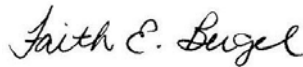


BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|------------------------------|---|-----------------------|
| 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 filed the following **COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINION** 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: September 13, 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, |) | |
| |) | |
| Respondent |) | |

**COMPLAINANTS’ OPPOSITION TO MIDWEST GENERATION, LLC’S
MOTION FOR LEAVE TO FILE ITS REPLY IN SUPPORT OF
ITS APPEAL OF THE HEARING OFFICER DENYING ITS OBJECTION TO
JONATHAN SHEFFTZ’S OPINION**

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) hereby respond to Midwest Generation, LLC’s (“MWG”) Motion to File a Reply in support of its Appeal of the Hearing Officer’s Ruling Denying its Objection to Jonathan Shefftz’s Opinions (“Motion”). The Board should deny MWG’s Motion because MWG has failed to demonstrate material prejudice as required by Rule 500(e). 35 Ill. Adm. Code 101.500(e). MWG will not be prejudiced by denial of its Motion because the Reply Memorandum attached to its Motion (the “Memorandum”) does not offer any argument on topics that it did not already address in its July 26, 2023 Appeal of the Hearing Officer’s Order Denying Its Objection to Jonathan Shefftz’s Opinion (“Appeal”).

MWG’s proffered reply brief offers nothing more than a repackaging of the same duplicative arguments that MWG has now made for the fifth time, complete with a new set of

misrepresentations of Mr. Shefftz's opinions and Complainants' legal arguments. Denial of the right to file a reply is appropriate and will not prejudice a party when that party has already "adequately stated its position." *People of the State of Illinois vs. Peabody Coal Co.*, No. 1999-134, 2002 WL 745609 at *3 (Ill. Pol. Control Bd/ Apr. 18, 2002). This means that a party cannot file a reply brief simply because it wants to make the same arguments more vehemently. As justification for its leave to file, MWG identifies two sections of Complainants' Response to which it claims it must have an opportunity to respond: first, it implies (without actually stating outright) that Complainants' description of the purpose of and inputs to Mr. Shefftz's testimony is different from previous descriptions; and second, it states that Complainants' limited discussion of Ms. Koch's analytical process is a "new" topic that requires a reply. MWG Mot. Para. 1-6, 10-11. Neither of these sections offers novel argumentation, and therefore neither provides any basis for a reply.

As an initial matter, MWG did not actually state in its Motion that Complainants' description of the purpose of and inputs to Mr. Shefftz's testimony is novel. This by itself is reason to deny the Motion; per Board rules, MWG may not file a reply brief simply because it has thought up a new way to communicate its concerns with Complainants' longstanding positions, and its failure to explicitly identify anything novel about Complainants' description of Mr. Shefftz's testimony negates its right to a reply brief on the subject. Instead, MWG suggests that the description is somehow novel by feigning new outrage; but that is simply not true. Most pointedly, MWG opens its Motion laser-focused on Complainants' use of the phrase "sole purpose" to describe Mr. Shefftz's testimony, MWG Mot. para. 1, but in so doing it disregards that Complainants used the *exact* same phrase to describe the purpose of Mr. Shefftz's testimony a year ago, when responding to MWG's initial Motion *in Limine* to remove Mr. Shefftz from this

case. *Compare*. Compl. Resp. to MWG's Appeal of the Hearing Officer's Ruling Denying its Objection to Jonathan Shefftz's Opinion ("Response") at 3, *with* Compl. Resp. to Respondent's Appeal of the Hr'g Officer's Ruling Denying its Mot. *in Lim.* to Exclude Jonathan Shefftz's Opinions ("MIL Response") at 3 (using near-identical language in both the heading and argument body). More broadly, Complainants incorporated by reference and attached the MIL Response in Complainants' Response to MWG's Appeal for the precise purpose of demonstrating that the issue had been briefed before. Compl. Resp. at 2 ("In support of this response, Complainants incorporate by reference and attach their written responses to the MWG MIL and MWG MIL Appeal."). In short, Complainants' previous brief contains the same description of the purpose of and inputs to Mr. Shefftz's testimony that was offered in the latest Response. MWG's assertion that any novel description was offered is belied by the very response containing that description.

MWG's secondary focus on Complainants' reference to Ms. Koch's analytical process also cannot justify a reply memorandum. Complainants' discussion of Ms. Koch's methodology is a direct response to—and offers no argumentation going beyond—MWG's own discussion of Ms. Koch's methodology in the original Appeal. MWG Appeal at 6-7 (contrasting Mr. Shefftz's inputs with Ms. Koch's inputs, and arguing that Ms. Koch's use of the Weaver Opinion was proper). In fact, Complainants took great pains to limit the responsive discussion of Ms. Koch's methods, explaining our intention to "examine [Ms. Koch's analysis] at length in the post-hearing briefing." Response at 6. And Complainants further explained that this discussion was only necessary to "underscore how fundamentally MWG misunderstands the appropriate role of an economic benefit expert." *Id.* at 7. In other words, the discussion of Ms. Koch's analysis was both directly responsive to argumentation in MWG's Appeal, and explicitly limited and tailored

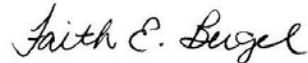
to avoid going beyond that argumentation. Thus, there is no basis for MWG to offer a Reply on the topic.

More broadly, nothing Complainants said in the Response offered any new perspective or argumentation beyond 1) a discussion of the new caselaw MWG cited in its original Appeal of the Hearing Officer's order ("Appeal"); and 2) a response to MWG's incredible claims in its Appeal that Ms. Koch should somehow be considered the definitive authority on appropriate economic expert behavior. Both of those discussions in Complainants' Response were limited to the scope of arguments MWG raised in its Appeal; Complainants offered no additional case citations. Thus, there is also no other basis for any reply brief from MWG.

For the foregoing reasons, Complainants respectfully request that the Board deny MWG's Motion for Leave to File Its Reply in Support of Its Appeal of the Hearing Officer Denying Its Objection to Jonathan Shefftz's Opinion.

Dated: September 13, 2023

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
fbugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
greg.wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
(802) 482-5379
aruss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
(312) 726-2938 (phone)
(312) 726-5206 (fax)
kharley@kentlaw.iit.edu

Attorney for CARE

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

Attorney for ELPC

CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, 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 **COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINION** before 5 p.m. Central Time on September 13, 2023, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 8 pages.

Respectfully submitted,



Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
greg.wannier@sierraclub.org

PCB 2013-015 SERVICE LIST:

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

Megan Wachspress
2101 Webster St., Ste. 1300
Oakland, CA 94612
Megan.wachspress@sierraclub.org

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

Albert Ettinger
Law Firm of Albert Ettinger
7100 N. Greenview
Chicago, IL 60606

Jennifer T. Nijman
Susan M. Franzetti
Kristen Laughridge Gale
Kelly Emerson
Nijman Franzetti LLP
10 South LaSalle St., Suite 3400
Chicago, IL 60603
(312) 251-5250
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com
ke@nijmanfranzetti.com

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

Electronic Filing: Received, Clerk's Office 09/13/2023

(773) 818-4825
ettinger.albert@gmail.com

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

James M. Morphey
Sorling Northrup
1 N. Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
(217) 544-1144
jmmorphey@sorlinglaw.com

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

Melissa S. Brown
Hepler Broom LLC
4340 Acer Grove Drive
Springfield, IL 62711
(217) 523-4900
melissa.brown@heplerbroom.com

Dated: September 13, 2023