends to have [the expert] testify are more properly addressed as argument in a brief.”). On the contrary, legal conclusions infringe both on the role of the trier of law in interpreting the applicable law, and on the role of the trier of fact in applying that law to the facts before it. *Lid Assocs. v. Dolan*, 324 Ill. App. 3d 1047, 1058 (2001); *McCormick v. McCormick*, 180 Ill.App.3d 184, 205, 129 Ill.Dec. 579, 536 N.E.2d 419 (1988) (*McCormick*) (expert testimony properly excluded when it “offered no more than another legal opinion to support [the plaintiff’s] position”.); *Klaczak v. Consolidated Medical Transport*, 2005 U.S. Dist. Lexis 13607, *30-31 (N.D. Ill. May 26, 2005).

Interpretation of legal documents and unambiguous language contained in such documents is a question of law upon which expert testimony is impermissible. *See, e.g., Cabrera v. ESI Consultants, Ltd.*, 41 N.E.3d 957, 397 Ill. Dec. 306 (Ill. App. Ct. 2015). For instance, expert testimony is improper in the case of a typical lease. *First Nat. Bank of Evanston v. Sousanes*, 96 Ill.App.3d 1047, 422 N.E.2d 188, 194, 52 Ill. Dec. 507, 513 (1981).

The lease in the instant case is a standard commercial lease. The facts were not technical nor beyond the understanding of the average juror. As such, special knowledge or expertise was not necessary for the jury to determine whether or not the facts established plaintiff's performance of its obligations under the lease. Accordingly, the court did not err in refusing to allow [an expert] to state his opinion.

Id. Expert testimony interpreting contracts and insurance policies is likewise improper. *See, e.g., William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App.3d 324, 338, 294 Ill. Dec. 348, 830 N.E.2d 760 (2005) (“[I]n the absence of ambiguity[,] contract interpretation is a question of law for which expert testimony would not be appropriate”); *Cohen v. Northwestern Nat. Life Ins. Co.*, 124 Ill. App.2d 15, 259 N.E.2d 865, 867 (1970) (“The construction of an insurance contract raises a question of law only.”); *William J. Templeman Co. v. Liberty Mutual Insurance Co.*, 316 Ill.App.3d 379, 390, 249 Ill. Dec. 65, 735 N.E.2d 669 (2000) (“[A]s the construction and interpretation of an insurance policy is a question of law, we fail to see the relevance of plaintiffs’ expert witness.”); *First Nat. Bank of Evanston v. Sousanes*, 96 Ill.App.3d 1047, 422 N.E.2d 188, 194, 52 Ill. Dec. 507, 513 (1981) (holding that no expert opinion is needed on a standard commercial lease).

Federal Courts have also delineated categories of legal documents where expert testimony is inappropriate under the Federal Rule of Evidence that parallels Illinois Rule 702. The relevant provisions of Illinois Rule 702 and Federal Rule 702 are virtually identical.¹ The Seventh Circuit has held that legal documents whose interpretation does not require expert testimony include technical and complex documents such as trust indentures, insurance policies

¹ Illinois Rules of Evidence, Rule 702 provides in part

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rules of Evidence, Rule 702 provides in part:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

and contracts, and mutual-to-stock conversions. “Argument about the meaning of trust indentures, contracts, and mutual-to-stock conversions belongs in briefs, not in ‘experts’ reports.” *RLJCS Enterprises, Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan and Trust*, 487 F.3d 494, 498 (7th Cir. 2007) (citations omitted); *Scottsdale Ins. Co. v. City of Waukegan*, 689 F. Supp. 2d 1018, 1022-23 (N.D. Ill. 2010) (striking expert’s opinion on what an insurance policy covers).

Further, the application of the language of a legal document to the undisputed facts is also within the purview of the trier of law and therefore not proper for expert testimony. *Dawe’s Laboratories, N.V. v. Commercial Insurance Co.*, 19 Ill.App.3d 1039, 1050, 313 N.E.2d 218, 226 (1974). The Illinois Appellate Court in *Dawes* made it clear that the court does not have discretion to allow expert testimony on the application of a legal document to undisputed facts: “Expert opinion on a problem of this type is inadmissible and patently unacceptable.” *Dawe’s Laboratories, N.V. v. Commercial Insurance Co.*, 19 Ill. App.3d 1039, 1050, 313 N.E.2d 218, 226 (1974).

b. David Callen’s Expert Testimony Contains Impermissible Legal Conclusions

David Callen’s conclusions that [REDACTED] and that [REDACTED] are improper legal opinions. [REDACTED]

[REDACTED] The portions of Mr. Callen’s report identified in the Motion must, therefore, be excluded under Illinois Rule 702. [REDACTED]

[REDACTED]

Right out of the gate, Respondent indicates that Mr. Callen will testify on relevance.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Relevance is a legal question that is not appropriate for expert testimony. *See, e.g.*, Ill. Rules of Evid. 402: “All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.” It is for the court to decide whether evidence is relevant not an expert. Further, stating that [REDACTED] [REDACTED] is just another way of opining as to [REDACTED] which, as noted below, is an impermissible legal conclusion. As such, Mr. Callen’s opinions regarding [REDACTED] [REDACTED] constitute impermissible legal conclusions.

Mr. Callen would also opine that [REDACTED] MWG states as follows on this topic:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] In his deposition, Mr. Callen revealed [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Whether [REDACTED] is a legal question stemming from a

legal document, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *First National Bank of Cicero v. Sylvester*, 554 N.E.2d 1063, 196 Ill. App.3d 902, 910 (Ill. App. Ct. 1990). As established above, the interpretation of a [REDACTED] is a legal question upon which expert testimony is prohibited. *See, e.g., William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App.3d 324, 338, 294 Ill. Dec. 348, 830 N.E.2d 760 (2005); *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. Sup. Ct. 2011) [REDACTED] [REDACTED] citing *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285, 314 Ill. Dec. 725, 875 N.E.2d 1012 (2007). Since the interpretation of a [REDACTED] is a question of law, the interpretation of [REDACTED] is also a question of law. Accordingly, any of Mr. Callen's opinions that are based on interpretations of [REDACTED] are legal opinions that must be precluded.

All of Mr. Callen's opinions as [REDACTED] are in fact based upon interpretations [REDACTED] as the following example shows:

- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] Since Mr. Callen's understanding that [REDACTED]
[REDACTED] is based upon [REDACTED] that opinion is an impermissible legal conclusion.

The legal nature of Mr. Callen's opinion on [REDACTED] is
underscored by his deposition testimony that h [REDACTED]

[REDACTED] In his deposition, Mr. Callen discussed [REDACTED]

[REDACTED] He testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr. Callen then testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Callen emphasized in his deposition that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The degree to which Mr. Callen [REDACTED]

[REDACTED]

underscores the extent to which he is providing legal opinions not appropriate for an expert. In

sum, all of Mr. Callen's opinions as to [REDACTED] are

impermissible legal opinions based upon the [REDACTED]

Mr. Callen also will testify [REDACTED]

[REDACTED]

[REDACTED] This opinion is elaborated upon further in the

interrogatory responses:

[REDACTED]

[REDACTED] Encompassed in this

testimony is his statement that [REDACTED]

[REDACTED]

[REDACTED]

2 Referring to [REDACTED] Mr. Callen was asked [REDACTED]

[REDACTED]

██████████ is a legal question on which expert testimony is prohibited because that opinion depends on the interpretation of a legal document, ██████████ Mr. Callen's primary basis for the statement that ██████████

██████████ is, once again, ██████████

██████████

- ██████████

- ██████████

- ██████████

- ██████████

- ██████████

██████████ And as established above, Mr. Callen ██████████

██████████ confirming the legal nature of this analysis. Thus the question whether ██████████ is a legal question on which expert testimony is prohibited.

Mr. Callen's final point in this section of prospective expert testimony, that ██████████ further confirms that he is providing a legal interpretation. ██████████

██████████

██████████

██████████

██████████ *see also Tulsa*

Professional Collection Services, Inc. v. Pope, 485 US 478, 487-88 (1988). ██████████

██████████ As stated

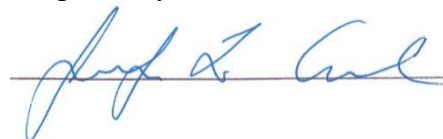
above, an ██████████ *see, e.g., Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. Sup.

Ct. 2011), and a [REDACTED] is a legal document. *See, e.g., William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 338, 294 Ill. Dec. 348, 830 N.E.2d 760 (2005). Any opinions of Mr. Callen's that are based upon [REDACTED] [REDACTED] are, therefore, legal interpretations that are not proper for expert testimony. As such, the opinions of Mr. Callen's regarding [REDACTED] [REDACTED] must be precluded.

CONCLUSION

MWG has stated that Defendants' expert David Callen will provide testimony opining on [REDACTED] [REDACTED] Both of those opinions are based on interpretations of legal documents and thus constitute impermissible legal conclusions. Citizens Groups' Motion *in Limine* to exclude Mr. Callen's testimony on those points should therefore be granted.

Respectfully submitted,



Jennifer L. Cassel
Lindsay Dubin
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
ldubin@elpc.org
(312) 795-3726

*Attorneys for ELPC, Sierra Club and
Prairie Rivers Network*

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091

(312) 282-9119
fbugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
Greg.wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org
802-662-7800 (phone)
202-296-8822 (fax)

Attorney for Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726-2938 (phone)
312-726-5206 (fax)

Dated: May 20, 2016

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing *Notice of Filing, Complainants' Motion In Limine to Exclude Expert Testimony of David Callen*, and *Memorandum in Support of Motion in Limine to Exclude Expert Testimony* was filed electronically on May 20, 2016 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

And that a true copy of: *Notice of Filing, Complainants' Motion In Limine to Exclude Expert Testimony of David Callen*, and *Memorandum in Support of Motion in Limine to Exclude Expert Testimony* was served via electronic mail on May 20, 2016 on the parties listed on the following Service List.

/s/ Robert Gelles
Robert Gelles
Legal Assistant
Environmental Law & Policy Center
35 E Wacker Drive. Suite 1600
Chicago, Illinois 60601
P: (312) 795-3718

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com

CT Corporation Systems
Midwest Generation, LLC
208 South LaSalle Street Suite 814
Chicago, IL 60604

Exhibit A - Redacted

Exhibit B - Redacted

Exhibit C - Redacted

Exhibit D - Redacted

Exhibit E - Redacted