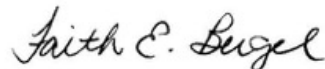


**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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,	)	
	)	
Respondents	)	

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that I have electronically filed the non-confidential version of the **COMPLAINANTS' MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY** in the above-captioned case today, copies of which are hereby served upon you. PLEASE TAKE NOTICE that I have also filed the enclosed hard copies containing non-disclosable information in the above-captioned case today, copies of which are hereby served upon you.



Faith E. Bugel  
Attorney at Law  
1004 Mohawk Rd.  
Wilmette, IL 60091  
Ph. (312) 282-9119  
ARDC No: 6255685

Dated: August 30, 2023

**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,	)	
	)	
Respondents	)	

**COMPLAINANTS’ MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO  
MIDWEST GENERATION, LLC’S RESPONSE TO COMPLAINANTS’ MOTION FOR  
INTERLOCUTORY APPEAL OF THE HEARING OFFICER’S ORDERS  
REGARDING ECONOMIC IMPACT TESTIMONY**

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this motion for leave to file *instanter* Complainants’ Reply to Midwest Generation, LLC’s (“Respondent”) Response to Complainants’ Motion for Interlocutory Appeal of the Hearing Officer’s Orders Regarding Economic Impact Testimony. In support of this motion, Complainants state as follows:

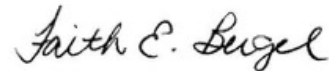
1. On July 26, 2023, Complainants moved the Illinois Pollution Control Board for interlocutory appeal of the Hearing Officer’s conflicting orders on the permissibility of economic impact testimony by Jonathan Shefftz and Gayle Koch (“Appeal”).
2. On August 16, 2023, Respondents filed their response to Complainants’ Appeal (“MWG Response”).

3. The Response raised several new arguments that are extremely prejudicial to Complainants. Specifically, Respondent argued that Complainants made false representations and that Complainants' motion to exclude portions of Ms. Koch's report was not timely, and Respondent also attempts to mischaracterize portions of Ms. Koch's report in order to introduce opinions on issues that Complainants' expert was not allowed to opine on.

4. Complainants would be prejudiced if they were not allowed to address these new, fallacious, and harmful arguments.

WHEREFORE, for the reasons stated above, Complainants request that the Hearing Officer grant leave to file *instanter* the attached Reply brief.

Respectfully submitted,



Faith E. Bugel  
1004 Mohawk Rd.  
Wilmette, IL 60091  
fbugel@gmail.com  
*Attorney for Sierra Club*

Keith Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker, Suite 750  
Chicago, IL 60606  
KHarley@kentlaw.iit.edu

*Attorney for CARE*

Albert Ettinger  
Law Firm of Albert Ettinger  
7100 N. Greenview  
Chicago, IL 60606  
ettinger.albert@gmail.com

*Attorney for ELPC*

Gregory E. Wannier  
Megan Wachspress  
2101 Webster St., Ste. 1300  
Oakland, CA 94612  
Greg.Wannier@sierraclub.org  
megan.wachspress@sierraclub.org

*Attorneys for Sierra Club*

Abel Russ Attorney  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Washington, DC 20005  
Aruss@environmentalintegrity.org

*Attorney for Prairie Rivers Network*

Dated: August 30, 2023

**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,	)	
	)	
Respondents	)	

**COMPLAINANTS’ REPLY IN SUPPORT OF COMPLAINANTS’ MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER’S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY**

Midwest Generation, LLC (“MWG”) raises several novel arguments in its response to Complainants’ appeal of the Hearing Officer’s conflicting orders on the permissibility of economic impact testimony by Jonathan Shefftz and Gayle Koch. First, MWG argues that Complainants motion to disregard was belated even though Complainants raised this issue when it came to light during cross-examination of Ms. Koch. Second, MWG argues that pages 28 and 29 should not be stricken even though MWG did not include these opinions in Ms. Koch’s direct testimony because MWG *repeatedly* conceded that they were only relevant in response to the Shefftz report that was not admitted into the record. June 15, 2023 Conf. Hr’g Tr. at 121:5-15

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ *see also* Midwest Generation, LLC's Resp. in Opp'n to Compl.' Mot. in Lim. to Exclude Portions of Gavle Koch's Expert Report at 2 (Mar. 4, 2022). Complainants would be

prejudiced if not allowed to reply to these novel arguments.

MWG argues that Complainants motion to strike pages 28 and 29 of Ms. Koch's report was belated. MWG Resp. at 1. Complainants moved to strike or at least ask the Board disregard the unresponsive portion of Ms. Koch's report on June 15, 2023, the same day the report was admitted, while Ms. Koch was still on the witness stand, and when objections and argument revealed that the economic impact opinions were admitted into the record without the opportunity for cross-examination on that portion of the report. MWG objected to questions of the witness on this portion of her report because of relevance and emphasized that this portion off the report was rebuttal to Mr. Shefftz's opinions that were not admitted June 15, 2023 Conf. Hr'g Tr. at 121:5-15 [REDACTED]

[REDACTED] Complainants' argument on the objection made clear that a new issue was coming to light at that [REDACTED] *Id.* at 123:1-3. As a result, Complainants' motion to exclude or ask the Board to disregard was timely.

MWG is trying to blur the distinction between the parts of the Ms. Koch's report (Ex. 1901) that respond to Shefftz's economic impact testimony and the parts that don't. MWG's attempts to characterize pages 28 and 29 as a response to Shefftz's report appear to be an effort to make them something other than an ability to pay (economic impact) argument. MWG's arguments are belied by examining the contents of pages 28-29 and Ms. Koch's testimony on the issue.

MWG argues that the content on pages 28 and 29 are part of Ms. Koch's economic reasonableness opinion responding to Shefftz's quote at the top of page 27. MWG Resp. at 2. However, an examination of pages 27 through 29 indicates that pages 28-29 cover different

material than page 27. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the three pages cannot summarily be lumped together as a response to the quote at the top of page 27, contrary to MWG's argument.

The first paragraph on page 28 relates to MWG's [REDACTED]. MWG claims that this is useful to assess "the period of non-compliance." MWG Resp. at 2-3. Again, a closer inspection shows that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On the same page, Table 6 [REDACTED]

[REDACTED] This is only relevant to the evaluation of the ability of a company to pay or the economic impact of a penalty. Complainants testimony discussing MWG [REDACTED] has not been allowed into the case. May 16, 2023 Conf. Hr'g Tr. at 89:14-90:20 (Hearing Officer excluding Comp. Ex 1207, Mr. Shefftz's Second Supplemental and Rebuttal Report). It would be prejudicial and in error to allow MWG to submit expert testimony discussing MWG [REDACTED] [REDACTED] without also allowing Complainants to submit expert testimony on MWG [REDACTED] [REDACTED] "[T]he inconsistent application of evidentiary rules contributed to an atmosphere of

futility at this hearing that gave petitioner an added disadvantage.” *Anderson v. Hum. Rts. Comm'n*, 314 Ill. App. 3d 35, 48, 731 N.E.2d 371, 381 (Ill. App. 1d. 2000)

Following table 6, there is an [REDACTED] discussion that, according to MWG, relates to MWG's future compliance. MWG Resp. at 3. Once again, this is a feint because Koch does not mention MWG's efforts toward compliance or due diligence anywhere in that paragraph. In that paragraph, Ms. Koch is talking about economic impact. For instance, Ms. Koch states: [REDACTED]

[REDACTED] Ex. 1901, Koch Report at 28. Ms. Koch's only mention of compliance in this paragraph is in relation to the [REDACTED]

[REDACTED] Ex. 1901, Koch Report at 29. Ms. Koch talks about good faith compliance earlier in her report, within the section of the report covering her opinion [REDACTED]

[REDACTED] *Id.* at 7-18. Ms. Koch's discussion of [REDACTED] and economic reasonableness is completely unrelated to good faith compliance, and MWG's attempts to connect this testimony to good faith compliance are disingenuous.

Ms. Koch goes on to discuss [REDACTED] Ex. 1901, Koch Report at 29. MWG argues that these references relate to the deterrence value of a penalty [REDACTED] MWG Resp. at 3-4. To the contrary, that is not the context in which projections for the coal-fired energy generation are presented in Koch's report. MWG is attempting to link new opinions to existing statements by Koch in an effort to shield these parts of Koch's report. Once again, however, this argument must fail because the context of the paragraph speaks for itself. Ms. Koch tied her point [REDACTED]

[REDACTED]

[REDACTED] Ex. 1901, Koch Report at 29.

MWG erroneously argues that pages 28 and 29 “are a direct rebuttal to Mr. Shefftz’s opinions.” MWG Resp. at 1-2. MWG is wrong and the only parts of Shefftz’s testimony that Ms. Koch could identify pages 28-29 of her report as being responsive to were recitations of *factual and financial information*. The parts of Mr. Shefftz’s report identified by Ms. Koch contained no analysis and no opinion by Mr. Shefftz.

[REDACTED]

June 15, 2023 Conf. Hr’g Tr. at 170:1-13.

[REDACTED]

June 15, 2023 Conf. Hr’g Tr. at 170:17-24.

[REDACTED]

June 15, 2023 Conf. Hr’g Tr. at 172:8-14. The part that Ms. Koch identifies as [REDACTED]

[REDACTED] was an offer of proof and, therefore, not part of the actual record unless the Board somehow reverses the Hearing Officer’s ruling on a separate issue that was not even appealed by the parties. MWG makes another one of their frequent and unfounded accusations



that Complainants are attempting to mislead the Board when in fact it is Respondent attempting to mislead the Board. MWG points out that Ms. Koch's "was present during Mr. Shefftz's testimony and heard Mr. Shefftz testify about information in his report that was related to economic reasonableness, to which her opinions were responsive. *Id.*, p. 171:5-24." MWG Resp. at 4-5. MWG is misleading the Board because some of Mr. Shefftz's testimony was in an offer of proof. For that reason and to avoid any confusion about what is in the record and what is out, the focus must be on the experts' reports and the unredacted portions of Shefftz's report (not Shefftz's offer of proof testimony) to which Ms. Koch's report is responsive. Further, counsel for MWG again claims that Complainants are misrepresenting Ms. Koch's testimony and further muddies the waters by confusing facts and opinions. MWG Resp. at 4. While Ms. Koch may have pointed to recitations of factual information in Shefftz's report and made claims that her opinions were responding to those facts, she cannot properly rebut facts with expert opinions.<sup>1</sup> If Shefftz did not offer any analysis or opinions, then there is nothing for Koch, as an expert witness offering expert opinions, to rebut.

[REDACTED]

June 15, 2023 Conf. Hr'g Tr. at 173:3-8. Shefftz's analysis comes later in Exhibit 1207, his second supplemental report, which the Hearing Officer did not admit into the record. Ms. Koch has taken the position that Shefftz's mere recitation of MWG financial data, a table and several

---

<sup>1</sup> Respondents make a big production over the Complainants argument that Ms. Koch was not able to identify any analysis of economic impact issues. Appeal at 5; *see also* MWG Resp. at 4. Complainants explicitly referred to "analysis." Respondents point out that Ms. Koch identified "four unredacted sections of Mr. Shefftz's Report." This is not a misrepresentation. This is the difference between facts and analysis. As discussed above, these four parts of Mr. Shefftz's report are factual recitations and not opinion or analysis.

sentences, without any opinions or analysis, is itself something to which she was required to respond with opinions on economic impact. To allow Ms. Koch to offer analysis and opinion on issues that Mr. Shefftz was not allowed to opine on would be highly prejudicial.

MWG is on record saying that Ms. Koch's testimony would not be needed if Shefftz's economic impact opinions were removed from the case, as they have been:

[REDACTED]  
[REDACTED]  
[REDACTED] To hold otherwise would allow Complainants to present opinions about MWG's ability to afford a penalty without MWG having the opportunity to respond. Regardless, and as discussed further below, all of Mr. Shefftz's opinions should be excluded. ***In that event, Ms. Koch's responsive opinions are no longer required.***

Midwest Generation, LLC's Resp. in Opp'n to Compl.' Mot. in Lim. to Exclude Portions of Gavle Koch's Expert Report at 4 (Mar. 4, 2022)(emphasis added). MWG repeated this point twice at the hearing when arguing whether questioning of Ms. Koch on MWG's ability to pay and pages 28 and 29 of her report should be allowed. June 15, 2023 Conf. Hr'g Tr. at 121:5-15

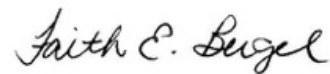
[REDACTED]  
[REDACTED]  
[REDACTED] Mr.

Shefftz's economic impact opinions were removed from the case the exact scenario in which MWG conceded that Ms. Koch's responsive opinions are no longer required. The Hearing Officer did not admit Exhibit 1207, Mr. Shefftz's Second Supplemental and Rebuttal Report, because it contained Mr. Shefftz's opinions regarding the economic impact of a remedy or penalty on MWG and the Hearing Officer concluded that the evaluation of the economic impact of a remedy or penalty is outside the scope of the factors that are considered by the Board. May 16, 2023 Conf. Hr'g Tr. at 89:14-90:20. As a result, Ms. Koch's responsive opinions on the

economic impact of a remedy or penalty on MWG on pages 28-29 should also be excluded.

In closing Complainants would be highly prejudiced in this proceeding if MWG were allowed to offer an expert report that includes discussion of the economic impact of a remedy or penalty determination on MWG, while Complainants were prohibited from offering similar expert testimony. Thus, pages 28 and 29 of Exhibit 1901, which contain Ms. Koch's opinions on economic impact on MWG, should be stricken from the record.

Respectfully submitted,



Faith E. Bugel  
1004 Mohawk Rd.  
Wilmette, IL 60091  
fbugel@gmail.com

*Attorney for Sierra Club*

Keith Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker, Suite 750  
Chicago, IL 60606  
KHarley@kentlaw.iit.edu

*Attorney for CARE*

Albert Ettinger  
Law Firm of Albert Ettinger  
7100 N. Greenview  
Chicago, IL 60606  
ettinger.albert@gmail.com

*Attorney for ELPC*

Gregory E. Wannier  
Megan Wachspres  
2101 Webster St., Ste. 1300  
Oakland, CA 94612  
Greg.Wannier@sierraclub.org  
megan.wachspres@sierraclub.org

*Attorneys for Sierra Club*

Abel Russ Attorney  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Washington, DC 20005  
Aruss@environmentalintegrity.org

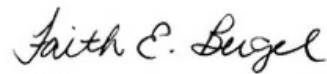
*Attorney for Prairie Rivers Network*

Dated: August 30, 2023

**CERTIFICATE OF SERVICE**

The undersigned, Faith E. Bugel, 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 the non-confidential version of the **COMPLAINANTS' MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY** and mailed hard copies of the non-disclosable version before 5 p.m. Central Time on August 30, 2023, to the addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 13 pages.

Respectfully submitted,



Faith E. Bugel  
1004 Mohawk  
Wilmette, IL 60091  
fbugel@gmail.com

**PCB 2013-015 SERVICE LIST:**

Jennifer T. Nijman  
Kristen Laughridge Gale  
Nijman Franzetti LLP  
10 South LaSalle St., Suite 3400  
Chicago, IL 60603  
(312) 251-5250  
[jn@nijmanfranzetti.com](mailto:jn@nijmanfranzetti.com)  
[kg@nijmanfranzetti.com](mailto:kg@nijmanfranzetti.com)

Abel Russ  
Environmental Integrity Project  
1000 Vermont Ave. NW, Suite 1100  
Washington, DC 20005  
(202) 263-4453  
[aruss@environmentalintegrity.org](mailto:aruss@environmentalintegrity.org)

Brad Halloran, Hearing Office  
Illinois Pollution Control Board  
100 W. Randolph St., Suite 11-500  
Chicago, IL 60601k  
(312) 814-3620  
[Brad.halloran@illinois.gov](mailto:Brad.halloran@illinois.gov)

Keith I. Harley  
Greater Chicago Legal Clinic, Inc.  
211 West Wacker Drive, Suite 750  
Chicago, IL 60606  
(312) 726-2938  
[kharley@kentlaw.edu](mailto:kharley@kentlaw.edu)

Don Brown – Clerk of the Board  
Illinois Pollution Control Board  
100 W. Randolph St., Suite 11-500  
Chicago, IL 60601k  
(312) 814-3620  
[Don.brown@illinois.gov](mailto:Don.brown@illinois.gov)

Albert Ettinger  
Law Firm of Albert Ettinger  
7100 N. Greenview  
Chicago, IL 60606  
(773) 818-4825  
[Ettinger.albert@gmail.com](mailto:Ettinger.albert@gmail.com)

Gregory E. Wannier  
Megan Wachspres  
2101 Webster St., Ste. 1300  
Oakland, CA 94612  
(415) 977-5646  
[Greg.Wannier@sierraclub.org](mailto:Greg.Wannier@sierraclub.org)  
[megan.wachspres@sierraclub.org](mailto:megan.wachspres@sierraclub.org)

August 30, 2023