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, 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, a REDACTED version of Midwest Generation, LLC's Motion to Strike Complainants' Reply or in the Alternative Motion for Leave to File a Sur-Reply, a copy of which is hereby served upon you. The unredacted version, labeled as "Non-Disclosable Information", was placed in the mail to the Clerk, and has been served on the Complainants and the Hearing Officer via email.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 7, 2020

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Respondent Midwest Generation, LLC's Motion to Strike Complainants' Reply or in the Alternative Motion for Leave to File a Sur-Reply was filed on August 7, 2020 with the following:

Don Brown, 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 August 7, 2020 to the parties listed on the foregoing Service List. MWG is filing a REDACTED version of its Motion because it contains Non-Disclosable Information, and has emailed the unredacted version, marked as "Non-Disclosable Information to the individuals on the attached service list only.

/s/ Jennifer T. Nijman

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

MIDWEST GENERATION, LLC'S MOTION TO STRIKE COMPLAINANTS' REPLY OR IN THE ALTERNATIVE MOTION FOR LEAVE TO FILE A SUR-REPLY

Midwest Generation, LLC ("MWG") moves to strike, pursuant to 35 Ill. Adm. Code 101.506, Complainants' August 5, 2020 Reply because it makes false representations to the Hearing Officer and does not respond to MWG's Supplemental Response to Complainants' Memorandum Regarding Replacement of their Expert, dated July 21, 2020 ("July 21, 2020 Supplemental Response"), as ordered by the Hearing Officer.[1] In the alternative, MWG requests leave to submit to the Hearing Officer to a Sur-reply to Complainants' August 5, 2020 Reply. 35 Ill. Adm. Code 101.500(e).

1. Complainants' August 5, 2020 Reply should be stricken because Complainants make no effort to reply to the issues raised in MWG's Supplemental Response. [redacted] Complainants also fail to explain

[1] Motions to strike pursuant to 35 Ill. Adm. Code 101 may be used for pleadings and other filings. *United City of Yorkville v. Hamman Farms*, PCB 08-96, 2010 Ill. ENV LEXIS 473 (Nov. 4, 2010), at *26-27.

how the record will not be adversely affected by a new expert with new opinions, when many of the elements related to remedy have already been entered into the record and will be relied upon at the next hearing. Finally, Complainants fail to explain how the record will be clear if they are allowed to present different experts with different and likely contradictory opinions.

2. Instead, Complainants' August 5, 2020 Reply doubles down on the false premise that discovery is open and that the discovery that was conducted over two years ago was somehow limited to the "liability-phase" of discovery. Complainants' Aug. 5, 2020 Reply, pp. 2-3, 7-8. There was never a "liability phase" of discovery, and Complainants' insistent repetition of that falsehood borders on an intentional misrepresentation to the Hearing Officer. *See* Rule 3.3 of IL Rules of Professional Conduct. The discovery schedules entered by the Hearing Officer were never called "liability phase discovery." Discovery was not limited to only to liability because the parties understood at that time that there was going to be a single hearing for this case. *See* Hearing Officer Orders dated: May 14, 2014, June 9, 2014, February 11, 2015, May 5, 2015, Aug. 26, 2015, and Sept. 30, 2015. Because there was no limitation and a single hearing was expected, Complainants presented multiple expert opinions specifically addressing the issue of remedy,[2] and MWG presented multiple expert opinions in response.[3] On April 14, 2016, the parties reported to the Hearing Officer that all discovery was complete. *See* Hearing Officer Order, April 14, 2016. The Hearing Officer bifurcated the hearing into two phases *after* all discovery had closed. (Hearing Officer Order, Feb. 9, 2017).

[2] James Kunkel's "**Expert Report on Remedy** for Groundwater Contamination," July 1, 2015 (Attached as Ex. A to MWG's April 15, 2020 Response) (emphasis added); Kunkel's "Rebuttal Report to Expert Report of John Seymour, P.E." entered in the Hearing as Ex. 407; Kunkel's Rebuttal Opinion On the Temporal Trend Results entered in the Hearing as Ex. 408; Excerpt of Kunkel's Deposition (Attached as Ex. C to MWG's April 15, 2020 Response); and David Schlissel's Opinion on NRG Energy's ability to provide the financial resources for Kunkel's estimation of the financial cost of the remedy (attached as Ex. B to MWG's April 15, 2020 Response).

[3] John Seymour's Expert Report that included a response to Kunkel's proposed remedy, entered as Exhibit 903; a Temporal Trend Analysis entered as Exhibit 906; Updates to Seymour's reports based upon new data, entered as Exhibits 904, 905, and 907; and David Callen's Opinion on MWG's financial status in response to David Schlissel's opinion.

3. Complainants know that their insistence that "discovery is open" has no basis. Complainants originally made this argument back in April 2020 when Complainants sought to file a reply brief in support of their original motion to substitute experts (*See* Motion for Leave to File Reply, *Instanter*, to Midwest Generation's Response to Complainants' Motion to Designate Substitute Expert witnesses, dated April 29, 2020, at pp. 1-2). As they did then, Complainants again incorrectly assert that the Board's April 16, 2020 order, which cites to an order of February 6, 2020, somehow suggested that discovery was open. MWG has briefed this issue and already explained that a simple review of the Board's February 6, 2020 Order clearly shows that it does **not** state that discovery is open. (*See* Response to Complainants' Motion for Leave to File Reply or in the Alternative, Motion for Leave to File Sur-Reply ("May 11, 2020 Response").

4. In the Board's April 16, 2020 Order, under the heading "ORDER", the Board makes no mention of discovery and simply, "**directs the parties and the hearing officer to proceed expeditiously to hearing on remedy**." (Order, April 16, 2020, p. 6, ¶2, emphasis added). The only mention of discovery in the April 16, 2020 Order is a vague reference in dictum citing to the Board's Feb. 6, 2020 Opinion. (Order, April 16, 2020, p. 2). But the reference back to the Board's February 6, 2020 Opinion is misleading and provides no support to Complainants. The February 6th Opinion does **not** state that discovery is reopened, nor does it direct anyone to proceed to discovery for the remedy hearing. The Board's February 6, 2020 Opinion states in its "ORDER" that the Board "**directs the parties and the hearing officer to proceed expeditiously to hearing on remedy.**" (Order, Feb. 6, 2020, p. 17, ¶4). In fact, the Board's only reference to discovery in the February 6, 2020 Opinion is that *discovery was closed* in this matter. (Order, Feb. 6, 2020, p. 7-8). *See* MWG's May 11, 2020 Response, at pp. 4-6.

5. Complainants' citations to Hearing Officer orders in support of their incorrect claim that discovery is "open" are disingenuous, at best. During discussions about the discovery

schedule, MWG has consistently asserted that discovery would only be updated to provide new information. In fact, the schedule agreed upon by the parties provides that the parties would simply identify and update their *prior* written discovery requests, with only five additional written requests. The Hearing Officer's only order regarding discovery agreed to this limitation. (Hearing Officer Order, March 30, 2020). Because Complainants' Response is based upon a false narrative of the course of this litigation, the Hearing Officer should disregard it and it should be stricken.

6. Complainants' additional assertion that they may identify new experts because the timing is "before the Hearing Officer has set a deadline for disclosure of expert witnesses" is pure sophistry. (Complainants' Reply, p. 6). There is no such upcoming deadline because experts were previously named in this case. Complainants effectively admit this fact by moving to "substitute" their existing expert. The hearing on remedy is not a new case in which a new expert disclosure will be ordered – it is simply a continuation of the prior case in which discovery was completed.

7. Instead of responding to MWG's July 21, 2020 Supplemental Response, Complainants' August 5, 2020 Reply improperly restates arguments made in earlier briefings as detailed below: [4]

- Complainants repeat their remarkable statement that the Hearing Officer is not entitled to know the reason for granting their motion to substitute their experts. *See* Complainants' August 5, 2020 Response, p. 2 and Complainants' April 29, 2020 Motion for Leave to File *Instanter*, its Reply to MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses ("Complainants' April 29, 2020 Reply"), at p. 6.
    - In response, MWG again points out that Complainants have provided no authority that a party may wholly replace its experts without any basis after discovery is closed and the expert opinions have been issued and relied upon. *See* MWG's April 15, 2020 Response, pp. 4-8; MWG's May 11, 2020 Response, at p. 3; MWG's July 21, 2020 Supplemental Response, at pp. 6-7.
    - In any case, Complainants have waived any argument that they need not justify their request to substitute experts when they failed to file an appeal of the Hearing

[4] The briefing on Complainants' request to substitute its expert witnesses is extensive and MWG provided a summary in pages two through three of its July 21, 2020 Supplemental Response.

Officer's May 22, 2020 Order directing them to elaborate on why Dr. Kunkel needs to be replaced.

- Complainants repeat their original argument from their April 1, 2020 Motion that there is no prejudice to MWG by their wholesale replacement of their experts because they claim there is no surprise to MWG. *See* Complainants' April 1, 2020 Motion, pp. 3-6; Complainants' April 29, 2020 Reply, pp. 7-11; Complainants' Aug. 5, 2020 Response, pp. 6-9.
    - There is no question that MWG would be highly prejudiced by a late-stage substitution because MWG conducted its litigation strategy to include the issues related to liability and remedy and MWG will be forced – through no fault of its own – to redo the discovery it has already conducted and re-establish the testimony it has already elicited. *See* April 15, 2020 Response, pp. 8-11; MWG's May 11, 2020, p. 6; June 9, 2020 Response pp. 8-10; July 21, 2020 Supp. response, pp. 7-8.

- Complainants repeat their incorrect limitation on the definition of "prejudice" to mean only timely notification to the other parties, which they first made in their original April 1, 2020 motion and have repeated in each following brief. *See* Complainants' April 1, 2020 Motion, at pp. 3-6; Complainants' April 29, 2020 Reply, at pp. 7-10; and, Complainants' August 5, 2020 Response, pp. 6-9.[5]
    - In response, case law supports the conclusion that consideration of prejudice to the non-moving party is broad and includes assessing whether a party is deprived of the ability to adequately prepare a case and construct a trial strategy. Here, MWG constructed its trial strategy with the knowledge that Kunkel's and Schlissel's Opinions would remain, and intentionally developed testimony in the first hearing that MWG will rely upon for the next hearing. *See* MWG's April 15, 2020 Response, pp. 9; MWG's May 11, 2020, pp. 6-8.

- Complainants repeat their unfounded argument that experts are not limited to their disclosed opinions under Rule 213 and there is no limit to any substituting expert opinions. Complainants' April 29, 2020 Reply, at pp. 11-13; and, Complainants' August 5, 2020 Response, pp. 9-12.
    - In truth, Rule 213 requires that any new expert must have the same or substantially the same opinions and that the purpose of allowing substitution is to place the movant in the same position as it would have been but for the need to change experts. Without a limitation, MWG will be further prejudiced because it will be required to review each new opinion to identify differences and inconsistences and will be forced to file motions *in limine* pursuant to Illinois Supreme Court Rule 213

[5] Complainants insert three new cases in their August 5, 2020 Reply, all of which are inapplicable here. *Prather v. McGrady*, 261 Ill. App. 3d 880 (1994) and *Hartman v. Pittsburgh Corning Corp.*, 634 N.E.2d 1133 (5th Dist. 1994) are both regarding the outdated Ill.S.Ct. Rule 220. As MWG explained in its April 15, 2020 Response, Rule 220 was replaced by Rule 213 which requires parties to strictly adhere to the disclosure requirements and it is immaterial whether there is prejudice or not to the other parties. *See* MWG's April 15, 2020 Response, pp. 7-8 *citing Seef v. Ingalls Mem'l Hosp.*, 311 Ill. App. 3d 7, 21-22, 724 N.E.2d 115, 126 (1st Dist. 1999). Similarly, *Adams v. Northern Ill. Gas Co.*, 774 N.E.2d 850 (1st Dist. 2002) is regarding preserving witness testimony under Rule 217 and has nothing to do with substituting an expert witness.

to exclude the new and different opinions. *See* MWG's May 11, 2020 Response, pp. 5-9; MWG's June 9, 2020 Response, pp. 8-10; MWG's July 21, 2020 Supplemental Response, pp. 5-9.

8. Complainants' Reply should be stricken. Complainants have had four opportunities to explain their request to replace their experts, and yet have not provided a sufficient basis in support. Complainants have failed crest the high burden established under Illinois Supreme Court Rule 213 to change their experts after discovery is closed. As MWG has repeatedly stated throughout its briefing, all that is required for the next hearing is the experts to update their opinions, if necessary, based on data collected since discovery closed, and nothing more.

9. If MWG's Motion to Strike is denied, then MWG request that the Hearing Officer give it leave to reply pursuant to 35 Ill. Adm. Code 101.500(e). MWG will suffer material prejudice if it is not allowed to address the false representations and baseless arguments in Complainants' August 5, 2020 Reply.

WHEREFORE, Midwest Generation, LLC requests that the Hearing Officer strike Complainants' Reply to Midwest Generation, LLC's Supplemental Response to Complainants' Memorandum Regarding Replacement of the Expert, and further deny Complainants Motion to Designate Substitute Experts. In the alternative, Midwest Generation, LLC requests that the Hearing Officer grant Midwest Generation, LLC leave to file a sur-reply to Complainants' Reply to prevent material prejudice to Midwest Generation, LLC.

Respectfully submitted,
Midwest Generation, LLC

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

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August 7, 2020

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Re: Sierra Club et al. v. MWG; PCB 13-15

Dear Don:

Today I filed with the Board in *Sierra Club et al. v. MWG*; PCB 13-15 a REDACTED Midwest Generation, LLC's Motion to Strike Complainants' Reply or in the Alternative Motion for Leave to File a Sur-Reply. However, due to COVID, I am not in the office today and cannot print in color the UNREDACTED Midwest Generation, LLC's Motion to Strike Complainant's Reply or in the Alternative Motion for Leave to File a Sur-Reply which is labeled as "Non-Disclosable Information" in red.

I will be in my office on Monday. Accordingly, on Monday I will print in color the UNREDACTED Motion labeled as "Non-Disclosable Information" in red and will place it in the mail to you for filing into the record in *Sierra Club et al. v. MWG*; PCB 13-15. We have emailed the UNREDACTED Motion with the red label to Complainants and the Hearing Officer today.

Please do not hesitate to call with any questions.

Very truly yours,

Kelly L. Emerson
Legal Assist. to Jennifer T. Nijman/Kristen L. Gale
Counsel for Midwest Generation, LLC

cc: Brad Halloran
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