Electronic Filing: Received, Clerk's Office 4/05/2022

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| **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
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Objections to Complainants' Three Requests for Leave to File Replies *Instanter* to Motions in Limine, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: April 5, 2022

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Midwest Generation, LLC's Objections to Complainants' Three Requests for Leave to File Replies *Instanter* to Motions in Limine, a copy of which is hereby served upon you was filed on April 5, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies of the Notice of Filing, Certificate of Service and Midwest Generation, LLC's Objections to Complainants' Three Requests for Leave to File Replies *Instanter* to Motions in Limine were emailed on April 5, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**MIDWEST GENERATION, LLC'S OBJECTIONS TO COMPLAINANTS' THREE REQUESTS FOR LEAVE TO FILE REPLIES *INSTANTER* TO MOTIONS IN LIMINE**

Midwest Generation, LLC ("MWG") objects to each of Complainants' Requests to file Reply briefs (*instanter*) in support of their Motions *in Limine* and asks that the Hearing Officer deny the requests and disregard the reply briefs from consideration. Complainants fail to provide any new information, but instead either entirely change their original request or restate arguments made in the original motion. Because the replies do not aid the Hearing Officer, Complainants will suffer no material prejudice if they are disregarded. Specifically, Complainants' motions for leave to file a reply should be denied and the replies should be disregarded based on the following:

A. Complainants' Reply in Support of Their Motion *in Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents ("Weaver Reply") improperly makes an entirely new and different request than their original motion, without any explanation. Complainants cannot be allowed to move the goal posts in their reply. If Complainants' reply is allowed, MWG would be forced to file a motion for leave to file a sur-reply to respond to the new request. The Weaver Reply should be disregarded.

B. Complainants' Reply to MWG's Response to Complainants' Motion to Incorporate Certain Documents ("Pressnall Reply") improperly attempts to cure, after the fact, their violation of the requirements under Section 101.306. Complainants admit that their failure to attach the relevant testimony they seek to incorporate in violation of the rules and without any explanation was intentional, allegedly out of concern for the Illinois Pollution Control Board ("Board") and Hearing Officer. Complainants the proceed to simply rehash their claims that Chris Pressnall's testimony on an issue never raised in this case is relevant, without providing an explanation on how it is relevant under Section 33(c) of the Act and shielding their arguments from any cross examination at hearing. For those two reasons, the Motion for Leave to file the Pressnall Reply must be denied and the reply disregarded.

C. Complainants' Reply to MWG's Response to Complainants' Motion *in Limine* to Exclude Portions of MWG's Expert Report ("Koch Reply") repeats the same arguments as their motion based upon the presumption that MWG is somehow going to claim in the future an "inability to pay." Complainants provide no information to support their assumption, but instead change their original argument in an attempt to shield their claims from MWG's examination. Complainants' Motion for Leave to File Koch Reply must be denied and reply ignored.

Complainants' pre-hearing motion briefs, including their responses, replies and objections to MWG's replies, are riddled with violations of the Board Rules and misrepresentations of Board and Hearing Officer Orders. The errors and misstatements are ongoing and it has become evident that Complainants' pleadings and facts cannot be trusted. MWG is forced to expend significant resources chasing down each citation and fact to determine whether it is actually true. While Complainants brush the errors aside as unintentional or minor, they are not. The failure to properly identify the holding of a case that Complainants previously relied on in this same matter, the failure to properly cite to cases, the failure to comply with Board rules, the failure to correctly describe the Board rules, the failure to include page numbers, and the altered requests for relief in a reply, all contribute to the fact that Complainants' replies will not aid the Hearing Officer.

Each of Complainants' three requests for leave to file reply is discussed in detail below.

## I. Complainants' Weaver Reply Makes an Entirely Different Request Than Their Motion *in Limine*

Complainants' Reply is improper and its filing should be denied because the Reply makes an *entirely new request*. Complainants' motion *in limine* requested that expert *opinions* be excluded based on certain documents, and now, in their proposed Reply, Complainants instead ask that specific *documents* be excluded – even though they did not object to the documents in their original motion. It is highly prejudicial to issue what is essentially a new motion without providing MWG the ability to respond. The proposed Reply should be disregarded on that basis alone.

Complainants' original motion is entitled: "Motion *in Limine* to Exclude **New or Revised Expert Opinions** Based on Untimely Disclosed Documents," and Complainants' specifically requested that "Respondent's experts should be barred **from providing new opinions** (i.e. opinions that were not provided in the expert report and depositions) based on these untimely produced documents. ***Such documents may only be used to strengthen any previously stated opinion***." Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, ¶16 (emphasis added). In its Response to this motion, MWG explicitly states that that there *are no revised or new opinions*, but that the publicly available documents are used to support (*i.e.* strengthen) its experts' previously held opinions. MWG's Response, p. 1. Complainants should be satisfied, and they certainly are not prejudiced merely because MWG's experts properly identified documents that support their previously stated opinions, well in advance of a hearing and pursuant to the pre-hearing schedule for expert disclosures.

Apparently because they had no answer to the fact that MWG's expert opinions did not change, Complainants' proposed Reply seeks to entirely change their request, and now asks that the Hearing Officer "**prohibit Respondent from relying upon untimely produced documents**."

Weaver Reply, p. 7 (emphasis added). Complainants provide no explanation for this change. Complainants' unprecedented shift in their request is untimely, baseless, wholly improper and must be disregarded. If the Weaver Reply is accepted, then MWG is forced to submit a motion for leave to file a sur-reply to respond to the new request.

Finally, Complainants simply repeat the argument in their motion that the Hearing Officer ended discovery and these documents were identified following the close of discovery. There is nothing new to this argument. Because MWG's experts are not adding to or changing their opinions, and given the time before a hearing will take place, Complainants are not prejudiced and the reply does nothing to aid the Hearing Officer.

## II. Complainants' Pressnall Reply Improperly Attempts to Cure Their Violation of Section 101.306 and Fails to Provide any New Information

Complainants' Pressnall Reply does not present any new information or respond to MWG's Response, and only attempts to cure Complainants' failure to follow the Board procedural rule 101.206 to file the material they seek to incorporate. Complainants' explanation for their failure to follow this basic requirement rings hollow and is in direct contravention to the rule's requirements. Section 101.306 explicitly orders each person seeking to incorporate to file the material from the record of another Board docket – material already filed with the Board – regardless of the length of the document. Complainants do not claim that their failure to file the documents was an error. Instead, they admit that they intentionally decided to not to follow the rule. Complainants' Reply, p. 8. They also agree that they failed to explain that decision to ignore the rule, by acknowledging that they could have been more explicit in their original motion. *Id.* p. 9, FN 8. For that reason alone, the Hearing Officer should disregard the Reply. Moreover, their self-serving claim of concern of a burden on the Board is contradicted by their own actions in this matter. Historically, Complainants have had no compunction to attach voluminous documents to

their briefs. For example, Complainants attached 4,555 pages of exhibits in support of their Partial Motion for Summary Judgement dated June 1, 2016, including the entire deposition transcripts of seven witnesses. The Hearing Officer should not allow Complainants to cure, after the fact, their obvious violation of Section 101.306 by allowing them to attach the excerpt they should have attached to their original motion. Moreover, Complainants, for the first time in their Reply, provide the exact page numbers of the portions of testimony they seek to incorporate. *See* Pressnall Reply, p. 12. If permitted, MWG will be forced to seek to file a response to the now-clarified materials.

Complainants also fail to demonstrate that they will suffer any material prejudice if their motion to file a reply is not granted. Rather, MWG will be highly prejudiced if Mr. Pressnall's testimony is incorporated. Complainants' reply provides no new information than was presented in their original motion. Instead, Complainants merely repeat that Mr. Pressnall's testimony is "relevant," without any further explanation and without acknowledging that his testimony raises an issue never before raised in this case. Merely repeating that something is relevant does not make it so. Complainants fail to explain ***how*** Mr. Pressnall's testimony in the CCR rulemaking is relevant to this proceeding. MWG asked that specific question in its Response numerous times, (Response, pp. 2, 5, 6), and Complainants fail to provide any answer, prejudicing MWG and rendering their proposed reply meaningless. In fact, Complainants tacitly admit that they are not explaining how Mr. Pressnall's testimony is relevant by stating that his testimony is for "Complainants' ***potential*** arguments about Section 33(c) factors, including the unsuitability of the location of the pollution." Reply, p. 7 (emphasis added). In other words, they intend to use this information as a placeholder for an argument they will make after the hearing, shielding the argument from any cross examination by MWG. This is just another attempt by Complainants to "hide the ball". The Board is "guided by the principle of preventing injustice to the parties as a result of unfair surprise. *David*

*and Jacquelyn McDonough v. Gary Robke*, PCB00-163, 2002 Ill. ENV LEXIS 111, *8, (March 7, 2002) *citing* 134 Ill.2d R. 213(g), Committee Comments. Here, Mr. Presnall is not testifying at the hearing and Complainants are not presenting any witness to testify about environmental justice issues. Thus, the first time MWG will see Complainants' "potential arguments" on how the Board should consider environmental justice in an enforcement matter will be in the post-hearing brief, long after the record is closed. It would be an injustice and unfair surprise to MWG if Complainants are allowed to present their "potential arguments" for the first time in their post-hearing brief. Accordingly, the Pressnall Reply should be disregarded, and their Motion should be denied.

## III. Complainants' Koch Reply Provides No New Information or Facts to Support their False Assumption that MWG will Claim an Inability to Pay in the Future

Similarly, Complainants' Koch Reply merely repeats the same arguments as their motion. Just like their original motion, their Reply is entirely based on the false premise that MWG is somehow "laying the groundwork for an inability to pay argument…" Koch Reply, p. 2. Complainants seem to be projecting onto MWG, without basis, an argument that MWG simply has not made.

Complainants provide no new evidence or facts to support their speculation that MWG has an intention of making a claim that it has an inability to pay.[1] Instead, Complainants improperly attempt to move the goal post in their Reply by newly claiming that they seek to evaluate ability to pay *only* as it relates to penalty under Section 42(h), even though they did not make that statement in their original Motion. Complainants' Reply, p. 6. This is another attempt by

[1] As stated in its Response, even if MWG were to claim an inability to pay, which it has not, consideration of its ability or inability to pay is limited to *MWG*, and any consideration of a non-party parent company is irrelevant. *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc.*, PCB 98-81 (May 6, 1999). It is an accepted principle of law that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998). In Illinois, to apply an exception to the rule of a separate corporate existence, a court is required to either pierce the corporate veil or find a subsidiary is merely an "alter-ego," both of which are high bars, and courts are admonished to undertake the tasks "reluctantly." *Ted Harrison Oil Co. v. Dokka*, 247 Ill.App.3d 791, 795 (1993).

Complainants to shield their arguments from any response from MWG. Had Complainants properly argued in their original Motion that they believed Ms. Koch's arguments were only related to Section 42(h) of the Act, MWG would have identified for them in its Response where Ms. Koch specifically stated in her deposition that her opinion was related to *both* Sections 33(c) and 42(h) of the Act.[2] Moreover, Complainants disingenuously claim that Ms. Koch's opinions are exclusively in response to their expert's *first* opinion. Comp.'s Reply, p. 6. Complainants ignore that the opinions Ms. Koch made in her deposition were in response to their expert's subsequent opinions which continued to assert "affordability" opinions, each of which were described and cited in MWG's Response. MWG's Response, p. 4.

Complainants' Koch Reply is merely a last ditch attempt to reverse the Hearing Officer's and Board orders regarding MWG's indirect parent company. For that reason, and because it provides no new information, their motion for leave should be denied and the Reply should be disregarded.

**IV. Complainants Disregard of Board Rules and Precedent is Prejudicial to MWG**

Throughout their motions *in limine*, responses, replies, and objections to replies, Complainants repeatedly disregard or misrepresent Board rules, and fail to properly cite to Board precedents. Complainants claim that their errors were small and somehow did not defeat their argument. But collectively, Complainants' violations of the Board rules and indifference to Board precedents are numerous and, in totality, prejudicial to MWG, the Board, and Hearing Officer because Complainants' briefs cannot be trusted as filed. *See Donohoe v. Consolidated Operating & Prod. Corp.*, 139 F.R.D. 626, 629 n. 6 (N.D. Ill. 1991) (A lawyer engages in bad faith by acting

[2] Because this is an objection to a reply, MWG is refraining from attaching exhibits. However, for reference, the citation to Ms. Koch's deposition is pp. 19-20. MWG also attached relevant deposition testimony as Exhibit 2 to its March 4, 2022 Response to Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report.

recklessly or with indifference to the law, and their reckless indifference "may impose substantial costs on the adverse party."). Complainants' failures to comply with Board rules and misrepresentations include:

1) Misrepresenting Rule 101.500(e) to argue that a reply brief cannot be longer than a motion. Rule 101.500(e) in no way requires, as Complainants suggest, that parties, "narrowly tailor any reply that they may seek to file." *See* Complainants' Objection to MWG's Motion for Leave to File Reply in Support of its Motion *in Limine* to Exclude Jonathan Shefftz, April 1, 2022, p. 3 and Complainants' Objection to MWG's Motion for Leave to File Reply in Support of its Motion *in Limine* to Exclude Quarles Opinion, April 1, 2022, p. 4.[3] Complainants rely on a fabricated interpretation of this rule to claim that the Hearing Officer must deny MWG's motions for reply and the replies because the briefs are longer than the motion. *Id*. Section 101.500(e) has no such limitation on the contents of a reply, and Complainants identify no Board authority that states replies have a page limit. Also, Complainants' claim that the Board rule means that a reply must be shorter is truly "the pot calling the kettle black." Complainants' Motion to Incorporate Certain Documents (Feb. 4, 2022) was six pages, and yet their Motion for the Pressnall Reply and Reply was over double in length, at 15 pages. Similarly, Complainants' Motion *in Limine* to Exclude Portions of MWG's Expert Report (Feb. 4, 2022) was five pages, and their Motion for the Koch Reply and Reply was far longer, at 12 pages.
2) Misrepresenting that the Board awarded sanctions in a cited case when the Board expressly did not. Complainants' Motion for Sanctions, February 18, 2022, p. 14. Complainants' claim that this was somehow inadvertent is belied by a comparison of their February 18, 2022 Motion and their Response brief dated April 3, 2018. In Complainants' 2018 Response, Complainants solely rely upon the same two Board cases, *Freedom Oil*, and *Illinois E.P.A. v. Celotex Corp*., 168 Ill. App. 3d 592 (3rd Dist. 1988) that they repeat in their 2022 Motion. *Compare* Complainants 2018 Response, p. 5 and Complainants' Motion, p. 7. Considering the few Board cases regarding sanctions, Complainants' claim of an inadvertent error is unconvincing. Moreover, a simple reading of the case immediately identifies Complainants' obvious error in asserting a holding that the Court simply did not make. Complainants had knowledge from their prior use of the case, and at very least they knew or should have known of the holding.

[3] 101.500(e) states: The moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response.

3) Misrepresenting that Hearing Officer's June 18, 2017 holding in his denial of MWG's Motion *in Limine* somehow supports their motion to exclude documents that MWG's expert will rely upon. *See* Complainants Motion *in Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, Feb. 4, 2022, ¶9. Complainants' explanation that their use of the word "consistent" is a "subtle distinction" from the term "support" demonstrates that Complainants seemed to be aware of the potentially misleading nature of their argument, yet proceeded to make the argument nonetheless. Complainants' Weaver Reply, p. 5.

4) Intentionally violating Board Rule 101.306 by failing to file the testimony they were seeking to incorporate. *See* Complainants' Motion to Incorporate Certain Documents into the PCB13-15 Docket, Feb. 4, 2022. As discussed herein, Complainants admit that they specifically elected not to comply with the Board's rule 101.306. Pressnall Reply, p. 8.

5) Completely changing, in their proposed Weaver Reply, the request for relief as compared to their Motion to Exclude New or Revised Opinions Based upon Untimely Documents. Complainants originally requested that MWG be precluded from issuing any new opinions not previously disclosed, and only be allowed to rely upon the new documents "to strengthen any previously stated opinion." As discussed above, Complainants' Weaver Reply changes their request to a new request that the Hearing Officer exclude the documents themselves. Complainants provide no explanation for their entirely new and similarly baseless request.

6) Incorrectly claim that the Board incorporated documents from a rulemaking into an adjudicatory matter in *Noveon*. Pressnall Reply, p. 3, FN 1. *In the Matter of: Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122*, concerned an adjusted standard and Noveon requested the Board incorporate the transcripts and exhibits from <u>its own NPDES permit appeal</u>. PCB02-05, 2004 Ill. ENV LEXIS 608 (Nov. 4, 2004), *9. There was no rulemaking involved.

7) Erroneously and improperly citing, multiple times, to a party's argument from the party's *brief* in an unrelated matter (not the decision), suggesting that the party's arguments in their *brief* are somehow authority for the Hearing Officer. *See* Complainants' Response to MWG's Motion *in Limine* to Exclude Quarles Opinion, March 4, 2022, pp. 13-14, *See* MWG's Reply in Support of its Motion *in Limine* to Exclude Quarles Opinion, pp. 9-10. Complainants claim that their error is minor, but then conveniently ignore that the Johns Manville *brief* was their primary authority, which they cited at least three times, for their response that Mr. Quarles's Discussions of the Weaver Witnesses was meritorious. *See* Complainants' Response to MWG's Motion *in Limine* to Exclude Quarles Opinion, pp. 13-14 and Complainants' Objection to MWG's Reply in Support of its Motion to Exclude Quarles Opinion, ¶7.

8) Incorrectly claiming that the Board accepted an argument that Section 42(h)(4) "necessarily centers on the violator's ability to pay." Koch Reply, p. 7. Once again Complainants improperly cite to a party's *brief* as opposed to the Board's decision. Complainants' quote in their Koch Reply is from the complainants' argument, that the Board cited as "Comp. Br. at 38". *See People v. Kershaw*, PCB92-164 (April 20, 1995), *slip op.* p. 14. The Board made no statement that Section 42(h)(4) centers on the violator's ability to pay and for Complainants to suggest otherwise is misleading, at best. In fact, the Board simply decided that the respondents had the ability to pay a $30,000 penalty, a reduction from the originally assessed $250,000 penalty. *Id*, p. 14.

9) Failing to follow the procedural rule – "All pages in the document sequentially numbered". 35 Ill. Adm. Code 101.302(g). *See* Complainants' and Complainants' combined Response to MWG's Motions to Exclude Consideration of Remedy at the Historic Ash Areas, March 4, 2022. Complainants provide no explanation for this violation of Board rules, making it difficult to follow their references and difficult to cite.

Complainants' ongoing errors are no longer merely inadvertent. They are indicative of statements and materials that must be checked and double checked, and thus provide no assistance to the Hearing Officer.

## V. Conclusion

For the foregoing reasons, MWG requests that the Hearing Officer deny Complainants' Motions for Leave to File the Replies and disregard each of the Replies.

Respectfully submitted,
Midwest Generation, LLC

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