

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>SIERRA CLUB, ENVIRONMENTAL</b>	)	
<b>LAW AND POLICY CENTER,</b>	)	
<b>PRAIRIE RIVERS NETWORK, and</b>	)	
<b>CITIZENS AGAINST RUINING THE</b>	)	
<b>ENVIRONMENT</b>	)	
	)	<b>PCB 2013-015</b>
<b>Complainants,</b>	)	<b>(Enforcement – Water)</b>
	)	
<b>v.</b>	)	
	)	
<b>MIDWEST GENERATION, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation LLC’s Motion *in Limine* and Memorandum in Support Regarding Expert Testimony, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: May 22, 2017

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Kristen L. Gale  
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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent, Midwest Generation LLC's Motion *in Limine* and Memorandum in Support Regarding Expert Testimony were filed electronically on May 22, 2017 with the following:

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

and that true copies were emailed and mailed by First Class Mail, postage prepaid, on May 22, 2017 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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<b>MIDWEST GENERATION, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT, MIDWEST GENERATION, LLC’S**  
**MOTION IN LIMINE REGARDING EXPERT TESTIMONY**

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits this Motion *In Limine* requesting the Hearing Officer enter an order limiting expert testimony at the hearing to the expert reports exchanged between the MWG and Complainants (collectively “the Parties”) and the deposition testimony of each Party’s expert. In support of its Motion, MWG submits its Memorandum in Support of its Motion *In Limine* and states as follows:

1) On June 9, 2014, the Hearing Officer entered a discovery schedule, which included deadlines for expert reports and depositions. Pursuant to the discovery schedule, as modified by the Hearing Officer, the Parties timely exchanged reports by their respective experts. Additionally, pursuant to the discovery schedule, the Parties timely took the deposition of the Parties’ experts.

2) Rule 213(f) of the Illinois Supreme Court Rules requires each party to disclose an expert witness’s proposed testimony and rule 213(g) limits the expert’s testimony at a trial to the information disclosed under Rule 213(f). Ill. Sup. Ct. Rule 213(f), (g).

3) The Board has followed the principles guiding Rules 213(f) and (g), and upheld the Hearing Officer's decision to strike the undisclosed opinions from the record. *McDonough v. Robke*, PCB 01-163, 2002 Ill. ENV LEXIS 111, March 7, 2002.

4) Pursuant to the Illinois Supreme Court Rules and Board precedent, the Parties' experts' testimony at hearing should be limited to the exchanged reports and deposition testimony.

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order limiting the expert opinions at the hearing to the expert reports exchanged between the Parties and the deposition testimony of each Party's expert

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman  
One of Its Attorneys

Jennifer T. Nijman  
Susan M. Franzetti  
Kristen L. Gale  
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<b>Respondent.</b>	)	

**RESPONDENT, MIDWEST GENERATION, LLC’S**  
**MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE***  
**REGARDING EXPERT TESTIMONY**

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits this Memorandum in Support of its Motion *In Limine* requesting the Hearing Officer enter an order limiting expert testimony to the expert reports exchanged between the MWG and Complainants (collectively “the Parties”) and the deposition testimony of each Party’s expert. In support of its Motion, MWG states as follows:

**I. BACKGROUND**

On June 9, 2014, the Hearing Officer entered a discovery schedule, which included deadlines for expert reports and depositions. Pursuant to the discovery schedule, as modified by the Hearing Officer, the Parties timely exchanged reports by their respective experts. Additionally, pursuant to the discovery schedule, the Parties timely took the deposition of the Parties’ experts.

## II. DISCUSSION

Under Rule 213(f) of the Illinois Supreme Court Rules, each party is required to disclose an expert witness's proposed testimony, including the conclusions and the basis for those conclusions. Ill. Sup. Ct. Rule 213(g). Additionally, under Rule 213(g), only the information disclosed by a retained expert in Rule 213(f) may be given as testimony by a witness on direct examination at trial. Ill. Sup. Ct. Rule 213(g). The purpose of this rule is to avoid surprise. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004). The committee comments to Rule 213(g) state that under the rule, "the subject matter of all opinions must be disclosed pursuant to this rule and Supreme Court Rule 218, and that no new or additional opinions will be allowed unless the interests of justice require otherwise." 166 Ill. 2d R. 213(g), Committee Comments, at lxxviii. Thus, Courts in Illinois routinely hold that parties must strictly comply with Rule 213, and not introduce undisclosed opinions at trial. *Sullivan*, 209 Ill. 2d at 110-111 (Illinois Supreme Court upheld trial court's decision to strike portion of expert testimony that had not been disclosed). *Clayton v. County of Cook*, 346 Ill. App. 3d 367, (Appellate Court vacated jury verdict and ordered new trial because of the erroneous admission of expert's undisclosed opinions at trial), *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 536-538, (4th Cir. 1998) (Court found that the trial court abused its discretion by allowing expert to testify to previously undisclosed opinions).

The Board does not have a similar rule in its procedure rules. 35 Ill. Adm. Code 101. Nevertheless, the Board procedural rules concerning discovery state that "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." 35 Ill. Adm. Code 101.616, citing 35 Ill. Adm. Code 101.100(b). The Board has followed the principle guiding Rule 213(g) by barring new opinion testimony from an expert witness that had not been previously disclosed. *McDonough v. Robke*, PCB 01-163, 2002

III. ENV LEXIS 111, March 7, 2002. In *McDonough v. Robke*, the Complainant's expert testified and gave opinions based upon a visit to the subject site the morning of the hearing. *Id.* Respondents objected to the new opinions, and the hearing officer granted a continuing objection at the hearing for the undisclosed opinions. *Id.* The Board stated that even though it has not incorporated the substance of Rule 213(g) into its procedural rules, it is guided by the "principle of preventing injustice to the parties as a result of unfair surprise." *Id.* at \*8. The Board held that the new and undisclosed opinions based upon the site inspection were properly stricken from the record. *Id.*

In this matter, the Parties have exchanged the reports of their respective experts and have taken the deposition of the experts pursuant to the discovery schedule. Thus, as required under Rule 213(g) and to avoid surprise, the experts' testimony at the hearing should be limited to the opinions in the reports and deposition.

### III. CONCLUSION

For the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order stating that the opinions of the experts at the hearing in this matter be limited to the expert reports exchanged between the MWG and Complainants (collectively "the Parties") and the deposition testimony of each Party's expert.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman  
One of Its Attorneys

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