

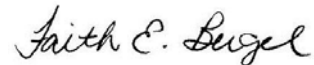
**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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 MIDWEST GENERATION, LLC’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER’S DECISION TO ADMIT MARK QUARLES’ OPINION AND REPORTS**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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*Attorney for Sierra Club*

Dated: September 13, 2023

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SIERRA CLUB, ENVIRONMENTAL )  
LAW AND POLICY CENTER, )  
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Complainants, ) (Enforcement – Water)  
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v. )  
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MIDWEST GENERATION, LLC, )  
)  
Respondent. )

**COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S  
MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT  
OF ITS APPEAL OF THE HEARING OFFICER’S DECISION TO ADMIT  
MARK QUARLES’ OPINION AND REPORTS**

On August 30, 2023, Midwest Generation, LLC (“MWG”), brought a motion for leave to reply (“MWG Reply Motion”). MWG’s motion should be denied because it distracts from the actual standard that should be applied and because Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, “Complainants”) did not raise any new arguments.

**I. MWG’s Motion Is a Distraction**

MWG’s motion for leave to reply should also be denied because it is a red herring. Every time this issue has been raised, it has become a greater distraction and moved further from the true test of whether a party should be allowed to substitute expert witnesses. In his September 14, 2020 order, the Hearing Officer applied the standard for substituting experts and concluded that “neither party will be surprised or prejudiced because it will have knowledge of any new expert

reports and depose any new witnesses prior to the hearing.” Sept. 14, 2020 Hr’g Officer Order at 3; see *People v. Pruum*, No. 2004-207, 2008 WL 4415083 at \*3 (Ill. Pol. Control Bd., Sept. 24, 2008) (holding that if parties will not be surprised or prejudiced, parties may substitute experts). The focus of the Board’s Dec. 15, 2022 Order was that Mr. Quarles met the three-part framework determinative of whether to admit an expert’s testimony. Dec. 15, 2022 Order of Bd. at 13-14 (citing *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893-94 (7th Cir. 2011)). MWG continues to pull tangential language from the Board’s order to complicate what is a straightforward question. MWG’s overlooks the requirement that they must show surprise and prejudice and continues to omit an explanation of why or how they were prejudiced.<sup>1</sup> Because MWG’s motion for leave to reply continues to distract from the correct standard that should be applied, it should be denied.

## **II. Complainants Did Not Raise a New Argument**

MWG makes the false claim the Complainants made a new argument. Complainants did not make a new argument. As a result, there is nothing new for MWG to reply to, their original appeal adequately states their position, and MWG’s motion for leave to reply should be denied. 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 Company*, No. 1999-134, 2002 WL 745609 at \*3 (Ill. Pol. Control Bd., Apr. 18, 2002).

MWG argues that, “[f]or the first time, Complainants attempt to equate Mr. Quarles’s reliance on the Board’s Interim Order with the Hearing Officer’s Order requiring Mr. Quarles to

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<sup>1</sup> MWG makes the conclusory statement that “MWG would be materially prejudiced if the Board were to give [Quarles’] opinions any weight because of Complainants failure to comply with the rules and orders issued by this Board and Hearing Officer.” (MWG Mot. at Par 22.) MWG fails to explain why or how this would prejudice MWG.

build on the testimony of Complainants prior expert.” MWG Reply Mot. at 1. Yet, Complainants made this argument a year ago in briefing:

Mr. Quarles’ reports show that he builds on, elaborates on, and amplifies the most relevant testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board’s findings and Interim Order. Quarles Initial Rep. at 1-13; Quarles Rebuttal Rep. at 2-3. By way of example, Mr. Quarles’ two reports contain more than 100 citations to the Interim Board Order. It is evident that Mr. Quarles uses the Interim Board Order as the foundation of and basis for his remedy phase reports. The Interim Board Order obviously includes evidence, such as Kunkel’s testimony, that provided the grounds for the Board’s decision. As a result, consistent with the Hearing Officer’s Sept. 14, 2020 Order, Mr. Quarles’s opinions and reports present more information and build on, elaborate on, and amplify the testimony from the liability phase proceedings.

Complainants’ Resp. to Respondent Midwest Generation, LLC’s Mot. In Lim. to Exclude Quarles Opinions at 3-4 (March 4, 2022). In arguing against MWG’s objection at the May 2023 hearing, Counsel for Complainants pointed out that “this was intensely briefed at that time, and nothing new is being established today, and we have pointed out time and time again that what Mr. Quarles has relied upon and elaborated on is the Board's decision being the ultimate findings in this case, and having parsed what from the record is most relevant.” May 15, 2023 Hr’g Tr. at 155:17-24.”

MWG also completely ignores its own Motions in Limine from the period leading up to this hearing. MWG brought and appealed a motion in limine attempting to exclude Quarles on nearly the same grounds as MWG’s current objection. Complainants incorporated by reference all of Complainants memorandums in response to MWG’s original motion in limine and appeal of the hearing officer’s decision on that motion. Compl. Resp. at 3-4 (Aug. 16, 2023).

Complainants also attached those memorandums to their response to MWG’s current appeal of the Hearing Officer’s decision. “In support of their arguments that the Board should uphold the Hearing Officer’s rulings, Complainants incorporate by reference ‘Complainants’ Response to

Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes' and 'Complainants' Response to Respondent Midwest Generation, LLC's Motion in Limine to Exclude Quarles Opinions,' attached hereto." Compl. Resp. at 3-4 (Aug. 16, 2023). As a result, Complainants' previous brief is attached to Complainants response and contains the argument that by relying on the Board's interim order, Mr. Quarles is building on Mr. Kunkel's previous testimony. Thus, MWG's argument that this is a new and novel argument is belied by the briefs attached to the very response that MWG asserts as containing a new argument and by the argument made by Complainants counsel on MWG's objection at the hearing.

MWG states that "Complainants now argue that Mr. Quarles relied on the June 20, 2019 Board Order 'as the foundation of and basis of his remedy reports.' Then, without explanation or specific citation, Complainants ask the Board to infer that through his reliance on the Board Order Mr. Quarles relied on Mr. Kunkel. Comp. Resp., p. 5." MWG Reply Mot. at para. 3. MWG disregards the explanations and citations that Complainants provided in Complainants Response to MWG's Appeal. MWG disregards the paragraph preceding the language that MWG quoted, which contained citations, and MWG disregards the three subsequent sentences following the language MWG quoted which contained Complainants' explanations:

Mr. Quarles, appropriately, relies heavily on the Board's findings and conclusions in its June 20, 2019 liability-phase order. Hr'g Ex. 1101 at 1-13; Hr'g Ex. 1102 at 2-3 (together containing 100+ citations to the June 20, 2019 Board Order). When asked about his process for selecting what to review from the thousands of pages in the record from the liability phase of this case, Mr. Quarles stated "[T]he Board's opinion was the best factual summary of that prior history of the expert opinions." May 16, 2023 Hr'g Tr. at 83:8-10. The Board itself acknowledges that "The Board has already made use of Mr. Kunkle's opinions in its interim order." Dec. 15, 2022 Order of Bd. at 13-15.

Mr. Quarles uses the liability phase Board Order as the foundation of and basis for his remedy phase reports. The June 20, 2019 Board Order obviously

includes evidence, such as Dr. Kunkel's testimony, that provided the grounds for the Board's decision that MWG is liable for violations of Sections 12(a), 12(d) and 21(a) of the Illinois Environmental Protection Act. By relying on the Board's Order, Mr. Quarles is building on the testimony already given—and especially building on the testimony that the Board found most pertinent and cited in its report. As a result, Mr. Quarles's reports, opinions and deposition testimony are all consistent with and build on Dr. Kunkel's hearing testimony, the evidence that is in the record, and most importantly the Board's findings and conclusions in its June 20, 2019 Order.

Compls. Resp. at 5 (Aug. 16, 2023). The explanation is not all that complicated. Mr. Quarles relied on the Board Order and the Board Order relied on Mr. Kunkel's testimony.

MWG makes the baseless claim that they could not have predicted this argument. MWG claims that “the filing of the attached Reply will prevent material prejudice and injustice by allowing MWG an opportunity to address Complainants' new arguments and misrepresentations that it could not have anticipated when drafting its appeal.” MWG Reply Mot. at para. 7. The claim is absurd because Complainants have made this argument multiple times when MWG has unsuccessfully attempted to exclude Mr. Quarles as a witness. For instance, Complainants' Response to Midwest Generation, LLC'S Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes stated:

Mr. Quarles, appropriately, relies heavily on the Board's findings and Interim Order. Quarles Initial Report at 1-13; Quarles Rebuttal Report at 2-3 (containing 100+ citations to the Interim Board Order). Mr. Quarles uses the Interim Board Order as the foundation of and basis for his remedy phase reports. The Interim Board Order obviously includes evidence, such as Kunkel's testimony, that provided the grounds for the Board's decision. As a result, Mr. Quarles's reports, opinions and deposition testimony are all consistent with Dr. Kunkel's hearing testimony and the evidence that is in the record.

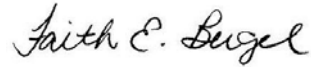
Compl. Resp. at 5 (Aug. 10, 2022). Thus, the current appeal is not the first time Complainants have made this argument and it would have been very easy for MWG to anticipate it because Complainants made the same argument at the hearing five months ago, and in memorandums one year ago and seventeen months ago when MWG was arguing virtually the same issue.

**III. Conclusion**

For all the reasons stated above, MWG's motion for leave to reply should be denied.

Dated: September 13, 2023

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 MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES'S OPINIONS AND REPORTS** 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 9 pages.

Respectfully submitted,

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