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' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS,** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

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Attorney for Sierra Club

Dated: March 4, 2022

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COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS

Pursuant to 35 Ill. Adm. Code 101.500, Complainants offer the following response to Midwest Generation, LLC's Motion *in Limine* to exclude Jonathan Shefftz Opinions ("MWG Motion"). MWG's Motion demonstrates a misunderstanding of the nature and purpose of Mr. Shefftz's testimony, and bases its extreme request—to completely remove crucial expert testimony that sets forth a process by which penalties should be calculated from this case—on an incomplete and ultimately unreliable retelling of the relevant caselaw.

I. Expert Testimony May Be Based on Circumstantial Evidence and Reasonable Assumptions

It is well established that "[e]xpert testimony is admissible if the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education and the testimony will assist the trier of fact in understanding the evidence." *Taylor v. Cty. of Cook*, 2011 IL App (1st) 093085, ¶ 32, 957 N.E.2d 413, 426 (internal quotations omitted). Indeed, this statement of

the rule comes from the first authority cited by MWG in its Motion. MWG's Motion does not challenge Mr. Shefftz's qualifications, training, or experience. Instead, MWG claims that because Mr. Shefftz relied on information from Complainants' counsel regarding MWG's date of noncompliance—which included reasonable assumptions based on the available data regarding the length of time a hypothetical remedy would take to implement—his testimony describing a detailed process for calculating economic benefit of noncompliance is somehow invalidated. This is false.

In support of its assertion that experts may not incorporate reasonable assumptions into their expert opinions, MWG offers citations to multiple decisions. MWG Mot. at para. 4, 5. But those decisions do not support MWG's argument. Instead, they stand only for the unremarkable proposition that an expert opinion should be excluded if the expert fails to explain his or her own methodology, or otherwise fails to explain the analysis applied to relevant facts and assumptions. *See Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (excluding the opinion of a forensic document examination expert that failed to disclose her own methodology for identifying the authenticity of signatures); *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (excluding the opinion of a fingerprint expert that failed to disclose his methodology for identifying fingerprints or the steps he followed); *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146-48 (2d Dist. 2000) (excluding the opinion of a medical expert where his testimony failed to establish the reasonableness of his reliance on a physical examination that occurred more than 2.5 years prior); *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (1st Dist. 2009) (excluding the opinion of an expert that constituted not an opinion on fact, but a legal conclusion); *In re Marriage of Cutle*r, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (excluding the opinion of an expert who based his valuation of a business on a "rule of thumb" calculation that ignored

numerous circumstances lowering the value of the business). None of the holdings of those decisions apply here. The decisions cited by MWG deal with fundamental flaws in experts' communication of their own methodology that rendered those expert opinions inadmissible. In contrast, Mr. Shefftz provided an exhaustively thorough description of the process he used to develop his opinions, meticulously laid out all assumptions (including the financial inputs he used to calculate a potential penalty), and developed a well-supported economic benefit of noncompliance.

Far more relevant are a series of decisions establishing that experts can and in fact regularly do base their opinions on assumptions, even where those assumptions remain uncertain. In Illinois, "[t]he fundamental requirement with respect to expert testimony is that the assumptions that support the expert's opinion must be within the realm of direct or circumstantial evidence, supported by the facts or reasonable inferences from the facts." *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539, 544, 428 N.E.2d 495, 499 (1981) (*citing Guardian Elec. Mfg. Co. v. Industrial Com.*, 53 Ill.2d 530, 535, 293 N.E.2d 590 (1973)); *see also People v. Negron*, 2012 IL App (1st) 101194, ¶ 49, 984 N.E.2d 491, 502, as modified on denial of reh'g (Jan. 31, 2013) ("'Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.'") (*quoting Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)). Thus, assumptions supported by inferences from the facts may be reasonably replied upon by experts, and Mr. Shefftz was well within the bounds of permissible expert conduct in basing his financial analysis on reasonable inferences from the record in this case.

MWG is also wrong to suggest that Mr. Shefftz may not properly rely on assumptions that Complainants' counsel provided. MWG Mot. at para. 9. MWG has identified no

prohibition against counsel providing experts with assumptions that should underly their analysis, because no such prohibition exists. And no such prohibition exists because it is in fact common practice for counsel to work with experts to determine what reasonable assumptions must be made to support the expert's opinions. Indeed, the Federal Rules of Civil Procedure explicitly anticipate this practice and set forth discovery rules around it: as part of the duty to disclose, parties must "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Fed. R. Civ. P. 26(b)(4)(C)(iii). MWG cites to only a single unpublished decision to support its assertion that an expert report may not rely in any form on statements provided by counsel: *Ross v. City of Rockford*. MWG Mot. at para. 11 (*citing* 2018 U.S. Dist. LEXIS 51398, *9). But that decision actually only cautions against those reports where the attorney's influence is so great that "it cannot be fairly said that the report was 'prepared' by the expert." *Johnson v. City of Rockford*, No. 15 CV 50064, 2018 WL 1508482, at *4, n.1 (N.D. Ill. Mar. 27, 2018).[1] Here, there can be no question that Mr. Shefftz's report is his own work, or that Mr. Shefftz's expert analysis is based entirely on his own extensive financial analysis.

MWG's concerns regarding Mr. Shefftz's expert opinion boil down to disputes they have with the usefulness of the assumptions Mr. Shefftz relied on. But excluding Mr. Shefftz's testimony is not the appropriate way to resolve these disputes. In cases where an expert relies on factual assumptions or circumstantial evidence, the "better course" for tribunals to take is generally "to admit the testimony of [an] expert witness and allow extensive cross-examination with respect to the disputed and unclear facts." *Nelson v. Speed Fastener,* 101 Ill. App. 3d at

[1] While the case cited by Respondent appears under a different name (*Ross v. City of Rockford* compared to *Johnson v. City of Rockford*), counsel for Complainants is confident that these are the same case.

545. MWG will have its opportunity to cross examine Mr. Shefftz regarding the assumptions underlying his expert opinion. But MWG may not short-circuit this process and avoid engaging with the well-reasoned financial analysis Mr. Shefftz provided. For these reasons, MWG's Motion should be denied.

II. The Remedy Cost and Expenditure Timeline Assumptions Mr. Shefftz Relied Upon Were Supported by Record Evidence and Reasonable Inferences

MWG's assertion that the assumptions incorporated into Mr. Shefftz's expert opinion are unsupported or otherwise improper also fails. MWG Mot. at paras. 7–12. Courts have regularly concluded that experts may rely on reasonable assumptions arising from the factual evidence in a case. "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible. . . . Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993) (internal citations omitted). Applying that standard here, the operational assumptions that were necessary for Mr. Shefftz to reach his opinion in this case either come directly from previous expert reports in this case, or arise naturally by reasonable inference from the record in this case or expert reports.

MWG's Motion takes issue with four sets of assumptions that underlie Mr. Shefftz's financial analysis: a) the capital investment costs associated with full removal of coal ash materials propounded by Complainants' expert James Kunkel; b) the compliance dates and remedy schedule that serve as the infrastructure for his financial analysis; c) the existence of ongoing violations at the MWG sites; and d) information relating to remediation activities that would have taken place regardless of when MWG fully removed coal ash materials from its sites.

MWG Mot. at para. 8–12. The first set of assumptions can be defended easily: the remedy cost figures are drawn directly from an expert report that was submitted by Complainants' expert Dr. Kunkel, and which is heavily supported by extensive documentation and expert analysis. The idea that it would be improper for Mr. Shefftz to base his economic benefit calculation on such a fully reasoned remedy report, even one that MWG disagrees with, is absurd.

The second set of assumptions Mr. Shefftz relied on that MWG takes issue with is the hypothetical compliance schedule MWG would have followed had it immediately remediated the groundwater contamination for which it has now been found liable, as well as the compliance schedule MWG will follow should it now remediate the groundwater contamination for which it has been found liable. These two schedules provide the inputs necessary for Mr. Shefftz to perform his analysis, because the economic benefit of noncompliance by its nature must compare the costs associated with a remedy with the costs the company would have incurred had it pursued that remedy in the first place, instead of waiting for a court to order them to do so. The economic benefit typically comes from the monetary windfall the violating entity has gained by delaying the process of cleaning up its violations. *See generally* Jonathan S. Shefftz, Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs (Jan. 25, 2021) ("Shefftz Initial Report") (Ex. 1 to MWG Mot.). As an initial matter, Mr. Shefftz assumed that the coal ash removal should have begun when MWG first began groundwater sampling because that is the time when MWG first became aware of its ongoing groundwater contamination—the contamination that the Board has now confirmed violated the Illinois Environmental Protection Act. In turn, Mr. Shefftz's assumption regarding the start of a possible remedy is based on the present calendar date, assuming the Board requires such a remedy. Mr. Shefftz has already updated his expert opinion to reflect the continued

passage of time while MWG does nothing, and he can do so again should it aid the Board.

Mr. Shefftz also relied on a 10-year construction schedule that was provided to him by Complainants' counsel as a schedule that he could rely on for purposes of his economic benefit analysis. This assumption, while a simplifying one because MWG has not offered how long it would take to organize removal of coal ash from its sites, is well "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences." *Carter v. Johnson*, 247 Ill. at 297. Specifically, Dr. Kunkel's report laying out the costs of coal ash removal also discusses the scope of activities that would be required. With this context, as well as Complainants' Counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states, a 10-year removal timeline represented a reasonable hypothetical timeline from which to base Mr. Shefftz's opinions.

The third set of assumptions MWG takes issue with is that there is ongoing groundwater contamination causing violations of the Illinois Environmental Protection Act at each of the sites. This assumption of course goes beyond Mr. Shefftz's field of expertise, but it is also supported by extensive and ongoing groundwater monitoring at each of the four sites in this case, which Complainants have received through supplemental discovery and will be entering into evidence at the forthcoming remedy hearing in this matter. Thus, there can be no reasonable dispute with Mr. Shefftz relying on this information.

The final set of assumptions to which MWG objects relates to Mr. Shefftz's reliance on Counsel's representations that MWG would have relined ponds and conducted groundwater monitoring even in Mr. Shefftz's hypothetical compliance scenario. MWG Mot. at para. 12. Mr. Shefftz's hypothetical to calculate economic benefit assumed MWG removed coal ash from the ponds and fill areas at the four sites when it first became aware of the groundwater

contamination from the coal ash. Shefftz Initial Report at 22; Jonathan S. Shefftz, Supplemental and Rebuttal Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, at 14 (July 16, 2021) (Ex. 2 to MWG Mot.). The idea that MWG would have relined the ponds and monitored groundwater in any scenario is not controversial—MWG did in fact reline the ash ponds and conducted groundwater monitoring, and did so pursuant to compliance agreements with Illinois EPA, which means that these activities would have occurred in any event. *See* Hr'g Exs. 626, 636, 647, and 656. In fact, IEPA communicated in 2009 that it was requiring groundwater monitoring of MWG's ponds. *See* Hr'g Exs. 621.[2] The conclusion that MWG would have relined the ponds even if MWG removed all of the onsite ash stems from the fact that, historically, MWG did reline the ponds even though MWG regularly removed the ash from the ponds. See, e.g., Joint Agreed Stipulations (Oct. 2, 2017); Hr'g Tr. at 58:22-59:6, 61:4-12, 101:1-6, 111:15-21, 118:13-24, 192:13-22, 208:29-209:2 (Jan. 30, 2018). It is clear from the record that removing the ash from the active ponds did not affect MWG's decision to reline those ponds. If MWG were going to continue to manage the ash wet (which it did), then it needed to use those ash ponds (which it did). If MWG were going to continue to use the ash ponds (which it did), then it needed to reline them (which it did). Removing additional ash from outside those ponds is not related in any way to the Respondent's decision to reline the ponds. The fact that MWG would have relined the ponds and monitored groundwater regardless of any removal scenario is absolutely "supported by the record" that has been established in this case, as demonstrated above. *See Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993). In short, each set of assumptions to which MWG objects

[2] MWG may dispute IEPA's authority to do so but that doesn't translate to the groundwater monitoring being voluntary. Hr'g Ex. 621.

arises either directly from the record or through reasonable inference and is therefore entirely appropriate and cannot justify excluding Mr. Shefftz's testimony. While MWG is free to challenge those assumptions in the course of a hearing, Mr. Shefftz's testimony is well within the scope of expert testimony Illinois courts have regularly allowed to be admitted.

III. MWG's Motion Reveals a Fundamental Misunderstanding of the Scope and Purpose of Mr. Shefftz's Testimony

MWG's entire Motion is premised on a challenge to the very concept that potential penalties may be discussed before a final remedy is determined. MWG Mot. at para. 14. MWG's apparent argument is that in cases where the remedy for a violation of the Illinois Environmental Protection Act requires long-term action, the Board should ignore the explicit statutory section of the Act requiring that the Board consider in its penalty determination "any economic benefits accrued by the respondent because of delay in compliance with requirements." 415 ILCS 5/42(h)(3). This position runs contrary to the core penalty provisions of the Act and is wholly unsupported by any caselaw. MWG's argument also fails to grasp that the primary function of Mr. Shefftz's testimony is to provide a methodology which may be applied to the facts established in this case to determine the appropriate penalty.

MWG cites to two Board Orders that it claims stand for the proposition that the Board should not calculate economic benefit of noncompliance where long-term remediation is required, but even a cursory review of those two orders makes clear that neither order actually supports this position. MWG's Mot. at para. 14. The first case, *Illinois v. Poland et al.*,[3] involved an open dumping enforcement claim by the state against a series of parties operating a landfill. PCB 98–148, 2003 WL 21995867 (Aug. 7, 2003). MWG asserts that the notable and relevant

[3] *Available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-39766.

component of that decision, as applied to this case, is the complainant's apparent acknowledgment that "a precise quantification of the economic benefit" may not be possible. But MWG fails to acknowledge that in reaching its decision the Board first recognized that the complainant contended it had "introduced testimony and documentary evidence regarding . . . the accrual of economic benefit," and that the Board imposed the specific penalty recommended by the complainant. *Compare Illinois v. Poland*, 2003 WL 2199586, at *7 (complainant discussing economic benefit and requesting a $25,000 penalty) *with id.* at *12–13 (Board imposing $25,000 penalty). The second case, *Illinois v. Lowell Null*,[4] involved an enforcement action against a pallet shredding company that illegally stored and burned waste on-site. PCB 11-26, 2011 WL 4863705, at *2 (Oct. 6, 2011). There, the Board only declined to meaningfully apply Section 42(h)(3) because it was simply unable to: there was no apparent attempt by either party to quantify the Respondent's economic benefit from delayed compliance. *Id.* at *11. This is obviously distinguishable from the situation here, where Complainants have proffered a robust quantification of MWG's economic benefit based on the remedy Complainants believe is appropriate here (full removal of all coal ash materials from all four sites).

More broadly though, this argument—and MWG's Motion overall—fails because it assumes that the facts and assumptions Mr. Shefftz relied upon must remain static as the case continues to progress. This is demonstrably not true: already, Mr. Shefftz has updated his economic benefit calculation to reflect the passage of time (resulting in an increased value due to the added delay MWG has benefitted from). This figure will need to be further updated as time continues to pass, but the passage of time is far from the only way in which his analysis may need to be updated depending on how this case progresses. Complainants asked Mr. Shefftz to

[4] *Available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-73890.

calculate an economic benefit based on the remedy Complainants believe is appropriate to remediate the statutory violations MWG has committed and continues to commit; but as will be demonstrated by Complainants' expert Mark Quarles in the upcoming hearing in this matter, a nature and extent study will be needed to identify the scope of contamination and ash material locations that will need to be cleared. The exact timeline of a remedy thus depends not merely on the Board's future decisions in this proceeding and the length of time it takes to begin remedial action, but also on the scope of the ash, contamination, and necessary cleanup that is identified through any nature and extent study the Board requires MWG to conduct.

At its core, the expert analysis and opinions provided by Mr. Shefftz offer a methodology for calculating the economic benefit MWG reaped by failing to remediate groundwater contamination at any of the four sites, despite being aware of it for eleven to twelve years and counting. The specific inputs to that methodology were never going to be exact, because the Board (and not Complainants) ultimately has the authority and obligation to determine a remedy for MWG's violations that addresses the ongoing violations. The extent of such a remedy will by its very nature impact the ultimate determination of penalties, because the economic benefit of delay is higher when the overall delayed costs are higher. Because of this reality, the Board could order Mr. Shefftz to update his calculations to account for new or updated inputs. But that does not mean that his current testimony is unsupported. To the contrary, in the face of this significant uncertainty, Mr. Shefftz has offered to the Board exactly what it will need to meet its obligation to consider economic benefit pursuant to Section 42(h)(3) of the Act; and he has calculated Complainants' best estimate of that benefit based either directly on facts established in the record today, or on reasonable inferences from those facts. Throwing out this analysis would deprive the Board of expert "testimony [that] will assist [the Board] in understanding the

evidence" before it, and it would be inconsistent with Illinois courts' consistent practice of allowing expert testimony that is reliably supported by the record. *See Taylor v. Cty. of Cook,* 2011 IL App (1st) at ¶ 32. For these reasons, MWG's Motion's request to strike Mr. Shefftz's economic benefit should be denied.[5]

IV. Mr. Shefftz's Opinion on Financial Deterrence Does Not Constitute a Legal Opinion, but Merely Offers Financial Context to Help Guide the Penalty Calculation

Finally, MWG's Motion also seeks to exclude sections of Mr. Shefftz's testimony discussing the importance of factoring in likelihood of enforcement as part of its penalty determination. MWG Mot. at paras. 17–21. This section of Mr. Shefftz's report makes the point that any penalty imposed should ensure that the economic cost of noncompliance, as measured by the probabilistic penalty amount (i.e., the penalty multiplied by the likelihood of enforcement), matches the economic benefit of noncompliance. MWG takes exception to this opinion, and offers two reasons it believes the opinion should be excluded: a) because Mr. Shefftz's opinion constitutes a "legal interpretation"; and b) because Mr. Shefftz's opinion "actually contradicts Board precedent." MWG Mot. at para. 20. Neither of these purported justifications is supported by caselaw or common sense.

MWG's claim that Mr. Shefftz's opinion constitutes a legal interpretation fails upon review of the actual language of Mr. Shefftz's report. In the section entitled "General Concepts and Probability Adjustments," Mr. Shefftz offers appropriate context to the Board for its determination of an appropriate penalty in this case. Mr. Shefftz refers to a panel of "EPA-

[5] Complainants reserve the right to contest MWG's request to exclude Mr. Shefftz's opinion that the recommended $41.6 million economic benefit penalty is affordable to MWG, based on the claim that it will be moot if Mr. Shefftz's economic benefit opinions are excluded. MWG's Motion at para. 21. This request is irrelevant, because there is no basis for excluding Mr. Shefftz's economic benefit opinions.

convened *academic* experts" that was constituted as the "Science Advisory Board," discusses their recommendations, offers additional context through analogy and based on his own expertise on the topic, and closes with an explanation why this consideration could help the Board ensure that it ultimately makes MWG "financially indifferent between compliance versus noncompliance."[6] Shefftz Initial Report at 7–9 (emphasis added). Nothing in any of this discussion seeks to interpret or apply any law, rule, regulation, or other legal standard. In fact, the Illinois Environmental Protection Act penalty factors under 415 ILCS 5/42(h), which the Board is obligated to follow, are not even mentioned in this section of his report. Complainants do not dispute that experts' opinions on legal matters are inadmissible and cannot be relied upon by the Board; but MWG has not identified any place in this discussion where Mr. Shefftz proffers a legal opinion.

MWG's second argument, that Mr. Shefftz's deterrence discussion recommends that the Board conduct a penalty analysis that runs contrary to Board precedent, is also untrue. Specifically, while MWG is correct that the Act does not contain any *specific* "requirement to adjust a penalty by probability of detection, prosecution, or ultimate payment" (MWG Motion at para. 19), it is incorrect that a specific reference is needed for the Board to enact such an adjustment. This is because the civil penalty factors are not presented as an exclusive list: the Board is authorized to "consider *any matters of record* in mitigation or aggravation of penalty, including, *but not limited to*," the specifically delineated factors. 415 ILCS 5/42(h). MWG's chain of citations to previous Board cases in which the Board did not consider this factor is largely irrelevant: the Board is not obligated to conduct the same penalty analysis in every case,

[6] The fundamental concept of economic benefit of noncompliance is based on the common understanding that without penalties, and even where remedial action is ultimately required, violators will find themselves incentivized *not* to comply with laws and regulations.

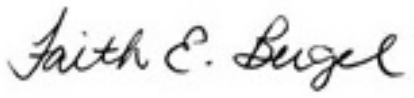
and it is not limited by its previous penalty determinations as to what it may consider in future penalty determinations. In fact, MWG's first citation underscores this point: MWG's Motion cites to *IEPA v. Barry* for the proposition that the Board "recognizes that no formula exists to determine how to adjust for deterrence." MWG's Motion at para. 19; *see IEPA v. Barry*, 1990 WL 271319, at *25, PCB 1988-71. But the Board was not discussing deterrence adjustments: it was explaining that no formula exists that dictates how it must balance the delineated (or nondelineated) factors in its Section 42(h) penalty determination, meaning that it can conduct this assessment for each individual case based on the specifics of that case.

V. Conclusion

For the reasons stated in more detail in the preceding Sections, Complainants Respectfully Request that the Hearing Officer Deny MWG's Motion *In Limine* to Exclude Jonathan Shefftz Opinions in its entirety.

Dated: March 4, 2022

Respectfully submitted,



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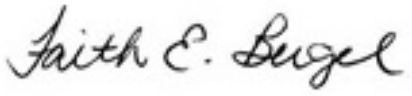
CERTIFICATE OF SERVICE

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 **COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS** before 5 p.m. Central Time on March 4, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 17 pages.

Respectfully submitted,



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