

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	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 Midwest Generation, LLC's Motion for Leave to File, Instantner, It's Reply to Complainants' Response to Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports and Midwest Generation, LLC's Reply in Support of Its Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: December 15, 2017

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Midwest Generation, LLC's Motion for Leave to File, Instantly, Its Reply to Complainants' Response to Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports and Midwest Generation, LLC's Reply in Support of Its Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports was filed electronically on December 15, 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 December 15, 2017 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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In the Matter of:)	
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AND POLICY CENTER, PRAIRIE RIVERS)	
NETWORK, and CITIZENS AGAINST)	
RUINING THE ENVIRONMENT)	
)	PCB 2013-015
Complainants,)	(Enforcement – Water)
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)	
Respondent.)	

**RESPONDENT’S MOTION FOR LEAVE TO FILE, INSTANTER, IT’S REPLY TO
COMPLAINANTS’ RESPONSE TO MOTION TO CLARIFY AND CONFIRM
THE HEARING OFFICER’S LIMITATION ON THE USE OF
THE HISTORIC PHASE I AND PHASE II REPORTS**

Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits this Motion for Leave to File, Instanter, its Reply to Complainants’ Response to Motion to Clarify and Confirm the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports pursuant to Sections 101.500(e) of the Illinois Pollution Control Board’s (“Board”) Procedural Rules. 35 Ill. Adm. Code 101.500(e). In support of this motion, MWG submits its Reply and states:

1. On November 13, 2017, MWG filed its Motion to Clarify and Confirm the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports. MWG’s Motion clarified that only those portions of the Phase I and II reports that were discussed during the Hearing are admitted into evidence.

2. On December 1, 2017, Complainants filed their Response to MWG’s motion. In their Response, rather than relying on the Hearing transcript, Complainants identified specific

pages of the Phase I and II reports and argued that they seek to admit “all content in the following pages of the Phase I and Phase II reports.” (Complainants’ Response, ¶4).

3. Complainants’ Response does not object to MWG’s Motion, but instead seeks new relief that goes beyond the Hearing Officer’s ruling. By failing to file a timely objection to the Hearing Officer’s prior ruling, Complainants’ waived their right to seek new relief and MWG’s Motion should be granted.

4. Complainants seek to include pages and information that were not discussed at the hearing as well as information that is unrelated to the Stations that are the subject of this matter. Additionally, Complainants’ Response excludes the information that MWG discussed during the Hearing.

5. MWG has prepared its Reply in support of its Motion, which is attached hereto, objecting to Complainants’ request to use the exhibits beyond the Hearing Officer’s order, objecting to information unrelated to the Stations, and requesting that the Hearing Officer clarify that the limitation includes the portions of the Phase I and II reports upon which MWG discussed at the hearing.

6. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by clarifying the scope of the admission of the Historic Phase I and Phase II Reports.

7. This Motion is being filed on December 15, 2017, within fourteen (14) days after service of Complainants’ Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent’s Motion for Leave to File, Instantly, its Reply to Complainants’ Response to Motion to Clarify and Confirm

the Hearing Officer's Limitation on the Admission of the Historic Phase I and Phase II Reports,
and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

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MIDWEST GENERATION, LLC’S REPLY IN SUPPORT OF ITS MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER’S LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II REPORTS

Pursuant to 35 Ill. Adm. Code 101.502(b) and 101.626, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits to the Hearing Officer this Reply in Support of its Motion to Confirm and Clarify the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports, identified as Exhibits 17D, 18D, 19D, 20D, 21, and 38 (the “Reports”).¹ Complainants do not object to MWG’s Motion, but instead seek new relief that goes beyond the Hearing Officer’s ruling. By failing to file a timely objection to the Hearing Officer’s prior ruling, Complainants’ waived their right to seek new relief and MWG’s Motion should be granted.

I. Introduction

On November 13, 2017, MWG filed its Motion to Confirm and Clarify the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports. At the hearing, the Hearing Officer explicitly limited the admission and use of Exhibits 17D, 18D, 19D, 20D, and 21 to the

¹ MWG filed, contemporaneously with this Reply, a Motion for Leave to file, Instanter.

questions asked at the hearing. *See* PCB13-15 Oct. 23, 2017 Transcript, pp. 126:23-127:3. Complainants did not object to the Hearing Officer's ruling at the hearing. *Id.* MWG's Motion was to simply clarify that the limitation the Hearing Officer clearly applied to Exhibits 17D, 18D, 19D, 20D, and 21, also applied to Exhibit 38, an additional Historic Report which had been admitted later in the hearing. *See* MWG's Motion, ¶7.

On December 1, 2017, Complainants filed their Response to MWG's Motion. Complainants did not object to MWG's Motion to clarify that Exhibit 38 was included in the Hearing Officer's decision. Instead, Complainants listed specific pages from each of the Reports, requesting that Complainants be permitted to rely upon all of the content of those pages of the Reports. *See* Complainants' Response, pp. 2-3. Rather than specifically addressing MWG's Motion in their Response, Complainants attempt to expand upon and object to the Hearing Officer's decision. As Complainants did not object to the Hearing Officer's ruling at the hearing and did not file an objection within 14 days of the date the transcript was filed, Complainants have waived their objection. 35 Ill. Adm. Code 101.502(e).

II. Complainants' Request to Use All Of the Information On The Specific Pages Is Beyond the Hearing Officer's Limitation

MWG objects to Complainants' request to use all of the content on the specific pages Complainants' cited because Complainants' request is beyond the limitation established by the Hearing Officer. At the hearing, the Hearing Officer granted MWG's request that the admission of the Reports was limited to the questions that were actually asked about the document, stating "Ms. Bugel, do you understand in your -- your briefing is limited to the questions you have asked of Ms. Race regarding these exhibits?" *See* Oct. 23, 2017 Transcript, pp. 126:24-127-3. The purpose of the limitation was to prevent the use of information in another section of the Reports that was unrelated to the testimony. In their Response, Complainants now seek to expand the

Hearing Officer's ruling to use all of the information on a specific page, even if it was not the subject of a question asked at the hearing. For instance, Complainants have requested to use all of the information on MWG13-15_3257: the Executive Summary of Ex. 17D, the ENSR Phase II Environmental Site Assessment for the Powerton Station. *See* Complainants' Response, p. 2. That page has a significant amount of information, including a discussion of potential areas of concern at the Stations unrelated to the ash ponds, and sampling and analysis for multiple constituents. Yet, at the hearing, when discussing MWG13-15_3257, Complainants only discussed the information in the first paragraph regarding Phase II activities and the purpose of the Phase II Environmental Site Assessment. *See* Oct. 23, 2017 Transcript, pp. 107:20-108:13. Similarly, Complainants have requested to use all of the information from a page containing a historic Site Plan for the Joliet 29 Station located at MWG13-15_25149 in Ex. 21. *See* Complainants' Response, p. 3. However, when Complainants discussed that page at the hearing, Complainants only asked whether Ms. Race had ever reviewed the page before, whether it was similar to the Phase II document, and the purpose for which Ms. Race reviewed the page. *See* Oct. 23, 2017 Transcript, pp. 122:23-125:5. Complainants did not ask Ms. Race questions regarding the contents of the page, including the areas described on the page, or her potential knowledge of any of the areas. *Id.* Additionally, Complainants have requested admission of the information from a page containing the Soil Boring/Monitoring Well Site Plan for the Joliet 29 Station, MWG13-15_23342. *See* Complainants' Response, p. 3. But, Complainants did not discuss that page at the hearing with Ms. Race, nor with any other witness. In short, Complainants are asking to use information unrelated to the testimony developed at the hearing and beyond the Hearing Officer's ruling. Complainants' Response does not provide any basis for their expanded requests and fails to explain why they did not file a timely motion.

Finally, MWG objects to Complainants' Response because Complainants seek to admit and rely upon pages from a Report that concern a property not at issue in this matter. Complainants ask to admit and rely upon the "Logs of Boreholes at the Joliet 29 Power Station" in Exhibit 20D, ENSR Phase II Environmental Site Assessment for the Joliet 29 Power Station, located at MWG13-15_23344-23349. *See* Complainants' Response, p. 3. The labels and headings on those exhibit pages clearly reflect that they concern the Joliet 9 Station, which is not at issue in this case. As explained further by Ms. Race during the hearing, the boring logs in Exhibit 20D are *not from the Joliet 29 Power Station*, but instead are from the Joliet 9 Power Station. *See* Oct. 23, 2017 Transcript, pp. 227:16 -228:12, Attachment A. Thus, MWG objects to the admission of logs of boreholes from the Joliet 9 Power Station, which is a station unconnected to this matter.

III. Complainants' Response Excludes the Sections of the Exhibits Cited by MWG

While citing to specific pages of the Reports that Complainants seek to use, Complainants failed to include any of the pages of the Reports that MWG discussed with the witness. MWG's motion addressed *both* parties' use of the Reports, and during the hearing, MWG discussed other sections of the Reports. *See* PCB13-15 Oct. 23, 2017 Transcript, pp. 117-119, 224-232, Attachment A. In particular, MWG discussed the limitation established by the consultant, ENSR, on the use of the Reports. *See* PCB13-15 Oct. 23, 2017 Transcript, pp. 117:20-119:9, *citing* Ex. 17D, MWG13-15_3260-3261, Ex. 18D, MWG13-15_5706-5807, Ex. 19D, MWG13-15_45786-45787, and Ex. 20D, MWG13-15_23308-23309. Additionally, MWG discussed the mistakes in one Report and the potential for additional mistakes in that same Report and in the other Reports. *See* Oct. 23, 2017 Transcript, p. 228:13-21, Attachment A. MWG also discussed that each of the Phase II Reports concluded that "there is no requirement under Illinois environmental law to further investigate or remediate this property." *See* Oct. 23, 2017 Transcript, pp. 229:10 – 232:13,

Attachment A, *citing* Ex. 17D, MWG13-15_3276-3277, Ex. 18D, MWG13-15_5723, Ex. 19D, MWG13-15_45801, and Ex. 20D, MWG13-15_23323-23324. Again, Complainants seek to alter the Hearing Officer's decision without basis. As the Hearing Officer correctly ruled, the use of the Reports by both parties is limited to the questions asked about the documents. Those questions and discussions are clearly set out in the Hearing transcript.

IV. Conclusion

MWG respectfully requests that the Hearing Officer grant MWG's Motion and confirm that the admission of the Phase I and Phase II Reports identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed by the parties at the Hearing, as set forth in the Hearing transcript. MWG further requests that the Hearing Officer deny Complainants' request to add listed pages of the Reports or rely upon information that was not discussed at the hearing. Complainants waived their right to seek that relief by failing to object at the Hearing and failing to file a timely motion to the Board.

Respectfully submitted,
Midwest Generation, LLC

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

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ATTACHMENT A

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.

1 Ms. Bugel, you can continue or Ms. Race can answer
2 if she is able.

3 BY MS. BUGEL:

4 Q. And NRG's purchase of Midwest
5 Generation was a purchase of the whole company
6 Midwest Generation, correct?

7 A. I'm not sure of the way that it
8 worked financially. I do know that NRG bought all
9 of the wind farms and the power plants that
10 Midwest Generation and Edison Mission Energy was
11 operating.

12 MS. BUGEL: If you give me one
13 moment, please.

14 BY MS. BUGEL:

15 Q. And can you turn to page one,
16 please?

17 A. Of document -- of 17D?

18 Q. Yeah, and that's Bates page 3257.

19 A. All right.

20 Q. Do you see the sentence in the
21 middle of the first paragraph "Phase two ESA
22 activities consisted of advancement of soil
23 borings, installation of monitoring wells and
24 collection of surface and subsurface soil sediment

1 and groundwater samples," do you see that?

2 A. Oh, right up here in the first
3 paragraph?

4 Q. Yes.

5 A. I'm sorry. I was looking in the
6 middle of the page, but, yes, I do see that now.

7 Q. And do you see the next sentence
8 after that "The purpose of the phase two ESA was
9 to investigate the potential presence of
10 contamination in the areas of environmental
11 concern identified in the phase one environmental
12 site assessment phase one ESA," do you see that?

13 A. Yes, I do.

14 MS. BUGEL: Hearing Officer, I would
15 offer that this -- we've laid out the purpose of
16 the phase two ESA and the witness has indicated
17 that, when available, she reviews phase two ESA's.
18 Obviously, this is not binding on Midwest Gen, but
19 this is still evidence that is -- that meets the
20 board's standard of being evidence that the board
21 may reasonably rely upon.

22 HEARING OFFICER HALLORAN: Is this a
23 publicly available document?

24 MS. NIJMAN: It is not.

1 there was an ash fill area on the property in the
2 location that you just described?

3 A. Just from reviewing the NPDES
4 documents when I was first working there. I
5 actually didn't probably see this document for two
6 or three years.

7 Q. Okay.

8 MS. BUGEL: Okay. And I have no
9 further questions about this document in the offer
10 of proof.

11 HEARING OFFICER HALLORAN: Okay.

12 MS. BUGEL: Complainants would move
13 to admit Complainants' Exhibit 20D into evidence.

14 HEARING OFFICER HALLORAN: Midwest,
15 Ms. Franzetti, give me your full objection,
16 please.

17 MS. FRANZETTI: Okay.

18 HEARING OFFICER HALLORAN: I know
19 it's the same as the others.

20 MS. FRANZETTI: All right. We
21 object to this on the grounds that it is not a
22 business record of Midwest Gen and it is not
23 admissible under any other hearsay exception to
24 the rules of evidence. This and the other three

1 are reports that were prepared for a completely
2 different corporate entity, namely Commonwealth
3 Edison Company. It was not prepared for Midwest
4 Gen and I would further point out that in each of
5 these reports at the end of the introductory
6 section in the last paragraph it states, quote,
7 this report and all field data notes and
8 laboratory test data, hereinafter collectively
9 information, were prepared by ENSR solely for the
10 benefit of ENSR's client ComEd. ENSR's client may
11 release this information to third-parties who may
12 use and rely upon the information at their own
13 discretion.

14 However, any use or reliance
15 upon this information by a party other than
16 parties identified shall be solely at the risk of
17 such third-party and without recourse to ENSR.
18 This information -- and it goes on at the end to
19 say "This information shall not be used or relied
20 upon by a party which does not agree to be bound
21 by the above statement."

22 There is no evidence that
23 Midwest Gen agreed to be bound by those statements
24 and that is an additional reason why this is

1 unreliable information with respect to Midwest
2 Gen's ownership and operation of these stations.

3 HEARING OFFICER HALLORAN: What page
4 were you reading from?

5 MS. FRANZETTI: I was --
6 specifically for that one, but it's the same
7 statement on all of them, I was referring to
8 Exhibit 20D this phase two report for Joliet 29
9 and the Bates number is Midwest Gen 13-15_23309.

10 HEARING OFFICER HALLORAN: But
11 Ms. Race did rely on them from time to time for
12 all four of these exhibits?

13 MS. NIJMAN: She said.

14 MS. FRANZETTI: I think rely is too
15 strong of a word. She used it as a source of
16 information at times.

17 HEARING OFFICER HALLORAN: Okay.
18 Thank you. All right. So I'm taking them as an
19 offer of proof. Exhibit's -- what is it -- 20,
20 19, 18 and 17.

21 MS. BUGEL: Can I get a response on
22 the record to Ms. Franzetti's last statement?

23 HEARING OFFICER HALLORAN: Sure.

24 MS. BUGEL: We would point out that

1 (Document marked as Complainants
2 Exhibit No. 21 for
3 identification.)

4 MS. NIJMAN: I'm sorry. Is this an
5 offer of proof?

6 HEARING OFFICER HALLORAN: We
7 haven't gotten there yet I don't think. This is
8 slightly different she said. So we'll see when we
9 get there I guess, Ms. Nijman.

10 BY THE WITNESS:

11 A. I have seen this document before.

12 BY MS. BUGEL:

13 Q. And have you -- you've reviewed this
14 document before?

15 A. Yes, I have reviewed it, but I
16 probably haven't spent that much time with it
17 because it wasn't readily available. I think it
18 was in storage.

19 Q. Do you recall when you first
20 reviewed it?

21 A. Maybe 2003, 2002. Something like
22 that.

23 Q. And, specifically, can you turn to
24 page -- I need my copy. Can you please turn to

1 page 25149.

2 A. Yes.

3 Q. Have you reviewed this map before?

4 A. It looks similar to the one that was
5 in the phase two document that you showed me
6 earlier.

7 Q. And do you notice any differences
8 from the earlier map?

9 MS. FRANZETTI: Objection to form.
10 I'm not sure what's covered by differences.

11 HEARING OFFICER HALLORAN:
12 Sustained.

13 BY MS. BUGEL:

14 Q. You said it looks similar to. Do
15 you see anything --

16 A. Nothing is jumping out at me as
17 being different.

18 Q. Okay. For what purpose did you
19 review this document?

20 A. Just to see what a prior
21 consultant's thoughts were on the site.

22 HEARING OFFICER HALLORAN: Prior
23 consultants what?

24 THE WITNESS: Thoughts were.

1 BY MS. BUGEL:

2 Q. And those thoughts would be related
3 to environmental issues because this is an
4 environmental site assessment?

5 A. Yes.

6 MS. BUGEL: Complainants offer
7 Complainants' Exhibit 21 into evidence.

8 HEARING OFFICER HALLORAN: Ms.
9 Franzetti?

10 MS. FRANZETTI: Same objection as
11 before. This is, again, a report by ENSR for
12 Commonwealth Edison. It is not a business record
13 of Midwest Generation.

14 MS. BUGEL: Same response as before.
15 This is an environmental document. It relates to
16 environmental issues at the site. Ms. Race is --
17 in one of her responsibilities is environmental
18 issues and she has reviewed this document and it
19 is -- meets the board's test of evidence a
20 reasonable person would rely on.

21 HEARING OFFICER HALLORAN: I'll take
22 it as an offer of proof. So Exhibit 21 is taken
23 as an offer of proof.

24 We have about five or six

1 minutes and I'm hoping to take a lunch break. I
2 don't know how many more witnesses or questions
3 you have for Ms. Race.

4 MS. BUGEL: I would say we're about
5 halfway done with Ms. Race.

6 HEARING OFFICER HALLORAN: When do
7 you think -- when do you think a good time to
8 stop?

9 MS. BUGEL: If you want -- right now
10 is a fine time to stop if we can stop.

11 HEARING OFFICER HALLORAN: Okay.
12 Let's go off the record for a minute.

13 (Whereupon, a break was taken
14 after which the following
15 proceedings were had.)

16 HEARING OFFICER HALLORAN: Back on
17 record. We're going to take an hour lunch so
18 hopefully everybody will be back by, what is that,
19 1:25. Thank you.

20 (Whereupon, a break was taken
21 after which the following
22 proceedings were had.)

23 HEARING OFFICER HALLORAN: Thank
24 you. We're back on the record. It is

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.

1 Q. Okay. So I've placed in front of
2 you, Ms. Race, Complainants' Exhibit's 17D, 18D,
3 19D and 20D. These are the -- reference phase two
4 ENSR reports that were prepared for Commonwealth
5 Edison.

6 MS. FRANZETTI: And this questioning
7 is without waiving our objection to the decision
8 on allowing these documents into -- into evidence.

9 HEARING OFFICER HALLORAN: So noted.

10 BY MS. FRANZETTI:

11 Q. With respect to these documents,
12 Ms. Race, first of all, ENSR was not Midwest
13 Generation's consultant, correct?

14 A. Correct.

15 Q. Did ENSR become Midwest Generation's
16 consultant after Midwest Gen purchased these
17 stations?

18 A. They did not become my consultant.
19 I don't know if someone else hired them or
20 something.

21 Q. Right. You have no --

22 A. I have no knowledge.

23 Q. -- knowledge of ENSR being -- I'm
24 sorry. We can't both talk at one time.

1 A. Sorry.

2 Q. You have no knowledge of ENSR having
3 been retained as a consultant regarding these
4 stations by Midwest Generation, correct?

5 A. Correct.

6 Q. And that applies for during the
7 whole time you were involved with the ash pond,
8 groundwater monitoring work, the relining work of
9 the ponds, ENSR never did any work for you?

10 A. Correct.

11 Q. Now, with respect to these phase two
12 reports, you said you had looked at them.

13 Now, you joined Midwest Gen, I
14 believe you've already testified, in 2001,
15 correct?

16 A. Correct.

17 Q. Did you look at them right after you
18 joined?

19 A. No.

20 Q. All right. Was it some period of
21 time after you joined?

22 A. Yeah, at least a couple of years. I
23 didn't really even know about them.

24 Q. Now, with respect to these reports,

1 do you have any idea what ENSR did in terms of
2 quality assurance or quality control procedure or
3 program to apply to the data that is -- or
4 information that's presented in those reports?

5 A. No, and actually it's not even
6 immediately obvious because they didn't include,
7 you know, QAQC's in their analytical reports. So
8 I don't know what was -- you know, if there was
9 flag data, I don't know why.

10 Q. And you previously made a comment in
11 your testimony in answer to Ms. Bugel's questions
12 that you didn't consider these reports the Bible,
13 do you remember saying that?

14 A. Yeah.

15 Q. What did you mean by that?

16 A. I think I said Gospel.

17 Q. Oh, sorry.

18 A. I looked at the data -- or I looked
19 at these documents for their historic information
20 that if someone asked me a question from a site, I
21 might go back and take a peek and look and see did
22 we ever have a well at this -- did they ever put a
23 well in over here or did they ever monitor for
24 anything over here. You know, if somebody had a

1 question, I might go back and look at these, but
2 they were really for historic information for me.
3 I didn't pay a lot of attention to them.

4 Q. Now, I want to turn to the Joliet 29
5 phase two report that is Exhibit --

6 A. 20D.

7 Q. Thank you. Can you go to the back
8 end of that report to the boring logs.

9 A. Okay. Hang on.

10 Q. It's okay. I should try and find
11 it.

12 A. I turned them upside down.

13 Q. I'll help you out. Go to Bates
14 23345.

15 A. 23345. Okay.

16 Q. Now, this is as we've just said the
17 phase two report for Joliet 29, correct?

18 A. Correct.

19 Q. Would you read from the top box of
20 page 23345 the first page of the boring logs what
21 location it says this boring log information is
22 for?

23 A. Joliet No. 9 Power Station.

24 Q. Is that a totally different

1 generating station from Joliet 29?

2 A. Yes.

3 Q. In terms of the information you see
4 here for the boring logs, if you keep flipping the
5 pages of the boring logs, does it keep saying
6 Joliet 9 and not Joliet 29?

7 A. Yes.

8 Q. So is it your understanding this
9 appears to be a mistake by ENSR and it put the
10 wrong boring log information in here for Joliet
11 29?

12 A. Yes.

13 Q. Did you look at the rest of this
14 report and any of the other reports to try and
15 check whether or not ENSR also made mistakes in
16 the other reports?

17 A. No, not that kind of detail.

18 Q. So you don't know whether or not
19 there aren't other mistakes in the rest of these
20 reports, correct?

21 A. Correct.

22 Q. Ms. Race, I'm done with all those.

23 A. Okay.

24 MS. FRANZETTI: If I can have a

1 minute, Mr. Hearing Officer.

2 HEARING OFFICER HALLORAN: Yes.

3 BY MS. FRANZETTI:

4 Q. Ms. Race, I lied. We're not done.

5 A. Okay.

6 Q. But, you know what, we can just use
7 one of them to -- to start with and let's do it in
8 correct number order here. So bear with me again.
9 Let's do 17 first.

10 Ms. Race, I've put back in front
11 of you Complainants' Exhibit 17D, which is the
12 phase two report for, bear with me, Powerton.

13 A. Yes.

14 Q. And I'm going to direct you to the
15 page with the Bates number 3277.

16 A. It doesn't look the same. I'm
17 looking at 76. Sorry.

18 Q. And on that page, does it state --
19 and this is -- I'm sorry. If you go to the prior
20 page, this is part of Section 4.2 entitled
21 Potential Contaminant Exposure Pathways, right?

22 A. Correct.

23 Q. And the sentence on page 3277 is,
24 quote, there is no requirement under Illinois

1 environmental law to further investigate or
2 remediate this property, do you see that?

3 A. Yes, I do.

4 Q. Do you recall that that was a
5 portion of the report you did review before?

6 A. Yes.

7 Q. And was that a portion of the report
8 that was relevant with respect to the work you
9 were doing with respect to the stations and their
10 ash ponds?

11 A. Yes, and I'm sure that I discussed
12 it with my boss.

13 Q. Now, I'm going to ask you to go to
14 18D.

15 A. The address is incorrect on that
16 one. Just saying.

17 Q. Okay. Ms. Race, directing your
18 attention to Complainants' Exhibit 18D,
19 specifically the page ending in Bates number 5723
20 and, again, I'm under the section entitled 4.2
21 Potential Contaminant Exposure Pathways and do you
22 see the same sentence that we just reviewed in the
23 prior exhibit that reads at the bottom, quote,
24 there is no requirement under Illinois

1 environmental law to further investigate or
2 remediate this property?

3 A. Yes.

4 Q. And if I asked you the same
5 questions that I asked you with respect to that
6 sentence in Exhibit 18 -- 17D, would your answers
7 be the same?

8 A. Yes, they would.

9 Q. Ms. Race, I'm now going to turn your
10 attention to Complainants' Exhibit 19D, the page
11 ending in Bates number 45801. Same section of the
12 report as in the other two reports Section 4.2
13 Potential Contaminant Exposure Pathways and is it
14 correct that the exact same sentence is also in
15 here as the conclusion that, quote, there is no
16 requirement under Illinois environmental law to
17 further investigate or remediate this property?

18 A. Correct.

19 Q. And so with respect to this -- the
20 Waukegan Generating Station report if I asked you
21 the same questions with respect to this identical
22 statement as I've already asked you with respect
23 to the other exhibit, would your answers be the
24 same?

1 A. Yes.

2 Q. And, lastly, Exhibit 20D. If you go
3 to Bates page number 23324 and, again, it's in the
4 same part of the report Section 4.2 Potential
5 Contaminant Exposure Pathways and the same
6 sentence "There is no requirement under Illinois
7 environmental law to further investigate or
8 remediate this property" and again this is the
9 Joliet 29 property, if I asked you the same
10 questions regarding this exhibit in that statement
11 as I have in the first report that we discussed
12 here, would your answers be the same?

13 A. Yes.

14 Q. I'm going to ask you to go to
15 Exhibit 22.

16 MS. NIJMAN: Mr. Hearing Officer,
17 did you want us to tie up at any time?

18 HEARING OFFICER HALLORAN: As I
19 stated before, about 4:30 I'd like to tie up.

20 MS. FRANZETTI: We don't have to be
21 out of the room at 4:30?

22 HEARING OFFICER HALLORAN: Well, tie
23 it up at 4:30.

24 MS. FRANZETTI: So you want me to go