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
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

Attached Service List

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinion and Reports and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinions and Reports, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 30, 2023

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3400
Chicago, IL 60603
(312) 251-5255
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Albert Ettinger
7100 N. Greenview
Chicago, IL 60626
Ettinger.Albert@gmail.com

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Megan Wachspress
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Megan.wachspress@sierraclub.org

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing for Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinion and Reports and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinions and Reports were filed electronically on August 30, 2023 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that copies were sent via e-mail on August 30, 2023 to the parties on the service list.

/s/ Jennifer T. Nijman

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	)	**PCB 2013-015**
Complainants,	)	**(Enforcement – Water)**
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v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES' OPINION AND REPORTS

Respondent, Midwest Generation, LLC ("MWG"), requests that the Illinois Pollution Control Board ("Board") grant this Motion for Leave to File, *Instanter*, its Reply (to Complainants' Response) in support of its Appeal of the Hearing Officer's decision to admit Mark Quarles's opinions and reports, pursuant to Sections 101.500 and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply brief is warranted because Complainants raised new arguments and admissions in its Response. For the first time, Complainants attempt to equate Mr. Quarles's reliance on the Board's Interim Order with the Hearing Officer's Order requiring Mr. Quarles to build on the testimony of Complainants prior expert. MWG will be materially prejudiced if it is not permitted to reply. In support of its motion seeking leave to file, instanter, MWG submits its Reply and states:

1. In making his decision about whether Complainants were permitted to replace their first expert ("Mr. Kunkel") in this matter, the Hearing Officer allowed Complainants to name a new expert, but explicitly ordered that "[a]ny testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." See H.O. Order, Sept. 14, 2020, p. 3.

2. The Hearing Officer's ruling is consistent with Illinois law regarding the substation of an expert witness in the middle of the trial. *Ind. Ins. Co. v. Valmont Elec., Inc.*, 2001 U.S. Dist. LEXIS 23256, at *4 (The court allowed substation of the expert and ordered the new expert opinions should be the same stating, "allowing this supplement is NOT an invitation to Plaintiffs (sic) to introduce new and different theories in this case.").

3. In their response to MWG's Appeal of its Appeal of the Hearing Officer's decision to admit Mark Quarles's opinions and reports ("Response"), Complainants make a new argument to attempt to justify the fact that Mr. Quarles failed to even review the opinions of Mr. Kunkel. Complainants now argue that Mr. Quarles relied on the June 20, 2019 Board Order "as the foundation of and basis of his remedy reports." Then, without explanation or specific citation, Complainants ask the Board to infer that through his reliance on the Board Order Mr. Quarles relied on Mr. Kunkel. Comp. Resp., p. 5.

4. Complainants have no basis for their new argument. First, Complainants improperly attempt to expand the Hearing Officer's Order – which was specifically directed to building on past *expert* opinions – to suggest that a new expert can build on anything that might be in the record. This is contrary to the order and to Illinois law. Second, even if Complainants' interpretation of the Hearing Officer's Order had any validity, Complainants do not (and cannot)

identify any specific testimony or evidence in the Board Order relied upon by Mr. Quarles that purportedly came from Mr. Kunkel.

5. Moreover, Complainants cannot escape the fact that Mr. Quarles admits he never relied on any testimony or reports by Mr. Kunkel. See e.g., 5/15/2023 Hr. Tr., p. 154:10-15 (Mr. Quarles admits he did not attempt to elaborate or amplify on Mr. Kunkel), p. 153:6-13 (Mr. Quarles did not reference any of Mr. Kunkel's reports), pp. 153:6-154:9 (Mr. Quarles admits he does not know Mr. Kunkel and was not aware of Mr. Kunkel's reports).

6. In comparison, MWG, in naming a new expert, complied with the Hearing Officer's Order to build on and elaborate the prior expert's opinions. For example, MWG's experts built on Mr. Seymour's evaluation of downgradient receptors and the absence of risk posed by the four stations. 6/12/2023 Hr. Tr. pp. 221:14-222:5. *See e.g*., 6/12/23 Hr. Tr. pp. 189:20-190:24, pp. 221:9-223:20, pp. 233:12-238:8, pp. 255:21-264:12; 6/13/23 Hr. Tr. pp. 35:9-36:24, pp. 150:21-151:12, pp. 217:12-218:11, pp. 229:1-9, pp. 231:10-17.

7. MWG has prepared its Reply in support of its Appeal which is attached hereto. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by allowing MWG an opportunity to address Complainants' new arguments and misrepresentations that it could not have anticipated when drafting its appeal.

8. This Motion is timely filed on August 30, 2023, 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 Instanter, its Reply (to Complainants' Response) in support of its Appeal of the

Hearing Officer's decision to admit Mark Quarles's opinions and 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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
312-251-5255

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES' OPINIONS AND REPORTS

Complainants agree that their new expert, Mark Quarles, entirely disregarded the Hearing Officer's and the Illinois Pollution Control Board's ("Board") Orders to build on, amplify or sufficiently rely upon the opinions of Complainants' original expert, James Kunkel. Instead, in their Response, Complainants claim for the first time that Mr. Quarles's reliance on the June 20, 2019 Interim Board Order is sufficient to infer reliance on Mr. Kunkel's opinions. In making this new argument, Complainants improperly attempt to expand the Hearing Officer's Order – which was specifically directed to building on past *expert* opinions. This is contrary to the orders in this case and to Illinois law. Even if Complainants' interpretation of the Hearing Officer's Order had any validity, Complainants do not (and cannot) identify the sections of the Interim Board Order where Mr. Quarles purportedly relied on Mr. Kunkel's opinions. The Hearing Officer's decision to allow Mr. Quarles's testimony and opinions, when they had no relation to the prior expert testimony or opinions, was incorrect and should be reversed.

A. Complainants' Expert's Failure to Build on the Prior Expert is Contrary to the Hearing Officer's Order and Illinois Law, and is Prejudicial to MWG

Complainants improperly attempt to expand the Hearing Officer's Order – which was specifically directed to building on past *expert* opinions – to suggest that a new expert can build on anything that might be in the record. This is contrary to the order and to Illinois law. Complainants ask this Board to re-interpret the Hearing Officer's Order to suggest that the Order's reference to "testimony that stands" means that a new expert can build on "all testimony" in the record. Comp. Resp., p. 4. But there is no doubt that the Hearing Officer's Order addressed only the issue of whether Complainants were allowed to substitute their expert witness in the middle of a trial. Complainants filed a motion asking for leave to substitute their expert witness; MWG objected and explained Illinois law limiting a new expert to the opinions of the prior expert to avoid prejudice to the objecting party. In the context of making a decision based on those pleadings, the Hearing Officer ruled "[a]ny testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." See H.O. Order, Sept. 14, 2020, p. 3. In fact, the Hearing Officer specifically referenced Complainants' representation at that time that there would be no inconsistency or contradiction with Mr. Kunkel's opinion, and that instead they would provide more detail and elaborate on Mr. Kunkel's opinion. *Id.* at 2, citing Comp.'s May 29, 2020 Memo, at 2-3.

The Hearing Officer's Order is consistent with Illinois law. In *Nelson v. Upadhyaya*, after allowing an expert substitution, the court barred the new expert from testifying at trial because the new expert reviewed far more material than the original expert and held opinions the original expert had not expressed. *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 418, 836 N.E.2d 784, 786-87 (1st Dist. 2005). Similarly, in *Ind. Ins. Co. v. Valmont Elec., Inc.*, when the court allowed the

substitution of plaintiff's expert, the court specifically ordered that the opinions and expertise of the new experts were to be the same and stated, "allowing this supplement is NOT an invitation to Plaintiffs (sic) to introduce new and different theories in this case." *Ind. Ins. Co. v. Valmont Elec., Inc.*, 2001 U.S. Dist. LEXIS 23256 (S.D. Ind. 2001), p. *4. The plaintiff in that case failed to follow the court's directive, and the court barred the new expert from testifying on the four new opinions stated in his deposition. Id. at *4.6. In *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp.*, the court limited the new expert's opinion to the previously provided opinion stating that "the purpose of allowing substitution of an expert is to put the movant in the same position it would have been in but for the need to change experts; it is not an opportunity to designate a better expert. 2015 U.S. Dist. LEXIS 45379, at *5-6 (D. Nev. Apr. 6, 2015).

Ignoring Illinois law on replacement of experts during trial, Complainants incorrectly claim Mr. Quarles's testimony should be allowed based on a three-part framework that is used to qualify an expert. Comp. Resp., p. 2, citing *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893-94 (7th Cir. 2011). Complainants misread the application of the three-part framework. The framework is used to determine if an expert witness is qualified to be a witness at hearing and does not discuss the limitations that may be placed on an expert who is substituted in the middle of trial. *Bielskis* 663 F.3d at 893-94. Mr. Quarles's general qualifications are not at issue. The issue is Mr. Quarles's failure to build upon or amplify the testimony and opinions made by Complainants' first expert, Mr. Kunkel.

Complainants incorrectly argue that MWG is not prejudiced by Mr. Quarles's opinions that did not build on or elaborate on Mr. Kunkel's testimony. Comp. Resp., p. 3. The authorities Complainants rely upon are of no support because none of those cases allowed a party to replace an expert with a new expert with entirely new opinions. Nor do the cases cited demonstrate that

it is appropriate or permissible to completely disregard the clear orders of the Hearing Officer and Board. All but one of Complainants' cases address a different issue – that is, whether an expert must be barred due to untimely disclosure. These same cases are further distinguished because in those cases a new expert was raised when there was no prior expert report and no prior expert discovery.[1] Also, the cases Complainants cite that pre-date 1996 are irrelevant because they rely upon inapplicable Illinois Supreme Court rules, including Rule 220 and even older rules. The applicable rule requiring disclosure of expert opinions is Rule 213, which has stricter standards. *Seef v. Ingalls Mem'l Hosp*., 311 Ill. App. 3d 7, 21-22, 724 N.E.2d 115, 126 (1st Dist. 1999). The single case that Complainants cite about substitution of an expert witness does not provide any support to their claim that Mr. Quarles may create entirely new opinions. *People v. Pruim*, PCB 04-207 (Sept. 24, 2008). In that case the moving party provided a basis for the substitution of an expert and the original expert and new expert worked together on the new opinion indicating that the opinions were substantively similar. *Id.*

Complainants' final and similarly incorrect claim is that the Board should simply weigh the effect of barring a witness. See Comp. Resp., p. 4 *citing Sullivan v. Eichmann*, 213 Ill. 2d 82, 92–93, 820 N.E.2d 449, 454 (Ill. Sup. Ct., 2004). Complainants fail to point out that the case they rely on, *Sullivan v. Eichman,* does not even discuss substitution of a witness; it is about substitution of counsel. *Id*.

Ultimately, MWG is materially prejudiced because it adhered to the Hearing Officer Order and Illinois law, and the Complainants did not. Trial procedures and court (or Board) orders are required to be followed. MWG's experts relied upon the previous expert's testimony and reports numerous times throughout the trial and for their final reports. While it is somewhat unknown

[1] Those cases are: *Appelgren v. Walsh*, 483 N.E.2d 686 (2nd Dist. 1985*); Rosales v. Marquez*, 55 Ill. App. 2d 203 (2nd Dist. 1965); *Miksatka v. Illinois Northern Ry. Co*., 49 Ill. App. 2d 258 (2nd Dist. 1964); *Hartman v. Pittsburgh Corning Corp*., 261 Ill. App. 3d 706 (5th Dist. 1994).

whether MWG's experts would have added additional "new" opinions had they "started from scratch" like Mr. Quarles did, Complainants cannot assume there was no prejudice by simply pointing to the lack of new opinions.

B. Complainants Admit that Mr. Quarles Did Not Build On or Elaborate Mr. Kunkel's Testimony or Reports

Complainants do not dispute that Mr. Quarles did not build on or elaborate on their original expert's opinions. Instead, they state that Mr. Quarles's reliance on the June 20, 2019 Interim Board Order is the "foundation of and basis for his remedy phase reports." Comp. Resp., p. 5. In a last-ditch attempt to argue that Mr. Quarles relied on Mr. Kunkel in any capacity, Complainants claim the "Board Order obviously includes evidence, such as Mr. Kunkel's testimony, that provided the grounds for the Board's decision…. By relying on the Board's Order, Mr. Quarles is building on testimony already given…" Comp. Resp., p. 5. But Complainants do not identify any testimony or evidence that Mr. Quarles built on from Mr. Kunkel that were cited in the Board opinion. Indeed, by his own admission, Mr. Quarles never relied on any testimony or reports from Mr. Kunkel. *See e.g.*, 5/15/2023 Hr. Tr., p. 154:10-15 (Mr. Quarles admits he did not attempt to elaborate or amplify on Mr. Kunkel), p. 153:6-13 (Mr. Quarles did not reference any of Mr. Kunkel's reports), pp. 153:6-154:9 (Mr. Quarles admits he does not know Mr. Kunkel and was not aware of Mr. Kunkel's reports).

If Complainants' argument were correct, then any new expert could simply look to any order or information in the existing record, argue that it must be somehow based on opinions of the prior expert, and then make an entirely new opinion. But that is not the law. The law in Illinois, as followed by the Hearing Officer, is that a new expert is required to build upon the opinions *of the prior expert*. The reasoning is clear – the only way an opposing party (in this case MWG) is not prejudiced by naming a new expert is to place limitations on the new expert

tying them to the first expert's opinions. *Nelson v. Upadhyaya*, 361 Ill. App. 3d at 418. Complainants' attempt to skirt the law results in the same prejudice to MWG that MWG asserted when it objected to Complainants' request to replace its first expert.

By comparison, MWG's new experts adhered to the Hearing Officer and Board Orders by specifically citing to and relying on MWG's prior expert, John Seymour. For example, MWG's experts built on Mr. Seymour's evaluation of downgradient receptors and the absence of risk posed by the four stations. 6/12/2023 Hr. Tr. pp. 221:14-222:5. See *e.g.*, 6/12/23 Hr. Tr. pp. 189:20-190:24, pp. 221:9-223:20, pp. 233:12-238:8, pp. 255:21-264:12; 6/13/23 Hr. Tr. pp. 35:9-36:24, pp. 150:21-151:12, pp. 217:12-218:11, pp. 229:1-9, pp. 231:10-17. By following the law and the Hearing Officer Order, MWG was prejudiced because it was effectively precluded from the opportunity to make new opinions.

C. Conclusion

MWG respectfully requests that the Board reverse the Hearing Officer's decision and exclude Mr. Quarles's report and testimony because it is in violation of the Hearing Officer and Board Orders.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
Drew Nishioka
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
312-251-5255