

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 RULING TO ADMIT COMPLAINANTS’ EXHIBIT 1408** and **COMPLAINANTS’ SURREPLY**, 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: September 13, 2023

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**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 RULING TO ADMIT
COMPLAINANTS’ EXHIBIT 1408**

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 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. 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’s initial filing on its appeal of the Hearing Officer’s Ruling on Exhibit 1408 adequately states its position and its motion for leave to reply should be denied.

Complainants’ argument that Exhibit 1408 is relevant is not a new argument. When moving for the admission of 1408 at the hearing, Complainants inherently took the position that Exhibit 1408 was relevant, material, and authentic and that Complainants’ questions had laid the

foundation for the exhibit. May 19, 2023 Hr'g Tr. 5:7-12:8. Hearing Officer Halloran agreed when stating "I think it's relevant to the extent the Board can weigh it, and it's on our website, so overruled. I'll take Complainant Exhibit 1408 over objection." May 19, 2023 Hr'g Tr. 12:22-13:2.

The principal basis MWG offers for its proposed reply brief is its contention that "Complainants for the first time identify fourteen paragraphs in Exhibit 1408 that they deem relevant to their arguments and three new arguments that were not even raised during the hearing." MWG Reply Mot. at para. 2. Neither of these contentions justify a reply brief here. First of all, Complainants' Response to MWG's Motion identified fourteen new paragraphs in direct response to MWG's arguments on appeal challenging the relevance of the exhibit, and compelling Complainants to respond. In other words, our reference to fourteen of the key paragraphs in the document, which establish its relevance, is entirely responsive to arguments MWG already made. Reply Mot. at para. 2. Although it should go without saying, Complainants have never taken the position that only one sentence is relevant, or that only fourteen paragraphs are relevant. Complainants' position is, and has been, that the document is relevant; the notion that documents can be sliced and diced as to relevance comes from MWG.

Nor do Complainants raise new arguments as to whether MWG is "diligently complying with the law," Reply Mot. at para. 4. These arguments are central to this case and address a legal question pursuant to 415 ILCS 5/42(h)(2). Both parties have submitted facts into the record and both parties will make their legal arguments as to whether those facts demonstrate "due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder." 415 ILCS 5/42(h)(2).

MWG's motion also rests on the bizarre – and wholly unsupported – premise that MWG

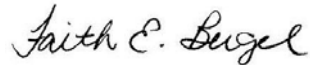
is entitled to know Complainants' legal arguments and litigation strategy in advance. *See, e.g.*, Reply Mot. at para. 3, 8; *see also* Reply at 2 (arguing that Complainants "hid[] the ball" by not explaining how the document would be used). Once the relevance, authenticity, materiality, and reliability of a document are established, the document is properly admitted into the record. The standard for admissibility clearly does not include the moving party's intended purpose in using a document. MWG is not entitled to know what Complainants legal arguments will be, nor how the evidence in the record supports our legal arguments.

MWG claims to know what Complainants' preferences are and then asserts that Complainants are using "an impermissible tactic" that is "not consistent with Board rulings." Reply Mot. at para. 3. Tellingly, MWG does not cite a single Board ruling in support of this argument. Nothing Complainants have argued here is remotely inconsistent with Board rules.

For all the reasons stated above, MWG's motion for leave to reply should be denied. In the alternative, should the Board decide to grant Respondent's Motion for Leave to Reply, Complainants respectfully request that the Board accept Complainants' surreply, attached.

Dated: September 13, 2023

Respectfully submitted,



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COMPLAINANTS' SURREPLY IN SUPPORT OF THE HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS' EXHIBIT 1408

The Board should deny Midwest Generation LLC's ("MWG") Appeal of the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 because the relevance and admissibility of Exhibit 1408 was established and Hearing Officer Brad Halloran properly admitted the exhibit. MWG's appeal rests on a bizarre and wholly unsupported premise, which is that Exhibit 1408 should only have been admitted if Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, "Complainants") established relevance and authenticity for every page in the document and also previewed how Complainants intend to use the document. This is not the standard for admissibility, and Complainants are not required to divulge our legal strategy. None of the other arguments in MWG's Reply hold water, as described below. Since the Hearing Officer correctly determined that Exhibi 1408 is admissible, MWG's appeal must be denied.

MWG references all sorts of fictitious rules that they allege apply to Board enforcement proceedings. For example, MWG has claimed that Complainants' refusal to preview our legal

arguments to MWG in advance of the posthearing briefing is improper, claiming that “[t]his type of hiding the ball is contrary to standard trial procedure and does not allow the Board to make a valid decision after hearing both parties’ positions.” MWG Reply at 2. In making this claim, MWG cites no Board rule, no Supreme Court Rule, and no case law to support its idea of what “standard trial procedure” is or what is required for the Board to make a “valid decision.” MWG also claims that Complainants had some sort of burden to “properly discuss[] all of the elements of Exhibit 1408” MWG Reply at 2. Again, MWG cites no Board rule, no Supreme Court Rule and no case law

MWG also argues that “Complainants plan to use portions of Exhibit 1408 that were not discussed at the hearing, drawing incorrect conclusions that MWG has no opportunity to rebut.” MWG Reply at 1. MWG has no idea what our plans are. MWG is very fond of alleging nefarious intentions, but there is no truth to these assertions. Indeed, it should be obvious that Complainants do not intend to draw incorrect conclusions, as doing so would certainly not help our credibility with the Board. MWG also points to the fourteen paragraphs that Complainants referred to in our briefing – in response to MWG’s appeal – as evidence of Complainants “deliberately” hiding our “true purpose.”¹ In fact, when MWG raises arguments on appeal as to relevance, we are compelled to respond and pointed to fourteen of the key paragraphs in the document that establish its relevance. MWG gets out ahead of itself when it concludes that these

¹ MWG accuses Complainants of engaging in a game of “hid[e] the ball” and concealing our “true purpose for moving to admit Exhibit 1408 so that [Complainants] could prevent MWG from responding to their false conclusions based on the exhibit.” MWG Reply at 2. Complainants do not agree that we were making any attempt to “hid[e] the ball,” but even if we were, we are, apparently, not very good at it because Complainants’ brief in response to MWG’s appeal, according to MWG, discloses our true intentions for Exhibit 1408. MWG Reply at 2. (“Complainants for the first time state that they intend to use Exhibit 1408 to demonstrate that MWG did not diligently comply with the Act because they claim it shows that MWG filed ‘unfounded petitions for adjusted standard’”). Since MWG now knows what they claim to be Complainants’ “true purpose[s],” they can respond in their post-hearing brief and are no longer disadvantaged.

fourteen paragraphs from Exhibit 1408 are the sections that Complainants will rely on in the post-hearing briefing. Complainants were compelled to respond to MWG's argument that Exhibit 1408 is not relevant and not reliable, and in doing so Complainants went into depth to assure that we sufficiently described the exhibit in order to provide the Board with background and context for the exhibit in this appeal, and to establish, again, the exhibit's relevance and reliability.

MWG is essentially taking the position that even though Exhibit 1408 is relevant, it should not have been admitted because parts of it were not covered in questioning. This runs counter to Board Rules that state that "[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged" 35 Ill. Adm. Code § 101.626, and the Illinois Rules of Evidence which provide that "All relevant evidence is admissible, except as otherwise provided by law." Ill. R. Evid. 402. MWG's position is that even when an exhibit has been established as relevant, the party offering the exhibit must ask about all elements, parts, subparts, and sections for the exhibit to be admissible, and describe its legal strategy. This is, of course, not supported by Illinois law.

MWG tries to claim that Complainants' questioning of MWG witness Sharene Shealey about the content of Exhibit 1408 was confined to a single sentence. MWG Reply at 2 ("But at the hearing, Complainants only asked MWG's witness Sharene Shealey about the existence of the document and a single sentence in the document that she corrected."). This is a gross mischaracterization of the nature of Complainants' counsel's questions on Exhibit 1408. While not asking about specific sentences in the document, counsel for Complainants did in fact ask numerous questions about the substance and general content of the exhibit. The following

excerpts demonstrate some of the questions Complainants asked of witness Sharene Shealey regarding Exhibit 1408:

Q. Do you recognize the document in front of you?

A. Yes, it appears -- it's a lot of pages, but it appears to be the Adjusted Standard Midwest Generation file for Waukegan Station AS21003.

Q. I believe it's actually the IEPA recommendation --

A. Oh.

Q. -- with respect to that.

A. I didn't read. I'm so sorry.

Q. That's okay.

A. Before -- in the matter of -- it is the IEPA's recommendation in that matter. Yes, I agree.

May 19, 2023 Hr'g Tr. at 5:21-6:10.

Q. And in the finding in front of you, the Illinois IEPA describes certain conclusions it reached about the past use of this area, correct?

A. I wouldn't call this a finding. It's a recommendation, I believe.

Q. I'll rephrase. As part of this recommendation, Illinois EPA describes certain conclusions it reached about the past use of this area, correct?

A. I believe so.

Q. And is it your understanding that Illinois EPA's recommendation was that the Board deny Midwest Generation's amended petition?

A. I am unsure whether they did with or without conditions, and I'm trying to get to their recommendation.

May 19, 2023 Hr'g Tr. at 6:19-7:10.

Q. The Illinois EPA -- Illinois EPA's recommendation was that the Board deny Midwest Generation's amended petition?

A. Correct.

Q. Okay. And the Illinois EPA recommended that the board find that the grassy field is a CCR impoundment, correct?

A. Yes.

May 19, 2023 Hr'g Tr. at 7:16-7:23. While MWG may somehow describe this as being confined to the "existence" of the document, these questions establish much more than just that the document "exists" but in fact establish the overall content and general nature of the Exhibit, and in doing so, establish relevance.

MWG also suggested that the questioning by counsel for Complainants about the

sentence in the Exhibit that discussed mitigation ended with one question when the questioning between counsel and Ms. Shealey about investigation versus mitigation continued in the transcript for four more pages. MWG Reply Mot. at 1. For instance, MWG ignores the fact that counsel for Complainants asked Ms. Shealey why she disagreed with a statement in the Exhibit. May 19, 2023 Hr'g Tr. at 8:10-13 (“A. That's what this says, but I don't agree with the statement. Q. Okay. What is the basis of your disagreement?”).)

Finally, MWG distracts from the issue at hand by arguing that to effectively respond to the Exhibit, MWG would have needed to “rebut every assertion in the 1,300 page exhibit.” MWG Reply. at 4. But MWG conflates the length of the recommendation itself with the length of the overall document, which includes attachments that are only ancillary to IEPA’s recommendation. Any “assertions” in the exhibit are confined to the thirty-five-page recommendation, not the entire 1,394-page filing. The remaining 1,359 pages are exhibits that include permits, aerial photos, history of construction documents from MWG, and a monitoring report from MWG. In fact, the vast majority of the 1,359 pages of exhibits are actually documents that MWG itself provided to the Agency, such as groundwater monitoring reports and history of construction documentation or permits MWG or its processor received from the agency in response to permit applications. The entire document is relevant and admissible, but any “assertions” in the exhibit that MWG needs to respond to are confined to the 35-page document itself.

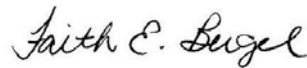
MWG also tries to cast doubt on the reliability of Illinois Environmental Protection Agency’s (“IEPA”) recommendation after the fact, calling it a “a mere pleading by a party in a different proceeding” MWG Reply. at 4. But MWG has waived this argument. At the time of their objection, MWG only raised relevance as the grounds for their objection and failed to raise

any objection to the reliability of the exhibit. May 19, 2023 Hr'g Tr. at 12:17-21. In any event, the exhibit is a signed, supported filing by IEPA in another Board proceeding which suggests that it is reliable. *See, e.g.*, 35 Ill. Admin. Code § 101.306. IEPA is the agency charged with the duty to comprehensively implement and enforce environmental rules in the State of Illinois. 415 ILCS 5/4. Thus, it is appropriate and proper for the Board to consider Exhibit 1408 and the judgment of Illinois EPA that is contained therein.

For all the reasons stated above, MWG's appeal should be denied and the Hearing Officer's ruling admitting Exhibit 1408 should be upheld.

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 LEAVE TO FILE, INSTANTER, ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS' EXHIBIT 1408** and **COMPLAINANTS' SURREPLY** 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 13 pages.

Respectfully submitted,

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