

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

|                                     |   |                              |
|-------------------------------------|---|------------------------------|
| <b>In the Matter of:</b>            | ) |                              |
|                                     | ) |                              |
| <b>SIERRA CLUB, ENVIRONMENTAL</b>   | ) |                              |
| <b>LAW AND POLICY CENTER,</b>       | ) |                              |
| <b>PRAIRIE RIVERS NETWORK, and</b>  | ) |                              |
| <b>CITIZENS AGAINST RUINING THE</b> | ) |                              |
| <b>ENVIRONMENT</b>                  | ) |                              |
|                                     | ) | <b>PCB 2013-015</b>          |
| <b>Complainants,</b>                | ) | <b>(Enforcement – Water)</b> |
|                                     | ) |                              |
| <b>v.</b>                           | ) |                              |
|                                     | ) |                              |
| <b>MIDWEST GENERATION, LLC,</b>     | ) |                              |
|                                     | ) |                              |
| <b>Respondent.</b>                  | ) |                              |

**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 Board Respondent, Midwest Generation LLC’s Objection to Complainants’ Motion for Leave to Reply, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By:           /s/ Jennifer T. Nijman          

Dated: July 28, 2016

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent, Midwest Generation LLC's Objection to Complainants' Motion for Leave to Reply was filed electronically on July 28, 2016 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 July 28, 2016 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**MIDWEST GENERATION, LLC’S OBJECTION TO COMPLAINANTS’ MOTION FOR LEAVE TO REPLY**

Pursuant to 35 Ill. Adm. Code 101.500(e), Respondent, Midwest Generation, LLC (“MWG”), objects to Complainants’ Motion for Leave to Reply to MWG’s Response to Complainants’ Motion for Partial Summary Judgment. Under the Illinois Pollution Control Board’s (“Board”) procedural rules, a reply memorandum is not permitted except to “prevent material prejudice.” 35 Ill. Adm. Code 101.500(e). Complainants have failed to meet the standard. Complainants present no support for their claim of material prejudice and are simply asking to remedy the multiple inconsistencies and mistakes made in their original motion.

**I. Complainants Misrepresent the Length of MWG’s Response**

Complainants base their request for a reply on the false and repeated statement that MWG’s Response to Complainants’ Motion for Partial Summary Judgment (“Response”) is “101 pages.”

*See* Complainants' Motion for Leave, p. 2-3.<sup>1</sup> Board Rule 101.302(k) limits motions and briefs to 50 pages and also states that "These limits do not include appendices containing relevant material." 35 Ill. Adm. Code 101.302(k). A simple review of MWG's Response shows that it is 48 pages and within the Board's page limitation established in 35 Ill. Adm. Code 101.302(k).<sup>2</sup> Complainants appear to be including in their page calculations Appendix A, attached to MWG's Response. As specifically stated in its Response, MWG created Appendix A for the Board's convenience. MWG explained, "Due to the sheer number of Complainants' Statements of Fact, and their complexity in alleging many facts in each paragraph, MWG has restated each statement of fact, followed by MWG's Response. The combined document is provided in App. A for ease of review." *See* Response, FN 3. Hence, Appendix A of MWG's Response contains each of Complainants' 138 asserted facts, followed by MWG's response, and the length of the Appendix is largely due to restating Complainants' facts. Complainants have not claimed, and cannot claim, that MWG's specific responses to Complainants' Statements of Facts are not "relevant material" allowed in an appendix attached to a brief filed with the Board.<sup>3</sup>

By their objection to Appendix A, Complainants seem to suggest that MWG should have listed its responses to each alleged fact without restating the factual assertions, thus leaving the Board to flip back and forth between documents in an attempt to decipher which facts are disputed. In fact, MWG could have submitted its responses to Complainants' Statement of Facts as one, single-spaced footnote in 10-point font, which would have fit onto one and one-half, very dense,

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<sup>1</sup> MWG presumes that the page citation to Complainants' Motion for Leave for Reply is correct because Complainants have failed to sequentially number the pages of their Motion, as required by 35 Ill. Adm. Code 101.302(g).

<sup>2</sup> Complainants' misrepresentations of the number of pages is compounded by including in the claimed total pages the Notice and Certificate of Service, which have never been considered part of a brief.

<sup>3</sup> In fact, it is common practice to present the responses to a Statement of Material Facts as an appendices in other forums and is explicitly required under Local Rule 56.1 of the Northern District of Illinois Federal Courts. N.D.Ill. LR 56.1(a)(3) and (b)(3).

pages. This is explicitly allowed under Board Rule 101.302(g)(2) and the Response would have been 50 pages. 35 Ill. Adm. Code 101.302(g)(2) and 101.302(k). It would also have been incredibly difficult for the Board to analyze, would have unnecessarily confused an already complex record, and would have inconvenienced both the Board and Complainants. That cannot be the intent of the Board's page limitation. The Board "has the power to construe its own rules and regulations to avoid absurd or unfair results." *Illinois E.P.A. v. Jersey Sanitation Corp.*, 336 Ill. App. 3d 582, 589, 784 N.E.2d 867, 872 (2003), citing *Village of Fox River Grove v. Pollution Control Board*, 299 Ill.App.3d 869, 880, 234 Ill.Dec. 316, 702 N.E.2d 656, 664 (1998). Here, Board Rule 101.302(k) clearly states that the page limitation does not include appendices containing relevant material. 35 Ill. Adm. Code 101.302(k). It would be absurd to conclude that that exception does not include an appendix that conveniently restates the Complainants' asserted facts immediately followed by the response. There is no basis to claim that MWG's Response brief violates the Board's rules or provides a basis for allowing a reply.

**II. Complainants Have Not Shown Any Material Prejudice Necessitating a Reply**

Complainants have put forth no legitimate basis to allow them leave to file a reply to MWG's Response. The Board has established that the party wishing to file a reply must demonstrate that it will suffer material prejudice if its filing is not permitted. *People of the State of Illinois v. Peabody Coal Company* PCB 99-134, 2003 WL 21405850, (June 5, 2003). A mere assertion that such prejudice will occur is insufficient. *People of the State of Illinois v. Skokie Asphalt Co. Inc., et al.* PCB 96-98, 2003 WL 21405849 (June 5, 2003), *slip op* at 3 (Board denied leave to reply because the bald assertion of material prejudice was unsupported by any information). Additionally, the Board has made it clear that when the issues are fully briefed, no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp.* PCB00-90, 2001 WL

725421, (June 21, 2001), slip op at 1. When the reply offers no assistance and the movant would suffer no material prejudice, a motion for leave to file a reply should be denied. *Commonwealth Edison v. Illinois Environmental Protection Agency*, 2007 WL 1266937, PCB04-215, (April 26, 2007), slip op at 2.

Here, Complainants merely want to remedy the deficiencies in their Motion by making a bald assertion of material prejudice without a sufficient description to support that claim. *People of the State of Illinois v. Skokie Asphalt Co. Inc., et al.* PCB 96-98, 2003 WL 21405849 (June 5, 2003). First, Complainants claim, without any explanation, that MWG “mischaracterizes” their motion on the locations of the Historic Ash Areas. *See* Complainants’ Motion for Leave, p. 2, ¶6. Yet, a simple claim of mischaracterization is insufficient to support allowing a reply. *See Commonwealth Edison Co. v. Illinois EPA*, PCB 04-215, 2007 WL 1241215, (April 19, 2007), slip op at 2 (Hearing Officer denied request for leave to reply despite claims that the response contained mischaracterizations). That MWG disagrees with Complainants’ Motion and identifies multiple ambiguities that present genuine issues of material facts should not be a surprise to Complainants, nor is it a basis to allow a reply.

Second, Complainants claim, again without an explanation or citations to the Response, that MWG “misrepresented the opinion of their expert.” *See* Complainants’ Motion for Leave, p. 2, ¶6. This claim is unfounded. In Section IV.b.i of MWG’s Response, MWG quoted from its expert’s written opinion and deposition, and cited to specific pages in both documents, which Complainants had attached to their Motion as Exhibits E5 and G. It is hard to fathom how direct quotes from a written opinion and a deposition, including specific pages numbers, are a “misrepresentation.” In fact, MWG argued in its Response that it was Complainants that misrepresented Mr. Seymour’s opinions. *See* Response, Sec. IV.b.i. That the parties dispute the

how Mr. Seymour's opinions are interpreted should not be a surprise to anyone. As both parties have had an opportunity to discuss Mr. Seymour's opinions, including citations to the record, the issue is fully brief, and no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp.* PCB00-90, 2001 WL 725421, (June 21, 2001).

Third, Complainants claim that MWG conflates coal ash indicators with coal ash contamination, again without any explanation or citation to MWG's Response. *See* Complainants' Motion for Leave, p. 2, ¶6. Rather, it is the Complainants who conflate the two terms in their Motion. *Compare* Complainants' SOF Nos. 36-39 and Complainants' SOF Nos. 53-56, Complainants' Motion for Partial Summary Judgment, pp. 13, 16-17. MWG identified that material issue in Section IV.c. of its Response. Complainants now seek a second bite at the apple by way of a reply to remedy their error. Again, this issue is fully briefed, and Complainants have not presented any reason that a reply would offer any assistance to the Board. *See Roger and Romana Young v. Gilster-Mary Lee Corp.* PCB00-90, 2001 WL 725421, (June 21, 2001) and *Commonwealth Edison v. Illinois Environmental Protection Agency*, 2007 WL 1266937, PCB04-215, (April 26, 2007).

Fourth, Complainants' claims of misinterpretation and incorrect application of case law are also not bases to allow a reply. *See* Complainants' Motion for Leave, p. 2, ¶6. The Board does not need assistance in interpreting the applicable case law, for it "is well equipped to assess the merit of the arguments raised" in the Response. *Hillsboro Glass Co. v. Illinois EPA*, PCB 93-9, 1993 WL 82936, (March 11, 1993), *slip op* at \*1 (Board found that the motion for leave to reply, which claimed the response "clouded the issue of law," need not be granted to prevent material prejudice). Any disputes of interpretation of the relevant case law are not extenuating circumstances that rise



to the level of material prejudice such that a reply is required. The Board is well equipped to assess the merits of case law argued by both Parties.

Fifth, Complainants also claim that they need to reply in order to clarify the “circumstances in which summary judgment is appropriate.” *See* Complainants’ Motion for Leave, p. 2, ¶6. *Complainants’ Motion for Leave*, p. 2. Again, the Board does not need assistance in determining the standard for summary judgment. *Hillsboro Glass Co. v. Illinois EPA*, PCB 93-9, 1993 WL 82936, (March 11, 1993). Both Complainants and MWG provided support for the standard for summary judgment in their briefs, and the Board can assess the merits of each brief as filed. *See Complainants’ Motion for Partial Summary Judgment*, p. 27 and *MWG’s Response to Complainants’ Motion*, Sec. III.

Complainants’ final assertions - that a reply is necessary to “untangle the web” of mischaracterizations and “clarify the relevant jurisprudence” - are not sufficient bases to prevent material prejudice if a reply is denied. *See* Complainants’ Motion for Leave, p. 2-3, ¶6. Ironically, it is the confusion created by Complainants’ own attempt at identifying “Historic Coal Ash” that created the tangled web, and MWG simply described the complexity of the areas in its Response. Regardless, as established above, claims of “mischaracterization” are insufficient to show that denying a reply will result in material prejudice. *Commonwealth Edison Co. v. Illinois EPA*, PCB 04-215, 2007 WL 1241215, (April 19, 2007), *slip op* at 2. Additionally, clarifying the “relevant jurisprudence” is merely another phrase for disputing the presented case law, which is not an issue with which the Board needs assistance. *Hillsboro Glass Co. and Commonwealth Edison v. Illinois Environmental Protection Agency*, 2007 WL 1266937, PCB04-215, (April 26, 2007), *slip op* at 2.

Based upon the lengths of both Parties’ memoranda, including the numerous exhibits attached, it is clear that the issues presented are fully briefed and no reply is necessary. Further,

Complainants have not established that a reply will offer any assistance to the Board nor that Complainants will suffer material prejudice. Thus, Complainants' Motion should be denied.

**III. If the Board Grants Complainants' Motion, MWG Respectfully Requests Leave for a Sur-Reply**

If the Board grants Complainants' Motion for Leave to Reply over MWG's objections, then MWG respectfully requests that it be granted leave to file a sur-reply. Complainants did not attach their proposed Reply to their motion, thus MWG cannot determine what, if any, new arguments or evidence they may use in their reply. The uncertainty of the contents of Complainants' reply necessitates leave for MWG to file a sur-reply.

Should the Board grant leave for the reply, MWG requests that it be given to September 20, 2016 to file a sur-reply for similar reasons claimed by the Complainants in their Motion. *See* Complainants' Motion for Leave, p. 3.

**IV. Conclusion**

For the foregoing reasons, MWG requests that Complainants' Motion for Leave to File a Reply be denied. In the alternative, if the Board grants Complainants' Motion, then MWG requests leave to file a sur-reply, to be filed by September 20, 2016.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By           /s/ Kristen L. Gale            
One of Its Attorneys

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