

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, 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 Respondent, Midwest Generation, LLC’s Objection and Appeal from Hearing Officer’s Ruling to Admit Discovery Responses as Evidence and Memorandum in Support of Midwest Generation, LLC’s Objection and Appeal from Hearing Officer’s Ruling to Admit Discovery Responses as Evidence, copies of which are hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: November 13, 2017

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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 and Appeal from Hearing Officer's Ruling to Admit Discovery Responses as Evidence and Memorandum in Support of Midwest Generation, LLC's Objection and Appeal from Hearing Officer's Ruling to Admit Discovery Responses as Evidence was filed electronically on November 13, 2017 with the following:

Don Brown, 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 emailed on November 13, 2017 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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AND POLICY CENTER, PRAIRIE RIVERS)	
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MIDWEST GENERATION, LLC’S OBJECTION AND APPEAL FROM HEARING OFFICER’S RULING TO ADMIT DISCOVERY RESPONSES AS EVIDENCE

Pursuant to 35 Ill. Adm. Code 101.502(b), 101.518 and 101.626, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits to the Illinois Pollution Control Board (“Board”) this Objection and Appeal from the Hearing Officer’s ruling to admit discovery responses. In support of its Objection and Appeal, MWG submits its Memorandum in Support and states as follows:

- 1) On October 23, 2017, the Complainants moved to admit into evidence Exhibit 5.5, MWG’s Response to Complainant’s Fourth Set of Document Requests, Second Set of Interrogatories, and Second Set of Requests for Admission to Respondents dated March 31, 2015. (Attachment A).
- 2) On October 23, 2017, the Complainants moved to admit into evidence Exhibit 6, MWG’s Supplemental Response to Complainants’ Second Set of Interrogatories, dated June 10, 2015. (Attachment B).
- 3) On October 23, 2017, the Complainants moved to admit Exhibit 7, MWG’s Supplemental Response to Complainants’ First Set of Interrogatories dated June 10, 2015. (Attachment C).

- 4) On October 23, 2017, over the objection of MWG, the Hearing Officer issued a ruling to admit Exhibits 5.5, 6, and 7 into evidence.
- 5) MWG appeals the Hearing Officer's decision to admit Exhibits 5.5, 6 and 7 because the documents are discovery materials, not material or reliable evidence. Discovery materials may be used to the same extent as discovery depositions and are only admissible for specific purposes identified in the Illinois Supreme Court Rules. Ill. S. Ct. Rule 212(a), 213(h); *Tower Oil & Technology Co. v. Buckley*, 99 Ill. App. 3d 637, 648 (1st Dist. 1981).
- 6) Pursuant to the Board's rules, 35 Ill. Adm. Code 101.626, the Hearing Officer "will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part." Section 101.626(f) provides that a prior statement under oath "*may be admitted to impeach a witness* if the statement is inconsistent with the witness' testimony at hearing." The Board's rule is consistent with the Illinois Supreme Court rule limiting use of material like discovery to impeachment or other specific uses.
- 7) Complainants did not use Exhibits 5.5, 6 or 7 for impeachment of a witness or any other permissible basis under Illinois Supreme Court Rule 212(a) and 213(h).
- 8) Complainants cannot use the discovery responses to include irrelevant material into evidence. It is well established that the use of discovery at trial cannot be an excuse to sweep irrelevant material into evidence. *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 807-08, 182 Ill. Dec. 814, 831, 610 N.E.2d 683, 700 (5th Dist. 1993) (*overruled on other grounds by Nolan v. Weil-McLain*, 233 Ill. 2d 416); *Morse v. Hardinger*, 34 Ill. App. 3d 1020, 1025, 341 N.E.2d 172, 176 (4th Dist. 1976).

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's ruling, exclude Exhibits 5.5, 6 and 7, and strike all testimony related to the

Exhibits. Alternatively, MWG requests that the Board rule that any use of or reliance on the Exhibits is limited to those portions of Exhibits 5.5, 6 and 7 that were discussed with the witness during the Hearing on October 23, 2017.

Respectfully submitted,
Midwest Generation, LLC

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

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**MEMORANDUM IN SUPPORT OF MIDWEST GENERATION’S OBJECTION
AND APPEAL FROM HEARING OFFICER’S RULING TO ADMIT
DISCOVERY RESPONSES AS EVIDENCE**

Midwest Generation, LLC (“MWG”) submits this Memorandum in Support of its Objection and Appeal from the Hearing Officer’s Ruling to Admit Discovery Responses. The discovery responses admitted as Exhibits 5.5, 6 and 7 should be excluded because they are not relevant or material and were not used by Complainants for impeachment or for any permissible purpose. Alternatively, MWG requests that the Illinois Pollution Control Board (“Board”) rule that any use of or reliance on the Exhibits is limited to those portions of Exhibits 5.5, 6 and 7 that were material, because they were discussed with the witness during the Hearing on October 23, 2017.

I. Background

On October 23, 2017, Complainants moved to admit three sets of MWG discovery responses as exhibits: Exhibit 5.5, MWG’s Response to Complainant’s Fourth Set of Document Requests, Second Set of Interrogatories, and Second Set of Requests for Admission to Respondents dated March 31, 2015; Exhibit 6, MWG’s Supplemental Response to Complainants’ Second Set of Interrogatories dated June 10, 2015; and Exhibit 7, MWG’s Supplemental Response to

Complainants' First Set of Interrogatories dated June 10, 2015. Copies of the Exhibits as presented by Complainants are included as Attachments A, B, and C to this Motion and Memorandum. MWG objected to the admission of the discovery responses because the responses are not evidence, but instead are discovery materials that may only be used to the same extent as discovery depositions, and are only admissible for specific purposes under the Illinois Supreme Court Rules. Ill. S. Ct. Rule 212(a), 213(h), *Tower Oil & Technology Co. v. Buckley*, 99 Ill. App. 3d 637, 648 (1st Dist. 1981). Overruling MWG's objection, the Hearing Officer admitted the discovery responses into evidence.

II. The Discovery Responses are Not Relevant Evidence Commonly Relied Upon by Prudent Person

Exhibits 5.5, 6 and 7 are discovery responses that contain irrelevant evidence, which is not commonly relied upon by prudent persons at a trial. Pursuant to the Board's rules and in accordance with the Section 10-40 of the Illinois Administrative Procedures Act ("Illinois APA"), the Hearing Officer "will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part." 5 ILCS 100/10-40, 35 Ill. Adm. Code 101.626. Additionally, the Illinois APA states that "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded,"...and that the rules of evidence as applied in civil cases shall be followed. 5 ILCS 100/10-40. The Illinois APA allows for the admission of non-admissible evidence "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." 5 ILCS 100/10-40. The Board's rules contain a similar exception in Part 101.626(a), which states that only evidence that is material, relevant and would be relied upon by prudent persons may be admitted. 35 Ill. Adm. Code 101.626(a). Courts have interpreted this to mean that, while hearsay evidence is generally inadmissible in an administrative hearing, the administrative

procedure rules create an exception to the rule if the hearsay is reliable. *Metro Utility v. Illinois Commerce Comm'n*, 193 Ill. App. 3d 178, 185, 549 N.E.2d 1327, 1331, 140 Ill. Dec. 455 (1990).

Exhibits 5.5, 6 and 7 are not evidence commonly relied upon by a prudent person, but instead are merely written discovery material produced to fully explore the other party's knowledge, and the location of witnesses and documents. *Portis v. City of Chi.*, No. 02 C 3139, 2005 U.S. Dist. LEXIS 7972, at *9 (N.D. Ill. Apr. 15, 2005) ("..., the primary purpose for interrogatories is to 'help determine the existence, identity, and location of witnesses, documents and other tangible evidence as a prerequisite to planning further discovery.'" *internal citations omitted*). As the purpose of the interrogatory is to assist in the discovery of information, most of the information in the interrogatories is not relevant to the issues at the trial, is limited in time, and is ultimately not reliable. For example, during the Hearing, Ms. Race corrected information stated in the interrogatories with the actual status of the Joliet 29 facility:

“BY MS. BUGEL: Q. And do you see where it indicates that in the first sentence that Joliet 29 station has three active ash ponds?

MS. RACE: A. I see that. However, I think it's important to keep in mind that ash pond has several different meanings under various regulations.

Q. And are those three ash ponds at Joliet still active?

A. No, they are not, not all three.

Q. Are any of those ponds still active?

MS. FRANZETTI: Objection to form in terms of the intended meaning of active, is it being ash added or taken away?

HEARING OFFICER HALLORAN: Sustained. Ms. Bugel?

BY MS. BUGEL: Q. You said not all three. Can you please clarify what you meant by that?

A. Because Joliet 29 has converted to natural gas from coal, there is no longer any ash being placed in impoundment two which is the only impoundment that would still be considered -- I don't know -- I guess you could consider it active at Joliet until it is cleaned out. Pond three is a polishing pond and is not considered an ash pond under the CCR rules and ash pond one was not covered under the CCR rules because it was cleaned out before the rules came into effect.”

(PCB 13-15 Hearing Transcript, Oct. 23, 2017, pp. 59:9 – 60:13, excerpt attached as Attachment D)

Moreover, the information in discovery responses is not necessary when a witness can testify to that information with their personal knowledge. For instance, even though Exhibit 6 discussed the electrical leak location method used on the liners, Ms. Race testified that she knew the method was used on the liners when the liners were installed.

MS. BUGEL: Q. Do you know if the electric leak location method has been used at other facilities?

MS. RACE: A. Yes, it has been.

Q. Do you know when it has been used?

A. When the liners are installed.

(PCB 13-15 Hearing Transcript, Oct. 23, 2017, p. 57:9-13, Attachment D).

Thus, the discovery responses are not reliable and are not material that can be relied upon by a prudent person for the purposes of a hearing. The discovery responses contain out of date information, which was updated by the witness at the Hearing, and the first-hand testimony of a witness is more reliable evidence than the information in the discovery responses.

Additionally, the Board Board's own rules bar the filing of written discovery. Thus, there is a presumption that discovery responses are not material or commonly relied on by a prudent person. Board Rule 101.302(i) states: "No written discovery, including interrogatories, requests to produce, and requests for admission, or any response to written discovery, may be filed with the Clerk of the Board except with permission or direction of the Board or hearing officer." 35 IAC 101.302(i). The Board rules clearly state that the written discovery responses are not to be filed, which emphasis the purpose of discovery as information gathering and not reliable or material evidence in a hearing.

III. Discovery Responses May Only be Used at Hearing Under Limited Circumstances

A party's responses to discovery are not automatically evidence, but may only be used in a trial or hearing under limited circumstances. As stated above, the Hearing Officer will "admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part." 35 Ill. Adm. Code 101.626. Part 101.626(f) provides that a prior statement under oath "*may be admitted to impeach a witness* if the statement is inconsistent with the witness' testimony at hearing." (emphasis added). The Board's rule is limits use of materials like discovery to impeachment.

Under the Illinois Supreme Court Rules, discovery responses are to be used in evidence to the same extent as a discovery deposition. Il. Sup. Ct. Rule 213(h). Illinois Supreme Court Rule 212(a) defines how discovery depositions may be used. Under that rule, a discovery deposition may only be used: for the purposes of impeaching the witness; as an admission made by a party or an officer or agent of a party; if otherwise admissible as an exception to the hearsay rule; for any purpose for which an affidavit may be used; or upon reasonable notice to all parties, as evidence at trial or hearing against a party if the deponent is unable to attend or testify at the trial or hearing because of death or infirmity, and the deponent's evidence deposition has not been taken. Il. Sup. Ct. Rule 212(a)(1)-(5). Moreover, discovery responses, including answers to interrogatories, are only evidentiary admissions, that "may be controverted or explained by the party." *Brummet v. Farel*, 217 Ill. App. 3d 264, 267, 160 Ill. Dec. 278, 280, 576 N.E.2d 1232, 1234 (1991) *citing M. Graham, Evidence Text, Rules, Illustrations and Problems*, at 146 (1983). As evidenced by Ms. Race's explanation of the responses at the hearing, the discovery responses are limited in time and scope and subject to multiple objections. (*See supra Section II*).

In presenting Exhibits 5.5, 6, and 7, Complainants did not establish that they had met any of the allowed uses of a discovery deposition or interrogatory response. Complainants presented the

interrogatory answers to Maria Race on the first day of the Hearing early in her testimony. (PCB 13-15 Hearing Transcript, Oct. 23, 2017, pp. 46-60, Attachment D). Complainants did not ask a single substantive question about Exhibit 5.5, but instead only asked Ms. Race about who prepared the responses (PCB 13-15 Hearing Transcript, Oct. 23, 2017, pp. 47:20 – 52:17, Attachment D). With regards to Exhibit 6, Complainants only asked about the responses to Interrogatory No. 1, but not for any of the bases allowed under Rule 212(a). Complainants did not use the response to Interrogatory No. 1 in Exhibit 6 for impeaching Ms. Race, as an admission by Ms. Race or MWG, as an exception to hearsay, as an affidavit, nor because Ms. Race or another representative of MWG was not available due to death or infirmity. Instead, Complainants only asked Ms. Race to confirm that the electric leak location test was used on the ponds after the ponds were relined. Ms. Race could have testified to this information without the interrogatory responses, because Mr. Race testified that she personally knew the electric leak location method was used at the facilities when the liners were installed. (*See supra* Section II, *citing* PCB 13-15 Hearing Transcript, Oct. 23, 2017, pp. 57:9-13, Attachment D). Regarding Exhibit 7, Complainants only asked about one paragraph regarding Joliet 29 on p. 3 of Exhibit 7. Again, Complainants did not use the discovery responses for any of the bases allowed under Rule 212(a). Instead, Ms. Race updated the information written in the discovery response from June 2015, because Joliet 29 converted to natural gas in 2016, and no longer produces coal ash. (*See supra* Section II, *citing* PCB 13-15 Hearing Transcript, Oct. 23, 2017, pp. 59:9 – 60:13, Attachment D).

Ultimately, Complainants did not use the discovery responses in any of the ways allowed under Rule 212(a). *Il. Sup. Ct. Rule 212(a)*. Because Complainants did not use the discovery responses as allowed under Rule 212(a), it was improper for the responses to be admitted into evidence.

IV. If Exhibits 5.5, 6, and 7 are Deemed Admitted, Then Only the Information Discussed During Testimony Should Be Admitted

Even if Complainants were using the responses to discovery for one of the purposes identified in Rule 212(a), entering all of the responses is improper. It is well established that a party may not “sweep irrelevant material into evidence,” by reading an entire deposition or discovery responses into evidence. *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 807-08, 182 Ill. Dec. 814, 831, 610 N.E.2d 683, 700 (5th Dist. 1993) (*overruled on other grounds by Nolan v. Weil-McLain*, 233 Ill. 2d 416); *Morse v. Hardinger*, 34 Ill. App. 3d 1020, 1025, 341 N.E.2d 172, 176 (4th Dist. 1976). At the Hearing, Complainants only discussed limited portions of the interrogatory responses; thus, only those specific sections are relevant to the issues at the Hearing. Complainants cannot sweep irrelevant material not discussed at the Hearing into the record for use in a later closing brief. The Hearing Officer has ruled similarly with regards to other exhibits admitted into evidence:

MS. NIJMAN: We would ask that the ruling [to admit Exhibits 17D, 18D, 19D, 20D, and 21] be limited then to -- for the purpose of relevancy the questions that are actually asked from that document. In other words, the concern is that there is a discussion with Ms. Race on one issue and then the closing brief comes around and something is pulled out of the back of that report that has nothing to do with the testimony.

HEARING OFFICER HALLORAN: I grant that. Ms. Bugel, do you understand in your – in your hearing brief, your -- your briefing is limited to the questions you have asked of Ms. Race regarding these exhibits?

MS. BUGEL: Okay. Well, then I would like the opportunity to go back and ask additional questions.

HEARING OFFICER HALLORAN: That's why I reversed my position now while Ms. Race is still in front of me.

(PCB 13-15 Hearing Transcript Oct. 23, 2017, pp. 126:15-127:9, Attachment D).

Similarly, if the Board concludes that the responses to discovery may be admitted as evidence, then only the issues shown to be relevant, which are the issues discussed by Complainants at the

Hearing, should be included as evidence. The remaining parts of the discovery responses should be excluded as irrelevant material.

MWG requests that the Board reverse the Hearing Officer's Decision, exclude Exhibits 5.5, 6 and 7, and strike all testimony related to the excluded Exhibits. Alternatively, MWG requests that the Board hold that the parties may only use or rely upon the portions of Exhibits 5.5, 6 and 7 that were deemed relevant because they were discussed with the witness during the Hearing on October 23 through 27, 2017.

Respectfully submitted,
Midwest Generation, LLC

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

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ATTACHMENT A

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)
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 Complainants,)
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 v.)
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 MIDWEST GENERATION, LLC,)
)
 Respondent.)

PCB No-2013-015
(Enforcement – Water)

MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' FOURTH SET OF DOCUMENT REQUESTS, SECOND SET OF INTERROGATORIES, AND SECOND SET OF REQUESTS FOR ADMISSION TO RESPONDENTS

Respondent, Midwest Generation, LLC, ("Midwest Generation"), through its undersigned attorneys, responds to Complainants' Fourth Set of Document Requests, Second Set of Interrogatories, and Second Set of Requests for Admission, ("Requests"), as follows:

GENERAL OBJECTIONS

Each of the Responses is made subject to and incorporates by reference the objections made in Midwest Generation's Responses to Complainants' First Set of Interrogatories, Requests for Documents and Request for Admission provided on September 2, 2014. Additionally, Midwest Generation makes the following objections:

1. Midwest Generation objects to the "Coal ash" definition to the extent that it includes other waste streams resulting from the operation of pollution controls.
2. Midwest Generation objects to the "Coal ash units" definition to the extent that it includes areas in which coal ash is not purposely directed to or placed on and to the extent it includes *de minimis* collections of coal ash due to the operations of the Station.

Comp. Exp. 5.5
~~11/13/17~~

3. Midwest Generation objects to the "Joliet 29" definition to the extent it states that the Station is located in Kendall County.

4. Midwest Generation objects to the "Uppermost aquifer" definition as vague, ambiguous and capable of varying interpretations. Additionally, Midwest Generation objects to the definition to the extent it depends upon a coal ash unit to identify any aquifer's location.

5. Midwest Generation objects to Instruction No. 6 as overly broad and unduly burdensome.

6. Midwest Generation objects to the Number of Requests to Admit as in excess of the number of requests allowed under the Ill. Sup. Ct. Rule 216(f) and the additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015. Illinois Supreme Court Rule 216(f) allows each party to issue a maximum of 30 requests for admission, and each subpart counts as a separate request. Ill. Sup. Ct. Rule 216(f). On June 16, 2014, Complainants submitted to Midwest Generation three Requests for Admission of Genuineness of Documents, attaching fifty-eight documents. Each of the fifty eight documents is a subpart of the request for admission. On February 4, 2015, the parties agreed that each may propound 20 additional requests for admission. On March 2, 2015, Complainants propounded a total of forty requests to admit to Complainants in their Second and Third Set of Requests for Admission. Because the requests to admit are in excess of the agreed extension and the limits under Ill. Sup. Ct. Rule 216(f), Midwest Generation has answered twenty of the forty propounded requests for admission.

7. Respondent reserves the right to object to the admissibility of any of the documents produced pursuant to the Responses, in whole or in part, at hearing in this action on any grounds including but not limited to materiality, relevance, confidential business information and privilege.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Provide any Documents related to each refusal to admit any requests for admission herein.

ANSWER:

Without waiving its objections, responsive documents include Bates #MWG13-15_18824-19428, and Bates #MWG13-15_4-9, 69, 73, 77, 81, 85, 89, 93, 97 and 101.

2. Provide all Documents that evidence or relate to your Interrogatory responses.

ANSWER:

Midwest Generation incorporates and includes the objections stated in response to each Interrogatory Request. Without waiving its objections, responsive documents are set forth in the interrogatory answers and have already been provided or are attached.

3. Provide all maps that accurately show which portions of the Joliet 29 site are owned or operated by MWG.

ANSWER:

Without waiving its objections, responsive documents are available for review; see Bates No. MWG13-15_48403 - 48414.

4. Provide all maps that accurately show which portions of the Powerton site are owned or operated by MWG.

ANSWER:

Without waiving its objections, responsive documents are available for review; see Bates No. MWG13-15_4815 - 48426.

5. Provide all maps that accurately show which portions of the Waukegan site are owned by MWG.

ANSWER:

Without waiving its objections, responsive documents are available for review; see Bates No. MWG13-15_48427 - 48432.

6. Provide all maps that accurately show which portions of the Will County site are owned by MWG.

ANSWER:

Without waiving its objections, responsive documents are available for review; see Bates No. MWG13-15_48433-48438.

7. Provide all Documents pertaining to boron or borax use at the Tannery site.

ANSWER:

Midwest Generation objects to Document Request No. 7 as overly broad and unduly burdensome and seeks documents or information not within Midwest Generation's possession, custody or control. Without waiving its objections, responsive and non-privileged documents currently in Midwest Generation's control include Bates MWG13-15_43754-43862.

8. Provide all Documents pertaining to boron or borax use at the General Boiler site.

ANSWER:

See Answer to Document Request No. 7, incorporated by reference. .

9. Provide all Documents related to groundwater elevations at Waukegan Groundwater Monitoring Wells MW-8 and MW-9.

ANSWER:

Without waiving its objections, responsive documents are available for review; see Bates MWG13-15_48439.

10. Provide all Documents related to groundwater elevation at all monitoring wells at the former General Boiler site, including but not limited to monitoring wells GB-1 through GB-7.

ANSWER:

Midwest Generation objects to Document Request No. 10 as overly broad and unduly burdensome and seeks documents and information not within Midwest Generation's possession, custody or control. Without waiving its objections, Midwest Generation states that no responsive documents within its custody or control are currently available.

11. Provide all Documents related to groundwater elevation at monitoring wells 1 through 9 at the Tannery site.

ANSWER:

Midwest Generation objects to Document Request No. 11 as overly broad and unduly burdensome and seeks documents and information not within Midwest Generation's possession, custody or control. Without waiving its objections, Midwest Generation states that responsive documents were previously provided and include Bates #MWG13-15_46211-MWG13-15_48402.

12. Provide all groundwater quality data from all monitoring wells at the former General Boiler site, including but not limited to monitoring wells GB-1 through GB-7.

ANSWER:

See Answer to Document Request No. 10, incorporated by reference.

13. Provide all groundwater quality data from monitoring wells 1 through 9 at the Tannery site.

ANSWER:

See Answer to Document Request No. 11, incorporated by reference.

14. Provide all Documents evidencing or related to the contents of soil borings taken when ELUC wells MW-10, MW-11, MW-12, and MW-14 were drilled, including but not limited to boring logs.

ANSWER:

Midwest Generation objects to Document Request No. 14 as vague as to the "contents of soil borings." Additionally, see Answer to Document Request No. 10, incorporated by reference.

15. Provide all Documents evidencing or related to the contents of soil borings taken when groundwater monitoring wells 1 through 14 at the Tannery site were drilled, including but not limited to boring logs.

ANSWER:

Midwest Generation objects to Document Request No. 15 as vague as to the "contents of soil borings." Additionally, see Answer to Document Request No. 11, incorporated by reference.

16. Provide all Documents evidencing or related to the contents of soil borings taken when all monitoring wells at the former General Boiler site, including but limited to monitoring wells GB-1 through GB-7, were drilled, including but not limited to boring logs.

ANSWER:

See Answer to Document Request No. 14, incorporated by reference.

17. Provide any and all groundwater quality data from the first quarter of 2015 from all groundwater monitoring wells at Joliet 29, Will County, Powerton, and Waukegan, including but not limited to all Waukegan Groundwater Monitoring Wells, all monitoring wells at the Tannery Site, all monitoring wells at the General Boiler site, and ELUC wells MW-10, MW-11, MW-12, MW-14 and MW-15.

ANSWER:

Midwest Generation objects to Document Request No. 17 as overly broad and unduly burdensome and seeks documents and information not within Midwest Generation's possession, custody or control. Without waiving its objections, Midwest Generation states that responsive documents are not currently available.

18. Provide a complete Phase II Environmental Site Assessment for Joliet 29, including all boring logs.

ANSWER:

Without waiving its objections, Midwest Generation states that responsive documents are included at Bates No. MWG13-15_48440-48492.

INTERROGATORIES

1. Identify any and all methods, other than visual inspection, that MWG uses to inspect ash pond liners for Damage, weakness or leaks at Joliet 29, Will County, Waukegan and Powerton, and state:
 - a. How each method of inspection identifies weakness or damage to liners;
 - b. When the use of each method of inspection began at each pond; and
 - c. The frequency with which each method of inspection is used at each pond.

ANSWER:

Midwest Generation objects to Interrogatory No. 1 because it is overly broad, unduly burdensome, and seeks material covered by the work product and attorney-client privilege. Without waiving its objections, Midwest Generation states that the other method to inspect the liners for damage or leaks is the electrical leak location method. The electrical leak location method detects paths through the geomembrane caused by water or moisture in the leaks. The electrical leak location method has been used on HDPE liners since mid-2000s and takes place when HDPE lining is installed at impoundments.

2. State whether MWG has ever monitored groundwater at Joliet 29, Waukegan, Will County and Powerton aside from the monitoring it currently performs at groundwater monitoring wells installed on or after 2010. If MWG has conducted such monitoring, state:
 - a. The specific locations at each site where groundwater was monitored; and
 - b. Over what time period that monitoring took place.

ANSWER:

Midwest Generation objects to Interrogatory No. 2 as overly broad and unduly burdensome and seeks documents or information not within Midwest Generation's possession, custody or control. Midwest Generation further objects to Interrogatory No. 2 to the extent it seeks materials that are

not relevant to the subject matter involved in the pending action or not reasonably calculated to lead to relevant, discoverable evidence. Finally, Midwest Generation further objects to this interrogatory as overly broad and limits its answer to monitoring for coal ash constituents. Without waiving its objections, Midwest Generation states that it provided all relevant groundwater monitoring results to Complainants in response to Document Request No. 8 of Complainants First Set of Document Requests, including Bates Nos. 2,459-6,822, 34716-36799, 43695-43862, 43871-44121, 44983-45769, and the documents provided at the offices of Nijman Franzetti. Additionally, see Midwest Generation response to Interrogatory No. 8 in Complainant's first Set of Interrogatories.

3. State whether MWG has ever removed Coal ash from any part of the Powerton site aside from the active ash ponds and, if MWG has done so, identify where the Coal ash were removed from and when that removal took place.

ANSWER:

Midwest Generation objects to Interrogatory No. 3 as overly broad and unduly burdensome and seeks documents or information not within Midwest Generation's possession, custody or control. Additionally, Midwest Generation objects to this interrogatory as requesting information already provided in the document requests and in the deposition of Mr. Mark Kelly. Without waiving its objections, Midwest Generation states that coal ash is removed from the silos and various ducts at the Station work during cleanouts. The coal ash is temporarily stored in the metal cleaning basin, until Midwest Generation removes the coal ash and hauls it offsite. The coal ash is removed from the metal cleaning basin approximately two to three times per year. Also, historically the limestone basin and areas around the coal piles were used for temporary placement of coal ash before off site removal. The coal ash was removed from these locations on a periodic basis before 2012.

REQUESTS FOR ADMISSION

1. Admit that Ash Landfill SW is within the current property boundaries of the portion of the Joliet 29 site that is operated by MWG.

ANSWER:

Midwest Generation objects to this request as calling for a legal conclusion. Without waiving its objections, Midwest Generation admits that it leases the Joliet 29 Station which includes the area defined here as the Ash Landfill SW.

2. Admit that Ash Landfill NE is within the current property boundaries of the portion of the Joliet 29 site that is operated by MWG.

ANSWER:

Midwest Generation objects to this request as calling for a legal conclusion. Without waiving its objections, Midwest Generation admits that it leases the Joliet 29 Station which includes the area defined here as the Ash Landfill NE.

3. Admit that, prior to approval of the Joliet 29 Groundwater Monitoring Zone ("GMZ"), all of the groundwater underlying Joliet 29 was classified as Class I: Potable Resource Groundwater pursuant to 35 Ill. Adm. Code Part 620.

ANSWER:

Midwest Generation objects to this request as calling for a legal conclusion. Midwest Generation further objects to this request pursuant to its sixth General Objection set forth above, that this request is in excess of the number of requests allowed under Ill. Sup. Ct. Rule 216(f) and the additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015.

4. Admit that, prior to approval of the Will County Groundwater Monitoring Zone ("GMZ"), all of the groundwater underlying Will County was classified as Class I: Potable Resource Groundwater pursuant to 35 Ill. Adm. Code Part 620.

ANSWER:

See Answer to Request No. 3, incorporated by reference.

5. Admit that, prior to approval of the Powerton Groundwater Monitoring Zone ("GMZ"), all of the groundwater underlying Powerton was classified as Class I: Potable Resource Groundwater pursuant to 35 Ill. Adm. Code Part 620.

ANSWER:

See Answer to Request No. 3, incorporated by reference.

6. Admit that the groundwater underlying Waukegan is classified as Class I: Potable Resource Groundwater pursuant to 35 Ill. Adm. Code Part 620.

ANSWER:

See Answer to Request No. 3, incorporated by reference.

7. Admit that Ash Landfill NE at Joliet 29 is not lined.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "lined" is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation states that after reasonable inquiry, the information known or readily obtainable is insufficient to allow Midwest Generation to admit or deny the request.

8. Admit that Ash Landfill NE has not been lined or relined since MWG began operating Joliet 29.

ANSWER:

Midwest Generation objects to this request on the grounds that the terms "lined" and "relined" are vague, ambiguous, and capable of varying interpretations. Midwest Generation further objects to this request pursuant to its sixth General Objection set forth above, that this request is in excess of the number of requests allowed under Ill. Sup. Ct. Rule 216(f) and the

additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015.

9. Admit that there is Coal ash in the ground within the boundary of the Ash Landfill NE at Joliet 29.

ANSWER:

Midwest Generation objects to this request on the grounds that the phrase “Coal ash in the ground” is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation states that after reasonable inquiry, the information known or readily obtainable is insufficient to allow Midwest Generation to admit or deny the request.

10. Admit that MWG has not removed Coal ash from Ash Landfill NE at Joliet 29.

ANSWER:

See Answer to Request No. 8, incorporated by reference.

11. Admit that there is no impermeable cap over Ash Landfill NE at Joliet 29.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation admits the request.

12. Admit that Ash Landfill SW at Joliet 29 is not lined.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “lined” is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation

states that after reasonable inquiry, the information known or readily obtainable is insufficient to allow Midwest Generation to admit or deny the request.

13. Admit that Ash Landfill SW has not been lined or relined since MWG began operating Joliet 29.

ANSWER:

See Answer to Request No. 8, incorporated by reference.

14. Admit that there is Coal ash in the ground within the boundary of the Ash Landfill SW at Joliet 29.

ANSWER:

Midwest Generation objects to this request on the grounds that the phrase "Coal ash in the ground" is vague, ambiguous, and capable of varying interpretations. Midwest Generation further objects to this request pursuant to its sixth General Objection set forth above, that this request is in excess of the number of requests allowed under Ill. Sup. Ct. Rule 216(f) and the additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015.

15. Admit that MWG has not removed Coal ash from Ash Landfill SW at Joliet 29.

ANSWER:

Denied.

16. Admit that there is no impermeable cap over Ash Landfill SW at Joliet 29.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "impermeable cap" is vague, ambiguous, and capable of varying interpretations. Midwest Generation further

objects to this request pursuant to its sixth General Objection set forth above, that this request is in excess of the number of requests allowed under Ill. Sup. Ct. Rule 216(f) and the additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015.

17. Admit that the Former Slag/Fly Ash Storage Area at Waukegan is not lined.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "lined" is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation states that after reasonable inquiry, the information known or readily obtainable is insufficient to allow Midwest Generation to admit or deny the request.

18. Admit that the Former Slag/Fly Ash Storage Area at Waukegan has not been lined or relined since MWG began operating Waukegan.

ANSWER:

See Answer to Request No. 8, incorporated by reference.

19. Admit that there is Coal ash in the ground within the boundary of the Former Slag/Fly Ash Storage Area at Waukegan.

ANSWER:

See Answer to Request No. 14, incorporated by reference.

20. Admit that Coal ash has not been removed from the Former Slag/Fly Ash Storage Area at Waukegan since MWG began operating Waukegan.

ANSWER:

Midwest Generation objects to this request pursuant to its sixth General Objection set forth above, that this request is in excess of the number of requests allowed under Ill. Sup. Ct. Rule

216(f) and the additional requests for admission agreed to in the Agreed Motion to Extend the Discovery Schedule and Modify the Discovery Order filed with the Board on February 4, 2015.

21. Admit that there is no impermeable cap over the Former Slag/Fly Ash Storage Area at Waukegan.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. Subject to its objection, Midwest Generation admits the request.

22. Admit that, other than any borings taken when drilling Waukegan Groundwater Monitoring Wells MW-1 through MW-5 at Waukegan, MWG has not removed any Coal ash from the ground in the vicinity of Waukegan Groundwater Monitoring Wells MW-1 through MW-4.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “vicinity” and the phrase “Coal ash from the ground” are vague, ambiguous, and capable of varying interpretations. Midwest Generation further objects to this request on the grounds that it is vague because it presumes that there is Coal ash on or in the soil in the vicinity of the Waukegan Groundwater Monitoring Wells MW-1 through MW-4. Subject to its objection, Midwest Generation denies this request.

23. Admit that, other than any borings taken when drilling Waukegan Groundwater Monitoring Wells MW-7 through MW-9, MWG has not removed any Coal ash from the ground in the vicinity of Waukegan Groundwater Monitoring Wells MW-7 through MW- 9 at Waukegan.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “vicinity” and the phrase “Coal ash from the ground” are vague, ambiguous, and capable of varying interpretations. Midwest Generation further objects to this request as vague because it presumes that there is Coal

ash on or in the ground in the vicinity of the Waukegan Groundwater Monitoring Wells MW-7 through MW-9. Subject to its objection, Midwest Generation denies this request.

24. Admit that the Retention Basin at Will County is not lined.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “lined” is vague, ambiguous, and capable of varying interpretations. Without waiving its objection, Midwest Generation denies this request.

25. Admit that the Retention Basin at Will County has not been lined or relined since MWG began operating Waukegan.

ANSWER:

Midwest Generation objects to this request on the grounds that the terms “lined” and “relined” are vague, ambiguous, and capable of varying interpretations. Midwest Generation further objects that this request is vague because operations at Will County did not depend upon operations at Waukegan. Without waiving its objection, Midwest Generation denies this request.

26. Admit that the Retention Basin at Will County currently contains Coal ash.

ANSWER:

Midwest Generation objects to this request on the grounds that the term “contains” is vague, ambiguous, and capable of varying interpretations because it does not account for *de minimis* amounts that may inadvertently land in the Retention Basin due to the nature of the operations at the Will County Station. Without waiving its objections, Midwest Generation denies this request.

27. Admit that Coal ash has not been removed from the Retention Basin at Will County since MWG began operating Will County.

ANSWER:

Denied.

28. Admit that there is no impermeable cap over the Retention Basin at Will County.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "impermeable cap" is vague, ambiguous, and capable of varying interpretations. Without waiving its objection, Midwest Generation admits this request.

29. Admit that the Standby Pond at Will County is not lined.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "lined" is vague, ambiguous, and capable of varying interpretations. See Answer to request No. 8, incorporated by reference.

30. Admit that the Standby Pond at Will County has not been lined or relined since MWG began operating Waukegan.

ANSWER:

See Answer to request No. 8, incorporated by reference.

31. Admit that Coal ash has not been removed from the Standby Pond at Will County since MWG began operating Will County.

ANSWER:

See Answer to request No. 20, incorporated by reference.

32. Admit that there is no impermeable cap over the Standby Pond at Will County.

ANSWER:

Midwest Generation objects to this request on the grounds that the term "impermeable cap" is vague, ambiguous, and capable of varying interpretations. Without waiving its objection, Midwest Generation admits this request.

33. Please admit you have no information that boron was used at the General Boiler site.

ANSWER:

See Answer to request No. 20, incorporated by reference.

34. Please admit you have no information that anything containing boron was used at the General Boiler site.

ANSWER:

See Answer to request No. 20, incorporated by reference.

Respectfully submitted,

Midwest Generation, LLC

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

March 31, 2015

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ATTACHMENT B

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.)
)
 MIDWEST GENERATION, LLC,)
)
 Respondent.)

PCB No-2013-015
(Enforcement – Water)

**MIDWEST GENERATION, LLC'S SUPPLEMENTAL RESPONSE TO
COMPLAINANTS' SECOND SET OF INTERROGATORIES**

Respondent, Midwest Generation, LLC, ("Midwest Generation"), through its undersigned attorneys, issues its supplemental response to Complainants' Second Set of Interrogatories, ("Requests"), as follows:

GENERAL OBJECTIONS

Each of the Responses is made subject to and incorporates by reference the objections made in Midwest Generation's Responses to Complainants' First Set of Interrogatories, Requests for Documents and Request for Admission provided on September 2, 2014. Additionally, Midwest Generation makes the following objections:

1. Midwest Generation objects to the "Coal ash" definition to the extent that it includes other waste streams resulting from the operation of pollution controls.
2. Midwest Generation objects to the "Coal ash units" definition to the extent that it includes areas in which coal ash is not purposely directed to or placed on and to the extent it includes *de*

Comp. EX 6



minimis collections of coal ash due to the operations of the Station.

3. Midwest Generation objects to the "Joliet 29" definition to the extent it states that the Station is located in Kendall County.

4. Midwest Generation objects to the "Uppermost aquifer" definition as vague, ambiguous and capable of varying interpretations. Additionally, Midwest Generation objects to the definition to the extent it depends upon a coal ash unit to identify any aquifer's location.

5. Midwest Generation objects to Instruction No. 6 as overly broad and unduly burdensome.

6. Respondent reserves the right to object to the admissibility of any of the documents produced pursuant to the Responses, in whole or in part, at hearing in this action on any grounds including but not limited to materiality, relevance, confidential business information and privilege.

INTERROGATORIES

1. Identify any and all methods, other than visual inspection, that MWG uses to inspect ash pond liners for Damage, weakness or leaks at Joliet 29, Will County, Waukegan and Powerton, and state:

- a. How each method of inspection identifies weakness or damage to liners;
- b. When the use of each method of inspection began at each pond; and
- c. The frequency with which each method of inspection is used at each pond.

ANSWER:

Midwest Generation objects to Interrogatory No. 1 because it is overly broad, unduly burdensome, and seeks material covered by the work product and attorney-client privilege. Additionally, Midwest Generation objects to this interrogatory as requesting information already provided in the responses to the document requests and in the depositions. Without waiving its objections, Midwest Generation states the following:

- a) Joliet 29: The other method to inspect the liners for damage or leaks is the electrical leak location method. The electrical leak location method detects paths through the

geomembrane caused by water or moisture in the leaks. The electrical leak location method was used on the HDPE liners in Ash Ponds 1 & 2 in 2008 and used on the Ash Pond 3 liner in 2013. The electrical leak location method was used when the HDPE lining was installed at Joliet 29 impoundments.

b) Powerton: The other method to inspect the liners at Powerton for damage or leaks is the electrical leak location method. The electrical leak location method detects paths through the geomembrane caused by water or moisture in the leaks. The electrical leak location method was used on the HDPE liner in the Metal Cleaning Basin in 2010 and 2011. The electrical leak location method was used on the HDPE liner in the Ash Bypass Basin in 2010. The electrical leak location method was used on the HDPE liners in the Ash Surge Basin and the Secondary Ash Settling Basin in 2013. The electrical leak location method was used when the HDPE lining was installed at Powerton impoundments.

c) Will County: The other method to inspect the liners at Will County for damage or leaks is the electrical leak location method. The electrical leak location method detects paths through the geomembrane caused by water or moisture in the leaks. The electrical leak location method was used on the HDPE liner in the Ash Pond 3S in 2009. The electrical leak location method was used on the HDPE liner in the Ash Pond 2S in 2013. The electrical leak location method was used when the HDPE lining was installed at Will County impoundments.

d) Waukegan: The other method to inspect the liners at Waukegan for damage or leaks is the electrical leak location method. The electrical leak location method detects paths through the geomembrane caused by water or moisture in the leaks. The electrical leak location method was used on the HDPE liner in the East Basin in 2003 and on the West Basin in 2005. The

electrical leak location method was used when the HDPE lining was installed at Waukegan impoundments.

Additional information can be found at Bates MWG13-15_8155, MWG13-15_8233, MWG13-15_8262, MWG13-15_29832-29837, MWG13-15_29903, MWG13-15_33987, MWG13-15_48645 and pp. 100-101 of the Chris Lux deposition.

2. State whether MWG has ever monitored groundwater at Joliet 29, Waukegan, Will County and Powerton aside from the monitoring it currently performs at groundwater monitoring wells installed on or after 2010. If MWG has conducted such monitoring, state:
- a. The specific locations at each site where groundwater was monitored; and
 - b. Over what time period that monitoring took place.

ANSWER:

Midwest Generation objects to Interrogatory No. 2 as overly broad and unduly burdensome and seeks documents or information not within Midwest Generation's possession, custody or control. Midwest Generation further objects to Interrogatory No. 2 to the extent it seeks materials that are not relevant to the subject matter involved in the pending action or not reasonably calculated to lead to relevant, discoverable evidence. Finally, Midwest Generation further objects to this interrogatory as overly broad and limits its answer to monitoring for coal ash constituents. Without waiving its objections, Midwest Generation states that it provided all relevant groundwater monitoring results to Complainants in response to Document Request No. 8 of Complainants First Set of Document Requests, including Bates Nos. 2,459-6,822, 34716-36799, 43695-43862, 43871-44121, 44983-45769, and the documents provided at the offices of Nijman Franzetti. Additionally, see Midwest Generation response to Interrogatory No. 8 in Complainant's first Set of Interrogatories, and the enclosed First Quarter 2015 Groundwater Monitoring results located at Bates MWG13-15_48646-MWG13-15_48958. Midwest Generation

has no knowledge of any other groundwater monitoring responsive to Interrogatory #2 at the Stations related to coal ash constituents.

Respectfully submitted,

Midwest Generation, LLC

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

June 10, 2015

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the Midwest Generation, LLP Responses to Complainants' Interrogatories and Requests to Admit dated September 2, 2014 and March 31, 2015 and supplemented on June 10, 2015, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that it verily believes the same to be true.

I have personal knowledge of the facts stated herein.

FURTHER AFFIANT SAYETH NOT.



Maria Race

ATTACHMENT C

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.)	

**RESPONDENT, MIDWEST GENERATION, LLC'S SUPPLEMENTAL RESPONSE TO
COMPLAINANTS' FIRST SET OF INTERROGATORIES**

Respondent, Midwest Generation, LLC, ("Midwest Generation"), through its attorneys Nijman Franzetti, LLP, issues its supplemental response to Complainants', Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment, First Set of Interrogatories, (the "Requests"), as follows:

GENERAL OBJECTIONS

Each of the Answers and Responses is made subject to and incorporates the following objections. Respondent reserves the right to object to the admissibility of any of the documents produced pursuant to the Responses, in whole or in part, at trial in this action on any grounds including but not limited to materiality, relevance, confidential business information and privilege.

1. Midwest Generation objects to the "Coal ash" definition to the extent it includes coal ash that is not stored or transferred to the Coal ash units at the Joliet 29, Powerton, Waukegan, and Will County Stations.

2. Midwest Generation objects to the Requests to the extent that they seek information that is subject to the attorney-client privilege or the work product privilege. To the extent that any privileged information is inadvertently provided in these responses or any documents produced, such provision shall not constitute waiver of the privilege or immunity as to any such information and Complainants shall return any such information upon request.

3. Midwest Generation objects to any Instruction that seeks to impose a duty or burden on Midwest Generation beyond that required by the Illinois Pollution Control Board ("Board") Rules, the Illinois Code of Civil Procedure.

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 7: Identify all known Coal ash units, including but not limited to ponds, impoundments, or landfills, that have ever been used to store or dispose of Coal ash at each plant, including both active and inactive or abandoned coal ash units, and for each Coal ash unit:

- a. State whether the unit was or is lined, and if so, when the original liner and any replacement liners were installed and the type of the original and any replacement liners;
- b. State whether all Coal ash has been removed from that unit, and if so, when and by whom that removal was performed; and
- c. State whether MWG has ever become aware of any Breach of, or damage to, any liner, and if so, what actions were taken to address those breaches or damage.

ANSWER: Midwest Generation objects to Interrogatory No. 7 because it is overly broad, unduly burdensome, is not limited in time, and seeks material covered by the work product and attorney-client privilege. Additionally, Midwest Generation objects to this interrogatory as requesting information already provided in the responses to the document

requests and in the depositions. Without waiving its objections and subject to a protective order, Midwest Generation states the following:

Joliet 29 Station has three active ash ponds and, based on information and belief, there are two historical ash areas. The three active ash ponds, Ash Ponds 1, 2, and 3, are lined with a High Density Polyethylene (HDPE) liner. They were originally constructed in 1978 with a poz-o-pac liner. MWG installed HDPE liners in Ash Ponds 1 & 2 in 2008 and installed an HDPE liner in Ash Pond 3 in 2013. Coal ash is removed from Ash Ponds 1 & 2 approximately every one to two years. Ash Pond 3 is a finishing pond, and coal ash was removed from Pond 3 in 2013. Coal ash is removed from the ponds by Beemsterboer. A breach in the liner in Ash Pond 3 above the water line occurred in February 2015, and was repaired as soon as the weather allowed in 2015. MWG has no knowledge of lining under the historical ash areas, or if there is a breach or damage to any liner under the historical areas. Coal ash was removed from the historical area on the southwest side of the property by KPRG in 2005 and 2007. Other than the two removals in 2005 and 2007, MWG has no knowledge of any removals of coal ash from the historical areas.

Powerton Station has three active ash ponds (the Ash Surge Basin, the Ash Bypass Basin, and the Secondary Ash Settling Basin), and uses one basin as a temporary holding spot (the Metal Cleaning Basin). The three ash ponds, and the basin are lined with a HDPE liner. The Ash Surge Basin and the Metal Cleaning Basin were originally constructed in 1978 with a poz-o-pac and hypalon liner. MWG has no knowledge of the original construction date of the Ash Bypass Basin or the Secondary Ash Settling Basin. Both the Secondary Ash Settling Basin and the Ash Bypass Basin originally had a hypalon liner. In 2010, the Metal Clean Basin and the Ash Bypass Basin were relined with HDPE liners. In 2013, the Ash Surge Basin and the Secondary Ash Settling Basin were relined with HDPE liners. Coal ash is removed from the Ash Surge Basin,

the Ash Bypass Basin and the Secondary Ash Settling Basin approximately every six to eight years. Coal Ash is removed from the Metal Cleaning Basin approximately annually. The Coal Ash is removed by Harsco Minerals, Capital Minerals and the Station. There were periodic tears at the top of the hypalon liners, above the water line, in the Ash Settling Basin Ash Bypass Basin, Metal Cleaning Basin, all of which were promptly repaired. On information and belief, the Powerton Station also has three areas that historically contained ash: the limestone basin, an area south of the ash bypass basin, and the former ash pond. The limestone basin is lined on the bottom with a poz-o-pac liner and a hypalon liner on the sides. Coal ash was temporarily stored in the limestone basin in the past, and it is not presently used for storage of coal ash. On information and belief, ash was removed from the limestone basin in 2004, but MWG been unable to locate information regarding the removal. On information and belief, there were breaches at the top of the hypalon liner on the sides of the limestone basin. On one occasion, between approximately 2002 and 2004, MWG installed temporary plastic lining in the limestone basin. Coal ash was also temporarily stored in an area south of the ash bypass basin in the winter of 2001, but has not been stored at that location since and no ash is at that location now. On information and belief, in 2001 Reed Minerals removed the ash in that area for beneficial use. Additionally, MWG has no knowledge of the lining under the area south of the ash bypass basin or if there was a breach any lining underneath the area. On information and belief, the former ash pond area is a historical ash area and there is no liner below the former ash pond. MWG has no knowledge if there is a breach or damage to any liner under the former ash pond, or if ash has been removed from the former ash pond.

Waukegan Station has two active ash ponds, both of which are lined with a HDPE liner, and, based on information and belief, a historical ash area. The ash ponds were originally

constructed in 1978 and lined with a hypalon liner. In 2003, the East Pond was relined with an HDPE liner, and in 2005, the West Pond was relined with an HDPE liner. Coal ash is removed approximately annually from the ash ponds by Lafarge North America. Minor breaches in the upper portions of the liners, due to equipment use above the water line, have occurred and have been promptly repaired. Recently, there was a tear in the top of the East Ash Pond in 2013 and a tear in the East and West Ponds in 2014. On information and belief, both tears were promptly repaired as soon as weather allowed. MWG has no knowledge of the lining under the historical ash area, whether coal ash was removed from the historical ash area, or if there is a breach or damage to any liner in the historical ash area.

Will County Station has two active ash ponds (Ponds 2S and 3S) and two inactive ash ponds (Ponds 1N and 1S). All four ash ponds were originally constructed in 1977 with a poz-o-pac liner. In 2009, Pond 3S was relined with an HDPE liner, and in 2013, Pond 2S was relined with an HDPE liner. Coal ash is removed from the ash ponds by Lafarge North America approximately annually. MWG is aware of a tear in the HDPE liner in 3S in 2012, which was promptly repaired in 2012, and there was also a crack in the second layer of poz-o-pac under Pond 3S in 2009. The Retention Basin, a concrete basin, also historically contained ash, and on information and belief the ash was removed approximately daily. The Retention Basin is no longer used for any processes related to ash, and no longer contains any ash. There is also a historical slag stockpile near the Retention Basin. In 2015, MWG removed approximately 1,800 tons of slag from the stockpile. Currently, the area contains an ash pile. A 1999 Phase II Report, conducted for a previous site owner, identified historic areas including a slag and bottom ash dumping area and a slag dumping area. MWG has no knowledge whether such areas were lined,

whether coal ash was removed from the areas, or if there is a breach or damage to any liner in the areas.

Responsive documents are also at Bates MWG13-15_1 -176, MWG13-15_8415-11492, MWG13-15_11493-13421, MWG13-15_17637-17973, MWG13-15_18823-MWG13-15_18990, MWG13-15_16770-18938, MWG13-15_28404-29796, MWG13-15_45621, MWG13-15_44770, MWG-13-15_48636-48639; M. Kelly deposition, pp. 26, 28, 31 40, 41, 42, 53, 54, 59, 77, 75 94, 112; J.DiCola Deposition, pp. 44, 103, 105, 106, 108, 109; C. Lux Deposition, p. 20; R.Maddox Deposition, pp. 90-93, 120-121.

Dated: June 10, 2015

Respectfully submitted,

Midwest Generation, LLC.


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

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the Midwest Generation, LLP Responses to Complainants' Interrogatories and Requests to Admit dated September 2, 2014 and March 31, 2015 and supplemented on June 10, 2015, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that it verily believes the same to be true.

I have personal knowledge of the facts stated herein.

FURTHER AFFIANT SAYETH NOT.



Maria Race

ATTACHMENT D

ILLINOIS POLLUTION CONTROL BOARD
August 31, 2017

SIERRA CLUB, ENVIRONMENTAL)	
LAW & POLICY CENTER,)	
PRAIRIE RIVERS NETWORK AND)	
CITIZENS AGAINST RUINING)	
THE ENVIRONMENT,)	No. PCB 13-15
)	
Complainants,)	
)	
vs)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

REPORT OF THE PROCEEDINGS had at the hearing on a motion of the above-entitled cause before the Honorable BRADLEY HALLORAN, Hearing Officer of said Court, Room 9-040, The Thompson Center, Chicago, Illinois, on the 23rd day of October, 2017, at the hour of 9:07 a.m.

L.A. Court Reporters, L.L.C.
312-419-9292

1 this document is Midwest Generation, LLC's
2 Response to Complainants' Fourth Set of Document
3 Requests, Second Set of Interrogatories and Second
4 Set of Requests for Admission.

5 (Document marked as Complainants
6 Exhibit No. 5 for
7 identification.)

8 MS. FRANZETTI: I'm sorry. Can we
9 go off the record one more time?

10 HEARING OFFICER HALLORAN: Let's go
11 off the record --

12 MS. FRANZETTI: I don't understand
13 the marking.

14 HEARING OFFICER HALLORAN: Excuse
15 me, Ms. Franzetti. Can you give me a second?

16 MS. FRANZETTI: I just want to
17 explain.

18 HEARING OFFICER HALLORAN: Okay.
19 Mr. Brickey, we can go off the record.

20 (Whereupon, a discussion was had
21 off the record.)

22 HEARING OFFICER HALLORAN: We're
23 back on the record. Thank you.

24 MS. NIJMAN: I also object to the

1 use of discovery materials. I'm putting in the
2 record -- an objection on the record because I'm a
3 little confused about calling the witness in --
4 our witness in their case, but discovery is used
5 as you know for cross-examination. It's not an
6 exhibit, per se. So to the extent it's being used
7 as an exhibit, I don't know, is this
8 cross-examination?

9 HEARING OFFICER HALLORAN: Well, as
10 you know, the rules of evidence are a little more
11 relaxed in administrative hearings. I think -- I
12 think -- I think I'll overrule your objection, but
13 just make clear, Ms. Bugel, what the heck is going
14 on.

15 MS. BUGEL: Absolutely.

16 HEARING OFFICER HALLORAN: Thank
17 you.

18 MS. BUGEL: Thank you.

19 BY MS. BUGEL:

20 Q. Ms. Race, you have lawyers
21 representing -- I'm sorry. Let me rephrase that.

22 Ms. Race, Midwest Generation has
23 lawyers representing them in this action, correct?

24 A. We have lawyers assisting us in

1 this, but I don't know what representing means in
2 this context.

3 Q. So do you -- I can -- is Nijman
4 Franzetti, the law firm, assisting Midwest
5 Generation in this action?

6 A. Yes, that's what I believe.

7 Q. And that includes Susan Franzetti?

8 A. Correct.

9 Q. And that includes Jennifer Nijman?

10 A. Correct.

11 Q. And your lawyers have prepared
12 documents to submit in this proceeding, is that
13 correct?

14 MS. FRANZETTI: Objection to form.
15 Lack of foundation as to what she knows about the
16 lawyers doing.

17 HEARING OFFICER HALLORAN:

18 Sustained.

19 BY MS. BUGEL:

20 Q. Do you know if your lawyers have
21 prepared documents in this proceeding?

22 A. I assume that they have prepared
23 documents for review by people like my boss.

24 Q. And have you, yourself, reviewed

1 some of those documents?

2 A. Documents that would have occurred
3 since I guess April of 2014 it would be very
4 unlikely that I reviewed.

5 Q. And the document I've placed in
6 front of you, are you familiar with this document?

7 A. I'm not familiar with this document,
8 no.

9 Q. Can you turn to the last page of
10 this document?

11 A. Mm-hmm.

12 MS. BUGEL: And that's page 17 and
13 for the record we have a full copy of this
14 document and we also have an excerpted copy simply
15 because we did not want to put a bunch of
16 unnecessary material into the record. So we have
17 excerpted it. I can put the full copy in front of
18 the witness and have her compare it if --

19 MS. FRANZETTI: I don't know why
20 you're doing that. So, I mean, yes, you could do
21 that, but I don't know what the purpose is.

22 MS. BUGEL: To authenticate it. But
23 I will -- that's okay. I will keep going.

24

1 BY MS. BUGEL:

2 Q. Ms. Nijman, looking -- I'm sorry.
3 Ms. Race, looking at the last page, is that your
4 attorney's name, does that appear on this page?

5 A. Jennifer Nijman and Susan Franzetti
6 and Kristen Gale all appear on this page.

7 Q. And on the signature line, do you
8 see Jennifer Nijman's name?

9 A. I do see her name.

10 Q. And I have an unmarked -- this is
11 not supposed to say -- I have an unmarked copy of
12 the full document that I'm placing in front of
13 Ms. Race and if you could glance at that. The
14 exhibit we have passed you is excerpted.

15 Just aside from the fact that
16 this document has been excerpted, does it
17 otherwise appear to be a true and accurate copy?

18 A. That would be hard for me to tell
19 without really reading the whole thing. I don't
20 know.

21 MS. BUGEL: Complainants move for
22 Exhibit 5 to be admitted into evidence.

23 MS. FRANZETTI: Objection. This
24 witness said she is not familiar with it. You

1 haven't laid a proper foundation with this
2 witness. So I would object to its introduction.

3 HEARING OFFICER HALLORAN:

4 Sustained.

5 MS. BUGEL: Can we go off the record
6 for a minute?

7 HEARING OFFICER HALLORAN: Yes,
8 we're off the record.

9 (Whereupon, a discussion was had
10 off the record.)

11 HEARING OFFICER HALLORAN: Let's go
12 back on the record. We're back on the record.
13 Ms. Franzetti objected to -- would you state your
14 objection again, Ms. Franzetti.

15 MS. FRANZETTI: Well, I objected to
16 the introduction of this document through this
17 witness because -- and use with this witness
18 because this witness has said she is not familiar
19 with the document. She hasn't seen it before and
20 so there is a lack of foundation to introduce this
21 exhibit Complainants' 5 through this witness.

22 HEARING OFFICER HALLORAN: Well,
23 I'll tell you what. I will let it in. It will go
24 in not necessarily -- it will go in for the

1 weight, not the admissibility. So Exhibit 5 is
2 admitted, the full copy.

3 MS. BUGEL: Very good. Thank you.

4 MS. FRANZETTI: Is there an exhibit
5 number for the full copy?

6 MS. BUGEL: Since it's the full copy
7 that went in and not the excerpts, why don't we
8 mark it Exhibit 5 and the excerpts are not an --

9 HEARING OFFICER HALLORAN: An
10 exhibit?

11 MS. BUGEL: -- an exhibit.

12 MS. FRANZETTI: Your transcript,
13 though, has questions and answers on the excerpt.
14 I don't think you want to switch the number, do
15 you want to call it 5A?

16 MS. BUGEL: Why don't we call it
17 5.5.

18 MS. NIJMAN: Oh, boy.

19 MS. BUGEL: For the record, I have
20 what has been marked as Complainants' Exhibit 6.

21 HEARING OFFICER HALLORAN: Let's
22 hold on, Ms. Bugel. I still don't have
23 Complainants' Exhibit 5.5, the full request to
24 admit document request. Thank you. So you're

1 taking back Exhibit 5 then?

2 MS. BUGEL: The excerpt did -- did
3 not go into the record, right. For the record, I
4 have what has been marked as Complainants' Exhibit
5 6.

6 The title of this document is
7 Midwest Generation, LLC's Supplemental Response to
8 Complainants' Second Set of Interrogatories that
9 I'm placing in front of you.

10 (Document marked as Complainants
11 Exhibit No. 6 for
12 identification.)

13 BY MS. BUGEL:

14 Q. Are you familiar with this document?

15 MS. NIJMAN: Mr. Hearing Officer,
16 I'm sorry. I have to object in this whole line of
17 questioning with the discovery. The Illinois
18 courts have made it very clear that Rule 212(c) is
19 not a -- cannot be used to sweep the relevant
20 information into a record. The discovery
21 responses are certainly permissible for use on
22 cross-examination if you have a question about
23 them, but simply putting them in because you want
24 to put them in that's not what discovery is for

1 and that's not the purpose.

2 HEARING OFFICER HALLORAN: Well, she
3 has questions and, again, we're not in circuit
4 court, Ms. Nijman.

5 MS. NIJMAN: Understood.

6 HEARING OFFICER HALLORAN: The rules
7 are a little more relaxed here. I think it is
8 what it says it is, but she hasn't moved it yet.

9 MS. NIJMAN: I was also referring to
10 the prior exhibit where there were no questions
11 asked about the whole exhibit and yet now it's in
12 the record.

13 HEARING OFFICER HALLORAN: Okay.
14 Well, she asked a few questions.

15 MS. NIJMAN: Only if the witness had
16 information about it and the witness had none.

17 HEARING OFFICER HALLORAN: Thank
18 you, Ms. Nijman. Your objection is on the record.

19 MS. NIJMAN: Thank you. We move to
20 strike.

21 HEARING OFFICER HALLORAN: I'm
22 sorry?

23 MS. NIJMAN: We would move to strike
24 all testimony regarding these discovery materials.

1 HEARING OFFICER HALLORAN: Okay.

2 Denied. Ms. Bugel, you're up.

3 MS. BUGEL: Thank you.

4 BY MS. BUGEL:

5 Q. I'm placing a document in front of
6 you that has been marked as Complainants' Exhibit
7 6, are you familiar with this document?

8 A. Yes.

9 Q. If you turn to the last page, does
10 your signature appear on this document?

11 A. Yes, it does.

12 Q. Can you please describe this
13 document for the record?

14 A. This document is called the Midwest
15 Generation, LLC Supplemental Response to
16 Complainants Second Set of Interrogatories.

17 Q. And if you turn to pages two to
18 three, do you see a description -- do you see
19 point A discussing Joliet 29?

20 A. Yes, I see point A.

21 MS. FRANZETTI: Objection.
22 Objection to form. I'm not there yet. Counsel,
23 is it at the bottom?

24 MS. BUGEL: Bottom of page two.

1 MS. FRANZETTI: Very bottom starting
2 at the second to last line?

3 MS. BUGEL: Yes.

4 MS. FRANZETTI: Thank you.

5 BY THE WITNESS:

6 A. Yes.

7 BY MS. BUGEL:

8 Q. Do you see the discussion for Joliet
9 29?

10 A. Yes, I see the discussion.

11 Q. Is that information about Joliet
12 still accurate?

13 A. Point A states that the electric
14 at -- the last sentence states that the electric
15 leak location method was used when the HDPE lining
16 was installed at Joliet 29 impoundments. So, yes,
17 that's true. That -- the electric leak location
18 method was used on the liners as they were
19 installed. That is true.

20 Q. Okay. And is it also true that the
21 electric leak location method was used on other --
22 the other liners at the other facilities, the
23 other HDPE liners at the other facilities when
24 they were installed?

1 MS. FRANZETTI: Objection to form.

2 Compound. You're asking her about --

3 HEARING OFFICER HALLORAN:

4 Sustained.

5 MS. FRANZETTI: -- the liner?

6 HEARING OFFICER HALLORAN:

7 Sustained. Ms. Bugel?

8 BY MS. BUGEL:

9 Q. Do you know if the electric leak
10 location method has been used at other facilities?

11 A. Yes, it has been.

12 Q. Do you know when it has been used?

13 A. When the liners are installed.

14 Q. And which liners are you referring
15 to?

16 A. Letter B Powerton in the document
17 you were discussing, letter -- letter C Will
18 County and letter D Waukegan states for the record
19 that the electrical leak location method was used
20 during installation.

21 Q. All right.

22 MS. BUGEL: Complainants move for
23 Exhibit 6 to be admitted into evidence.

24 HEARING OFFICER HALLORAN: Midwest?

1 MS. NIJMAN: Same objections.

2 Standing objection.

3 HEARING OFFICER HALLORAN: It's

4 admitted over objection.

5 BY MS. BUGEL:

6 Q. Complainants have what has been
7 marked as Complainants' Exhibit 7.

8 For the record, this is titled
9 Respondent Midwest Generation, LLC's Supplemental
10 Response to Complainants First Set of
11 Interrogatories.

12 (Document marked as Complainants
13 Exhibit No. 7 for
14 identification.)

15 BY MS. BUGEL:

16 Q. We're placing this document in front
17 of you, Ms. Race.

18 Are you familiar with this
19 document?

20 A. Yes, I am.

21 Q. And if you turn to the last page,
22 does your signature appear?

23 A. Yes, it does.

24 Q. And can you describe this document

1 for the record?

2 A. This is a supplemental response to
3 the complainants first set of interrogatories.

4 Q. And if you turn to page three, the
5 full paragraph appearing at the top of that page
6 beginning Joliet 29 station, do you see that
7 paragraph?

8 A. Yes, I do.

9 Q. And do you see where it indicates
10 that in the first sentence that Joliet 29 station
11 has three active ash ponds?

12 A. I see that. However, I think it's
13 important to keep in mind that ash pond has
14 several different meanings under various
15 regulations.

16 Q. And are those three ash ponds at
17 Joliet still active?

18 A. No, they are not, not all three.

19 Q. Are any of those ponds still active?

20 MS. FRANZETTI: Objection to form in
21 terms of the intended meaning of active, is it
22 being ash added or taken away?

23 HEARING OFFICER HALLORAN:

24 Sustained. Ms. Bugel?

1 BY MS. BUGEL:

2 Q. You said not all three. Can you
3 please clarify what you meant by that?

4 A. Because Joliet 29 has converted to
5 natural gas from coal, there is no longer any ash
6 being placed in impoundment two which is the only
7 impoundment that would still be considered -- I
8 don't know -- I guess you could consider it active
9 at Joliet until it is cleaned out. Pond three is
10 a polishing pond and is not considered an ash pond
11 under the CCR rules and ash pond one was not
12 covered under the CCR rules because it was cleaned
13 out before the rules came into effect.

14 MS. BUGEL: Complainants move for
15 Exhibit 7 to be admitted into evidence.

16 MS. NIJMAN: Same objection.

17 HEARING OFFICER HALLORAN: Admitted
18 over objection, standing objection.

19 MS. NIJMAN: Mr. Hearing Officer, if
20 we're done with discovery responses as evidence,
21 we renew our motion to strike all testimony and
22 the actual exhibits from the record.

23 HEARING OFFICER HALLORAN: The
24 record will so note, but overruled. The board

1 approximately 1:28. Over lunch I reviewed my
2 decision regarding these ComEd Phase Two
3 Environmental Site Assessment exhibits and I
4 wanted to make my ruling while Ms. Race was still
5 here.

6 You know, looking at this rule I
7 don't even have to get to any hearsay issues. I
8 consider Ms. Race a reasonable and prudent person
9 and she reviewed these documents and I don't think
10 she would have reviewed them for a waste of time
11 and, you know, that's all Section 101.626
12 requires. So I'm reversing my offer of proof
13 rulings on Complainants' Exhibit 17D, 18D, 19D,
14 20D and Exhibit 21.

15 MS. NIJMAN: We would ask that the
16 ruling be limited then to -- for the purpose of
17 relevancy the questions that are actually asked
18 from that document. In other words, the concern
19 is that there is a discussion with Ms. Race on one
20 issue and then the closing brief comes around and
21 something is pulled out of the back of that report
22 that has nothing to do with the testimony.

23 HEARING OFFICER HALLORAN: I grant
24 that. Ms. Bugel, do you understand in your -- in

1 your hearing brief, your -- your briefing is
2 limited to the questions you have asked of
3 Ms. Race regarding these exhibits?

4 MS. BUGEL: Okay. Well, then I
5 would like the opportunity to go back and ask
6 additional questions.

7 HEARING OFFICER HALLORAN: That's
8 why I reversed my position now while Ms. Race is
9 still in front of me.

10 MS. BUGEL: Thank you. May I have
11 one moment to confer with co-counsel?

12 HEARING OFFICER HALLORAN: Yes.
13 We're off the record again.

14 (Whereupon, a discussion was had
15 off the record.)

16 HEARING OFFICER HALLORAN: We're
17 back on the record, Ms. Bugel. Ms. Race, you're
18 still under oath. Thank you.

19 MS. BUGEL: I'm taking a moment just
20 to go back to my previous questions.

21 BY MS. BUGEL:

22 Q. Can we please turn back to Exhibit
23 17D.

24 A. Yes.