

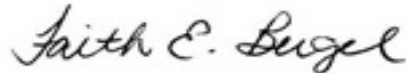
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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’ MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT’S RESPONSE TO THEIR MOTION *IN LIMINE*, and COMPLAINANTS’ REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE NEW OR REVISED OPIONIONS BASED ON UNTIMELY DISCOSED DOCUMENTS** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: March 18, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
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MIDWEST GENERATION, LLC,)	
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Respondent.)	

COMPLAINANTS’ MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT’S RESPONSE TO THEIR MOTION *IN LIMINE*

Pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) Procedural Rules, 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*, their Reply to Respondent MWG’s Response to their Motion *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents. A reply brief is warranted because MWG’s Response fundamentally mischaracterizes Complainants’ Motion and misconstrues the Board’s December 10, 2021 Order and Complainants would be prejudiced if no reply were allowed. In support of their motion, Complainants submit their Reply and state:

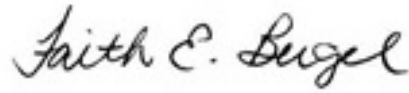
1. On March 4, 2022, MWG filed its Response to Complainants’ Motion *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents. MWG’s Response presents a misleading account of Complainants’ Motion and the Hearing Officer’s December 10, 2021 Order.

2. First, Respondent erroneously states that they have complied with the Hearing Officer's December 10, 2021, Order, which sets forth the timeline for proper production of documents. The Hearing Officer's December 10, 2021 Order is explicitly clear and unambiguous concerning the timing on document disclosure – "No further production" will be allowed after December 15, 2021. As such, all documents must have been produced by December 15, 2021. Despite this instruction, Respondent claims they complied with the Hearing Officer's Order when they produced the documents in question on January 10, 2022.
3. Next, Respondents assert that their production is proper because the untimely documents support the Weaver expert opinion. Respondent attempts to ignore the plain language of the Hearing Officer's Order. Complainants will be prejudiced if Respondent is allowed to offer expert opinions on documents that were kept from view. Respondent's experts should be barred from providing opinions based on these untimely produced documents.
4. Lastly, Respondent attempts to discredit Complainants. Complainants are entitled to an opportunity to defend themselves against this accusation.
5. Complainants will suffer material prejudice if they are not permitted to Reply to address these issues. Complainants have prepared a Reply in support of their Motion *In Limine*, and have attached that Reply to this motion.
6. This Motion is timely filed on March 18, 2022, within fourteen days after service of MWG's Response, as required by 35 Ill. Admin. Code § 101.500(e).

WHEREFORE, Complainants respectfully request that the Hearing Officer grant Complainants' Motion for Leave to File, *Instantly*, their Reply to Respondent's Response to their Motion *In Limine* to Exclude New or Revised Expert Opinions, and accept the attached Reply as filed on this date.

Dated: March 18, 2022

Respectfully submitted,



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Complainants,)	
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v.)	PCB No-2013-015
)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

COMPLAINANTS’ REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE NEW OR REVISED OPIONIONS BASED ON UNTIMELY DISCLOSED DOCUMENTS

Pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) Procedural Rules, Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this Reply to Respondent *Midwest Generation, LLC’s Response in Opposition to Complainants’ Motion in Limine to Exclude New or Revised Expert Opinions* (“MWG Resp.”). MWG’s Response fundamentally mischaracterizes Complainants’ Motion and misconstrues the Hearing Officer’s December 10, 2021 Order. In support of their original motion, Complainants submit their Reply and state:

I. MWG’s Late Production Violates the Hearing Officer’s December 10, 2021, Order

MWG’s *Response in Opposition to Complainants’ Motion In Limine to Exclude New or Revised Expert Opinions* ignores that Complainants’ Motion *In Limine* asserts that the expert

opinions should be excluded because they were based on untimely disclosed documents. MWG even deletes from its description of Complainants' Motion the portion of the title that indicates it is "Based on Untimely Disclosed Documents".¹ Respondent never responds to the portion of Complainants' argument where Complainants pointed out that the basis of the motion was "untimely produced documents" and that Respondent never "indicated their intention to rely on any of these documents at their expert depositions."²

To compound this, MWG misstates the holding of the Hearing Officer's December 10, 2021, Order which outlines the requirements for timely document production. MWG states "[t]he items identified were exactly as the [December 10, 2021] Order required – additional materials."³

Indeed, the Hearing Officer's December 10, 2021 Order is explicitly clear and unambiguous concerning the timing on document disclosure: "No further production" will be allowed after December 15, 2021. The Hearing Officer's Order— in relevant part— provided two critical deadlines:⁴

- December 15, 2021: All supplemental fact discovery due; no further production after this date;
- January 10, 2022: Notice of any additional items experts will rely on based on supplemental production

As such, the Parties, by the close of supplemental discovery on December 15, 2021, must have produced all documents. Per the Order, no additional production would be allowed after this date. By January 10, 2022, the Parties must identify items in this supplemental production – that

¹ MWG Resp. at 1.

² Complainants' Mot. *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, at 1, and ¶ 5, Feb. 4, 2022 ("Complainants' Mot.").

³ MWG Resp. at 1.

⁴ Hearing Officer Order at 1, Dec. 10, 2021.

is, documents produced by December 15, 2021 – their respective experts would rely on. In other words, party experts would not be able to rely on the additional items if the items were not part of the December 15, 2021 supplemental production.

Accordingly, the dispositive question is: Did MWG produce its supplemental production of documents on or before December 15, 2021? The answer to this question is definite: No. MWG made no effort to supplement or produce any of the documents in question by December 15, 2021. Indeed, Complainants had no indication that Respondent would rely on any of the underlying documents prior to Respondent’s production of such on January 10, 2022.

Respondent, however, asserts their late production on January 10, 2022, is authorized as “[t]he items identified were exactly as the Order required – additional materials.”⁵ Respondent ignores the requirement from the Hearing Officer’s Order that any additional material be based on the “supplemental production.”⁶

The documents at issue—as listed in Complainants’ Motion at ¶ 4—were never identified or included in any supplemental production. Because none of the underlying documents were “additional items ... based on supplemental production,”⁷ Respondent’s experts may not rely on any of those documents. Respondent did not produce these documents in a timely manner. Despite MWG’s assertion, MWGs failed to comply with the Hearing Officer’s order and their “additional materials” are not proper. As Respondent violated the Hearing Officer’s Order, Respondent and their expert should be limited to documents properly produced.

⁵ MWG Resp. at 1.

⁶ Hearing Officer Order at 1, Dec. 10, 2021.

⁷ *Id.*

II. Complainants are Prejudiced as They Should Have Had the Opportunity to Depose Weaver on the Additional Material, as Such Material was Available Prior to the Weaver Deposition

Respondent's failure to timely produce, or provide notice of, the additional documents prejudices Complainants. Such steps to suppress these additional documents is an affront to the discovery process and is prejudicial to Complainants. Nothing in MWG's Response remedies or excuses this prejudice. Respondent does not contest that the documents were available prior to Weaver's deposition. Nor does Respondent contest that it did not disclose these documents until after the close of the supplemental discovery period. Despite Respondent's failure to timely disclose these readily available documents, they now seek the ability to use such documents at the hearing to support Weaver's opinion.

As the documents were readily available to Respondent prior to their expert's deposition, Complainants should have been given the opportunity to depose Weaver on such matter, and/or have their expert review the documents Weaver based their opinion on. Respondent's failure to properly supplement fact discovery with this information prevents Claimants from adequately preparing for cross-examination.

Respondent's assertion that the production should be allowed because "[t]hese additional, factual, and public documents clearly support Weaver's original opinions on compliance" is irrelevant.⁸ At issue is the fact that Respondent failed to disclose these documents in a timely manner (either prior to deposition or by December 15, 2021). This failure to disclose amounts to a surprise and is therefore improper, especially in light of the fact that the documents in question consist of a new category of documents (adjusted standard proceedings before the PCB), unlike the Federal or State CCR documents.

⁸ See MWG Resp. at 3.

As stated in the underlying motion *in limine*, Complainants will be prejudiced if MWG is allowed to offer expert opinions on documents that were kept from Complainant's view. Respondent has failed to explain why their experts should not be barred from providing opinions based on these untimely produced documents.

III. Respondent's Improper Attempt to Shift Blame to Complainants Fails.

Respondent, in an attempt to discredit Complainants, states that Complainants claimed that the July 18, 2017 Hearing Officer Order "supported their motion to exclude."⁹ Respondent misunderstands and mischaracterizes Complainants' statements. Complainants stated that Complainants' Motion to Exclude is "consistent with the Hearing Officer's Order of July 18, 2017."¹⁰ This subtle distinction between "supported" and "consistent with" is important.

A brief review of the facts of the 2017 dispute are instructive. There, the Hearing Officer entered a discovery schedule, which included deadlines for expert reports and deposition.¹¹ Respondent took the Complainants' expert's deposition on March 17, 2016.¹² The Parties then timely exchanged over 4,000 pages of additional discovery, to include documents relevant to the opinions of both parties' experts.¹³ Respondent then filed a motion *in limine* seeking to limit the experts to the opinions stated in their reports and depositions.¹⁴ The Hearing Officer denied Respondent's motion, holding that "experts may rely on discovery documents produced after those expert's depositions in order to elaborate previously disclosed opinions."¹⁵

The substantial difference between the current issue and the 2017 issue is that in 2017 Respondent sought to exclude timely produced documents. Currently, Complainants are seeking

⁹ MWG Resp. at 8.

¹⁰ Complainants' Mot., ¶¶ 9-10 (Feb. 4, 2022) (emphasis added).

¹¹ Hearing Officer Order, Sept. 30, 2015.

¹² Complainants' Resp. to Mot. *In Limine* Regarding Expert Testimony at 2, June 8, 2017.

¹³ *Id.*

¹⁴ MWG's Mot. *In Limine* Regarding Expert Testimony, May 22, 2017.

¹⁵ Hearing Officer Order, July 18, 2017.

to exclude untimely produced documents. In this matter, Respondent—apparently seeking to rely on the Hearing Officer’s prior determination that “experts may rely on discovery documents produced after those expert’s depositions in order to elaborate previously disclosed opinions”¹⁶—failed to disclose documents prior to the deposition, and untimely produced these documents after the close of fact discovery. Ultimately, Respondent’s ploy must fail because the Hearing Officer’s July 18, 2017 Order provides no cover for Respondent’s failure to produce these documents by the deadlines established in the Hearing Officer’s December 10, 2021 Order, and because Respondents could have produced the documents prior to deposition but chose not to.

Respondent erroneously claims that Complainants’ fail to “even attempt[] to explain or distinguish [the July 2017 Order].”¹⁷ Respondent is wrong. Complainants’ Motion does exactly what Respondent claims it does not—explain why Complainants’ motion is consistent with the Hearing Officer’s July 18, 2017 Order. In three sentences, Complainants explain all of this:

9. ... In that instance, Respondent produced the documents at issue after the expert’s deposition. Respondent then brought a motion *in limine* to exclude Complainant’s experts from relying on these documents.

10. Currently at issue, the dockets containing the documents listed above were all initiated in May and September by MWG itself and before expert depositions, so those initial docket filings could have been disclosed at expert depositions.¹⁸

In short, Complainants’ Motion *In Limine* is consistent with the Hearing Officer’s July 18, 2017 order because the situations are distinguishable. There is nothing misleading here, let alone

¹⁶ *Id.*

¹⁷ MWG Resp., at 8

¹⁸ Complainants’ Mot. *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, ¶¶9-10 (Feb. 4, 2022) (emphasis added).

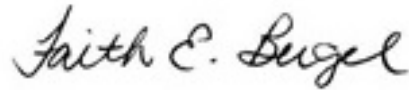
intentionally misleading and sanctionable. Respondent is attempting to divert the discussion from the substance of Complainants' motions.

IV. CONCLUSION

For all of these reasons — including as stated in Complainants' Motion *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents — Complainants respectfully request that the Hearing Officer enter an order prohibiting Respondent from relying on the untimely produced documents listed in paragraph 4 of the Complainants' Motion in Limine to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents.

Dated: March 18, 2022

Respectfully submitted,



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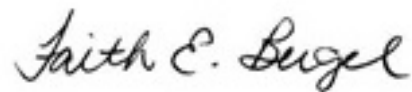
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CERTIFICATE OF SERVICE

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' MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT'S RESPONSE TO THEIR MOTION *IN LIMINE*, and COMPLAINANTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE NEW OR REVISED OPIONIONS BASED ON UNTIMELY DISCOSED DOCUMENTS** before 5 p.m. Central Time on March 18, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 14 pages.

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