

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 Board Respondent, Midwest Generation LLC’s Response to Complainants’ Motion to Strike Appendix A, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Kristen L. Gale

Dated: August 16, 2016

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

SERVICE LIST

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

Jennifer L. Cassel
Lindsay P. Dubin, also for Prairie Rivers Network
and Sierra Club
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
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091

Greg Wannier, Associate Attorney
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent, Midwest Generation LLC's Response to Complainants' Motion to Strike Appendix A was filed electronically on August 16, 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 August 16, 2016 to the parties listed on the foregoing Service List.

/s/ Kristen L. Gale

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**MIDWEST GENERATION, LLC’S RESPONSE TO COMPLAINANTS’
MOTION TO STRIKE APPENDIX A**

Pursuant to 35 Ill. Adm. Code 101.500(d), Respondent, Midwest Generation, LLC (“MWG”), responds to Complainants’ Motion to Strike Appendix A of MWG’s Response to Complainants’ Motion for Partial Summary Judgment. The Board should deny Complainants’ motion because it is duplicative and because Complainants present no support for their claim that an appendix attached to a response is considered a part of the page limitation set forth in 35 Ill. Adm. Code 101.302(k).

I. Appendices are Explicitly Excluded from the Page Limitation

MWG’s Appendix A, attached to its Response to Complainants’ Motion for Partial Summary Judgment (“Response”), does not exceed the Board’s page limit. Board Rule 101.302(k) explicitly excludes from the page limitation appendices attached to a motion that include “relevant material.” 35 Ill. Adm. Code 101.302(k). In fact, Complainants have recently argued to the Board that they “are not aware of any Board Rule restricting attachments...” *See Complainants’ Response to MWG’s Motion to For an Extension of Time*, June 17, 2016, p. 3. Complainants do not and

cannot argue that responses to statements of facts are not relevant. Instead, Complainants make the unsupported argument that responses to disputed statements of facts must be included in a response to summary judgment because they are “essential” as opposed to “relevant material”.¹ There is no law, statute or regulation to support such a notion, making it “frivolous” under Board Rules. 35 Ill. Adm. Code 101.202.

The Board Rules broadly describe the various elements in a record that the Board may look to when determining that there is no genuine issue of material fact. 35 Ill. Adm. Code 101.202.² The definition does not segregate the elements between items that must be in the brief and those that may not be included. 35 Ill. Adm. Code 101.202. Complainants seem to be suggesting that the Board create a new standard for summary judgment motions that segregates the information that must be in a brief with the information that may be attached. There is no authority for creating this new standard. *Kochanski v. Hinsdale Golf Club*, PCB88-16 (July 13, 2989), 1989 WL 95646, *slip op.* 1. (“The Board has no powers others than those derived from statute, and it has no powers which are not expressly identified in statute.”). Thus, Complainants’ proposition that the Board may reject “relevant material” because it is “essential” and must be within a brief is “frivolous” because it is “a request for relief that the Board does not have the authority to grant...” 35 Ill. Adm. Code 101.202.

The Board’s 1989 Procedural Rules Revisions Opinion supports MWG’s position that “relevant material” is any material relevant to a brief. *In the Matter Of: Procedural Rules Revision* 35 Ill. Adm. Code 101, 106 (Subpart G) and 107, PCB R88-5, (June 8, 1989) 1989 WL 1127868.

¹ Complainants’ Motion to Strike also suggests that MWG’s Response brief did not identify any genuine issues of material facts, which is inaccurate. Sections IV and V of MWG’s Response describe numerous material issues of fact in dispute.

² ‘Summary judgment’ means the disposition of an adjudicatory proceeding without hearing when the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.202.

In that Opinion, the Board did not limit the attachments, but instead stated “The page limits do not include appendixes containing regulations, cases, and *other relevant material*.” *Id* at 5. In other words, the Board expressly allowed material that may be relevant to a decision to be attached. In fact, if the Board accepted Complainants’ interpretation that “relevant material” consists only of regulations and cases, then Complainants’ own 81 attachments, including a custom made chart of alleged exceedance of groundwater standards, would be in violation of their own newly created standard.

Moreover, the Board expressly revised the language of its page limitation Rule to include any relevant material. Since 1989, the Board has dropped the words “regulations” and “cases” from Section 101.302(k), and now that section simply states, “These limits do not include appendixes containing relevant material.” 35 Ill. Adm. 101.302(k). Clearly, the Board intends that the appendixes attached to a brief means any material that is relevant to that brief. Thus, Appendix A, containing each of Complainants’ 138 Statements of Fact and MWG’s specific statement in response, is relevant material allowed under the Board’s Rules.

II. Requiring Appendixes To Be Formatted To Fit Within 50 Pages Causes An “Absurd” Result

The absurdity of Complainants’ arguments is highlighted by the fact that MWG could have included its responses from Appendix A into its Response brief and remained within 50 pages. Instead, as MWG stated in its Response, and reiterated in its Objection to Complainants’ Motion for Leave to Reply (“MWG’s Objection for Leave”), MWG specifically elected to restate each of Complainants’ Statement of Facts, followed by MWG’s specific response, for the Board’s convenience and ease of review. *See Response*, July 19, 2016, FN 3 and *MWG’s Objection for Leave*, July 28, 2016, p. 2. The Board should deny the Motion to Strike Appendix A to avoid an absurd result.

In its Motion for Partial Summary Judgment, Complainants chose to single-space many pages and to include a 10-point font footnote that extended over two pages. Complainants specifically argued to this Board that single spacing is permitted. *See Complainants' Response to MWG's Motion to For an Extension of Time*, PCB13-15, June 17, 2016, p. 3 (Complainants are unaware of a Board Rule prohibiting the use of single-spaced formatting). MWG could similarly have submitted its responses to Complainants' Statement of Facts as a single-spaced footnote in 10-point font. Inserting a 10-point font footnote is explicitly allowed under Board Rule 101.302(g)(2) and the resulting response brief would have been fifty very dense pages. 35 Ill. Adm. Code 101.302(g)(2), 101.302(k). Alternatively, MWG could have formatted its brief such that it were entirely single-spaced, and included a new section of only its responses to Complainants' Statements of Facts, without the original corresponding statements. This formatting would also have resulted in a very dense brief that was under 50 pages. 35 Ill. Adm. Code 101.302(k). In both of the alternatives, the Board would have had to flip between Complainants' Motion and MWG's Response to understand the numerous facts and issues raised in both briefs – an inconvenient exercise serving no purpose.

It cannot be the intent of the Board's page limitation to require a party to fill as much space of a page with information so as to contain all of the information within the 50-page limit. The Board "has the power to construe its own rules and regulations to avoid absurd or unfair results." *Illinois EPA 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, requiring a party to shoehorn all of the relevant information into very dense fifty pages, instead of simply allowing an appendix of relevant responses to statements of facts, is simply absurd. Nevertheless, if the Board prefers the proposed

alternative briefs, then MWG seeks leave to refile its Response and Appendix A with a brief that is reformatted to fit within 50 pages.

III. Complainants' Motion to Strike Should Denied As Duplicative

Complainants' Motion to Strike is duplicative of its Motion for Leave to File a Reply, ("Motion for Leave") because both are based upon a protest over the length of MWG's Response. The Board has already granted Complainants' request to file a Reply brief based on Complainants' arguments over the length of MWG's Response. Complainants are now seeking to "have their cake and eat it too" by requesting that MWG's Appendix A also be stricken. The Board should deny Complainants' Motion to Strike because they have already received relief over the length of MWG's Response and Appendix A.

On July 22, 2016, Complainants filed its Motion for Leave in response to MWG's Response. In their Motion for Leave, Complainants repeatedly stated that a Reply was necessary due to the length of MWG's Response, which they calculated at 101 pages because they included Appendix A in the total. *Complainants' Motion for Leave*, pp. 2-3. In its objection to Complainants' Motion for Leave, MWG explained that its Response properly consisted of 48 pages; and Appendix A, containing all of Complainants' lengthy Statements of Fact as well as MWG's Responses, was simply attached for ease of the Board's review. *MWG's Objection for Leave*, pp. 1-3.

Without waiting for a decision on their Motion for Leave, on August 2, 2016, Complainants filed a Motion to Strike Appendix A, repeating their claim that MWG's Response exceeded the Board's page limitation. The next day, Hearing Officer Halloran granted Complainants' Motion for Leave to Reply based in part, if not significantly, on Complainants' arguments concerning the lengths of MWG's brief. *Sierra Club et al v. MWG*, PCB13-15 (Aug. 3, 2016), *slip op* at 1.

Upon receiving their requested relief to file a reply, Complainants' cannot now be permitted to strike the very appendix Complainants used to entitle it to file a reply brief. Complainants should have filed their Motion to Strike at the same time as their Motion for Leave to Reply to allow the Board to consider the alternatives of either allowing the Reply or striking Appendix A. Complainants cannot now be allowed to have it both ways and be allowed to reply to an Appendix they desire stricken.

IV. Conclusion

For the foregoing reasons, MWG requests that the Board deny Complainants' Motion to Strike Appendix A to MWG's Response to Complainants' Motion for Partial Summary Judgment. Alternatively, if the Board believes Appendix A exceeds its page limitation, MWG seeks leave to reformat and replace its Response and Appendix A with a brief containing the same information and totaling 50 pages.

Respectfully submitted,

MIDWEST GENERATION, LLC.

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

Dated: August 16, 2016

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