

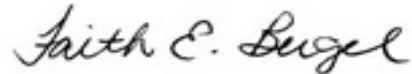
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
ENVIRONMENT)	
)	PCB No-2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY TO COMPLAINANTS’ RESPONSE TO MOTION IN LIMINE AND MOTION FOR STAY** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: March 17, 2021

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.)	PCB No-2013-015
)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

COMPLAINANTS’ OPPOSITION TO RESPONDENT’S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY TO COMPLAINANTS’ RESPONSE TO MOTION *IN LIMINE* AND MOTION FOR STAY

Pursuant to 35 Ill. Adm. Code 101.500(d), Complainants respectfully request that the Illinois Pollution Control Board (“Board”) deny Midwest Generation, LLC’s (“MWG”) Motion for Leave to File, *Instanter*, Its Reply to Complainants’ Response to Motion in Limine and Motion for Stay for the reasons stated below:

1. Respondent, as a matter of practice, moves for leave to file a reply or sur-reply with virtually every substantive motion. *See, e.g.*, Respondent’s Motion for Leave to File Its Reply in Support of Its Motion for Reconsideration (Oct. 28, 2019); Midwest Generation, LLC’s Response to Complainants’ Motion for Leave to File Reply or in the Alternative, Motion for Leave to File Sur-Reply (May 11, 2020); Midwest Generation, LLC’s Motion to Strike Complainants’ Reply or in the Alternative Motion for Leave to File a Sur-Reply (Aug. 7, 2020). By way of example, this is the fifth time MWG has requested leave to file a reply or sur-reply in

this matter just since the Board's decision on liability. *Id.*; *see also* Email from Kristen Gale to Brad Halloran, *Midwest Generation LLC's Limited Request for Leave to Reply to Complainants' Response* (July 22, 2019). The frequency and pervasiveness of Respondent's motions for leave to file a reply or sur-reply underscore that Respondent requests leave as a matter of routine and does not confine its requests to those instances where there is the possibility of material prejudice. 35 Ill. Adm. Code 101.500(e).

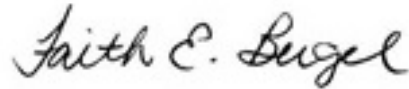
2. MWG has failed to demonstrate material prejudice as required by Rule 500(e). 35 Ill. Adm. Code 101.500(e). MWG argues that Complainant has raised new issues in arguing ability to pay and relying on federal case law. MWG argues that ability to pay is not a factor that the Board considers and claims the Complainants are inserting a new factor into the Act. Br. at 2-3. Nevertheless, as explained in Complainants' Response Brief, ability to pay is a consideration that is relevant to more than one of the Section 33(c) and Section 42(h) factors. Br. at 2-4. MWG ignores the fact that ability to pay falls within the Section 42(h)(3) factor of "the economic benefits accrued by the Respondent because of delay in compliance" and the Section 42(h)(4) factor of "the amount of monetary penalty which will serve to deter further violations" MWG also makes the irrational argument that considering inability to pay is somehow different from considering ability to pay. Br. at 2-3. Finally, drawing an analogy to federal penalty case law doesn't rise to the level of materially prejudicing MWG. Analogizing case law is different from raising a new argument or issue.

3. To be clear, Complainants understand that MWG is seeking a limited stay just as to expert discovery on the subject of NRG's financials. All of Complainants' arguments against a stay are directed at MWG's motion for a limited stay.

For the foregoing reasons, Complainants respectfully request that the Board deny MWG's Motion for Leave to File Its Reply.

Dated: March 17, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY TO COMPLAINANTS' RESPONSE TO MOTION IN LIMINE AND MOTION FOR STAY** before 5 p.m. Central Time on March 17, 2021, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 6 pages.

Respectfully submitted,

Jeffrey Hammons

PCB 2013-015 SERVICE LIST:

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