

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	Attached Service List
Illinois Pollution Control Board	
60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board Midwest Generation, LLC’s Objection to Complainants’ Sur-Reply Regarding Complainants’ Exhibit 1408, a copy of which is herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: September 21, 2023

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MIDWEST GENERATION, LLC’S OBJECTION TO COMPLAINANTS’ SUR-REPLY REGARDING COMPLAINANTS’ EXHIBIT 1408

Midwest Generation, LLC (“MWG”) objects to and requests that the Board reject Complainants’ brief filed as a “Sur-Reply” in support of their Response to MWG’s Appeal from Hearing Officer’s ruling to admit Complainants’ Exhibit 1408 as Evidence (“sur-reply”). Complainants’ filing must be disregarded because Complainants failed to request leave to file the sur-reply, failed to provide any basis for the Board to accept the sur-reply, and failed to make any claim of material prejudice, each as required by Illinois Pollution Control Board (“Board”) rules.

Section 101.500(e) of the Board Rules states that the moving party does not have a right to reply, except as allowed by the Board or Hearing Officer to prevent material prejudice. 35 Ill. Adm. Code 101.500(e). A reply must be filed with a motion for permission to file a reply. *Id.* There is no distinction between a reply and a sur-reply and when a party fails to seek leave to file a motion for reply or sur-reply, the Board disregards them. *People of the State of Illinois v. American Waste Processing, LTD*, PCB96-264, (Jan. 23, 1997) (Board struck both the complainants’ reply and respondents’ sur-reply because both parties failed to seek leave to file the

motions). When a party fails to demonstrate material prejudice, the Board will deny the motion for leave. *People of the State of Illinois v. Panhandle Eastern Pipeline Company*, PCB99-191 (July 27, 2000) (Board denied motion to file reply because movant failed to demonstrate material prejudice).

Here, Complainants do not request leave to file a sur-reply.¹ Complainants also do not claim any material prejudice should their sur-reply not be accepted. In fact, their sur-reply makes no mention of material prejudice at all. Because Complainants failed to follow the Board rules, Complainants' sur-reply must be disregarded and struck from the record.

Moreover, MWG would be materially prejudiced if the Board were to consider the sur-reply. Complainants raise even more novel and unsupported arguments in their sur-reply than in their original response. If the Board were to allow the sur-reply, then MWG would ask leave to file a sur-sur-reply in response to the novel arguments. The Board should end this now and reject the unsupported and improperly filed sur-reply.

Respectfully submitted,
Midwest Generation, LLC

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

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¹ In fact, Complainants' sur-reply is misplaced and premature for the simple reason that MWG's reply brief (for which MWG requested leave to file) has not yet been accepted by the Board.